INTRODUCTION

1. The Labour Relations Legislation Amendment and Repeal Bill 2012 (the Bill) will principally amend the Industrial Relations Act 1979 (IR Act) to:

   (a) streamline the structure of the Western Australian Industrial Relations Commission (Commission) by abolishing the position of President and the constituent authorities (Part 2 of the Bill);

   (b) make a number of technical amendments to the Commission’s powers (Part 2 of the Bill);

   (c) require the Commission to undertake an award modernisation process of all State private sector awards (Part 3 of the Bill);

   (d) provide that industrial agreements can only be terminated by the Commission (Part 4 of the Bill);

   (e) extend the maximum nominal expiry date of industrial agreements to four years and enterprise orders to three years (Part 4 of the Bill);

   (f) broadly harmonise the IR Act’s unfair dismissal provisions with those of the federal Fair Work Act 2009 (FW Act) (Part 5 of the Bill);

   (g) require employers to provide employees with pay slips (Part 6 of the Bill);

   (h) streamline the process for determining minimum wages (Part 8 of the Bill);

   (i) improve the regulation of registered organisations and associations under the IR Act (Part 9 of the Bill);

   (j) make minor amendments to the IR Act’s freedom of association provisions (Part 10 of the Bill);

   (k) more effectively regulate industrial agents who represent parties in proceedings before the Commission and the State industrial courts (Part 11 of the Bill);

   (l) broadly harmonise the IR Act’s right of entry provisions with those of the FW Act (Part 13 of the Bill);

   (m) more closely align the powers of industrial inspectors under the IR Act with those of inspectors under the FW Act (Part 14 of the Bill); and

   (n) increase the maximum penalties for contravention of an industrial instrument, order of the Commission or statutory minimum condition of employment (Part 14 of the Bill).
2. The Bill will also:

(a) repeal the *Minimum Conditions of Employment Act 1993* (MCE Act) and the *Termination, Change and Redundancy General Order*, and incorporate statutory minimum conditions of employment and redundancy pay in the IR Act (Part 12 of the Bill);

(b) update statutory minimum conditions of employment (Part 12 of the Bill);

(c) prohibit the engagement of children on unpaid trial work under the *Children and Community Services Act 2004* (Part 7 of the Bill); and

(d) repeal the *Coal Industry Tribunal of Western Australia Act 1992*, the *Conspiracy and Protection of Property Act of 1900* and the *Labour Relations Reform Act 2002* (Part 16 of the Bill).
PART 1 OF THE BILL – PRELIMINARY

Clauses 1 and 2 of the Bill – Short title and commencement

3. Clause 1 of the Bill provides for the short title of the legislation, namely the Labour Relations Legislation Amendment and Repeal Act 2012 (Amendment Act).

4. Clause 2(1) of the Bill provides that Part 1 of the Amendment Act will commence on the Royal Assent, while the rest of the Amendment Act will commence on a day(s) fixed by proclamation.

5. Clause 2(2) of the Bill requires the award modernisation process (see clause 84 of the Bill) to be completed before section 93, 95 or 99 of the Amendment Act can come into operation. Sections 93 and 95 will amend the IR Act to replace the current process for reviewing awards with a new process, which is predicated on the award modernisation process having being completed. Section 99 is consequential to sections 93 and 95.
PART 2 OF THE BILL – AMENDMENTS ABOUT THE WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Clause 3 of the Bill – IR Act amended

6. Clause 3 provides that Division 1 of Part 2 of the Bill will amend the IR Act.

Clause 4 of the Bill – Definitions

7. Clause 4 of the Bill will delete a number of existing definitions in section 7(1) of the IR Act, as well as insert some new definitions. These changes will be explained elsewhere.

Clause 5 of the Bill – President’s position abolished

8. Clause 5 of the Bill will amend section 8 of the IR Act as a consequence of the position of President being abolished. Section 8 sets out the members of the Commission. As a result of the President’s position being abolished, the only “members” of the Commission will be the Chief Commissioner, the Senior Commissioner and other commissioners.

9. The President currently sits on the Full Bench to hear appeals from decisions of single commissioners and industrial magistrates, as well as deal with questions of law. The President also exercises a number of functions sitting alone, mainly relating to registered organisations under the IR Act. The President is required to have a least five years’ legal experience.

10. Successive independent reviews of the IR Act have recommended that the President’s position be abolished. In 2005 the IR Act was amended to enable the appointment of an acting President, with a view to the position being abolished.

11. The Bill will enable a Supreme Court judge assigned by the Chief Justice of Western Australia to sit on the Full Bench as required, instead of the President. The Supreme Court judge will be referred to as the “presiding member” of the Full Bench.

12. The assignment of a Supreme Court judge to the Full Bench will ensure that the Full Bench retains legal expertise, while ensuring a more efficient use of resources by diverting funding for the President’s position to the Supreme Court.

13. New section 8(3AA) of the IR Act will make it clear that the Full Bench includes the presiding member, even though the presiding member is not a “member” of the Commission per se. The presiding member will constitute the Commission when exercising jurisdiction under the IR Act (see new section 15A(4) of the IR Act, clause 11 of the Bill).

1 Commissioner G.L. Fielding, Review of Western Australian Labour Relations Legislation (July 1995); Dr Sally Cawley, The Industrial Relations Act 1979 and the Western Australian Industrial Relations Commission (January 2003).
Clause 6 of the Bill – Consequential amendment to section 9

14. Clause 6 of the Bill will amend section 9 of the IR Act to delete the minimum qualification requirements for the President, as a consequence of the position being abolished.

Clause 7 of the Bill – Protection for office holders

15. Clause 7 of the Bill will amend section 13 of the IR Act, which protects various office holders in the performance of their duties under the IR Act. Section 13 will be amended to:

(a) extend the application of section 13 to the presiding member and the Registrar and deputy registrars of the Commission;

(b) delete current section 13(b) of the IR Act, which refers to “a member of a Board of Reference referred to in section 48”. Clause 97 of the Bill will delete section 48 of the IR Act, with a view to Boards of Reference being phased-out over time. While the reference to Boards of Reference in section 13 will be deleted, clause 257 of the Bill will ensure the continuing application of current section 13(b) to existing Boards of Reference (see clause 10(2) of new Schedule 6 of the IR Act); and

(c) delete current section 13(c) of the IR Act, which refers to “a constituent authority or a member of a constituent authority”. This is a consequence of clause 53 of the Bill, which will abolish the constituent authorities under the IR Act (namely public service arbitrators, Public Service Appeal Boards and the Railways Classification Board). A number of consequential amendments will be required as a result of the constituent authorities being abolished.

Clause 8 of the Bill – Consequential amendment to section 14

16. Clause 8 of the Bill will delete section 14(1) of the IR Act, consequential to the President’s position being abolished.

Clauses 9 and 10 of the Bill – Dual appointments

17. Clause 9 of the Bill will replace current section 14A of the IR Act with a new section 14A.

18. Current section 14A enables a Commission member to be dually appointed as a member of Fair Work Australia. Section 631(2) of the FW Act facilitates such dual appointments. To be appointed as a member of Fair Work Australia, a commissioner must first obtain the Governor’s approval under section 22(2)(c) of the IR Act.

19. Section 631(1) of the FW Act also facilitates a Fair Work Australia member being appointed as a member of a “prescribed State industrial authority”. New section 14A will enable a Fair Work Australia member to be dually appointed as a member of such an authority.

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2 This clause will insert new Schedule 6 – Transitional Provisions into the IR Act.
3 The Commission is a “prescribed State industrial authority” under regulation 1.06 of the *Fair Work Regulations 2009*. 

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appointed to the Commission, and vice versa. New section 14A(2) will define a Fair Work Australia member appointed to the Commission as a “dual member”. While a dual member will not be entitled to remuneration as a commissioner, they will be entitled to expense-related allowances considered reasonable by the Minister.

20. The capacity for dual appointments, as well as the sharing of administrative resources (see clause 56 of the Bill), may have practical and financial advantages for both the Commission and Fair Work Australia.

21. Clause 10 of the Bill will make minor amendments to the language of section 14B(1) of the IR Act, which sets out the duties and powers of a commissioner dually appointed to Fair Work Australia.

Clause 11 of the Bill – Sections 15 and 16 replaced


New section 15 – Constitution of Full Bench

23. New section 15(1) of the IR Act will set out the constitution of the Full Bench. The Full Bench will comprise of the presiding member assigned by the Chief Justice of Western Australia, and at least two commissioners assigned by the Chief Commissioner. New section 15(2) will clarify that the constitution of the Full Bench may be altered, while new section 15(3) will ensure there is continuity in the proceedings if such an alteration occurs. These provisions are consistent with new section 16(3) and (4) of the IR Act, which deal with alteration of the Commission’s constitution.

New section 15A – Presiding member of Full Bench

24. New section 15A of the IR Act will ensure that the assignment of a Supreme Court judge as presiding member does not affect the judge’s office, status, entitlements and other rights and privileges as a judge. New section 15A(4) will replace current section 14(1) of the IR Act (to be deleted by clause 8 of the Bill), to prescribe the jurisdiction and powers of the presiding member.

New section 15B – Commission in Full Session

25. Current section 15(2) of the IR Act sets out the constitution of the “Commission in Court Session”. The Commission in Court Session is responsible for hearing and determining more significant matters under the IR Act, such as the annual State Wage order. The Bill will rename the Commission in Court Session the “Commission in Full Session”. The new name will more accurately reflect the Commission in Court Session’s functions, given it does not perform judicial or court-like functions.

4 In terms of transitional arrangements, clause 7 of new Schedule 6 of the IR Act will provide that a reference to the “Commission in Court Session” in any instrument is taken to be a reference to the “Commission in Full Session”, unless the context otherwise requires.
26. New section 15B of the IR Act will replace current section 15(2), to set out the constitution of the Commission in Full Session. The Commission in Full Session will comprise of at least three commissioners.

**New section 16 – Powers and duties of Chief Commissioner**

27. New section 16 of the IR Act will replace current section 16, with the following changes:

(a) new section 16(1) will require the Chief Commissioner to act in a manner that encourages cooperation between the Commission and Fair Work Australia;\(^5\)

(b) the Chief Commissioner will remain responsible for administrative matters relating to commissioners and the Commission generally, but not the presiding member;

(c) current section 16(1a) will be deleted, consequential to the constituent authorities being abolished;

(d) current section 16(2)(c) will be deleted, consequential to the President’s position being abolished; and

(e) current section 16(2A) to (2E) will be deleted and replaced by new section 16AA.

**New section 16AA – Occupational Safety and Health Tribunal**

28. New section 16AA of the IR Act will replace current section 16(2A) to (2E), which deals with the designation of a commissioner to constitute the Occupational Safety and Health Tribunal under the *Occupational Safety and Health Act 1984*. New section 16AA is materially the same as current section 16(2A) to (2E).\(^6\)

**Clause 12 of the Bill – Consequential amendment to section 17**

29. Clause 12 of the Bill will amend section 17 of the IR Act, consequential to the President’s position being abolished. In terms of transitional arrangements, clause 4 of new Schedule 6 of the IR Act will enable the person who is acting President immediately before commencement of section 12(2) of the Amendment Act to remain in office for the purpose of completing any outstanding matters.

**Clause 13 of the Bill – Consequential amendment to section 18**

30. Clause 13 of the Bill will replace current section 18(3) and (4) of the IR Act, consequential to the President’s position being abolished.

\(^5\) Complementary to section 649(1) of the FW Act, which imposes a similar obligation on the President of Fair Work Australia.

\(^6\) In terms of transitional arrangements, clause 3 of new Schedule 6 of the IR Act will provide that the commissioner designated under section 16(2A) immediately before commencement of section 11 of the Amendment Act will be taken to be designated under new section 16AA(1). This will ensure continuity in the constitution of the Occupational Safety and Health Tribunal.
Clause 14 of the Bill – Consequential amendment to section 19

31. Clause 14 of the Bill will replace current section 19 of the IR Act, which deals with the duties of Commission members. The reference to “members” will be replaced with “commissioners”, to reflect that only commissioners will be members of the Commission once the President’s position is abolished.

Clause 15 of the Bill – Conditions of service for Commission members

32. Clause 15 of the Bill will amend section 20 of the IR Act, primarily as a consequence of the President’s position being abolished.

33. Current section 20(1) will be deleted, which prescribes the President’s conditions of service. Current section 20(2), dealing with the determination of commissioners’ remuneration, will be renumbered new section 20(1).

*Ability for commissioner to work full-time or part-time*

34. New section 20(2) will enable the Governor to determine whether a commissioner is to work full-time or other than full-time. The intent is to enable commissioners to work part-time, which may be beneficial to their personal needs and suit the operational requirements of the Commission. New section 20(3) will ensure that the Governor can only exercise the power under new section 20(2) with the consent of the affected commissioner.

*Commissioner must not engage in other paid work without permission*

35. New section 20(4) will prevent a commissioner from engaging in other paid work without the Governor’s permission (a comparable provision exists for magistrates).7 This provision will be particularly relevant given the potential for commissioners to work on a part-time basis under new section 20(2).

*Section 20(12) and (13) preserved for past Presidents*

36. Current section 20(8c) and (8d) will be deleted. These provisions concern a President who was, immediately prior to appointment, a “contributor” within the meaning of the *Superannuation and Family Benefits Act 1938*. No previous President was a contributor within the meaning of that Act.

37. Current section 20(11) to (13) will also be deleted. However, clause 5 of new Schedule 6 of the IR Act will provide for the continuing operation of current section 20(12) and (13) where past Presidents or their dependents are entitled to a pension by application of the *Judges’ Salaries and Pensions Act 1950*.

Clause 16 of the Bill – Section 22A deleted

38. Clause 16 of the Bill will delete section 22A of the IR Act, consequential to the constituent authorities being abolished.

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7 Schedule 1, clause 5 of the *Magistrates Court Act 2004*. 

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Clause 17 of the Bill – Allocation of Commission’s work

39. Clause 17 of the Bill will amend section 25 of the IR Act, which deals with the allocation of the Commission’s work.

40. New section 25(2) will provide that the Chief Commissioner’s power to allocate work is subject to any provision of the IR Act which requires the Commission to be constituted in a particular way. For example, section 50(1) will require the Commission to be constituted by the Commission in Full Session for the purposes of making a General Order.

41. New section 25(3) will enable the Chief Commissioner to allocate an interlocutory matter before the Commission in Full Session to one of the commissioners constituting the Commission in Full Session. This will enable the interlocutory matter to be dealt with more efficiently and expeditiously, rather than the Commission in Full Session having to deal with the matter itself. Similarly, new section 25(4) will enable the presiding member (after consultation with the Chief Commissioner) to allocate an interlocutory matter before the Full Bench to one of the commissioners constituting the Full Bench.

Clause 18 of the Bill – Section 26 amended

42. Clause 18 of the Bill will amend section 26(3) of the IR Act, which currently obliges the Commission to notify parties of its intention to take into account any information that was not raised at hearing. The amendment is consequential to clause 19(2) of the Bill, which will insert new section 27(3) into the IR Act to enable the Commission to determine matters without a hearing in certain circumstances. Section 26(3) will be amended so that the obligation to notify parties will only apply in the circumstance where the Commission has held a hearing.

43. Clause 18 of the Bill will also delete section 26(4) of the IR Act, which refers to “final offer arbitration”. The concept of final offer arbitration will be deleted from the IR Act (see also clause 4(1) of the Bill, which will delete the definition of “final offer arbitration” in section 7(1) of the IR Act). Final offer arbitration effectively means arbitration in which the Commission adopts the final proposal of one of the parties to the dispute, without amendment. The concept is considered to be out dated and rarely occurs in practice.

Clause 19 of the Bill – General powers of the Commission

44. Clause 19 of the Bill will amend section 27 of the IR Act, which sets out the general powers of the Commission. Section 27 will be amended to:

(a) clarify that the Commission may exercise one or more of the powers in section 27(1);

(b) empower the Commission to dismiss a matter that it is vexatious, trivial, without substance or has no reasonable prospect of success. This will help to ensure a more efficient use of the Commission’s time and resources, and that parties are not subject to unnecessary proceedings;
(c) reflect that questions concerning the interpretation of a registered organisation’s rules will be dealt with by the Chief Commissioner or the Commission in Full Session, rather than the Full Bench (amendment to section 27(1)(u) – see also clause 152 of the Bill).

45. Clause 19(2) of the Bill will insert new section 27(3) into the IR Act to enable the Commission to make:

(a) a finding without a hearing. A “finding” is defined in section 7(1) of the IR Act to mean a decision, determination or ruling that does not finally decide the matter in question. Interim orders made in a conciliation conference are examples of a “finding”; and

(b) a final decision without a hearing if the parties consent. A “final decision” will be defined in section 7(1) of the IR Act to mean a decision, determination or ruling that finally decides the matter in question (see clause 4(2) of the Bill). There may be instances in which the parties agree it is appropriate for a matter to be finally determined without a formal hearing. For example, parties seeking to have an agreement registered as an industrial agreement.

Clause 20 of the Bill – Commission’s powers to order costs

46. Clause 20 of the Bill will insert new section 28A into the IR Act to strengthen the Commission’s powers to order costs in prescribed circumstances. New section 28A will enable the Commission to order a party (the first person) to pay another party's costs if the Commission is satisfied that:

(a) the first person initiated proceedings, or responded to proceedings, vexatiously or without reasonable cause; or

(b) it should have been reasonably apparent to the first person that the proceedings initiated by them, or their response to the proceedings, had no reasonable prospect of success.

47. New section 28A will replace current section 27(1)(c) of the IR Act (which will be deleted by clause 19(1)(e) of the Bill). Among other things, the Commission will be able to order costs for the services of a legal practitioner or industrial agent in proceedings.

Clause 21 of the Bill – Service of claims and applications

48. Clause 21 of the Bill will amend section 29A of the IR Act to streamline the service of claims and applications (referred to collectively as “applications”). In particular, section 29A will be amended to:

(a) remove the current requirement in section 29A(2)(a) and (b) that certain applications be served on UnionsWA, the Chamber of Commerce and Industry of Western Australia, the Australian Mines and Metals Association and the Minister. This requirement is considered to be of minimal practical benefit and administratively burdensome. There will still be a requirement, however, that applications for the issuance, variation or cancellation of an award be served on relevant persons in accordance with amended section 29A(3); and
(b) delete section 29A(2b), consequential to the amendment to section 29A(2)(a) and (b) above.

49. Clause 21 of the Bill will not change the current requirement in section 29A(2) for certain applications to be published in the required manner (as defined in section 7(1) of the IR Act).

Clause 22 of the Bill – Intervention by Minister in Commission proceedings

50. Clause 22 of the Bill will replace current section 30 of the IR Act with a new section 30, to provide the Minister with the right to intervene in Commission proceedings on behalf of the State. The Minister will no longer require the Commission’s leave to intervene.

Clause 23 of the Bill – Special standing of Australian Mines and Metals Association removed

51. Certain bodies (namely UnionsWA, the Chamber of Commerce and Industry of Western Australia, the Australian Mines and Metals Association and the Minister) currently have special standing under the IR Act. Clause 23 of the Bill will amend section 31(1)(c)(i) of the IR Act to delete the reference to “the Mines and Metals Association”. The Bill will remove the Australian Mines and Metals Association’s special standing, given that most of its members are covered by the FW Act rather than the IR Act. A number of consequential amendments will be required as a result.

52. Clause 23 of the Bill will also amend section 31(5) to clarify that it is the Chief Commissioner, rather than commissioners generally, who is responsible for making regulations under section 113 of the IR Act.

Clause 24 of the Bill – Conciliation and arbitration under section 32

53. Clause 24 of the Bill will amend section 32 of the IR Act to:

(a) clarify that section 32(4) does not apply to an order or declaration to which section 35 applies. Section 35 generally requires final decisions to be first drawn up in the form of minutes. There would be unnecessary duplication if section 32(4) also applied to such decisions, given that section 32(4) requires decisions to be reduced to writing and prefaced with a preamble;

(b) provide that the commissioner who conciliated a matter under section 32 must not also decide the matter by arbitration under section 32(6), unless all the parties consent in writing. This is intended to encourage full and frank disclosure by the parties in conciliation;

(c) require the Commission to specify a timeframe for compliance with any condition in a direction, order or declaration. This is intended to provide certainty to the parties about their respective rights and obligations; and

(d) delete current section 32(7), which requires the Commission to try and resolve a matter “on terms that could reasonably have been agreed between the parties in the first instance or by conciliation”. This requirement is considered to be unduly vague and an unnecessary
constraint on the Commission’s powers to effectively resolve a matter by arbitration.

Clause 25 of the Bill – Consequential amendment to section 33

54. Clause 25 of the Bill will delete section 33(6), which refers to a summons issued under section 44. This amendment is consequential to clause 32 of the Bill, which will replace current section 44 with new sections 44 to 45F.

Clause 26 of the Bill – When Commission decision “made”

55. Clause 26 of the Bill will replace current section 34(1) of the IR Act with a new section 34(1). Importantly, the amendment will provide that a final decision is “made” when it is signed and dated by the commissioner or presiding member (as the case may be). This will alter the current situation whereby a decision is made when it is signed and “delivered”, namely deposited in the office of the Registrar.\textsuperscript{8} It should be noted that a decision may not necessarily take effect, however, when it is made.\textsuperscript{9}

56. New section 36 of the IR Act will still require decisions to be deposited in the office of the Registrar and copies made publicly available (see clause 28 of the Bill).

Clause 27 of the Bill – Only final decisions to be drawn up in form of minutes

57. Clause 27 of the Bill will replace section 35(1) of the IR Act to provide that only final decisions must be drawn up in the form of minutes before they are made. Section 35(1) will not, therefore, apply to findings such as interim orders made in a conciliation conference.

58. As is currently the case under section 35, final decisions will not be required to be drawn up in the form of minutes where:

(a) the final decision is an order made under section 27(1)(a) to dismiss a matter or refrain from further hearing or determination; or

(b) the Commission considers the process to be inappropriate or unnecessary and the parties consent.

Clause 28 of the Bill – Copies of decisions to be deposited in office of Registrar

59. Clause 28 of the Bill will replace section 36 of the IR Act so that as soon as practicable after making a decision, the Commission must give a copy to each party and deposit a copy in the office of the Registrar. Copies of decisions will continue to be available for public inspection. While the onus is on the Commission to comply with section 36, failure to comply will not affect the fact that a decision has been validly made.

60. Clause 28 of the Bill will also insert new section 37A into the IR Act to enable the Commission to correct clerical mistakes in a decision or errors arising from an accidental slip or omission. The Commission must first be satisfied that correcting the mistake or error would not prejudice any of the parties.

\textsuperscript{8} Graham McCorry v Como Investments Pty Ltd (1989) 69 WAIG 1000.

\textsuperscript{9} For example, an award may have retrospective effect.
New section 37A will be consistent with section 90(4) of the IR Act, which provides the Western Australian Industrial Appeal Court with a similar power.

Clause 29 of the Bill – Consequential amendment to section 38

61. Clause 29 of the Bill will amend section 38(1) of the IR Act, consequential to the Australian Mines and Metals Association’s special standing under the IR Act being removed.

Clause 30 of the Bill – Section 40B amended

62. Clause 30 of the Bill will amend section 40B(2) of the IR Act, so that prescribed parties will have the opportunity to make submissions – whether oral or written – on proposed award variations under section 40B. This will replace the current requirement that they be given an “opportunity to be heard”, which implies that a hearing must be held. The amendment is intended to provide the Commission with greater flexibility in terms of how it conducts proceedings, while still providing affected persons with procedural fairness.

63. Clause 30 of the Bill will also amend section 40B(2) and (3) of the IR Act, consequential to the Australian Mines and Metals Association’s special standing under the IR Act being removed.

Clause 31 of the Bill – Section 42E amended

64. Clause 31 of the Bill will amend section 42E of the IR Act, which deals with the Commission’s powers to assist parties to bargain for an industrial agreement. The amendments will clarify that section 42E does not itself confer a separate head of power for conciliation and arbitration – these are functions of section 32 and new Division 2C. Section 42E merely articulates some of the orders and directions that the Commission may make under section 32 and new Division 2C (as the case may be) when assisting parties to bargain.

Clause 32 of the Bill – Conciliation and arbitration under new Part II Division 2C

65. Clause 32 of the Bill will insert new Part II Division 2C into the IR Act. New Division 2C will replace current section 44 of the IR Act, which deals with compulsory conferences.

66. New Division 2C will retain most aspects of current section 44, with some modifications. The key changes are outlined below:

(a) conciliation conferences will no longer be convened by the Commission issuing a summons. Instead, the Commission will be required to convene a conference on the application of a person currently prescribed in section 44(7)(a) (which will be replaced by new section 45A(2)). The Commission will retain the power to convene a conference on its own motion where industrial action has occurred or is likely to occur;

10 Section 40B will eventually be deleted by clause 93 of the Bill.
(b) new section 45A(4) will require an application for a conciliation conference concerning unfair dismissal to be made within the 21-day timeframe specified by new section 37G(2) (see clause 122 of the Bill);

(c) the Commission will be able to direct a person to attend a conciliation conference (new section 45B(1)). Any such direction will be enforceable under section 83 of the IR Act;

(d) the Commission will be prevented from making written recommendations in a conciliation conference concerning the content of a proposed industrial agreement (new section 45B(5)). This will be consistent with current section 42F of the IR Act;

(e) the Commission will be required to specify a timeframe for compliance with any condition in a direction, order or declaration (new section 45C(3));

(f) the commissioner who conciliated a matter under new Division 2C will be prevented from deciding the matter by arbitration under new section 45D, unless all the parties consent in writing. This is intended to encourage full and frank disclosure by the parties in conciliation.

Clause 33 of the Bill – Cancellation of defunct awards and industrial agreements

67. Clause 33 of the Bill will amend section 47 of the IR Act to streamline the process for cancelling defunct awards and industrial agreements on the Commission’s own motion (section 47 also enables the Commission to strike out the names of redundant parties from awards and industrial agreements).11

68. Relevantly, section 47 will be amended to:

(a) enable the Commission to cancel an award or industrial agreement that is obsolete or no longer capable of operating (for example, because the employer is a constitutional corporation and therefore covered by the FW Act);

(b) remove the requirement in section 47(3) that the Registrar make enquiries and report to the Commission before an order is made under section 47. This requirement is of minimal practical benefit and administratively burdensome. The Commission will still be required, however, to publish notice of its intention to make an order;

(c) remove the requirement that a copy of an order concerning an award be served on UnionsWA, the Chamber of Commerce and Industry of Western Australia, the Australian Mines and Metals Association and the Minister;

11 Since 2006, employers that are constitutional corporations have been primarily covered by federal industrial relations laws. Current section 47 of the IR Act has proven inadequate to address the large volume of industrial instruments made obsolete by the federal changes (predominantly industrial agreements made with a constitutional corporation).
(d) remove the requirement that a copy of an order concerning an industrial agreement be served on the parties to the agreement. This has proven problematic where an employer has ceased to trade or cannot be located. Instead, there will be a requirement for a copy to be served on any person who was given notice of the Commission’s intention to make the order.

69. The award modernisation process prescribed by Part 3 of the Bill, combined with mandatory 4 yearly reviews of awards, should minimise the risk of awards becoming defunct in the future. However, section 47 of the IR Act will remain as a safeguard to enable the Commission to deal effectively with any such awards or industrial agreements.

Clauses 34 and 35 of the Bill – Appeals to the Full Bench

70. Clause 34 of the Bill will rename the heading to Part II Division 2E of the IR Act to “Appeals”.

71. Clause 35 of the Bill will amend section 49 of the IR Act, which deals with appeals from decisions of commissioners to the Full Bench. Most of the amendments are consequential to the President’s position and the constituent authorities being abolished.

Clauses 36 to 39 of the Bill – Consequential amendments

72. Clauses 36 to 39 of the Bill will amend various sections of the IR Act, consequential to the Australian Mines and Metals Association’s special standing under the IR Act being removed.

Clause 40 of the Bill – Amendment to section 51N

73. Clause 40 of the Bill will amend section 51N(3) of the IR Act to make reference to new section 37A. This will make it clear that notwithstanding section 51N(2), an order under section 51I can be varied in accordance with new section 37A. New section 37A will enable an order to be varied to correct clerical mistakes or certain errors.

Clauses 41 to 51 of the Bill – Amendments to Part II Division 4

74. Clauses 41 to 51 of the Bill will amend Part II Division 4 of the IR Act, which deals with registered organisations and associations. Most of the functions under that Division are currently carried out by the Full Bench and the President. As a result of the President’s position being abolished, the functions will be transferred to the Commission in Full Session and the Chief Commissioner. Clauses 41 to 51 of the Bill will in part give effect to these changes (see also Part 9 of the Bill).\(^\text{12}\)

\(^{12}\) In terms of transitional arrangements, clause 8 of new Schedule 6 of the IR Act will provide for continuity in proceedings where the Commission’s constitution changes as a result of the Amendment Act. Any proceedings commenced before the Amendment Act comes into operation can be dealt with as if the Commission’s constitution had not changed (e.g. if a matter was being dealt with by the Full Bench under Part II Division 4 of the IR Act, it can continue to be dealt with by the Full Bench rather than the Commission in Full Session).
Clause 52 of the Bill – Section 76 deleted

75. Clause 52 of the Bill will delete section 76 of the IR Act. Section 76 is a transitional provision and is no longer relevant.

Clause 53 of the Bill – Constituent authorities abolished

76. Clause 53 of the Bill will replace Part IIA of the IR Act, which deals with the Commission’s jurisdiction over government officers.

77. In new Part IIA the functions and jurisdiction of a public service arbitrator (PSA) and a Public Service Appeal Board (PSAB) will be performed by a single commissioner. The intention is to streamline the operation of the Commission without substantively affecting the nature of the PSA and PSAB jurisdictions. Current section 80D, which regulates the appointment of PSAs, will therefore not be replicated in new Part IIA. Similarly, current sections 80H and 80K, which regulate the structure and proceedings of PSABs, will not be replicated.

78. Current Part IIA Division 3 – Railways Classification Board (RCB), will not be included in new Part IIA. This is because there are no longer any employees employed as railway officers (as defined by section 80M(1) of the IR Act). All such employees are now employed as government officers.

79. In accordance with clause 9 of new Schedule 6 – Transitional Provisions of the IR Act any application, appeal or other claim made to a former constituent authority under deleted Part IIA that was commenced before section 53 of the Amendment Act comes into operation may be dealt with after the coming into operation of section 53 as if deleted Part IIA were still in operation.

New section 80Q – Definitions

80. New section 80Q will set out the terms used in Part IIA.

81. The terms “Arbitrator” and “Board” will not be included in new section 80Q as they will no longer exist. Rather, references to an “Arbitrator” or a “Board” in Part IIA will be replaced with a reference to the “Commission”. The term “Association” will also not be included as this is a term currently used only in section 80(H) and this section will be repealed.

82. The remaining terms which are currently defined in section 80C(1) will be replicated in new section 80Q, with the exception of the following which are new or differ from those currently contained in section 80C(1):

(a) “Commission” will mean the Commission constituted by a commissioner, unless the contrary intention appears; and

(b) “government officer” will not include the current reference to “any railway officer as defined in section 80M”, as section 80M will be repealed.

New section 80R – Which government officers are covered by Part IIA

83. New section 80R(1), (4) and (5) will substantively replicate current section 80C(2), (3) and (4) respectively.
84. Section 80R(2) will specify that the Commission will not have the jurisdiction to deal with an industrial matter in relation to an employee who is a government officer except in accordance with Part IIA. This will not, however, limit the operation of Part II Division 3 (General Orders), new Part XI (the State employment standards (SES)) or new Part XII (Right of entry) in relation to government officers.

New section 80S – Jurisdiction of Commission in relation to government officers

85. New section 80S will substantively replicate the provisions currently contained in section 80E of the IR Act, with the exception of section 80E(6). ¹³

86. Section 80E(6) is not required as section 27(1)(t) and new section 27(1)(u)¹⁴ will apply given the jurisdiction of a PSA and a PSAB will be performed by a commissioner.

New section 80T – Who may refer matters to Commission under section 80C

87. New section 80T will substantively replicate the provisions currently contained in section 80F of the IR Act.

New section 80U – Certain provisions of Part II apply to exercise of Commission’s jurisdiction under section 80S

88. New section 80U will substantively replicate the provisions currently contained in section 80G of the IR Act.

New section 80V – Commission’s jurisdiction to hear and determine specified appeals

89. New section 80V will substantively replicate the provisions currently contained in section 80I of the IR Act.

90. New section 80V(1)(b) will combine current section 80I(1)(b) and (d), and new section 80V(1)(c) will combine current section 80I(1)(c) and (e). These will be combined as current section 80H(3) and (4), which require that the matters in subsections (1)(b) and (d), and subsections (1)(c) and (e) be dealt with separately depending on whether the government officer in question is the holder of an office included in the Special Division of the Public Service, will not be replicated in new Part IIA. There will therefore be no need to distinguish between government officers in this way and to categorise their appeals separately. This amendment will not change the substance of the provisions.

91. New section 80V(3) and (4) will replicate the provisions currently contained in section 80L of the IR Act, with such consequential amendments required due to amendments made elsewhere in the Bill.

¹³ This section will not, however, refer to the Commission having “exclusive” jurisdiction as there will no longer be a PSA with which a distinction needs to be drawn.
¹⁴ To be inserted by clause 19 of the Bill.
92. Section 49 will apply to decisions of the Commission made under new section 80V as these decisions will no longer be made by a tripartite board (a PSAB) but by a single commissioner.

**New section 80W – How and by whom an appeal under section 80V is made**

93. New section 80W will include a definition of “organisation”. This will be the same definition as currently contained in section 80H(6) of the IR Act. As section 80H will not be replicated in new Part IIA, this definition (which relates to who may institute an appeal under new section 80V) will need to be included in new section 80W.

94. Regulation 107(2) of the *Industrial Relations Commission Regulations 2005* prescribes the time, being 21 days after the date of the decision against which the appeal is brought, within which an appeal under section 80I of the IR Act may be instituted. This provision will now be included in section 80W(2)(b).

95. In addition, new section 80W(3) will give the Commission the discretion to allow certain specified appeals (being appeals that involve a decision to dismiss or terminate the employment of a government officer) to be made out of time if the Commission considers that it would be unfair not to do so. This provision will be made so as to provide consistency with new section 37G(3).\(^{15}\)

96. New section 80W(2)(c) will not replicate the current reference to “the public service officer” contained in section 80J(b) as the definition of government officer in section 80Q will include “a public service officer”.

**Clauses 54, 55 and 56 of the Bill – Arrangements with other industrial authorities**

97. Clause 54 of the Bill will amend section 80ZH(3) of the IR Act, consequential to the constituent authorities being abolished.

98. Clause 55 of the Bill will replace section 80ZI of the IR Act, which deals with the Commission’s ability to hold a joint conference with another industrial authority. New 80ZI will be materially the same as current section 80ZI, but will be streamlined and modernised.

99. Clause 56 of the Bill will insert new section 80ZK into the IR Act. New section 80ZK will enable the Chief Commissioner to enter into an arrangement with Fair Work Australia for the provision of administrative support. Section 650 of the FW Act facilitates such arrangements. The sharing of administrative resources (along with the capacity in new section 14A for dual appointments) may have practical and financial advantages for the Commission and Fair Work Australia, particularly as they are physically located in the same building in Perth.

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\(^{15}\) New section 37G(3), which relates to claims of unfair dismissal, will be inserted by clause 122 of the Bill.
Clause 57 of the Bill – Consequential amendment to section 84

100. Clause 57 of the Bill will amend section 84 of the IR Act, consequential to new section 28A being inserted. New section 28A will prescribe the Commission’s powers to order costs, and as such, section 84(5) is no longer required.

Clauses 58 to 70 – Other consequential amendments to IR Act

101. Clause 58 of the Bill will amend section 90 of the IR Act, which deals with appeals to the Western Australian Industrial Appeal Court (Industrial Appeal Court). The amendments are consequential to the President being replaced on the Full Bench by the presiding member, and the Commission in Court Session being renamed the Commission in Full Session.

102. Clause 59 of the Bill will amend section 92(4) of the IR Act, consequential to the President being replaced on the Full Bench by the presiding member.

103. Clauses 60 and 61 of the Bill will amend sections 97U(1) and 97UN(2) of the IR Act respectively, consequential to the constituent authorities being abolished.

104. Clause 62 of the Bill will replace section 97VQ(2) of the IR Act, consequential to the constituent authorities being abolished. Reference will also be made to new section 28A, to clarify that the Commission may exercise its powers under that section to order costs.

105. Clause 63 of the Bill will amend section 97VZ of the IR Act, consequential to the Australian Mines and Metals Association’s special standing under the IR Act being removed.

106. Clause 64 of the Bill will amend section 106(a)(ii) of the IR Act, which requires judicial notice to be taken of certain signatures and appointments under the IR Act. The amendments are consequential to the President’s position being abolished and the presiding member sitting on the Full Bench.

107. While clause 64 will delete reference to the President in section 106(a)(ii), clause 6 of new Schedule 6 of the IR Act will ensure that judicial notice is still required of any past President’s signature and appointment.

108. Clause 65 of the Bill will amend section 112A of the IR Act, consequential to the Australian Mines and Metals Association’s special standing under the IR Act being removed.

109. Clause 66 of the Bill will delete section 113(1)(da) of the IR Act, consequential to the constituent authorities being abolished.

110. Clause 67 of the Bill will amend Schedule 1 of the IR Act, consequential to the President’s position being abolished and the presiding member sitting on the Full Bench.

111. Clause 68 of the Bill will amend Schedule 3 of the IR Act, consequential to the constituent authorities being abolished.
112. Clause 69 of the Bill will amend various sections of the IR Act, consequential to the Commission in Court Session being renamed the Commission in Full Session.

113. Clause 70 of the Bill will amend various sections of the IR Act, consequential to other amendments made by Part 2 of the Bill. Among other things:

(a) the term “member of the Commission” will be replaced with “commissioner”, given that only commissioners will be members of the Commission once the President’s position is abolished; and

(b) the term “relevant industrial authority” will be replaced with “Commission”, consequential to the constituent authorities being abolished.

Clauses 71 to 77 of the Bill – Consequential amendments to other Acts

114. Clauses 71 to 77 of the Bill will amend the following Acts, consequential to amendments made to the IR Act by Part 2 of the Bill:

(a) Constitution Acts Amendment Act 1899, consequential to the President’s position and the constituent authorities being abolished;

(b) Construction Industry Portable Paid Long Service Leave Act 1985, to make reference to new sections 28A and 37A of the IR Act;

(c) Equal Opportunity Act 1984, consequential to the President’s position being abolished;

(d) Health and Disability Services (Complaints) Act 1995, consequential to the constituent authorities being abolished;

(e) Juries Act 1957, consequential to the President’s position being abolished;

(f) Occupational Safety and Health Act 1984, consequential to certain provisions of the IR Act being renumbered or inserted;

(g) Police Act 1892, consequential to certain provisions of the IR Act being modified or inserted.

Clause 78 of the Bill – Consequential amendments to Public Sector Management Act 1994 (PSM Act)

115. Clause 78 of the Bill will replace section 37 of the PSM Act with a new section 37. New section 37 will provide that a matter covered by section 37 may be referred to the Commission under new section 80S of the IR Act, rather than to the PSA.

116. Unlike current section 37, new section 37 will not include the term “appeal”. Rather, it will provide that a public service officer may “refer” the matter to the Commission and the Commission will have the jurisdiction to hear and determine “the matter referred”.

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117. Although section 37 currently refers to “appeals”, this is not a reference to an appeal under section 80I of the IR Act (being an appeal that is dealt with by a PSAB). Under section 37 a public service officer appeals to and has the matter heard and determined by a PSA. Furthermore, the nature of the claim dealt with by section 37 is similar to a claim that may be heard by a PSA under current section 80E(2)(a) of the IR Act, relating to the remuneration payable to the public service officer. Consequently, while the terminology in new section 37 will differ from the current terminology, the substance of the provision will not be changed.

118. Clause 78 of the Bill will also make a number of consequential amendments to section 78 of the PSM Act. These amendments will reflect the abolition of the PSA and PSAB.

Clause 79 of the Bill – Certain regulations repealed

119. Clause 79 of the Bill will repeal the Industrial Relations Commission (Railways Classification Board [Elections]) Regulations 1985, consequential to the constituent authorities being abolished. Clause 79 will also repeal the Industrial Relations Commission (Government School Teachers Tribunal [Elections]) Regulations.\(^\text{16}\)

\(^{16}\) The Government School Teachers Tribunal was abolished in 1995 by the Industrial Legislation Amendment Act 1995.
PART 3 OF THE BILL – AMENDMENTS ABOUT AWARDS

Overview

120. Part 3 of the Bill will amend the IR Act, including Part II Division 2A – Awards, to provide for an award modernisation process, four yearly reviews of all awards, and other amendments relating to the making, varying and cancelling of awards.

121. Under the award modernisation process, the Commission will be required to make modern awards to replace existing State private sector awards within 12 months. Many of the State private sector awards are out dated, use antiquated language and contain inconsistent and ambiguous provisions.

122. Part 3 of the Bill will:

(a) distinguish between the awards that the Commission can currently make. These awards will be called pre-modern State awards, enterprise awards and public sector awards; and

(b) create two new award types – modern State awards and the miscellaneous modern State award (miscellaneous award).

123. The term “award” as currently defined in section 7 of the IR Act will remain the same, that is, an award made by the Commission under the IR Act, and will encompass all of the awards mentioned above. However, the term may have a different meaning in different sections, depending upon the provision.

Clause 80 of the Bill – IR Act amended

124. Clause 80 of the Bill provides that Part 3 of the Bill will amend the IR Act.

Clause 81 of the Bill – New definitions relating to awards

125. Clause 81 of the Bill will amend section 7(1) of the IR Act to include a number of new definitions relating to awards. The definitions will be as follows:

(a) “award modernisation process” will be defined as the process of reviewing pre-modern State awards and the making of modern State awards (as will be provided for in new sections 37P and 37Q).

(b) “covers” will have two meanings – one that will apply to modern State awards and one that will apply to all other awards. These meanings will be provided for in new section 40BB and amended section 37(2) of the IR Act respectively. The meanings will, however, be substantively the same.

The definition of the term is a consequence of the inclusion of new provisions referring to an award “covering” an employer, employee, organisation or association.

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17 This will also be the default definition if no alternative definition is given in a particular section.
18 To be inserted by clause 84 of the Bill.
(c) “enterprise award” will mean an award that is expressed to relate to a single business, project, undertaking or activity carried on by an employer other than an employer in the public sector. This term will only relate to awards that are in effect at the commencement of the Amendment Act (new section 37M(1)\textsuperscript{19} will prevent the Commission from making any new enterprise awards).

(d) “miscellaneous modern State award” will be the modern State award that is expressed to cover any employee whose work is of a similar nature to work that has traditionally been covered by an award (whether made under a law of the Commonwealth or the States) but who is not covered by any other modern State award.

(e) “modern State award” will mean an award that is made in the terms of new section 37T,\textsuperscript{20} other than a public sector award. It will not include an enterprise award, given that the Commission will not have the power to make a new enterprise award (as per new sections 37L and 37M(1) of the IR Act).

(f) “pre-modern State award” will mean an award other than a modern State award, a public sector award or an enterprise award. A pre-modern State award will include:

(i) an award (other than a public sector award or enterprise award) in effect at the commencement of Part 3 of the Amendment Act; and

(ii) by virtue of new section 37L, a pre-modern State award made by the Commission prior to the conclusion of the award modernisation process.\textsuperscript{21}

(g) “public sector” will have the same meaning as in section 3(1) of the PSM Act which is all the agencies, ministerial offices and non-SES organisations. The PSM Act defines “agency” to mean a department or a SES organisation, and “department” to mean a department established under section 35 of the PSM Act.

Section 3(1) of the PSM Act defines both SES and non-SES organisations, while Schedule 1 of the PSM Act specifies which entities are not organisations and Schedule 2 specifies which entities are SES organisations.

(h) “public sector award” will mean an award that covers employers in the public sector and their employees. It will include an award that is expressed to relate to a single business, project, undertaking or activity carried on by such an employer.

It is intended that, unlike for non-public sector employers, the Commission can continue to make awards in the public sector that apply to a single employer. This is because the nature of the public sector means it may be necessary for certain awards to apply to a

\textsuperscript{19} Ibid.
\textsuperscript{20} Ibid.
\textsuperscript{21} In accordance with new section 37L(a), once the award modernisation process has concluded, the Commission will be unable to make a new pre-modern State award.
single employer. For example, the Police Award 1965 can only apply to the Western Australian Police Force.

Clause 82 of the Bill – Consequential amendment to section 34

126. Clause 82 of the Bill will insert new section 34(2B) to define the meaning of “award” in section 34(1). This will be a consequential amendment arising from the introduction of new provisions in the IR Act relating to the making of different types of awards.

Clause 83 of the Bill – Part II Division 2A Subdivision 1 heading inserted

127. Clause 83 of the Bill will insert the new heading “Subdivision 1 – Award-making functions of Commission”.

Clause 84 – Section 36A replaced to provide for the awards the Commission may make

128. Clause 84 of the Bill will insert new sections 37L, 37M and 37N into the IR Act, which will replace existing section 36A. It will also insert “Subdivision 2 – Award modernisation and review of enterprise awards” into Part II Division 2A of the IR Act.

New section 37L – Awards that the Commission may make

129. New section 37L will specify the four types of awards that the Commission will be able to make:

(a) a pre-modern State award and the miscellaneous award if made before the date referred to in new section 37U(2) (being the completion of the award modernisation process);

(b) a modern State award; and

(c) a public sector award.

130. An award will continue to be made via the referral of an industrial matter to the Commission under section 29(1) of the IR Act. The Commission will, however, also be able to make a modern State award or a public sector award under new section 40BH(2)(a)22 of the IR Act as part of the four yearly review of all awards. The four yearly review process will be on the Commission’s own motion.

New section 37M – Limitations on the Commission’s award making powers

131. New section 37M will prevent the Commission from making:

(a) an enterprise award;

(b) a new modern State award covering particular employers or employees unless the Commission has considered whether it should instead vary an existing modern State award to cover them; and

22 To be inserted by clause 95 of the Bill.
(c) a modern State award that will result in an organisation or association being covered by the modern State award unless it is entitled to represent the industrial interests of one or more employers or employees who will be covered by the modern State award.

New section 37N – Awards are enforceable under section 83

132. New section 37N will signpost that awards are enforceable under section 83 of the IR Act.

New section 37O – Constitution of the Commission for award modernisation and the review of enterprise awards

133. New section 37O will define “Commission” as the Commission in Full Session for the purposes of sections 37P to 37U thereby requiring award modernisation to be conducted by a Commission in Full Session. “Commission” will be defined as a single commissioner for the purposes of sections 37V to 37X thereby requiring the review of enterprise awards to be conducted by a single commissioner.

134. Although award modernisation will be conducted by the Commission in Full Session, the Chief Commissioner will be able to allocate work relating to consultation (as per new section 37R) to one of the commissioners constituting the Commission in Full Session. The intention is to facilitate an efficient award modernisation process.

New section 37P – Commission required to review and replace every pre-modern State award

135. New section 37P will establish the parameters of the award modernisation process. The Commission will be required to review every pre-modern State award and make such modern State awards as it thinks necessary or expedient to replace every pre-modern State award.

136. As the definition of a pre-modern State award excludes a public sector award, public sector awards will be excluded from the award modernisation process.23 Public sector awards will, however, be included in the four yearly reviews of all awards24 to ensure they remain up-to-date.

137. Section 37P will provide the Commission with the discretion to include transitional provisions in a modern State award. For example, the Commission could include provisions for the phasing-in of any wage increases resulting from award modernisation, or include provisions that ensure an employee’s take-home pay is not reduced by the making of the modern State award.

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23 Public sector awards will be excluded as they have been regularly and substantively updated over time.
24 Provision for the conduct of four yearly award reviews will be inserted by clause 95 of the Bill.
138. The Commission will also be able to include transitional provisions to address any consequences arising from the repeal of section 48 of the IR Act.\textsuperscript{25} For example, there may be determinations made by a Board of Reference in relation to a particular pre-modern State award that the Commission considers ought to be included in the modern State award that replaces it.

139. There will be nothing to prevent or require the Commission from progressively making modern State awards during the award modernisation process or alternatively making all modern State awards at the end of the review process.

140. Despite section 90 of the IR Act, there will be no scope to appeal a decision of the Commission in relation to the making of a modern State award or the inclusion of transitional provisions in a modern State award under section 37P. This is intended to give certainty to the award modernisation process. It should be noted, however, that there will be scope under section 40 of the IR Act (as amended) for an application to be made to vary a modern State award.

**New section 37Q – Commission may make modern State awards that do not replace a pre-modern State award**

141. New section 37Q will ensure that the Commission will be able to make a modern State award during the award modernisation process that does not replace a pre-modern State award. This may be necessary where the Commission considers that an industry or occupation that is not currently covered by a pre-modern State award ought to be covered by an award.

142. It should be noted that new section 40BD\textsuperscript{26} of the IR Act will prevent a modern State award from being expressed to cover classes of employees who:

(a) have not been traditionally covered by awards (be these awards made under laws of the Commonwealth or the States)\textsuperscript{27} due to the nature or seniority of their role; or

(b) perform work that is not of a similar nature to work that has been traditionally regulated by such awards.

143. New section 40BD will therefore apply to the Commission when it is exercising its power under new section 37Q to make a modern State award that does not replace a pre-modern State award (i.e. an existing award).

**Miscellaneous modern State award**

144. New section 37Q will also provide the Commission with the discretionary power to determine if it will make the miscellaneous award. The Commission will only be able to make one miscellaneous award.

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\textsuperscript{25} Section 48 of the IR Act currently requires the establishment of Boards of Reference in each award. Clause 97 of the Bill will repeal section 48 of the IR Act. This will mean that there will be no requirement for awards made after the commencement of the Amendment Act to include Boards of Reference.

\textsuperscript{26} To be inserted by clause 94 of the Bill.

\textsuperscript{27} This includes awards made in other State jurisdictions in the past or presently.
145. The Commission will only be able to make the miscellaneous award as part of the award modernisation process. New section 37L(a)(ii)\(^{28}\) will provide that if the Commission is to make the miscellaneous award, it must be made before the award modernisation process is completed (being the date referred to in new section 37U(2)\(^{29}\)).

146. The purpose of the miscellaneous award is to limit the number of award free employees who ought to be covered by an award as the work they perform is of a similar nature to work that has been traditionally regulated by Commonwealth or State (including other States’) awards. This will, in part, recognise that industries and occupations change over time and, until a new modern State award is made or a modern State award is varied to apply to such industries or occupations (if so determined by the Commission), employees in these industries or occupations would be without award coverage.

147. As with any modern State award, the making of the miscellaneous award will be governed by new section 40BD concerning which classes of employees will not be able to be covered by a modern State award.

**New section 37R – Commission required to consult as part of the award modernisation process**

148. New section 37R will require the Commission to consult with the following persons as part of the award modernisation process:

- (a) UnionsWA, the Chamber of Commerce and Industry of Western Australia and the Minister; and

- (b) any other person including an employer, employee, organisation or association, which the Commission considers to have an interest in any relevant matter.

149. The Commission will be able to choose the manner and extent to which it consults. It will, however, be required to consult in relation to the:

- (a) review of every pre-modern State award;

- (b) making of every modern State award and the miscellaneous award; and

- (c) making of exposure drafts of each modern State award.

**New section 37S – Commission required to make exposure drafts of all proposed modern State awards available for public comment**

150. New section 37S will require the Commission to make an exposure draft of every proposed modern State award and to make the exposure drafts available for public comment. The Commission will also be required to have regard to any submission made in accordance with the notice provisions in section 37S(2).

\(^{28}\) Ibid.

\(^{29}\) Ibid.
151. Section 37S will set out the process by which the Commission will be required to make exposure drafts available to the public and for the public to make written submissions.

**New section 37T – Form and content of modern State awards**

152. New section 37T will establish the parameters for modern State awards in terms of their form and content. These parameters will apply whether the modern State award is made as part of the award modernisation process or after the completion of the award modernisation process.

153. Many existing State awards use antiquated language and contain inconsistent and ambiguous provisions. An intended outcome of the award modernisation process is that modern State awards be in a form that is simple to understand.

154. In making modern State awards, the Commission will be required to avoid making a modern State award that unnecessarily duplicates another modern State award. For example, there are 13 awards covering clerks performing the same or similar work in different industries. The Commission may, for example, consider a single modern State award covering clerical work in a range of industries to be appropriate so as to avoid unnecessary duplication.

**New section 37U – When the award modernisation process must be completed**

155. New section 37U will require the Commission to complete the award modernisation process 12 months after the commencement of section 84 of the Amendment Act, or by the end of such other period that is prescribed by regulations. Once the process has been completed, the Commission must make an order declaring the date of completion of the award modernisation process.

156. As part of this order, the Commission will be required to cancel all pre-modern State awards. It should be noted, however, that where a modern State award is made during the award modernisation process, rather than at the end, a pre-modern State award that is replaced by that modern State award will have ceased to cover (and therefore bind) an employee and employer prior to the cancellation of all pre-modern State awards at the completion of the award modernisation process.\(^{30}\)

157. Section 47 of the IR Act, which deals with the cancellation of awards on the Commission’s own motion, will not apply to the Commission’s cancellation of pre-modern State awards under new section 37U.

158. Nothing in the Bill will prevent the Commission from utilising its powers under section 47 of the IR Act to cancel a defunct pre-modern State award on its own motion during the award modernisation process. It may wish to do so if, for example, its review of a particular pre-modern State award determines

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\(^{30}\)In accordance with new section 40BE(2), once a modern State award comes into operation and replaces a pre-modern State award, the pre-modern State award will cease to cover the relevant employer, employee, organisation or association.
that it is obsolete and therefore should not be replaced with a modern State award as would be required under new section 37P.  \textsuperscript{31}

**New section 37V – Commission must review each enterprise award to determine whether it should be cancelled**

159. New section 37V will require the Commission to review each enterprise award to determine whether it should be cancelled on specified grounds, and if so, cancel the award.

160. The Commission will be required to carry out this review as soon as practicable after it has issued its order declaring the completion of the award modernisation process.

161. It is intended that there be as few enterprise awards as possible, with the majority of employees who are not employed in the public sector being covered by a modern State award.  \textsuperscript{32}

162. There will, however, remain scope for enterprise awards to be retained in prescribed situations. For example, the Commission could determine under section 37V that there is no modern State award appropriate for all the employees covered by an enterprise award. In this circumstance, the Commission would not be satisfied that this section applies to the award and thus could not cancel the enterprise award. Similarly, as will be provided for by new sections 37W and 37X, the Commission may allow an objection to the cancellation of an enterprise award and, in so doing, will be prevented from cancelling that award.

**New section 37W – Prerequisites to cancellation of an enterprise award**

163. New section 37W will set out the requirements with which the Commission must comply before it will be able to cancel an enterprise award. Relevant persons (such as the parties to an enterprise award) will be notified of the Commission’s intention to cancel an enterprise award and provided with an opportunity to object to its cancellation.

164. The Commission will not be able to cancel an enterprise award unless all objections lodged in accordance with new section 37X have been disallowed.

**New section 37X – Objections to proposed cancellation of an enterprise award**

165. New section 37X will set out the grounds on which an objection to the cancellation of an enterprise award will be able to be made, \textsuperscript{33} these being the:

(a) enterprise award provides for enterprise-specific terms and conditions of employment that will not be adequately provided for by a modern State award; or

\textsuperscript{31} Similarly, nothing in the Bill will prevent the Commission from using its powers under section 40 of the IR Act to cancel or vary a pre-modern State award on application during the award modernisation process.

\textsuperscript{32} A business that wishes to operate under enterprise-specific conditions can negotiate an industrial agreement.

\textsuperscript{33} Only one ground will need to be made out.
(b) cancellation and the consequential application of the modern State award will adversely affect the ongoing viability or competitiveness of the enterprise carried on by the persons covered by the award.

166. The Commission will be required to consider any objection made under new section 37X and either allow or disallow the objection. If the Commission allows the objection, new section 37W(1) will prevent cancellation of the enterprise award.

Clause 85 of the Bill – Part II Division 2A Subdivision 3 heading inserted

167. Clause 85 of the Bill will insert the heading “Subdivision 3 – Miscellaneous provisions about awards”.

Clause 86 of the Bill – Award area and scope provisions in section 37 replaced

168. Clause 86 of the Bill will delete current section 37 of the IR Act and replace it with new provisions.

New section 37 – Area and scope of awards, other than modern State awards

169. In new section 37, “award” will mean a pre-modern State award, a public sector award and an enterprise award. Section 37 will not therefore apply to modern State awards.

170. New section 37 will not substantively alter the effect, area and scope of an award as currently provided for in section 37 of the IR Act. New section 37(2) will, however, include a reference to an award “covering” employees and employers. This will, in effect, mean that an award extending to and binding an employee and employer will be the same as an award covering an employee and employer.

171. It will remain the case that an award will operate throughout the State, except as otherwise provided for by the award.

172. New section 37(4) will allow an award to operate in areas to which section 3(1) of the IR Act applies (i.e. prescribed offshore areas) if to do so is consistent with section 3 and the award is expressed to operate in these areas.

173. Under new section 39A, an award made after the commencement of section 84 of the Amendment Act will not be able to be made for a specified term. New section 37(5) will preserve, however, an award provision which:

(a) was in force immediately before the commencement of section 86 of the Amendment Act; and

(b) provides that the award, or a provision of the award, is to be in force for a specified period of time.

34 To be inserted by clause 89 of the Bill.
Clause 87 of the Bill – Named parties provisions in section 38 amended

174. Clause 87 of the Bill will amend section 38 of the IR Act, which relates to named parties to awards, to define “award” as a pre-modern State award, a public sector award and an enterprise award.

175. Section 38 of the IR Act will not apply to modern State awards as modern State awards will not include named parties. Rather, under new section 40BA(2), modern State awards will be expressed as covering specified employers and specified employees of those employers.

176. Clause 87 of the Bill will also delete section 38(1a) of the IR Act as this is an obsolete provision.

Clause 88 of the Bill – Award date of operation provisions in section 39 amended

177. Clause 88 of the Bill will amend section 39 of the IR Act to provide that an award will come into effect on:

(a) the day on which it is made, rather than on the day it is delivered as is currently the case; or

(b) such day or days as the Commission fixes and specified in the award (as the Commission may currently do).

178. Clause 88 of the Bill will also include a provision preventing the Commission from giving retrospective effect to a modern State award made during award modernisation.

Clause 89 of the Bill – New sections 39A, 39B, 39C and 39D inserted


New section 39A – Duration of operation of awards made after the commencement of the Amendment Act

180. New section 39A will apply to modern State awards, and to pre-modern State awards and public sector awards made after the commencement of the Amendment Act. It will not apply to enterprise awards, or to pre-modern State awards or public sector awards made before the commencement of section 84 of the Amendment Act.

181. Section 39A will require an award to be expressed to remain in force until it is cancelled, suspended or replaced under the IR Act. This will replicate, in part, the provisions currently contained in section 37(4) of the IR Act.

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35 To be inserted by clause 94 of the Bill.
36 The Commission will not, however, be prevented from giving retrospective effect to a modern State award made after the conclusion of the award modernisation process.
182. In contrast to current section 37(4) of the IR Act, new section 39A will provide that an award (as defined in section 39A(1)) cannot be expressed to have effect for a specified length of time. Limiting the duration of awards is considered unnecessary and out-dated.

**New section 39B – Power of Commission to cancel an award on application**

183. New section 39B will provide the Commission with the power to cancel an award on application by an:

(a) employer, or organisation or association that is covered by the award; or

(b) organisation or association that is entitled to represent the industrial interests of one or more employers or employees that are covered by the award.

184. Section 39B will also require the Commission to cause a copy of its order cancelling an award to be given to certain employers, organisations and associations as determined by the Commission.

**New section 39C – Prerequisites to cancellation of an award under section 39B**

185. New section 39C will establish the requirements with which the Commission must first comply before cancelling an award under section 39B. These requirements concern notification by the Commission of its intention to cancel an award and the provision of an opportunity to object.

186. The provisions contained in section 39C will be akin to those in amended section 47\(^{37}\) and new section 37W of the IR Act.

**New section 39D – Objections to proposed cancellation of an award under section 39B**

187. New section 39D will provide any person with the right to lodge an objection to the proposed cancellation of an award under section 39B within a specified period.

188. The Commission will be required to consider any objection made under new section 39D and either allow or disallow the objection. If the Commission allows the objection, new section 39C(1) will prevent cancellation of the award.

**Clause 90 of the Bill – Amendment to who may make an application under section 40 to vary an award**

189. Section 40(2) of the IR Act currently enables a named organisation or association to an award, or an employer bound by an award, to make application to vary that award.

190. Clause 90 of the Bill will amend section 40 of the IR Act to ensure that an application to vary an award will be able to be made by an employer, organisation or association that is or would be covered by the award, or an organisation or association that is or would be entitled to represent the

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\(^{37}\) To be amended by clause 33 of the Bill.
industrial interests of one or more employers or employees that are or would be covered by the award.

191. This amendment will be required as a consequence of the introduction of modern State awards, which will not have named parties.

192. Clause 90 of the Bill will also insert new section 40(4A) into the IR Act, which will limit the definition of “award” in section 40(3) to enterprise awards, and pre-modern State awards and public sector awards made before the commencement of section 90 of the Amendment Act.

193. Section 40(3) of the IR Act relates to awards and award provisions that are of limited duration. As noted previously, new section 39A(3) will prevent the Commission from limiting the duration of modern State awards, and the duration of pre-modern State awards and public sector awards made after the commencement of section 84 of the Amendment Act. The inclusion of new section 40(4A) is therefore a consequential amendment arising from the introduction of section 39A(3).

194. It should be noted that the current reference to “cancel” in section 40 relates to the capacity for the Commission under section 40(3)(c) to cancel an award that is limited in duration, where agreed to by the parties. The Commission’s power to cancel awards in other situations will be regulated by new sections 37V(3), 38 39B(1), 39 40BH(2)(c) and amended section 47(1), as appropriate.

195. It will remain the case that the Commission’s ability to vary an award under section 40 will be subject to sections 29A, 38 and 39 of the IR Act (as amended).

Clause 91 of the Bill – New section 40AA inserted

196. Clause 91 of the Bill will insert new section 40AA into the IR Act, which will limit the Commission’s ability to vary an award under section 40.

New section 40AA – Limitations on the Commission’s power to vary an award under section 40

197. Consistent with new section 37M(2) and (3), which will place limits on the making of modern State awards, new section 40AA will prevent the Commission from varying a modern State award:

(a) in a way that would mean particular employers or employees stop being covered by the modern State award unless the Commission is satisfied that they would be covered by another modern State award that is appropriate to them. This will not include the miscellaneous award;

(b) so that an organisation or association that is not entitled to represent the industrial interests of one or more employers or employees who are or will be covered by the award would be covered by the award.

38 Cancellation of an enterprise award.
39 Cancellation of an award on application.
40 Cancellation of an award during the four yearly review of awards.
41 Cancellation of an award on the Commission's own motion.
198. The Commission will also be prevented from varying any award so that provision is made for a Board of Reference or other entity or person (other than the Commission) will have the functions currently provided to a Board of Reference under section 48(6) of the IR Act. For example, while an award can, in accordance with section 48(6) of the IR Act, currently provide that a Board of Reference may determine a particular matter in that award, such an award term will not be possible after the commencement of the Amendment Act. Rather, an award will only be able to provide the Commission with the power to determine a particular matter (should the Commission determine that it is appropriate to include such a term in that award).

199. This amendment will complement clause 97 of the Bill, which will delete section 48 of the IR Act and so remove all provisions relating to Boards of Reference from the IR Act. The intention of new section 40AA(3) and clause 97 of the Bill is to prevent the inclusion of Board of Reference provisions into any award, whether this be done by making a new award or varying an existing award, from the date of commencement of the Amendment Act.

Clause 92 of the Bill – Amendment to who may apply for the incorporation of industrial agreement provisions into an award under section 40A

200. Section 40A of the IR Act enables the incorporation of industrial agreement provisions into an award by the consent of the named parties to the industrial agreement.

201. Clause 92 of the Bill will amend section 40A of the IR Act to ensure that an employer covered by an award, or an organisation or association that is entitled to represent the industrial interests of one or more employers or employees covered by an award, will be able to apply for the incorporation of industrial agreement provisions into the award by consent. These persons will be collectively defined as a “relevant person in relation to the award”.

202. This will be a consequential amendment arising from the introduction of modern State awards, which will not have named parties.

Clause 93 of the Bill – Commission’s power to vary awards under section 40B deleted

203. Section 40B of the IR Act currently provides the Commission with the power to vary awards of its own motion for certain purposes relating to the updating of awards.

204. Clause 93 of the Bill will delete section 40B of the IR Act. However, in accordance with clause 2(2) of the Bill, a proclamation bringing clause 93 into operation cannot be made until the Minister is satisfied that the award modernisation process is concluded and gives the Governor a certificate to that effect.\[42\]

205. The intention behind clause 2(2) of the Bill is to ensure that section 40B will remain in effect and be available to the Commission to vary an award during the award modernisation process, should it think this is necessary.

\[42\] Clause 99 of the Bill, which will make a consequential amendment to section 96 of the IR Act, will also not come into operation under the award process is concluded and the Minister gives the Governor a certificate to that effect.
206. At the same time as clause 93 comes into operation, clause 2(1) of the Bill will enable the proclamation of clause 95. Clause 95 will introduce provisions concerning four yearly reviews of awards by the Commission. The intention is that 4 yearly reviews of awards will replace section 40B award updating.

**Clause 94 of the Bill – Part II Division 2A Subdivision 4 inserted**

207. Clause 94 will insert new “Subdivision 4 – Provisions about modern State awards”.

**New section 40BA – Modern State awards must include coverage provisions**

208. New section 40BA will require a modern State award to include provisions setting out the employers and employees that are covered by the award. A modern State award will be required to be expressed to cover specified employers and specified employees of employers covered by the award.

209. It will be possible to specify employers by name, by inclusion in a specified class or classes, or in both ways, while a modern State award will be required to specify employees by inclusion in a specified class or classes. A “class” may be specified by reference to a particular industry or part thereof, or a particular kind of work.

210. New section 40BA is based on section 143 of the FW Act. The following modern federal awards illustrate different forms of award coverage:

   (a) *Book Industry Award* – “this award covers employers throughout Australia in the book industry…”;

   (b) *Airport Employees Award* – “this award covers employers throughout Australia that operate airports…”;

   (c) *Clerks – Private Sector Award* – “this award covers employers in the private sector throughout Australia with respect to their employees engaged wholly or principally in clerical work…”; and

   (d) *Manufacturing and Associated Industries and Occupations Award* – “this award covers employers throughout Australia of employees in the manufacturing and associated industries and occupations…”.

211. Importantly, unlike current State awards, the scope of a modern State award cannot be fixed by reference to any industry or part thereof carried on by an employer who is specified by name in a modern State award.43

212. For example, the scope clause of the *Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977* provides “this award shall apply to all workers employed in any calling or callings herein mentioned in the industry or industries carried on by the Respondents named in Schedule C and to all employers employing those workers”. This limits the scope of the award to the industries carried on by the named respondent employers. As a consequence, the award may not, for example, extend to mobile phone

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43 *Freshwest Corporation Pty Ltd v TWU* (1991) 71 WAIG 1746 provides an example of how the scope of an award can currently be fixed by reference to the industry carried out by an employer.
retailers as there is no employer named in Schedule C which carries out the “industry” of selling mobile phones.

213. The limitation of the scope of a modern State award in this manner will be prevented by new section 40BA(5), notwithstanding that an employer may be specified by name in that modern State award.

214. New section 40BA(6) will provide for the discretionary specification of organisations or associations by name in relation to all or specified employees or employers covered by the modern State award. However, as per new sections 37M(3) and 40AA(2), the Commission cannot make or vary a modern State award to cover an organisation or association that is not entitled to represent the industrial interests of one or more employers or employees who are or will be covered by the award.

New section 40BB – Who is bound by a modern State award

215. New section 40BB will provide that a modern State award extends to and binds an employee and employer that the award covers. In other words, an employee and employer that are expressly stated in the award to be covered.

216. As noted previously in relation to clause 86 which will insert new section 37(2), the term “covers” will have the same meaning as the term “extends to and binds”.

New section 40BC – Area of operation of a modern State award

217. Consistent with new section 37(3) of the IR Act, a modern State award will operate throughout the State except as may otherwise be provided for in the modern State award.

218. Consistent with new section 37(4), new section 40BC(2) will allow a modern State award to operate in areas to which section 3(1) of the IR Act applies (i.e. prescribed offshore areas) if to do so is consistent with section 3 and the award is expressed to operate in these areas.

New section 40BD – Modern State awards must not cover employees who have not traditionally been covered by awards or who perform work not of a similar nature

219. As noted previously, new section 40BD of the IR Act will prevent a modern State award from being expressed to cover classes of employees who:

(a) have not traditionally been covered by awards (be these awards made under laws of the Commonwealth or the States) due to the nature or seniority of their role; or

(b) perform work that is not of a similar nature to work that has traditionally been regulated by such awards.

220. In some industries, managerial employees have traditionally not been covered by awards.

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44 Which will regulate pre-modern State awards, public sector awards and enterprise awards.
New section 40BE – Modern State awards must not cover employees and their employers covered by enterprise awards or public sector awards

221. New section 40BE(1) will prevent a modern State award from being expressed to cover employees and their employers in the public sector.

222. Similarly, modern State awards cannot be expressed to cover employees and employers covered by an enterprise award. New sections 37V to 37X will establish the process by which the Commission will review each enterprise award and, if it determines that the employees could be more appropriately covered by a modern State award (other than the miscellaneous modern State award), to cancel the enterprise award. Until an enterprise award is cancelled, however, it will continue to cover the employees notwithstanding that the scope of a modern State award could otherwise cover those employees. Consequently, modern State awards will be required to specifically exclude enterprise awards from their coverage.

223. New section 40BE(2) will provide that once a modern State award covering an employee, their employer or an organisation or association that is entitled to represent the industrial interests of the employee comes into operation and replaces a pre-modern State award, that pre-modern State award will cease to cover (and can never again cover) the employee, or the employer, organisation or association in relation to the employee.

224. As per new section 37(2), the term cover will have the same meaning as the term "extend to and bind". Consequently, the pre-modern State award will no longer bind the employee and their employer.

Clause 95 of the Bill – Part II Division 2A Subdivision 5 inserted

225. Clause 95 of the Bill will insert new “Subdivision 5 – 4 yearly reviews of awards”.

New section 40BF – Commission in Full Session to conduct 4 yearly reviews

226. New section 40BF will define "Commission" as the Commission in Full Session for the purposes of new Subdivision 5 thereby requiring 4 yearly reviews of awards to be conducted by a Commission in Full Session.

New section 40BG – Commission must conduct 4 yearly reviews of all awards

227. New section 40BG will require the Commission to conduct 4 yearly reviews of each award in its own right. The first review will be required to commence as soon as practicable after the fourth anniversary of the completion of the award modernisation process. The Commission will then be required to conduct a review of all awards at 4 yearly intervals. The Commission will be able to review two or more awards at the same time.

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45 As per new section 39(1), an award will come into operation on the day on which it is made, or on such day or days as the Commission fixes and specifies in the award. A modern State award which replaces a pre-modern State award will be one that is made during the award modernisation process. Once the award modernisation process is completed, all pre-modern State awards will be cancelled.

46 This is consistent with section 156 of the FW Act, which also provides for 4 yearly reviews of modern awards.
228. New section 40BG(2) will set out the requirements of the Commission in conducting the review. These requirements will reflect the existing requirements contained in section 40B of the IR Act, including the need to ensure that the award does not contain provisions that are obsolete or need updating. There will be an additional requirement, however, for the Commission to ensure that an award itself is not obsolete.

229. Section 48(6) of the IR Act provides Boards of Reference with specific powers. As clause 97 of the Bill will delete section 48 in its entirety, new section 40BG(2)(g) will require the Commission to ensure that an award does not contain any provision of the kind referred to in section 48(6) of the IR Act.

**New section 40BH – The powers of the Commission in a 4 yearly review**

230. New section 40BH will provide the Commission with the power to do the following things as a result of its review of every award:

(a) do nothing;

(b) make one or more modern State awards or public sector awards;

(c) vary one or more awards in conformity with any applicable statement of principles that is in force under section 50A(2) of the IR Act; and

(d) cancel one or more awards.

231. The limitations on the Commission’s power to vary a modern State award, which will be contained in new section 40AA, will apply to the Commission when varying a modern State award under new section 40BH. Similarly, the limitations on making a modern State award that will be contained in new section 37M will apply to the Commission when making a new award under section 40BH.

**New section 40BI – Notices the Commission must give before it makes, varies or cancels an award under section 40BH**

232. New section 40BI will set out the notification requirements the Commission will be required to comply with before making, varying or cancelling an award under section 40BH.

233. The Commission will also be required to give specified parties the opportunity to be heard in relation to its proposal and to cause a copy of the resultant award or order to be given to the specified parties and to be published in the required manner.47

234. Unlike a modern State award made as part of the award modernisation process,48 there will be nothing to prevent an appeal of a decision of the Commission made under section 40BH.

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47 “Published in the required manner” is defined in section 7(1) of the IR Act.

48 Refer to new section 37P(2).
New section 40BJ – When an award made under section 40BG comes into operation

235. New section 40BJ will provide that an award or order made as a result of the 4 yearly review (under section 40BH) will come into operation in accordance with section 39 of the IR Act. Unlike a modern State award made as part of the award modernisation process, the Commission will be able to give retrospective effect to an award made under new section 40BH.

236. The reference in section 39(3) of the IR Act to the date upon which an application was lodged in the Commission will be read as if it were a reference to the date on which the Commission first gave notice of its intention to make, vary or cancel an award under section 40BI(2).

Clause 96 of the Bill – Industrial inspector able to seek interpretation of an award under section 46

237. Clause 96 of the Bill will amend section 46(1) of the IR Act to enable an industrial inspector to seek an interpretation of an award or order made by the Commission.

Clause 97 of the Bill – Repeal of Board of Reference provisions

238. Section 48 of the IR Act requires the inclusion of Boards of Reference in every award. Section 13(b) of the IR Act provides the same protection and immunity to a member of a Board of Reference as a judge.

239. Clause 97 of the Bill will delete section 48 which will mean that there will no longer be a requirement for awards made after the commencement of the Amendment Act to include a Boards of Reference. In accordance with clause 10 of new Schedule 6 of the IR Act, a Board constituted under section 48 in relation to an award immediately before the repeal of section 48 will continue in existence for as long as the award remains in force and a Board is required to be constituted in relation to it.

240. This will mean that section 48 (and by extension, section 13(b)) will continue to have effect in respect of that Board as if section 48 had not been deleted. This will remain the case for as long as the relevant award remains in force and a Board is required to be constituted in relation to it. Once a Board is no longer required to be constituted in relation to an award, or an award does not remain in force, these sections will have no effect. For example, a pre-modern State award that has been replaced by a modern State award will no longer remain in force and accordingly section 48 will no longer apply.

Clause 98 of the Bill – Limits on when an application to enforce an award under section 83 may be made

241. Clause 98 of the Bill will insert new section 83(4A) into the IR Act to prevent an application seeking the enforcement of an award being made if not less than 21 days have elapsed since the first day on which the award has been published.

\[49\text{ Refer to new section 39(5).}\]
242. This will allow time for employers and employees to become aware of, and to comply with, their respective rights and obligations under a new award.

**Clause 99 of the Bill – Consequential amendment to section 96**

243. Clause 99 of the Bill will make consequential amendments to section 96 of the IR Act due to the deletion of section 40B.
PART 4 OF THE BILL – INDUSTRIAL AGREEMENTS AND ENTERPRISE ORDERS

Clause 100 of the Bill – IR Act amended

244. Clause 100 of the Bill provides that Part 4 Division 1 of the Bill will amend the IR Act.

Clause 101 of the Bill – Part II Division 2B titled “Industrial agreements and enterprise orders”

245. Clause 101 of the Bill will delete the current heading to Part II Division 2B of the IR Act titled “Industrial agreements” and replace it with “Industrial agreements and enterprise orders”. This reflects the fact that Division 2B deals with the making of enterprise orders, as well as industrial agreements.

Clause 102 of the Bill – Section 40C amended

246. Clause 102 of the Bill will amend section 40C of the IR Act, which defines certain terms in Division 2B. The term “nominal expiry date” will be inserted, which is relevant to both industrial agreements and enterprise orders. The term means the date specified in an industrial agreement or enterprise order as its nominal expiry date.

Clause 103 of the Bill – Section 41(6), (7) and (8) deleted

247. Clause 103 of the Bill will delete section 41(6), (7) and (8) of the IR Act, which currently deals with the expiry and replacement of industrial agreements. These provisions will be replaced by new sections 41C, 41D and 41E (see clause 105 of the Bill).

Clause 104 of the Bill – Conditions to be met before Commission can register industrial agreement

248. Clause 104 of the Bill will replace current section 41A(1) of the IR Act, which requires certain conditions to be met before the Commission can register an industrial agreement. New section 41A(1) will require an agreement to:

(a) specify a nominal expiry date of up to four years (increased from the current maximum of three years);\(^{50}\)

(b) include any provision ordered to be included in the agreement under section 42G, which enables the Commission to arbitrate any outstanding matters by consent of the parties;\(^{51}\)

(c) include an estimate of the number of employees to be bound by the agreement;\(^{52}\)

(d) contain dispute settlement procedures as per section 48A(1) of the IR Act;

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\(^{50}\) Four years will be consistent with the maximum nominal term of enterprise agreements under the FW Act.

\(^{51}\) This is a current requirement under section 41A(1)(b) of the IR Act.

\(^{52}\) This is a current requirement under section 41A(1)(c) of the IR Act.
(e) comply with section 96B of the IR Act, which deals with freedom of 
association;

(f) comply with the SES;\(^{53}\)

(g) provide for choice of superannuation fund (to the extent that the 
agreement requires superannuation contributions to be made) as per 
section 48B of the IR Act; and

(h) be consistent with the right of entry provisions in new Part XII of the 
IR Act, as per new section 212 (see clause 202 of the Bill).\(^{54}\)

Clause 105 of the Bill – New sections 41B to 41F inserted

249. Clause 105 of the Bill will insert new sections 41B to 41F into the IR Act.

New section 41B – Date of operation of industrial agreements

250. New section 41B(1) will provide that industrial agreements come into 
operation on the day of registration, or a later day specified in the agreement.

251. New section 41B(2) will clarify that industrial agreements can give 
retrospective effect to the whole or any part of the agreement. For example, 
an agreement could backdate a wage increase to a day earlier than the day 
of registration. New section 41B(2) will only enable the parties to agree to 
retrospectivity through the industrial agreement. The Commission will still be 
unable to make an order giving retrospective effect to any part of an industrial 
agreement.\(^{55}\)

252. New section 41B(3) will clarify what is meant by “retrospective effect” 
(consistent with current section 39(4) of the IR Act).

New section 41C – Term of industrial agreements

253. New section 41C(2) and (3) will replace current section 41(6) and (8) of the 
IR Act. Notwithstanding that an industrial agreement has reached its nominal 
expiry date (as will be defined by new section 40C), it will continue in force 
until:

(a) a new industrial agreement, award or enterprise order is made in 
substitution for the agreement; or

(b) the agreement is terminated under new section 41E.

254. New section 41C will introduce the notion of industrial agreements being 
“terminated”. Currently, a party can retire from an expired industrial 
agreement by giving a minimum of 30 days’ notice. This ability will be 
removed so that expired industrial agreements continue in force until they are

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\(^{53}\) A provision of an industrial agreement will have no effect to the extent it is less favourable 
to an employee than a State employment standard – see new section 118(2) of the IR Act 
(clause 176 of the Bill).

\(^{54}\) This is a current requirement under section 49N(1) of the IR Act.

substituted by another instrument or they are terminated by the Commission under new section 41E.

255. Where a new instrument is made in substitution for an industrial agreement, the agreement will be taken to be cancelled except to the extent its provisions are saved by the new instrument.

**New section 41D – Termination of industrial agreement before nominal expiry date**

256. New section 41D(1) will enable the parties to an industrial agreement to agree to terminate the agreement before its nominal expiry date. In this case, application must be made to the Commission to terminate the agreement. This contrasts with current section 43(1) of the IR Act, which enables the parties to “cancel” an industrial agreement by a subsequent agreement. Section 43 will be deleted by clause 110 of the Bill.

257. New section 41D(2) will require the Commission to terminate the agreement if satisfied that all of the parties have agreed to termination.

258. New section 41D(3) will provide that the termination operates from the relevant day specified in the Commission’s decision.

**New section 41E – Termination of industrial agreement after nominal expiry date**

259. New section 41E(1) will enable a party to an industrial agreement to apply to the Commission to terminate the agreement on or after its nominal expiry date.

260. New section 41E(2) will require a copy of the application to be served on each party to the agreement if practicable. There may be situations in which it is not practicable for an application to be served, for example, where an employer is no longer trading.

261. New section 41E(3) will require the Commission to terminate the agreement if termination:

(a) is not contrary to the public interest; and

(b) is appropriate taking into account all the circumstances including any views of the parties, and the circumstances of the parties, employees and other persons affected by the agreement.

262. Currently under section 41(7) of the IR Act, a party can unilaterally retire from an expired industrial agreement by giving a minimum of 30 days’ notice. The ability for a party to unilaterally retire could have serious operational, financial or personal implications for the other party and/or employees covered by the agreement. For example, an employee with childcare responsibilities could rely on the agreement to facilitate part-time or flexible work.

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56 If there are multiple employer or union parties, all of the parties must agree to termination.

57 Similar to section 226 of the FW Act.
263. There could also be public interest considerations involved, particularly where the industrial agreement covers public sector employers and employees. For example, one party unilaterally retiring from an agreement could give rise to industrial disharmony and/or industrial action, which in turn could negatively impact upon the delivery of essential public services.

264. For these reasons, it is appropriate that the Commission be involved where termination of an expired industrial agreement is sought by one or all of the parties. Even if all of the parties agree to termination, the Commission will still be required to assess the proposed termination in accordance with new section 41E(3).

265. New section 41E(4) will provide that the termination operates from the relevant day specified in the Commission’s decision.

New section 41F – Enforcement of industrial agreements

266. New section 41F will signpost that industrial agreements are enforceable under section 83 of the IR Act.

Clause 106 of the Bill – Section 42(8) deleted

267. Clause 106 of the Bill will delete section 42(8) of the IR Act, which currently defines “nominal expiry date” for the purposes of section 42. This term will now be defined in section 40C for the purposes of Part II Division 2B more broadly.

Clause 107 of the Bill – Section 42A(1) replaced

268. Clause 107 of the Bill will replace current section 42A(1) of the IR Act, which deals with a person’s response to a notice to bargain for an industrial agreement. New section 42A(1) will require the person’s response to be in writing. Requiring a written response will help to avoid disputes about whether a response was given, or given within the prescribed timeframe.

Clause 108 of the Bill – Limited intervention in proceedings for enterprise order

269. Clause 108 of the Bill will insert new section 42I(5) and (6) into the IR Act. Section 42I enables the Commission to make an enterprise order in prescribed circumstances. New section 42I(5) will apply where a person seeks to intervene in proceedings for an enterprise order. The Commission will only be allowed to permit intervention where:

(a) the person has a sufficient interest in the matter; and

(b) the intervention is necessary to enable determination of the matter.

270. New section 42I(5) will apply in lieu of section 27(1)(k), which prescribes the Commission’s general powers to permit intervention in proceedings. New section 42I(5) is intended to prescribe a stricter test for intervention than section 27(1)(k), to help expedite proceedings for an enterprise order.
271. New section 42I(6) will make it clear that new section 42I(5) will not affect the 
Minister’s right to intervene in proceedings under new section 36.\textsuperscript{58}

**Clause 109 of the Bill – Other amendments concerning enterprise orders**

272. Clause 109(1) of the Bill will amend section 42K(2) of the IR Act to extend the 
maximum nominal expiry date of enterprise orders from two years to three 
years. A longer nominal expiry date may provide greater industrial stability 
and certainty for the parties.

273. Clause 109(2) of the Bill will insert new section 42K(3A) into the IR Act to 
clarify that the Commission cannot give retrospective effect to any part of an 
enterprise order.\textsuperscript{59}

274. Clause 109(3) of the Bill will amend section 42K(6) of the IR Act to clarify that 
the Commission can only cancel an enterprise order if an industrial 
agreement, award or another enterprise order is made in substitution for it.\textsuperscript{60}

**Clause 110 of the Bill – Section 43 deleted**

275. Clause 110 of the Bill will delete section 43 of the IR Act. Section 43(1) effectively provides 
that an industrial agreement can be varied, renewed or cancelled by a “subsequent agreement”. The section is ambiguous as it is 
unclear whether the subsequent agreement must itself be in the form of an industrial agreement. The section will be replaced by new section 41C.

276. Section 43(2) and (3), which enable the Commission to vary an industrial 
agreement specifically in relation to stand-down, will not be retained. Industrial agreements are negotiated by the parties and should only include provisions agreed upon by them (subject to section 42G of the IR Act).

**Clause 111 of the Bill – Consequential amendment to section 97UC**

277. Clause 111 of the Bill will amend section 97UC(3) of the IR Act, which deals 
with restrictions on what may be included in EEAs. Various State laws (other 
than the IR Act) limit what may be included in EEAs for certain categories of employees. Section 97UC(3) simply signposts these other laws.

278. The amendments to section 97UC(3) are consequential in nature and will:

(a) delete the reference to section 99(2) of the PSM Act. Section 99 of that 
Act was deleted in 2010;\textsuperscript{51} and

(b) include reference to section 19(2) of the *Electricity Corporations Act* 
2005 and section 11(5) of the *Western Australian Land Authority Act* 
1992, both of which limit the operation of EEAs.

\textsuperscript{58} To be inserted by clause 22 of the Bill.

\textsuperscript{59} As established by case law – *The Australian Rail, Tram and Bus Industry Union of 
Employees, Western Australian Branch v Public Transport Authority* (2011) WAIRC 00157.

\textsuperscript{60} The intention is to ensure that an enterprise order cannot be “substituted” by an order that 
is not an enterprise order.

\textsuperscript{61} Section 57 of the *Public Sector Reform Act 2010*. 
Clause 112 of the Bill – Consequential amendment to section 97UF

Clause 112 of the Bill will amend section 97UF(1)(b) of the IR Act to replace the reference to “section 41(6)” with “section 41C(2)” as section 41(6) will be deleted by clause 103 of the Bill.

Clauses 113, 114 and 115 of the Bill – Consequential amendments to other Acts

Clauses 113, 114 and 115 of the Bill will amend various other Acts,\(^{62}\) consequential to section 99 of the PSM Act being deleted in 2010.

\(^{62}\) Section 19(1) of the *Electricity Corporations Act 2005*; section 16(4) of the *Port Authorities Act 1999*; and section 11(4) of the *Western Australian Land Authority Act 1992*. 
PART 5 OF THE BILL – AMENDMENTS ABOUT UNFAIR DISMISSAL

Overview

279. Part 5 of the Bill will insert new Division 2AA – Unfair dismissal into Part II of the IR Act. This new Division will incorporate both existing and new provisions relating to unfair dismissal. It will also amend existing unfair dismissal provisions.

280. The new unfair dismissal provisions in new Part II Division 2AA will be largely based on the unfair dismissal provisions contained in Part 3-2 of the FW Act.

Clause 116 of the Bill – IR Act amended

281. Clause 116 of the Bill provides that Part 5 Division 1 of the Bill will amend the IR Act.

Clause 117 of the Bill – Definitions of dismissed and unfairly dismissed

282. Clause 117 of the Bill will insert two new definitions in section 7(1) of the IR Act (which are based on sections 385 and 386 of the FW Act):

(a) “dismissed” will be defined to have the meaning given in new section 37E.63 That is, an employee will be dismissed if (a) their employment has been terminated at the employer’s initiative, or (b) the employee has resigned but was forced to do so because of the conduct of the employer.64

(b) “unfairly dismissed” will be defined to have the meaning given in new section 37D.65 That is, an employee will be unfairly dismissed if the employee has been dismissed, the dismissal was harsh, unjust or unreasonable, and the dismissal was not a case of genuine redundancy as defined by new section 37D.

Clause 118 of the Bill – Jurisdiction of the Commission under section 23 amended

283. Clause 118 of the Bill will replace current section 23(3)(h) of the IR Act with a new section 23(3)(h), which prescribes limits on the Commission’s jurisdiction. When dealing with a claim of unfair dismissal, or an application under new section 45A66 concerning unfair dismissal, the Commission will only be able to order a remedy that is authorised by new section 37H(1).67 This will ensure consistency and equity in the treatment of unfair dismissal remedies under the IR Act.

63 To be inserted by clause 122 of the Bill.
64 This is intended to reflect the common law concept of constructive dismissal and allow for a finding that an employee was dismissed where the employee is effectively instructed to resign by the employer in the face of an impending or threatened dismissal; or where the employee quits their job in response to conduct by the employer which gives them no reasonable choice but to resign. It is intended that the term “conduct” include both an act and a failure to act by the employer.
65 To be inserted by clause 122 of the Bill.
66 To be inserted by clause 32 of the Bill.
67 To be inserted by clause 122 of the Bill.
Clause 119 of the Bill – Section 23A deleted

284. Clause 119 of the Bill will delete section 23A of the IR Act, which currently regulates the powers of the Commission in relation to claims of unfair dismissal. New Part II Division 2AA will instead regulate unfair dismissal.

Clause 120 of the Bill – Consequential amendment to section 29

285. Consequential to the term “unfair dismissal” being defined by clause 117 of the Bill, clause 120 of the Bill will insert a new section 29(1)(b)(i) into the IR Act to simply refer to an employee being “unfairly dismissed” from employment.

286. Clause 120 of the Bill will delete section 29(2) and (3) of the IR Act, which currently deal with timeframe issues for referring an unfair dismissal claim to the Commission. New section 37G(2) and (3)\(^{68}\) will instead deal with these issues.

Clause 121 of the Bill – removal of provisions relating to unfair dismissal from section 29AA

287. Clause 121 of the Bill will delete section 29AA(1) and (2) as these provisions will be included in new section 37H(4) and (5).\(^{69}\) Section 29AA(1) prevents the Commission from determining an unfair dismissal claim if the employee has lodged an application with Fair Work Australia in respect of the dismissal. Section 29AA(2) prescribes the circumstances in which the Commission can still deal with such a claim.

288. Clause 121 of the Bill will also delete section 29AA(3) of the IR Act, as these provisions will instead be included in new section 37B(2)(b).\(^{70}\) Section 29AA(3) provides that the Commission must not determine an unfair dismissal claim if an industrial instrument does not apply to the employee and the employee’s contract of employment provides for a salary exceeding the prescribed amount.

289. As a consequence of these amendments, section 29AA will be limited to preventing the Commission from determining certain contractual benefit claims. The new heading of this section – “Certain contractual benefits claims not to be considered” – will therefore reflect this.

290. Clause 121 of the Bill will replace section 29AA(5) with a new section 29AA(5), which will contain:

(a) an amended definition of “industrial instrument”. The reference to “an order of the Commission” in current section 29AA(5) will be replaced by the term “enterprise order”. The intention behind this amendment is to ensure that the application of a General Order to an employee will not prevent the application of the prescribed amount (i.e. salary cap) to that employee;\(^{71}\) and

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\(^{68}\) Ibid.

\(^{69}\) Ibid.

\(^{70}\) Ibid.

\(^{71}\) In Thomas Quinn v Kalgoorlie Consolidated Gold Mines Pty Ltd (2006) 86 WAIG 2725 the Commission held that an industrial instrument includes a General Order (being an order of the
(b) an updated “prescribed amount” of $141,000. Although the prescribed amount in section 29AA(5) is $90,000, as this is an indexed figure, the actual amount is currently $140,400.72 The intention behind this amendment is to provide a more realistic indication of the salary cap in the IR Act.

To complement this amendment, regulation 5(1) of the Industrial Relations (General) Regulation 1997 will be amended to include the same specified salary as new section 29AA(5). The definition of “base weekly earnings” in regulation 6 will also be amended to refer to the last amount published before 1 July 2013, and the definition of “indexation day” will be amended to refer to 1 July 2014.73

291. Although these amendments will only apply to denial of contractual benefit claims, similar provisions will be made in new section 37B in relation to unfair dismissal claims.

Clause 122 of the Bill – New Division 2AA – Unfair dismissal inserted

292. Clause 122 of the Bill will insert new “Division 2AA – Unfair dismissal” into Part II of the IR Act.

293. Clause 12 of new Schedule 6 of the IR Act will provide that new Division 2AA will operate in respect of any dismissal that occurs on or after the commencement of section 122 of the Amendment Act. For any dismissal that occurred before the commencement Part 5 Division 1 of the Amendment Act, current sections 23(3)(h), 23A, 29 and 29AA of the IR Act will continue to apply.

New section 37B – When an employee is protected from unfair dismissal

294. Under new section 37B(2), an employee will be protected from unfair dismissal for the purposes of new section 37H if:

(a) they have completed the minimum employment period prescribed by new section 37C; and

(b) an industrial instrument applies to the employee and/or the employee’s salary does not exceed the prescribed amount.

295. Section 37B(1) will include the same definitions of “industrial instrument” and “prescribed amount” as will be contained in new section 29AA(5). Section 37B is based on section 382 of the FW Act.

Commission). This effectively negates the application of the salary cap, given that most employees in the State industrial relations system are covered by the Termination, Change and Redundancy General Order of the Commission. The amendment to section 29AA(5) will avoid this situation arising in the future.
72 As at 1 July 2012.
73 Currently these dates are 1 July 2002 and 1 July 2003 respectively.
New section 37C – Meaning of minimum employment period, period of employment and small business employer

296. New section 37C(1) will set out the two “minimum employment periods” that will apply in relation to new section 37B(2)(a):

(a) if the employer is not a small business employer, six months ending at the earlier of (a) the time the employee is given notice of dismissal, or (b) immediately before the dismissal; and

(b) one year if the employer is a small business employer.

297. These minimum periods are based on section 383 of the FW Act and will give employers sufficient time to assess the capacity and conduct of a new employee without being subject to an unfair dismissal claim if they dismiss the employee during this period.

298. New section 37C(2) will stipulate that an employee’s “period of employment” with an employer at a particular time is the period of continuous service (as defined in new section 116)74 the employee has completed with the employer.

299. New section 37C(3) will exclude a period of casual employment from an employee’s period of employment, unless that employment was on a regular and systematic basis and the employee had a reasonable expectation of continuing employment on a regular and systematic basis.75

300. Under new section 37C(4), an employer is a “small business employer” at a particular time if they employ fewer than 15 employees. For the purposes of this calculation, the following employees will be required to be counted:

(a) all employees employed by the employer at that time, subject to section 37C(5)(b);

(b) a casual employee who has, at that time, been employed by the employer on a regular and systematic basis;

(c) the employee who is being dismissed or whose employment is being terminated, subject to section 37C(5)(b); and

(d) any other employee of the employer who is also being dismissed or whose employment is being terminated, subject to section 37C(5)(b).

301. Section 37C(4) is based on the meaning of “small business employer” in section 23 of the FW Act.

New section 37D – What is an unfair dismissal and a genuine redundancy

302. Under new section 37D(1) an employee will be “unfairly dismissed” if the Commission is satisfied that the employee has been dismissed, the dismissal was harsh, unjust or unreasonable, and the dismissal was not a case of genuine redundancy within the meaning of new section 37D(2).76

74 To be inserted by clause 176 of the Bill.
75 Section 37C(2) and (3) is based on section 384(1) and (2) of the FW Act.
76 This is based on section 385 of the FW Act.
303. An employee’s dismissal will be a case of genuine redundancy if the employer no longer required the employee’s job to be done by anyone and the employer complied with the SES redundancy requirements set out in new Part XI Division 11 of the IR Act.\(^{77}\)

304. A dismissal will not, however, be a case of genuine redundancy if it would have been reasonable in all the circumstances for the employee to be redeployed within the employer’s business, activity, project or undertaking. There may be many reasons why it would not be reasonable for a person to be redeployed. For example, the employer may be a small business with no opportunity for redeployment or with no other positions available for which the employee has suitable qualifications or experience.

305. Although new section 37D is based on sections 385 and 389 of the FW Act, new section 37D(2) will require compliance with the SES redundancy requirements, in contrast to the FW Act which requires compliance with redundancy consultation provisions contained in awards and agreements.\(^{78}\)

**New section 37E – What is and is not a dismissal**

306. New section 37E will define what constitutes, and what does not constitute, a dismissal. This section is based on section 386(1), (2)(a) and (2)(b) of the FW Act.

307. Under new section 37E(2), an employee will not be considered “dismissed” if the employee was:

(a) employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment terminated at the end of the period, on completion of the task, or at the end of the season. However, in accordance with new section 37E(3), this exclusion will not apply if a substantial purpose for employing the employee under this kind of contract was to avoid the employer’s obligations under new Division 2AA; or

(b) a person employed for a specified period of time under a training contract registered under Part 7 Division 2 of the *Vocational Education and Training Act 1996*, or a person whose employment was limited to the duration of the training contract, and whose employment terminated at the end of the training contract.

308. New section 37E(2)(a) reflects the common law position that termination in these circumstances would not be dismissal. The fact that an employment contract may allow for earlier termination will not alter the application of this provision if the employment terminates at the end of the period, task or season. New section 37E(2)(a) will not, however, prevent a person engaged on this kind of contract from making an unfair dismissal claim if they are terminated prior to the end time specified in their contract.

\(^{77}\) To be inserted by clause 176 of the Bill.

\(^{78}\) It should be noted that the FW Act, in contrast to new Part XI Division 11 of the IR Act, does not have a national employment standard regarding redundancy consultation. Part 6-4 – Division 3 of the FW Act does, however, contain obligations relating to the making of 15 or more employees redundant.
309. In relation to employment for a specified task, new section 37E(2)(a) will only apply where it was specifically intended at the start of the person’s employment that their employment would terminate on completion of the specified task. It is not intended to apply to a person who was simply engaged in connection with a particular task at first instance (for example, to work on a particular project) but whose employment was intended to be ongoing.

310. The term “season” will have its ordinary meaning and is intended to cover a range of situations. For example, the part of a year when a product is available, the part of a year characterised by particular conditions or weather, or the part of the year marked by certain conditions, festivities or other activities.

**New section 37F – Criteria for considering whether a dismissal is harsh, unjust or unreasonable**

311. New section 37F, which is based on section 387 of the FW Act, will provide the criteria the Commission must take into account in determining whether a dismissal was harsh, unjust or unreasonable. It is intended that the Commission will weigh up all the factors in coming to a decision about whether a dismissal was harsh, unjust or unreasonable and no factor alone will necessarily be determinative.

**New section 37G – Process and timeframes for making claim of unfair dismissal**

312. New section 37G will set out the two avenues by which an employee may make a claim that they have been unfairly dismissed:

(a) by reference to the Commission under amended section 29; or

(b) by application to the Commission under new section 45A(2).

313. Regardless of the avenue by which a claim of unfair dismissal is made, the reference or application (as the case may be) will be required to be made within 21 days after the dismissal took effect or within such further period as the Commission allows under new section 37G(3).

314. New section 37G(3) will substantively replicate current section 29(3) of the IR Act by giving the Commission the discretion to accept an out of time reference or application if it considers that it would be unfair not to do so.

315. The intention behind section 37G is to ensure that any claim for unfair dismissal, whether made under section 29 or new section 45A, will be subject to the same timeframes and processes.79

316. New section 37G(2) and (3) will be consistent with new section 80W(2) and (3) of the IR Act, which will prescribe timeframes for appeals by government officers against a decision to terminate their employment.

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79 New section 45A(4) will require an application to convene a conciliation conference in respect of an unfair dismissal to be made within the time specified in new section 37G(2).
**New section 37H – When the Commission may order a remedy for unfair dismissal**

317. The Commission will be able to order reinstatement or the payment of compensation under new section 37H if satisfied that the employee is protected from unfair dismissal and they have been unfairly dismissed. The Commission will only be able to make an order if the employee’s claim has been made in accordance with new section 37G.

318. New section 37H(3) will prevent the Commission from ordering the payment of compensation to an employee unless satisfied that reinstatement is impracticable and an order for compensation is appropriate in all of the circumstances of the case. New section 37H(3) is based on section 390(3) of the FW Act. It also reflects, in part, current section 23A(6) of the IR Act.

319. As noted previously, new section 37H(4) and (5) substantively reflect (and will replace) current section 29AA(1) and (2) of the IR Act.

**New section 37I – Reinstatement**

320. New section 37I will set out the requirements relating to an order for an employee’s reinstatement. These requirements are based on section 391 of the FW Act.\(^{80}\)

321. Under new section 37I(1) an order for reinstatement will require an employee’s employer to either:

(a) reappoint the employee to the position in which the employee was employed immediately before the dismissal; or

(b) appoint the employee to another position on terms and conditions that are no less favourable than those on which the employee was employed immediately before the dismissal.

322. New section 37I(2) will provide that, where the Commission makes an order for reinstatement, it may also make any order it considers appropriate to maintain (a) the continuity of an employee’s employment, and (b) the period of the employee’s continuous service with the employer.

323. Similarly, new section 37I(3) will enable the Commission to make any order it considers appropriate to cause the employer to pay an amount for the remuneration lost, or likely to have been lost, by the employee because of the dismissal. New section 37I(4) will set out the factors that the Commission must take into account when making such an order.

324. Sections 37I(2)(a) and (3) are consistent with current section 23A(5) of the IR Act.

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\(^{80}\) Section 391(1A) of the FW Act will not, however, be replicated as it relates to entities under the *Corporations Act 2001* and such entities are not covered by the IR Act.
New section 37J – Compensation

325. Under section 37J(1) an order for compensation will be required to be an order that an employer pay compensation to an employee in lieu of reinstatement.

326. New section 37J(2) will specify the factors the Commission must take into account when determining an amount of compensation. Section 37J(3) is based on section 392(2) of the FW Act.

327. Under new section 37J(3), if the Commission is satisfied that an employee’s misconduct contributed to the employer’s decision to dismiss the employee, the Commission will be required to reduce the amount of compensation by an appropriate amount on account of the misconduct. This section will therefore apply where the Commission determines that, despite the misconduct, the employee was unfairly dismissed but that the employee’s misconduct warrants a reduced amount of compensation.

328. New section 37J(4) will preclude compensation from including a component for shock, distress, humiliation or other analogous hurt caused by the dismissal. New section 37J(4) is based on section 392(4) of the FW Act.

329. New section 37J(5) will limit the amount of compensation payable to a maximum of six months of the employee’s remuneration, while new section 37J(6) will allow for the Commission to calculate compensation based on the employee’s average earnings in a relevant period of employment. These sections will replace current section 23A(8) and (9) of the IR Act.

New section 37K – Payment by instalments and other matters relating to orders

330. New section 37K will replicate current section 23A(10), (11) and (12) of the IR Act. New section 37K will provide for the payment of an amount by instalments, the setting of specified times within which an order must be complied with and the making of ancillary or incidental orders.

Clause 123 of the Bill – Section 83B amended

331. Clause 123 of the Bill will make a number of consequential amendments to section 83B of the IR Act resulting from the deletion of section 23A and the introduction of new Division 2AA.

Clause 124 of the Bill – Section 96 amended

332. Clause 124 of the Bill will make a consequential amendment to section 96(3) of the IR Act to reflect the deletion of section 23A and the introduction of new Division 2AA.

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81 Based on section 392(3) of the FW Act.
82 This section will not apply where the Commission determines that the employee’s misconduct was such that they were not unfairly dismissed.
83 This is also provided for by section 393 of the FW Act.
Clause 125 of the Bill – Section 113 amended

333. Clause 125 of the Bill will amend section 113(1)(ba) of the IR Act to remove the words “harsh, oppressive, or”. The reference will therefore only be to unfair dismissal (as defined by new section 37D).

Clause 126 of the Bill – Consequential amendments to Mines Safety and Inspection Act 1994

334. Clause 126 of the Bill will make consequential amendments to section 68D(3) of the Mines Safety and Inspection Act 1994 to reflect the deletion of section 23A of the IR Act and the introduction of new Division 2AA.

Clause 127 of the Bill – Consequential amendments to Occupational Safety and Health Act 1984

335. Clause 127 of the Bill will make consequential amendments to section 35D(3) of the Occupational Safety and Health Act 1984 to reflect the deletion of section 23A of the IR Act and the introduction of new Division 2AA.

Clause 128 of the Bill – consequential amendment to PSM Act

336. Clause 128 of the Bill will make a consequential amendment to section 101 of the PSM Act to reflect the deletion of section 23A of the IR Act and the introduction of new Division 2AA.
PART 6 OF THE BILL – AMENDMENTS ABOUT EMPLOYEE RECORDS AND PAY SLIPS

Overview

337. Part 6 of the Bill will amend the employment record provisions contained in Part II Division 2F of IR Act and it will include new provisions in Part II Division 2F regarding pay slips.

338. The pay slip provisions are based on the pay slip provisions contained in section 535 of the FW Act and regulations 3.45 and 3.46 of the Fair Work Regulations 2009 (FW Regulations).

Clause 129 of the Bill – IR Act amended

339. Clause 129 of the Bill provides that Part 6 of the Bill will amend the IR Act.

Clause 130 of the Bill – Additional employment record keeping requirements

340. Section 49D of the IR Act sets out the employment records an employer must keep. These records include details of the time at which an employee started and finished work, the period for which they were paid, gross and net amounts paid, and all leave taken (whether paid, partly paid or unpaid) by the employee.

341. Clause 130 of the Bill will amend section 49D to introduce additional record keeping requirements. These requirements will be a record or copy of (as the case may be):

(a) the employer’s name and, if any, their Australian Business Number;

(b) any time during which an employee was on call and the times during which the employee undertook a duty of employment;

(c) incentive based payments, bonuses, loadings, penalty rates and/or other monetary allowances or separately identifiable entitlements for which the employee is entitled to be paid;

(d) any agreement made with the employee to cash out annual leave including details of the amount of leave foregone, the rate of payment for the benefit in lieu and when this was given to the employee;

(e) each written authorisation, including any variations and/or withdrawals, made by the employee for the employer to deduct monies for the employee’s benefit under new section 132;

(f) each written authorisation made by the employee for the employer to deduct monies for the employer’s benefit under new section 133;

(g) each agreement made between an employer and an employee with a disability, if the provisions of the Support Wage System (SWS) or supported wage provisions require the agreement to be kept;
any document relating to the determination of a wage for an employee with a disability that the provisions of the SWS or supported wage provisions require to be kept; and

how the employee’s employment was terminated and by whom.

342. New section 49D(2)(ba) and (ha) are based on regulations 3.32(f) and 3.33(3) of the FW Regulations, while new section 49(3C) is based on regulation 3.40 of the FW Regulations.

343. The remainder of the additional record keeping requirements will relate to either:

(a) existing obligations under the MCE Act that will be replicated in new Part XI – the SES. For example, section 8(1)(c) of the MCE Act (which will be replicated in new sections 120 and 132 of the IR Act) require the making of a written agreement or authorisation. There is, however, currently no requirement for the employer to keep a copy of such an agreement or authorisation. This will now be required under new section 49D(3A)(a) and (3B)(a);

(b) new obligations that will be inserted into new Part XI. For example, the requirement for an employee to authorise a deduction that is for the employer’s benefit and the introduction of SWS provisions, which may require the keeping of written assessments made under the SWS.

344. Significantly, clause 130 of the Bill will amend section 49D of the IR Act to ensure that the record keeping requirements apply in relation to employees covered by an industrial instrument and to those who are only covered by the SES.

345. This will be a consequential amendment resulting from the repeal of the MCE Act, which currently specifies the records that must be kept in relation to employees who are not covered by an award, industrial agreement or EEA. That aside, however, the amendment will ensure that there is a single uniform set of record keeping requirements applicable to all employers.

Clause 131 of the Bill – New requirement for an employer to issue pay slips

346. Clause 131 of the Bill will introduce new section 49EA into the IR Act requiring an employer to issue pay slips. This obligation will apply in relation to employees covered by an industrial instrument and to those who are only covered by the SES.

347. An employer will be required to provide an employee with a pay slip within one working day of paying the employee for the performance of work. This is based on section 536(1) of the FW Act.

348. An employer will be able to choose the form of the pay slip, being either paper or electronic.

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84 Contracting out of annual leave.
85 Authorised deductions from an employee’s pay.
86 Which will be provided for in new section 133(5).
87 Termed a “SWS wage assessment agreement”.
349. New section 49EA will specify the details that must be included on each pay slip. These requirements are based on the requirements in regulation 3.46(1) to (4) of the FW Regulations.

Clause 132 of the Bill – Employment record and pay slip requirements will be civil penalty provisions

350. Section 49F of the IR Act currently designates the record keeping provisions as civil penalty provisions for the purposes of section 83E. Clause 132 of the Bill will amend section 49F to ensure that the amended record keeping requirements and the new pay slip requirements are also civil penalty provisions.

351. Clause 132 of the Bill will also insert new section 49F(2) to provide that the requirements of Part II Division 2F of the IR Act will operate in conjunction with the record keeping requirements in new sections 195A and 195B of the Children and Community Services Act 2004 (CCS Act).
PART 7 OF THE BILL – CHILDREN AND COMMUNITY SERVICES ACT 2004 AMENDED

Overview

352. Part 7 of the Bill will amend Part 7 of the CCS Act to introduce new provisions relating to unpaid trial work and child employment records.

Clause 133 of the Bill – CCS Act amended

353. Clause 133 of the Bill provides that Part 7 of the Bill will amend the CCS Act.

Clause 134 of the Bill – Children not to do unpaid trial work

354. Clause 134 of the Bill will insert new section 192A into the CCS Act, which will prohibit a person from requiring a child to carry out unpaid trial work.

355. “Unpaid trial work” will be work that a person requires a child to carry out for the purpose of becoming employed by that person and for which there will be either no payment or reward, or only nominal payment or reward.

356. A child is currently defined in section 3 of the CCS Act as person who is under 18 years of age.

357. There will be some exceptions to this prohibition. These relate to work that is carried on by a child as part of an educational programme, an approved Vocational Education and Training or university course, or work that is arranged by a government funded employment service for people with disabilities which the child is eligible to use. The regulations may also prescribe other exceptions. The intention is to ensure that a child is able to carry out these types of work without payment or reward given that the primary purpose of such work is to contribute to the child’s education and training. Furthermore, work of this nature is regulated by other legislation.

358. Volunteer work performed by a child will not be prohibited as long as a person has not required the child to carry out that work for the purpose of becoming employed by the person.

Illustrative examples

Scenario 1
A person requires a 15 year old child to complete three hours’ work in their café to assess the child’s suitability for employment as a kitchen hand. This work is unpaid. This will be prohibited and action may be taken against the employer for contravention of new section 192A of the CCS Act.

Scenario 2
A person asks a 13 year old child to sell raffles tickets for a school fundraiser. The work is unpaid. The person does not intend to employ the child either at that time or subsequent to the completion of the task.

As the person is not requiring the child to carry out work for the purpose of becoming employed, the work does not amount to unpaid trial work. The person is therefore not prohibited under the CCS Act from requiring the child to carry out this work.
Scenario 3
A person requires a 16 year old child to complete one day’s work in their clothing shop in order to assess the child’s suitability as a shop assistant. The person pays the child for the trial work.

This will not be prohibited under the CCS Act as long as the payment or reward given to the child is more than nominal. That is, an amount that is more than minimal in comparison with real worth.

359. Consistent with section 190(2) of the CCS Act, a person charged with requiring a child to do unpaid trial work will be able to use the defence that the person believed on reasonable grounds that the child was 18 at the time of the alleged offence.

Clause 135 of the Bill – Requirements relating to the keeping of and access to employment records for child employees

360. Clause 135 of the Bill will insert new section 195A into the CCS Act, which will require a person who employs a child to keep specified records. These records will need to be kept for at least seven years after the record is made.

361. A person will also be required to ensure that a copy of the following is made and kept for at least seven years after it is made:

(a) a parent’s written authorisation of an adult to accompany their child\(^88\) while carrying out delivery work in accordance with section 191(3)(b)(ii) of the CCS Act; and

(b) a parent’s written permission for their child\(^89\) to carry out delivery work, work in a shop, retail outlet or restaurant, or in any other work prescribed in the regulations, between 6am and 10pm.

362. Clause 135 of the Bill will also insert new section 195B into the CCS Act, which will require an employer to, on the written request of a relevant person, provide employment records to them and let them inspect the records.

363. The term “employment records” will encompass the records required to be kept under new section 195A of the CCS Act. A “relevant person” will mean:

(a) the employee;

(b) if the employee is represented, their representative;

(c) a person authorised in writing by the employee;

(d) an officer of the Registrar’s department authorised in writing by the Registrar; and

(e) if the employee is less than 15 years of age, a parent of the employee.

\(^88\) Being a child who is at least 10 years old but under 13 years of age.

\(^89\) Being a child who has reached 13 years of age.
364. Consistent with section 49E of the IR Act, new section 195B will include provisions regarding how long the obligation to produce records will remain, further duties relating to access to and copying of records, and timeframes for compliance with a request.

365. These record keeping requirements will be in addition to those the employer is required to keep under the IR Act, and access by relevant persons to employment records that are required to be kept under the IR Act will be regulated by the IR Act.  

**Clause 136 of the Bill – New powers for authorised officers**

366. Clause 136 of the Bill will replace the provisions of section 195 of the CCS Act (which deals with the powers of authorised officers) with amended provisions that will ensure an authorised officer has the same functions and powers as those conferred on an industrial inspector under section 98 of the IR Act.

367. As an authorised officer will have an increased number of powers by virtue of the application of section 98 of the IR Act, new section 195(4) of the CCS Act will prohibit a person from failing to comply, without reasonable excuse, with a requirement of an authorised officer made for compliance purposes. A person will also be prohibited from obstructing an authorised officer in the performance of their functions.

**Clause 137 of the Bill – Consequential amendment to section 196**

368. Clause 137 of the Bill will amend section 196 of the CCS Act to delete the reference to section 195(5), consequential to clause 135 of the Bill (which will delete section 195(5)).

**Clause 138 of the Bill – Enforcement of employment records and powers of authorised officers**

369. Clause 138 of the Bill will insert new section 197 into the CCS Act. Section 197(1) will designate new sections 195A(1), (2) and (3), 195B(2) and 195(4) of the CCS Act as civil penalty provisions for the purposes of section 83E of the IR Act. These provisions will accordingly be enforceable in the Industrial Magistrates Court.

370. New section 197(2) will clarify that the employment record requirements in new sections 195A(1), (2) and (3) and 195B(2) of the CCS Act will be in addition to, and will not limit, the employment record requirements in the IR Act.

371. New section 197(3) will be akin to new section 102(4) of the IR Act. New section 197(3) will enable the Industrial Magistrates Court to determine that a person has failed to keep an employment record as required under new section 195A of the CCS Act, as an alternative to determining that the person failed to comply with an authorised officer’s requirement under new section 195(4)(a) to produce an employment record.

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90 Refer to clause 138 of the Bill and new section 197(2) of the CCS Act.
91 As defined by new section 195(1) of the CCS Act.
92 To be inserted by clause 229 of the Bill.
PART 8 OF THE BILL – AMENDMENTS ABOUT GENERAL ORDERS

Overview

372. Part 8 of the Bill will amend Part II Division 3 of the IR Act and its provisions relating to General Orders, principally the State Wage General Order (State Wage order).

373. Of significance will be the removal of the requirement for the Commission to conduct a hearing when making a State Wage order, and the introduction of a process concerning the making of written submissions for the Commission’s consideration in the making of the State Wage order. These amendments are based on similar provisions contained in section 289 of the FW Act regarding the making of the National Minimum Wage Order (National Wage order).

Clause 139 of the Bill – IR Act amended

374. Clause 139 of the Bill provides that Part 8 of the Bill will amend the IR Act.

Clause 140 of the Bill – Section 7 amended

375. Clause 140 of the Bill will insert two new definitions into section 7(1) of the IR Act:

(a) “General Order” will mean an order made under Part II Division 3; and

(b) “State Wage order” will mean a General Order made under new section 50A(1).

Clause 141 of the Bill – Section 50A amended

376. Clause 141 of the Bill will delete section 50A(1) and replace it with the requirement for the Commission, on its own motion, to make the State Wage order dealing with the matters specified in new sections 50A(2), 50B and 50C before 1 September each year. Section 50A(5) will also be amended to refer to 1 September.

377. The intention behind the 1 September date is to ensure that the Commission has sufficient time to consider the National Wage order, which must come into operation on 1 July each year.93

378. Clause 141 will delete section 50A(2) and replace it with the requirement for the Commission to set out a statement of principles in each State Wage order. This section replicates current section 50A(1)(d).

379. There will be a number of amendments made to section 50A(3), which sets out the matters the Commission must take into consideration when making a State Wage order. Of significance:

(a) the words “…that Western Australians have…” will be deleted from section 50A(3)(a)(i). These words will be deleted to recognise the fact that, as the majority of Western Australians are now regulated by the

93 In accordance with section 287(1) of the FW Act.
FW Act, the Commission is not able to ensure that Western Australians as a group have a system of fair wages and conditions.

The term “Western Australian” will be deleted from section 50A(3)(e) for the same reason.

Despite the removal of these words, the Commission will still be required to consider the need to ensure that there is a system of fair wages and conditions of employment in Western Australia for those Western Australians who are covered by the IR Act and that the award framework represents a system of fair wages and conditions of employment for those Western Australians who are covered by that award framework.

(b) section 50A(3)(d) will be replaced by the requirement for the Commission to take into consideration, to the extent that it is practicable, the capacity of employers as a whole to whom the order relates to bear the costs of increased wages, salaries, allowances and other remuneration.

This amendment will be made to recognise the fact that the State Wage order does not apply to a significant number of employers in Western Australia who are covered by the FW Act. The Commission should therefore only be required to consider the capacity of those employers who will be covered by the State Wage order, where this is practicable.

(c) section 50A(3)(f) will be replaced with the requirement for the Commission to take into consideration the most recent National Wage order made under an annual wage review under the FW Act when making the State Wage order.

Current section 50A(3)(f), with its reference to relevant decisions of other industrial courts and tribunals, will be replaced as it is only the National Wage order (being a decision of Fair Work Australia) that is of significance to the Commission, given the other States have referred their industrial relations powers in relation to the private sector to the Commonwealth.

Should it consider it relevant, the Commission will be able to consider the decisions of other industrial courts and tribunals under section 50A(3)(g).

380. Clause 141 of the Bill will delete section 50A(4). Its provisions will, however, be replicated in new section 50C(4).94

381. Clause 141 of the Bill will amend section 50A(8) to include a reference to new section 37A.95

382. The heading of amended section 50A will read “State Wage order” to reflect that this section will now only deal with the making of the State Wage order.

94 To be inserted by clause 143 of the Bill.
95 To be inserted by clause 28 of the Bill.
383. In accordance with clause 13 of new Schedule 6 of the IR Act, any minimum rate of pay or rate of wages paid under an award set under the State Wage order made under current section 50A and in effect immediately before the commencement of section 141 of the Amendment Act will have effect as if it were set in accordance with new section 50B or 50C as the case requires.

Clause 142 of the Bill – Section 50B amended

384. Clause 142 of the Bill will amend section 50B of the IR Act to include new section 50B(1A).

385. New section 50B(1A), with its requirement for the Commission to set specified minimum weekly rates of pay, replicates current section 50A(1)(a) of the IR Act. This section will, however, also include new paragraph (c) as a consequence of the insertion of new section 129 into the IR Act.96

386. New section 129 will incorporate certain provisions of the SWS97 – the provisions that:

(a) enable a determination of the percentage of the minimum 21 year old (i.e. adult) wage to which an employee with a disability is entitled based on their assessed productive capacity; and

(b) require an employee to be paid a minimum weekly amount regardless of the determined percentage of the minimum adult wage.

387. New section 129(3) will set the minimum weekly amount payable to employees with a disability at $76 per week or a higher amount set by the Commission under new section 50B(1A)(c).

388. New section 50B(1B) will specify that a minimum weekly rate or amount set may differ from, or be the same as, that set in the previous State Wage order. This section will therefore provide the Commission with the discretion to determine no increase to the minimum weekly rate or amount should it deem this appropriate.

389. Section 50B(1) and section 50B(4)(b)(i) will be amended as a consequence of the introduction of new section 50B(1A).

390. The heading of amended section 50B will be “Setting minimum rates of pay”.

Clause 143 of the Bill – Section 50C inserted

391. Clause 143 of the Bill will insert new section 50C into the IR Act.

392. New section 50C(1)(a) will require the Commission to adjust the rates of wages paid under awards, or order that the rates are to be the same as in the previous State Wage order. Again, this provision will enable to the Commission to make no increase to award rates of pay should it deem this appropriate.

96 New provisions relating to employees with a disability will be inserted by clause 176 of the Bill.

97 As will be defined in section 7(1) of the IR Act by clause 179 of the Bill.
393. New section 50C(1)(b) will require the Commission to adjust the weekly amount paid under awards to employees with a disability mentioned in new section 129(3)(b) in accordance with section 129(3). As with new section 50C(1)(a), the Commission will be able to make no increase to this amount by ordering that the amount be the same as in the previous State Wage order.

394. As awards may incorporate the SWS, where they do, they will include the entitlement for an employee to be paid no less than the minimum weekly amount payable (currently $76 per week). Consequently, in the same way as the Commission will be required to set the minimum weekly amount payable to employees with a disability under new section 50B(1A)(c), it will be necessary for the Commission to also adjust this amount in awards that have incorporated the SWS.

395. It is intended that the minimum weekly amount payable to employees with a disability under section 129(3) be the same as the minimum weekly amount payable to an employee with a disability under an award that incorporates the SWS.

396. Although the $76 minimum weekly amount is based on the same amount applicable in special national minimum wage 2 of the National Minimum Wage Order 2012, it is not intended that the Commission be either required to or prevented from adjusting this amount in accordance with the National Wage order. The Commission will, however, be required under new section 50A(3) to take into consideration the most recent National Wage order made under the FW Act when making the State Wage order, which will include a consideration of special national minimum wage 2.

397. New section 50C(2), (3) and (4) replicate current section 50A(1)(c), (2) and (4) of the IR Act. There will be no substantive changes to these provisions.

Clause 144 of the Bill – Section 51A deleted

398. Clause 144 of the Bill will delete section 51A – General Orders as to public sector discipline, as this section is not currently used and is considered unnecessary as such matters are regulated by the PSM Act.

Clause 145 of the Bill – Sections 51BA and 51BB replaced

399. Clause 145 of the Bill will replace current sections 51BA and 51BB with new sections 51BA and 51BB.

New section 51BA – Submissions in respect of State Wage order

400. New section 51BA will require the Commission to ensure that, for the purposes of making a State Wage order, all persons have a reasonable opportunity to make written submissions to the Commission for consideration in making the order. The Commission will be able to set a time within which submissions may be made.

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98 Refer to clause A.8.3 in Schedule A – Special national minimum wage 2, of the National Minimum Wage Order 2012. Special national minimum wage 2 applies to employees with a disability (as defined).

99 These provisions will be deleted by clause 141 of the Bill.
401. Under new section 51BA(3), the Commission will be required to publish all submissions made under section 51BA. However, in relation to information in a submission that a person claims is confidential or commercially sensitive, and where the Commission is satisfied that this is the case, the Commission will have the discretion under new section 51BA(4) to:

(a) decide not to publish the information; and

(b) instead publish:

(i) a summary of the information which contains sufficient detail to allow a reasonable understanding of the substance of the information (without disclosing anything that is confidential or commercially sensitive); or

(ii) if the Commission considers that it is not practicable to prepare a summary that would comply with subparagraph (i) – a statement that confidential or commercially sensitive information in the submission has not be published.

402. The Commission will be required to ensure that all persons have a reasonable opportunity to make written comments on any submissions, and on any summaries and statements concerning confidential and commercially sensitive information, which have been published. The Commission will be required to consider these comments in making the State Wage order.

403. The Commission will have the discretion to publish all material under section 51BA(3) and (4) on the Commission’s website or by any other means that it considers appropriate.

404. With the exception of new section 51BA(2), section 51BA is based on section 289 of the FW Act. Section 51BA(2) is considered necessary to ensure the conduct of a timely process.

**New section 51BB – Hearings**

405. Current section 51BB of the IR Act provides specified persons with the right to be heard in relation to the making of any General Order.

406. New section 51BB will require the Commission to hold at least one hearing for the purposes of making a General Order. This requirement will not, however, apply to the making of the State Wage order. Rather, the Commission will have the discretion to hold one or more hearings.

407. The intention behind this amendment is to expedite the process for making the State Wage order, particularly as it is a General Order that is made every 12 months. It is also based on the approach to the making of the National Wage order under the FW Act.

408. As per new section 51BA, there will be a comprehensive process for the making of written submissions and comments on written submissions to the Commission for consideration in the making of the State Wage order. This process will enable the parties to provide all the materials they consider necessary to the Commission. The publishing of the submissions will then ensure the process is transparent. It will, however, be open for the
Commission to hold a hearing in relation to the making of the State Wage order if it considers the written material provided is insufficient or the oral presentation of material would assist in the making of the order.

409. New section 51BB(3) will replicate current section 51BA to require the Commission to notify certain persons of each initial hearing in relation to the making of a General Order. The Commission will also be required to publish notification of the initial hearing.

410. New section 51BB(4) will replicate current section 51BB to require the Commission to give certain persons the opportunity to be heard in relation to the making of a General Order for which a hearing is held. This provision will not apply in respect of a State Wage order if the Commission determines it will not hold a hearing (in accordance with new section 51BB(2)).

100 Note, however, that the Mines and Metals Association will not be included in new section 51BB(3). This will be consistent with the amendments to sections 50, 51I, 51J and 51K of the IR Act that will be made by clauses 36 to 39 of the Bill.
PART 9 OF THE BILL – AMENDMENTS ABOUT ORGANISATIONS AND ASSOCIATIONS

Overview

411. Part 9 of the Bill will amend the provisions in the IR Act that regulate organisations and associations, principally Part II Divisions 4 and 5.

412. Many of the amendments are based on similar provisions contained in the Fair Work (Registered Organisations) Act 2009 (RO Act). Significantly, this will include new provisions regulating the validation of certain acts done by organisations in good faith, and the disqualification of certain prescribed persons from holding office in an organisation. As a consequence of the inclusion of these new provisions, two additional subdivisions (6 and 7) will be inserted into Part II.

Clause 146 of the Bill – IR Act amended

413. Clause 146 of the Bill provides that Part 9 of the Bill will amend the IR Act.

Clause 147 of the Bill – Definition of committee of management

414. Clause 147 of the Bill will introduce a definition of “committee of management” into section 7(1) of the IR Act, which is based on the definition of the same term in section 6 of the RO Act.

Clause 148 of the Bill – Commission able to permit registration under section 55 notwithstanding technical failure to comply with an organisation’s rules

415. Section 55 of the IR Act specifies the requirements that are to be met by an organisation seeking registration under the IR Act. Clause 148 of the Bill will amend section 55 to provide the Commission in Full Session with the discretion to permit the registration of an organisation where there has been:

(a) substantial compliance with requirements in an organisation’s rules regarding the authorisation of an application for registration; and

(b) any failure to comply with these requirements has been of a technical nature.

416. This amendment will be introduced to be consistent with the same amendment that will be made to section 62 of the IR Act by clause 151 of the Bill.

417. In accordance with clause 14 of new Schedule 6 of the IR Act, where an application for registration has been lodged with the Registrar under section 55 and not finally dealt with, nor abandoned at the time of commencement of the Amendment Act, it will be dealt with in accordance with section 55 as in force before the coming into operation of the Amendment Act.

Clause 149 of the Bill – Election regulations made by the Chief Commissioner

418. Clause 149 of the Bill will amend section 57(2) of the IR Act (which provides for elections to be by secret postal ballot) to specify that the regulations referred to are those made by the Chief Commissioner under section 113.
Clause 150 of the Bill – Registrar able to correct typographical etc. errors in rules, with organisation’s consent

419. Clause 150 of the Bill will amend section 58 of the IR Act to allow the Registrar to, before registering the rules of an organisation, correct a typographical, clerical or formal error in those rules. This will be subject to having received the consent of the organisation. Furthermore, this power will not apply to rules that relate to an organisation’s name, qualifications for membership or a matter referred to in section 71(5) of the IR Act.

Clause 151 of the Bill – Amendments to the process of altering an organisation’s rules under section 62

420. Section 62 of the IR Act regulates the process by which an organisation’s rules may be altered. Section 62(4) provides for the application of sections 55, 56 and 58(3) of the IR Act to rule alterations, with such modification as is necessary.

421. Clause 151 of the Bill will repeal section 62 of the IR Act and replace it with a new section 62. New section 62 will detail the entire process for altering an organisation’s rules. It will not therefore adopt the current approach of incorporating sections 55, 56 and 58(3) into section 62 by reference. Furthermore, two types of rule alterations will be established to expedite the process of registering rule alterations. These will be:

(a) a prescribed alteration. This will be a proposed alteration of the rules that relate to an organisation’s name, qualifications for membership or a matter referred to in section 71(5). The Commission in Full Session will be responsible for determining these applications; and

(b) an ordinary alteration. This will be all other proposed rule alterations, which the Registrar will be able to determine.

422. New section 62(2) will replicate existing section 62(1), being the requirement for the Registrar to give an organisation a certificate that the alteration has been registered in order to render an alteration effective.

Prescribed alterations

423. New section 62(5) will provide that the Registrar will not have the power to register a prescribed alteration without the authorisation of the Commission in Full Session.101

424. New section 62(6), (7) and (8) will include the same requirements as currently contained in section 55(2), (3) and (4) of the IR Act.102 That is the:

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101 Under section 55(4) of the IR Act, responsibility for authorising such an alteration lies with the Full Bench. Consistent with amendments to the IR Act made by clause 41 to 51 of the Bill, this role of the Full Bench will be replaced by the Commission in Full Session.

102 As noted, these provisions currently apply to section 62 rule alterations by virtue of section 62(4), which applies section 55 by reference.
(a) Registrar will be required to publish in the required manner a notice of an application for a prescribed alteration, a copy of the proposed alteration, and notice regarding the scope for a person who objects to the proposed alteration to be heard;

(b) application will not be able to be listed for hearing until after the expiration of 30 days from the date on which the matters in section 62(6) are first published; and

(c) grounds on which the Commission in Full Session will be required to be satisfied in order to not refuse the application.

425. New section 62(10) will substantively reflect section 55(5) of the IR Act and its treatment of rules that may result in overlapping membership with another organisation.

Ordinary alterations

426. Where an application concerns an ordinary alteration, the Registrar will be able to register the alteration under new section 62(11) if satisfied that the application has been authorised in accordance with the rules of the organisation. This will vary from current section 62(3) in that:

(a) the Registrar will not be required to consult with the Commission before registering the ordinary alteration;\(^{103}\) and

(b) it will not be mandatory for the Registrar to first be satisfied that reasonable steps have been taken to inform the members of the proposed alteration and that they may object to the alteration, that members have been given a reasonable opportunity to object to the proposed alteration and that less than five per cent objected, or a majority of members voted for the proposed alteration.\(^{104}\) It will be sufficient for the Registrar to be satisfied that the application has been authorised in accordance with the organisation’s rules (as is currently required by section 62(3)(a)) for the Registrar to register the alteration.

427. The intention behind new section 62(11) is to expedite the process of registering an ordinary alteration. It should be noted, however, that:

(a) this amendment will not prevent an organisation from providing its members with an opportunity to object to or to vote on a proposed alteration; and

(b) new section 62(13) will give the Registrar the discretion to decline to register the alteration on specified grounds,\(^ {105}\) despite being satisfied that the application was authorised in accordance with the organisation’s rules as per new section 62(11).

\(^{103}\) The Registrar is currently required to consult with the President.

\(^{104}\) These requirements are currently contained in section 62(3)(b) and (c) of the IR Act.

\(^{105}\) Which will replicate the grounds in section 62(3)(b) and (c) of the IR Act.
428. Consistent with new section 58(4), new section 62(4) will allow the Registrar to amend an application for an ordinary alteration to the rules of an organisation to correct a typographical, clerical or formal error in those rules. Again, this will need to be with the consent of the organisation.

429. New section 62(11) to (13) will not affect the operation of section 71(8) of the IR Act.106

430. New section 62(9) and (12) will provide the Commission in Full Session and the Registrar respectively with the power to allow the registration of a rule alteration where they are satisfied there has been substantial compliance with the authorisation requirements of the organisation and any non-compliance has been of a technical nature.

431. The intention is to give the Commission this discretion in order to avoid the unnecessary loss of time and effort resulting from what may be quite insignificant instances of non-compliance with an organisation's rules.107

432. Clause 15 in new Schedule 6 of the IR Act will provide that, where an application for the registration of a rule alteration has been lodged with the Registrar under section 62 and not finally dealt with nor abandoned at the time of commencement of the Amendment Act, it will be dealt with in accordance with the provisions of section 62 as in force before the coming into operation of the Amendment Act.

Clause 152 of the Bill – Commission may refuse to deal with an application under section 66 if not satisfied that all reasonable steps have been taken to resolve it

433. Section 66 of the IR Act provides the President with the power to deal with complaints about an organisation by members of that organisation, other persons and the Registrar.

434. As a consequence of the President's position being abolished, clause 152 of the Bill will make several amendments to replace references to the President with references to the Chief Commissioner. Section 66(9) will also be amended to provide that the power of the Chief Commissioner under section 66(2)(d) to declare the true interpretation of any rule may be exercised by the Commission in Full Session (rather than the Full Bench, as is currently the case).108

106 Section 71(8) regulates the alteration of an organisation’s rules to register a memorandum of agreement made between a State registered organisation and its counterpart federal body.

107 The amendment may, for example, prevent situations such as that arising in Re United Fire Fighters Union of WA (2003) 83 WAIG 1400. In this case, while union members had agreed to alter the union rules, this had been done at an annual general meeting, rather than a special general meeting as required by the union rules. See also The Electrical and Communications Association of Western Australia (Union of Employers) (2007) 87 WAIG 2899. In this case, the association had advised members they could object to the rule amendment (no one did) but failed to mention the 21 day time frame, which was required by the association's rules. In both cases the Full Bench had no choice but to refuse the applications as they failed to comply with section 55(4)(a).

108 This is consistent with other amendments to the IR Act which replace the Full Bench with the Commission in Full Session.
435. New section 66(2A) will enable the Chief Commissioner to refuse to deal with an application under section 66 if not satisfied that the applicant has taken all reasonable steps to have the matter resolved within the organisation.

436. In addition, new section 66(2B) and (2C) will provide the Chief Commissioner with the power to make any interim order that is considered appropriate, particularly orders or directions that are intended to further the resolution of the matter within the organisation.

437. These provisions are based on section 164(3) and (4) of the RO Act and are intended to ensure all reasonable attempts have been made to resolve a matter before the assistance of the Commission is sought.

438. Clause 152 of the Bill will delete section 66(2)(e) and (f), as provisions dealing with the Commission’s ability to determine whether an invalidity or nullity has occurred in an election will be instead included in new section 80O.109

439. Clause 152 of the Bill will delete section 66(3), (7) and (8).110 The heading to amended section 66 will be amended to “the power of the Chief Commissioner to deal with rules of organisation”. This will reflect the change from President to Chief Commissioner and more clearly articulate that section 66 deals with organisational rule matters.

Clause 153 of the Bill – Divisions 4 to 7 apply to industrial associations

440. Clause 153 of the Bill will amend section 67(3) of the IR Act so it is clear that Division 4 to 7 (in particular) apply to industrial associations, these being a council or other body formed to represent two or more organisations.

Clause 154 of the Bill – Contravention of amended section 69(6) and (9) to be a civil penalty provision

441. Section 69 of the IR Act regulates the conduct of elections in organisations. Section 69(6) provides that a person shall not refuse or fail to comply with a direction given by a person conducting an election, nor obstruct or hinder that person. Section 69(9) requires the secretary of an organisation to lodge a copy of the organisation’s register of members with the Registrar.

442. Clause 154 of the Bill will amend section 69 to divide section 69(9) into section (9), (10A) and (10B). There will be no substantive change to these provisions.

443. Clause 154 of the Bill will also insert new section 69(13), which will make a contravention of section 69(6) or (9) a civil penalty provision for the purposes of section 83E of the IR Act.

109 To be inserted by clause 159 of the Bill.
110 Section 66(3) – the signing of a decision of the Chief Commissioner – will be provided for by new section 34(1)(a). Section 66(7) and (8) are obsolete provisions.
444. This is consistent with the RO Act insofar as there is a penalty attached to contraventions of equivalent sections in the RO Act.\textsuperscript{111} This amendment will also be made as a consequence of the introduction of grounds for disqualification from holding office in an organisation.\textsuperscript{112}

**Clause 155 of the Bill – Requirements relating to the keeping of ballot papers and other election material by WA Electoral Commission or organisation**

445. Regulation 21 of the *Industrial Arbitration (Union Elections) Regulations 1980* requires the keeping of ballot papers for at least 12 months after an election.

446. Clause 155 of the Bill will insert new section 70A into the IR Act, which will regulate the preservation of ballot papers and other election material. If an election is conducted under section 69 of the IR Act, the Western Australian Electoral Commission will be required to take the necessary steps to ensure ballot papers and other election material are preserved for one year after the election is completed. The same requirement will be placed on an organisation, and its officers and employees who are able to do so, if the election is conducted by the organisation. This is consistent with section 199(1) of the RO Act.

447. Failure by an organisation to comply with this requirement, without a reasonable excuse, will be a civil penalty provision for the purposes of section 83E of the IR Act. This is consistent with section 199(3) of the RO Act insofar as there is a penalty attached to a contravention of equivalent sections in the RO Act.\textsuperscript{113} This amendment will also be made as a consequence of the introduction of grounds for disqualification from holding office in an organisation.

**Clause 156 of the Bill – Commission able to cancel registration of an organisation under section 73 on its own motion**

448. Section 73 of the IR Act regulates the cancellation and suspension of the registration of an organisation. Section 73(12) currently requires the Full Bench to cancel the registration of an organisation on specified grounds on the application of the Registrar.

449. To expedite the cancellation of an organisation on the grounds specified in section 73(12), clause 156 of the Bill will amend section 73(12) to allow the Commission in Full Session\textsuperscript{114} to cancel an organisation’s registration on its own motion. This will then enable cancellations to be made either on the Commission’s own motion or by application of the Registrar. As a consequence of this amendment, clause 156 will repeal section 73(12a) with its requirement for the Registrar to make such an application in every case.

\textsuperscript{111} Section 191 of the RO Act makes it an offence for an organisation to fail to make a register of its members available. Sections 193 and 194 of the RO Act similarly make it an offence for a person to fail to comply with a direction of an election official or to hinder or obstruct that person.

\textsuperscript{112} To be inserted by clause 159 of the Bill. To be disqualified from holding office on certain grounds, such grounds must be either an offence or civil penalty provision.

\textsuperscript{113} Section 199 of the RO Act makes it an offence for an organisation to fail to take the necessary steps to ensure ballot papers and other election materials are kept for 12 months.

\textsuperscript{114} Clause 51 of the Bill will replace the reference to the Full Bench in section 73(12) with a reference to the Commission in Full Session.
where they believe there are sufficient grounds for doing so. This approach is consistent with section 30(1)(c) of the RO Act.

450. In order to make it clear that the Commission in Full Session will not be required to issue a summons to an organisation under section 73(1) when the organisation is defunct\(^{115}\) and where the serving of a summons would therefore be administratively difficult, or where the organisation itself has made the application,\(^{116}\) clause 156 will insert new section 73(13A) stipulating that section 73(1) will not apply to the Commission in Full Session’s exercise of power under section 73(12). However, if the Commission in Full Session is intending to cancel the registration of an organisation on the grounds that the number of its members would not entitle it to registration under section 53 or 54 of the IR Act,\(^{117}\) the Commission in Full Session will be required to first give that organisation an opportunity to be heard.

Clause 157 of the Bill – Sections 74A and 74B inserted

451. Clause 157 of the Bill will insert new sections 74A and 74B into the IR Act.

*New section 74A – Dues payable to an organisation may be sued for summarily*

452. New section 74A will replicate the provisions currently contained in section 109 of the IR Act. There will be no substantive change to these provisions.

*New section 74B – Invalidity of certain provisions in organisation rules*

453. New section 74B will replicate the provisions currently contained in section 112 of the IR Act. There will be no substantive change to these provisions.

454. The intention behind these amendments is to incorporate all provisions relating to organisations and associations into Part II Divisions 4 to 7. Sections 109 and 112 of the IR Act will be deleted by clauses 160 and 161 of the Bill respectively.

Clause 158 of the Bill – Part II Division 5 heading amended

455. Clause 158 of the Bill will amend the heading of Part II Division 5 to include associations as well as organisations, so it is clear the same provisions relating to duties of officers apply to both organisations and associations.

Clause 159 of the Bill – Section 80 deleted and Part II Divisions 6 (Conduct resulting in disqualification from holding office) and 7 (Validating provisions for organisations and associations) inserted

456. Section 80 of the IR Act provides for the disqualification of a finance official from holding or acting in an office in an organisation for breach of specified duties.

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\(^{115}\) As per section 73(12)(b) of the IR Act.

\(^{116}\) As per section 73(12)(c) of the IR Act.

\(^{117}\) As per section 73(12)(a) of the IR Act.
Clause 159 of the Bill will delete section 80 of the IR Act and replace it with new Division 6, which will deal with conduct by any person that will result in disqualification from holding office in organisations. Division 6 will comprise new sections 80A to 80J.

**New section 80A – Definitions used in new Division 6**

New section 80A will define the terms that will be used in new Division 6. The term “Commission” will mean the Commission in Full Session.

The following new terms will be defined:

(a) “court officer” will mean the registrar or other proper officer of a federal court, a court of a State or Territory, or a court of another country.

(b) “exclusion period” will have three different meanings (which will be given by new section 80C(1), (2) and (3)) that will be categorised by the nature of the offence or contravention committed by the person. The exclusion periods will be:

(i) five years beginning on the day on which the person was convicted or, if the person was imprisoned, on the day on which the person is released from prison – for a conviction mentioned in new section 80B(a);

(ii) five years beginning on the day on which the person was convicted – for a conviction mentioned in new section 80B(b); and

(iii) five years beginning on the day on which the decision, determination or order was made – for a decision, determination or order mentioned in new section 80B(c), (d) or (e).

The definition of exclusion period is based on section 213A(1) of the RO Act.

(c) “person who holds office in an organisation” will include persons who hold office pursuant to a certificate issued under section 71(5) or pursuant to a scheme approved under new section 80P(2).

(d) “prescribed person” will mean a person to whom new Division 6 will apply under new section 80B.

(e) “reduced exclusion period” will have the meaning provided by new section 80C(4) – that is, a period specified by the Commission for the purposes of new section 80E(2)(b) under new sections 80F(2)(b) or 80G(2)(b).

This definition is based on the definition of “reduced exclusion period” in section 213A(2) of the RO Act.

(f) “relevant decision” – this term will apply to a prescribed person and will mean different things according to the nature of the offence or contravention committed by the person. It will mean:

\[118\] New section 80B will set out the relevant offences and contraventions.
(i) the conviction mentioned in new section 80B(a) or (b);

(ii) the decision mentioned in new section 80B(c);

(iii) the determination mentioned in new section 80B(d); or

(iv) the order mentioned in new section 80B(e),

because of which new Division 6 will apply to the person.

Clause 16 of new Schedule 6 of the IR Act will provide that if the relevant decision in relation to a prescribed person was made before the commencement of the Amendment Act:

(i) the person will be regarded as having become a prescribed person on the day on which the Amendment Act comes into operation for the purposes of new sections 80E(3), 80F(3)(b) and 80G(1); and

(ii) the references in new sections 80E(3) and 80G(1) to the day on which the relevant decision was made will be regarded as references to the day on which the Amendment Act comes into operation.

New section 80B – Which persons will be covered by Division 6

460. New section 80B will set out the persons (“prescribed person”) to whom Division 6 will apply.

461. A prescribed person will mean a person who has been convicted by a court of a specified offence or a person who has been determined by the Industrial Magistrates Court to have contravened a specified provision of the IR Act.

462. Division 6 will apply to a person who was convicted of a specified offence or who contravened a specified provision of the IR Act before the commencement of the Amendment Act. So, for example, a person who was convicted of an offence under a law of the Commonwealth involving fraud prior to the commencement of the Amendment Act will be considered a prescribed person under new section 80B. As noted previously, in accordance with clause 16 of new Schedule 6 of the IR Act, such a person will be regarded as a prescribed person on the day on which the Amendment Act comes into operation.

Specified offences

463. Under new section 80B(a), Division 6 will apply to a person who:

(a) has been convicted by a court of an offence under a written law or law of the Commonwealth, another State, a Territory, or another country, involving fraud or dishonesty and punishable by three or more months’ imprisonment; or

(b) convicted of and sentenced to a term of imprisonment by a court for any other offence under a written law or law of the Commonwealth, another State, a Territory, or another country, involving the intentional use of violence towards another person, the intentional causing of death or
injury to another person or the intentional damaging or destruction of property.

464. New section 80B(b) will provide that Division 6 will apply to a person who has been convicted of an offence under section 78 of the IR Act. Section 78 of the IR Act provides that a person who fails to comply with an order under section 77(2)(e) is guilty of an offence.

465. Under section 77(2)(e) the Industrial Magistrates Court may order a finance official to do a specified thing or to cease any specified activity where it is proven the person has failed to comply with section 74 of the IR Act.\(^{119}\)

*Specified contraventions of the IR Act*

466. In accordance with new section 80B(c), Division 6 will apply to a person if it has been decided by the Industrial Magistrates Court under section 83 of the IR Act that a contravention of section 80O(4) by that person in relation to a direction under section 80O(3)(a) is proved.

467. New section 80O(4) will provide that a person must comply with an order or direction given under new section 80O(3). New section 80O(3)(a) will give the Commission the power to direct a person in relation to ballot papers or other documents relating to an election that the Commission is examining following an application questioning whether an invalidity or nullity has occurred in that election.

468. In accordance with new section 80B(d), Division 6 will apply to a person if it has been determined by the Industrial Magistrates Court under section 83E that that person has contravened section 69(6) or (9), 70(1) or (2) or 70A(2) of the IR Act. These sections provide for the following:

(a) section 69(6) of the IR Act provides that a person shall not refuse or fail to comply with a direction given by a person conducting an organisational election, nor obstruct or hinder that person;

(b) new section 69(9) will require the secretary of an organisation to lodge a copy of the organisation's register of members with the Registrar;

(c) section 70(1) and (2) sets out a range of offences in relation to elections in organisations; and

(d) new section 70A(2) will require an organisation, and its officers and employees who are so able, to take the necessary steps to ensure ballot papers and other election materials are preserved for one year after an election is completed, where the election is conducted by the organisation.

469. In accordance with new section 80B(e), Division 6 will apply to a person if an order has been made by the Industrial Magistrates Court against that person under section 77(2)(b), (c), (d) or (e) of the IR Act.

\(^{119}\) Section 74 sets out the duties of an organisation's finance official.
470. Where it is proven that a finance official has failed to comply with section 74 of the IR Act, the Industrial Magistrates Court may, under section 77(2)(b) to (e), do the following:

(a) impose a penalty not exceeding $5,000;
(b) order the payment of compensation to the organisation;
(c) order the restitution or forfeiture of any pecuniary advantage obtained;
(d) order the finance official do a specified thing or to cease any specified activity.

471. The prescription of specified persons under new Division 6 is based on similar provisions contained in section 212 of the RO Act regarding the meaning of "prescribed offence".

**New section 80C – Exclusion periods and reduced exclusion periods**

472. As already detailed, new section 80C will set out the different exclusion periods. The exclusion periods will each be five years, but the date of commencement of an exclusion period will vary depending upon whether the person was or was not imprisoned.

473. The purpose of the exclusion period will be to set the period of time within which a prescribed person will not be eligible to be a candidate for an election to office in organisations, be elected or appointed to an office, or continue to hold an office.

474. There will be scope for the Commission to specify a reduced exclusion period under new sections 80F(2)(b) and 80G(2)(b). That is, the Commission will be able to specify a period of less than five years during which time the prescribed person will not be eligible to be a candidate for an election to office in organisations, be elected or appointed to an office, or continue to hold an office.

**New section 80D – certificate of court or prison officer or Registrar is evidence of facts relating to prescribed persons**

475. Under new section 80D, a certificate purporting to be signed by a court officer, officer in charge of a prison, court officer, clerk of the Industrial Magistrates Court or Registrar (as the case may be) and stating one of the following will be considered evidence of facts for the purposes of section 80E, 80F or 80G:

(a) a person was convicted by a court of a specified offence on a specified day;
(b) a person was acquitted by a court of a specified offence or a specified charge against the person was dismissed by a court;
(c) a person was released from prison on a specified day;
(d) the sentence of a person who was convicted of a specified offence has been suspended for a specified period;
(e) the outcome of proceedings under section 83D or 83E of the IR Act;

(f) the outcome of proceedings under section 77 or 83 of the IR Act.

476. This section is based on section 214 of the RO Act.

New section 80E – Certain persons will be disqualified from holding office in organisations

477. Under new section 80E a prescribed person will not be eligible, during an exclusion period, to be a candidate for an election to office in organisations, or to be elected or appointed to an office.

478. This proscription will not apply, however, if the person has made an application under new section 80F or 80G in relation to the relevant decision and the person was:

(a) granted leave to hold office in organisations; or

(b) refused leave but granted a reduced exclusion period by the Commission under new section 80F(2)(b) or 80G(2)(b) and that period has elapsed.

479. An office holder who becomes a prescribed person will cease to hold that office at the end of 28 days beginning on the day on which the relevant decision was made. This will not, however, apply if, within that 28 day period, the person makes an application to the Commission for leave to hold office under either new section 80F or 80G.

480. Where the office holder makes an application under section 80F or 80G and that application is not determined within three months after the date of the application, section 80E(4) will provide that the person will cease to hold office at the end of the three month period. The office holder may, however, apply to the Commission for an extension to this period. If the Commission extends the period, then the person will cease to hold office at the end of the extended period.

481. New section 80E(5) will prevent the Commission from giving an extension under section 80E(4) unless the application is made before the end of the three month period or, if the Commission has already given an extension under section 80E(4)(b), before the end of the extended period.

482. An organisation, a member or the Registrar will be able to apply to the Commission for a declaration as to whether, because of the operation of section 80E, 80F or 80G, a person is not, or was not, eligible to be a candidate for election, or to be elected or appointed to an office in the organisation, or a person has ceased to hold an office in the organisation.

483. Under new section 80E(7), although the Commission may grant a prescribed person leave to hold office in organisations under section 80F or 80G, leave granted in relation to a particular relevant decision will not affect the operation of section 80E, 80F or 80G in relation to any other conviction, decision, determination or order of a kind mentioned in section 80B.

484. New section 80E is based on section 215 of the RO Act.
New section 80F – Application by prescribed person for leave to be candidate for election or to be elected to hold office in organisations

485. New section 80F will provide a prescribed person who wants, during the exclusion period, to be a candidate for an election to an office in an organisation, or to be elected or appointed to an office, with the ability to apply to the Commission for leave to hold office in organisations.

486. Under section 80F(2) the Commission will have the power to:

(a) grant the person leave;

(b) refuse the person leave but specify a reduced exclusion period for the purposes of new section 80E(2)(b); or

(c) refuse the person leave.

487. A person holding office in an organisation who becomes a prescribed person and who, on making an application under this section for leave to hold office, is refused leave, will cease to hold office in the organisation.

488. A prescribed person will not be able to make more than one application under section 80F in relation to the relevant decision. They will also be unable to make an application under section 80G in relation to the relevant decision.

489. New section 80F is based on section 216 of the RO Act.

New section 80G – Application by prescribed person for leave to continue to hold office in organisations

490. Under new section 80G, if an office holder becomes a prescribed person, they will be able to apply to the Commission for leave to hold office in organisations. This will need to be done within 28 days beginning on the day on which the relevant decision was made.

491. The Commission will have the power under section 80G(2) to:

(a) grant the person leave;

(b) refuse the person leave but specify a reduced exclusion period for the purposes of new section 80E(2)(b); or

(c) refuse the person leave.

492. If the person is refused leave, they will cease to hold their current office.

493. A prescribed person will not be able to make more than one application under section 80G in relation to the relevant decision. They will also be unable to make an application under section 80G if they have already made an application under new section 80F in relation to the relevant decision.

494. New section 80G is based on section 217 of the RO Act.
New section 80H – Commission to have regard to certain matters when using powers to grant or refuse leave under sections 80F or 80G

495. New section 80H will set out those matters the Commission must regard when exercising powers under new section 80F or 80G to refuse or grant leave to a prescribed person to hold office in organisations.

496. These requirements are based on the same requirements placed on the Federal Court in section 218 of the RO Act.

New section 80I – Persons and organisations to be given opportunity to be heard by Commission

497. Under new section 80E(6) an organisation, a member or the Registrar will be able to apply to the Commission for a declaration as to whether, because of the operation of section 80E, 80F or 80G, a person is not, or was not, eligible to be a candidate for election, or to be elected or appointed to an office in the organisation, or a person has ceased to hold office in an organisation.

498. New section 80I will provide that the Commission may, in spite of anything in the rules of the organisation concerned, make any order that it considers appropriate to give effect to such a declaration.

499. Where an application is made under section 80E(6), the Commission will be required to give the person whose eligibility or holding of office is in question an opportunity to be heard. Similarly, if the application is not made by the organisation concerned, the Commission will be required to give that organisation an opportunity to be heard.

500. If an application for leave to hold office in organisations is made under new section 80F or 80G, the Commission will be required to give the organisation concerned an opportunity to be heard.

501. New section 80I is based on section 219 of the RO Act.

New section 80J – Acting as an officer in an organisation when ineligible

502. New section 80J will provide that an ineligible person must not perform or attempt to perform the functions of an office in an organisation. Contravention will not be an offence but it will be a civil penalty provision for the purposes of section 83E of the IR Act.

503. An “ineligible person” will be defined as a person who, because of the operation of section 80E, 80F or 80G, will not be eligible to be a candidate for election, or to be elected or appointed, to an office in an organisation, or has ceased to hold an office, and who has not been granted leave to hold office under section 80F or 80G.

504. Clause 159 of the Bill will also insert new Division 7.

New section 80K – Definitions in new Division 7

505. New section 80K will define the terms that will be used in new Division 7. These terms will be as follows:
(a) “collective body” – the collective body of an organisation will mean the committee of management or a conference, council, committee, panel or other body of or within the organisation. This definition is based on the definition of “collective body” in section 6 of the RO Act.

(b) “invalidity or nullity” – this term will include but will not be limited to any invalidity or nullity resulting from an omission, defect, error, irregularity or absence of a quorum or caused by the fact that:

(i) a relevant person has not been elected or duly elected;
(ii) a relevant person has purported to be elected by an election that was a nullity;
(iii) a relevant person was not entitled to be elected or to hold office;
(iv) a relevant person was not a member of the organisation;
(v) a relevant person was elected/purported to be elected in a case where one or more of the persons who took part in the election/the purported election was or were not entitled to do so or was or were not members of the organisation; or
(vi) persons who were not entitled to do so, or were not members of the organisation, took part in the making/purported making or the alteration/purported alteration of the rules of an organisation, as officers or voters or otherwise.

This definition is based on section 318 of the RO Act.

(c) “relevant person” – a relevant person will be:

(i) a member, or each of two or more of the members, of a collective body of the organisation;
(ii) one of the persons, or each of two or more of the persons, purporting to act as the members of a collective body of an organisation; or
(iii) each of two or more persons holding/purporting to hold office in the organisation.

This definition is based on section 318(a) of the RO Act.

New section 80L – Validation of certain acts done in good faith

506. New section 80L will provide for the validation of certain acts done in good faith, subject to new section 80N.

507. All acts that have been done in good faith by a collective body or persons purporting to act as a collective body will be valid in spite of any invalidity or nullity that may be later discovered in the:
(a) election of the collective body, any member of the collective body or the persons or any of the persons purporting to act as the collective body; or
(b) making or alteration of a rule of the organisation.

508. Similarly, all acts that have been done in good faith by a person holding or purporting to hold an office in an organisation will be valid in spite of any invalidity or nullity that may be later discovered in the:

(a) election of the person; or
(b) making or alteration of a rule of the organisation.

509. For the purposes of section 80L:

(a) a person will not be treated as purporting to act as a member of a collective body or as an office holder unless the person has, in good faith, purported to be, and has been treated by officers or members of the organisation as being, a member or office holder;
(b) an act will be treated as done in good faith until the contrary is proved;
(c) a person who has purported to be a member of a collective body will be treated as having done so in good faith until the contrary is proved;
(d) knowledge of facts from which an invalidity or nullity arises will not of itself be treated as knowledge that the invalidity or nullity exists; and
(e) an invalidity or nullity in an election, or the making or alteration of a rule to which section 80L will apply will not be treated as discovered before the earliest time proved to be a time when the existence of the invalidity or nullity was known to a majority of the members of the committee of management, or a majority of the persons purporting to act as that committee of management.

510. Section 80L will apply to an act whenever it was done, including before the commencement of the Amendment Act and in relation to an organisation before it became registered.

511. As per section 80L(5), nothing in section 80L will validate the expulsion or suspension of a member, or the imposition of a fine or other penalty on a member, that would not have been valid if section 80L was not enacted. Furthermore, nothing in section 80L will affect the operation of new section 80O.

512. Section 80L is based on section 319 of the RO Act.

New section 80M – Validation of certain acts after four years

513. New section 80M will validate certain acts after four years, subject to new section 80N.
The act, election/purported election to an office in an organisation, or the making/purported making or alteration/purported alteration of a rule of an organisation will be taken to have been done in compliance with an organisation’s rules after the end of four years from the:

(a) doing of the act by, or by persons purporting to act as, a collective body, or by a person holding/purporting to hold an office, and purporting to exercise power by or under the rules of the organisation;

(b) election/purported election to an office; or

(c) making/purported making or alteration/purported alteration of the rule.

The operation of section 80M will not affect the validity or operation of:

(a) an order, judgement, decree, declaration, direction, verdict, sentence, decision or similar judicial act of any court; or

(b) an order, declaration, direction or decision of the Commission, made before the end of the four years that will be referred to in section 80M(1).

Section 80M will apply to an act, election/purported election, making/purported making or alteration/purported alteration of a rule, done or occurring before the commencement of the Amendment Act and in relation to an organisation before it became registered.

Section 80M is based on section 320 of the RO Act.

New section 80N – Commission may make an order affecting the application of section 80L or 80M on the grounds of doing substantial injustice

Under new section 80N an organisation, a member of an organisation or any other person having a sufficient interest in relation to an organisation may apply to the Commission for an order declaring that the application of new section 80L or 80M in relation to an act would do substantial injustice, having regard to the interests of:

(a) the organisation;

(b) members or creditors of the organisation; or

(c) persons having dealings with the organisation.

Section 80N(1) will define “act” to include an election/purported election, and the making/purported making or alteration/purported alteration of a rule.

In considering such an application the Commission will have the discretion to determine:

(a) what notice, summons or rule to show cause is to be given to other persons of the intention to make an application or an order under section 80N; and
(b) whether and how the notice, summons or rule should be given or served and whether it should be published in the required manner.

521. If the Commission is satisfied that substantial injustice would be done if section 80L or 80M were applied in relation to an act, it will be required to declare by order accordingly. If such a declaration is made, section 80L or 80M, as the case may be, will not apply and will be taken to have never applied in relation to the act specified in the declaration.

522. Section 80N is based on section 321 of the RO Act.

New section 80O – Commission may make orders for the consequences of invalidity or nullity

523. Under new section 80O an organisation, a member of an organisation or any other person having a sufficient interest in relation to an organisation may apply to the Commission for a determination of the question whether an invalidity or nullity has occurred in:

(a) the management or administration of the organisation;

(b) an election in the organisation; or

(c) the making or alteration of the rules of the organisation.

524. Section 80O(1)(b) will replace section 66(2)(e) of the IR Act. Under section 66(2)(e) the President is responsible for inquiring into elections. In accordance with clause 152 of the Bill, the President’s functions under section 66 will become the responsibility of the Chief Commissioner. For this reason, an application under section 80O(1) will also need to be dealt with by the Chief Commissioner.

525. Section 66(2)(f)(i) and (ii) will be replaced by section 80O(3). This will give the Commission the power to direct a person in relation to ballot papers or other documents relating to an election, and to make any interim order it considers appropriate as to the holding of the office to which the election relates.

526. Section 80O(4) will replicate section 66(4) and so ensure that a person will be required to comply with a direction or order given or made under section 80O(3).

527. The Commission will have the power to make any declaration it considers proper in relation to an application made under section 80O(1).

528. Where it finds that an invalidity or nullity of the kinds referred to in section 80O(1) has occurred the Commission will be able, under section 80O(6), to make any order it considers appropriate to:

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120 Section 66(2)(e) will be deleted by clause 152 of the Bill.
121 These sections will be deleted by clause 152 of the Bill.
(a) rectify the invalidity or nullity or cause it to be rectified;
(b) negative, modify or cause to be modified the consequences in law of the invalidity or nullity; or
(c) validate any act, matter or thing rendered invalid by or because of the invalidity or nullity.

529. The Commission will also be able to give such ancillary or consequential directions as it considers appropriate. The Commission will not, however, be able to make an order under section 80O(6) unless it is satisfied that the order will not do substantial injustice to:

(a) the organisation;
(b) any member or creditor of the organisation; or
(c) any person having dealings with the organisation.

530. In considering an application under section 80O, the Commission will have the discretion to determine:

(a) what notice, summons or rule to show cause is to be given to other persons of the intention to make an application or an order under section 80O; and
(b) whether and how the notice, summons or rule should be given or served and whether it should be published in the required manner.

531. Section 80O will apply to an invalidity or nullity whenever it was done, including before the commencement of the Amendment Act and in relation to an organisation before it became registered.

532. Section 80O is based, in part, on section 322 of the RO Act.

New section 80P – Commission may make orders for the effective functioning of an organisation

533. Under new section 80P(1) an organisation, a member of an organisation or any other person having a sufficient interest in relation to an organisation may apply to the Commission for a declaration that:

(a) a part of the organisation, including a collective body, has ceased to exist or function effectively and there are no effective means under the rules of the organisation by which it can be reconstituted or enabled to function effectively; or

(b) an office in the organisation is vacant and there are no effective means under the organisation's rules to fill the office,

and the Commission will be able to declare accordingly.

534. The applicant will be able to submit a scheme to the Commission for approval for the taking of action by a collective body or by an officer or officers of the organisation:
(a) for the reconstitution of the collective body; or

(b) to enable the collective body to function effectively; or

(c) for the filling of the office.

535. Where the Commission makes a declaration under section 80P(1) it will be able to approve, by order, such a scheme. It will also be able to give such ancillary or consequential directions as it considers appropriate. The Commission will not, however, be able to make an order under section 80P unless it is satisfied that the order will not:

(a) do substantial injustice to the organisation or any member of the organisation; or

(b) allow an office to be filled by a prescribed person.

536. Furthermore, in order to ensure consistency with section 56(1)(c) of the IR Act, the Commission will not be able to approve a scheme involving provision for an election to office unless the scheme provides for the election to be held by a:

(a) direct voting system; or

(b) collegiate electoral system being, in the case of an office the duties of which are of a full time nature, a one-tier collegiate electoral system.

537. In considering an application under section 80P, the Commission will have the discretion to determine:

(a) what notice, summons or rule to show cause is to be given to other persons of the intention to make an application or an order under section 80P; and

(b) whether and how the notice, summons or rule should be given or served and whether it should be published in the required manner.

538. An order or direction of the Commission under section 80P, and any action taken in accordance with the order or direction, will have effect in spite of anything in the rules of the organisation.

539. Section 80P is based on section 323 of the RO Act.

Clause 160 of the Bill – Sections 109 and 110 deleted

540. Clause 160 of the Bill will delete section 109 of the IR Act as it will be replicated in new section 74A and will therefore be redundant. Clause 160 will also delete section 110 of the IR Act as:

(a) new section 66(2A) will require a member to take all reasonable steps to have a complaint relating to the rules of the organisation resolved within the organisation. It is therefore intended that section 66(2A) will require the applicant to take all reasonable steps to have the dispute resolved in accordance with the organisation’s rules; and
(b) new section 74A will provide that all dues\textsuperscript{122} payable to an organisation may be sued for and recovered in a court of competent jurisdiction.

\textbf{Clause 161 of the Bill – Section 112 deleted}

541. Clause 161 of the Bill will delete section 112 of the IR Act as it will be replaced by new section 74B.

\textsuperscript{122}“Dues” will be defined to mean fines, penalties, subscriptions and levies.
PART 10 OF THE BILL – FREEDOM OF ASSOCIATION

Clause 162 of the Bill – IR Act amended

542. Clause 162 of the Bill provides that Part 10 of the Bill will amend the IR Act.

Clause 163 of the Bill – Section 96B(2) deleted

543. Clause 163 of the Bill will delete section 96B(2) of the IR Act. Section 96B(2) is a transitional provision that is no longer relevant.

Clause 164 of the Bill – New section 96C(1A) inserted

544. Clause 164 of the Bill will insert new section 96C(1A) into the IR Act to define the term “treat” for the purposes of section 96C. Section 96C(1) prohibits a person “treating” an employee or independent contractor less or more favourably based on whether or not they are a union member. New section 96C(1A) will make it clear that a person can offend against section 96C(1) by threatening to treat an employee or independent contractor more or less favourably. Threatening to do something could have the same effect as actually doing the thing.

Clause 165 of the Bill – Section 96D amended

545. Clause 165 of the Bill will amend section 96D of the IR Act, which prohibits discrimination against employees (and prospective employees) based on whether or not they are a union member.

546. In effect, section 96D will be amended so that it:

(a) protects independent contractors (and prospective independent contractors) as well as employees; and

(b) also prohibits discrimination on the ground that a person has made, or intends to make, a complaint or inquiry to an industrial authority.

Terms defined

547. New section 96D(1A) will define various terms for the purposes of section 96D.

Protections extended to independent contractors

548. New section 96D(1) will be expanded to protect prospective independent contractors, as well as prospective employees. A person will be prohibited from refusing to employ or engage another person on a ground forbidden by section 96D.

549. Section 96D(2) will also be expanded to protect independent contractors, as well as employees. A person will be prohibited from engaging in certain discriminatory acts against an employee or independent contractor on a ground forbidden by section 96D.
Discrimination forbidden on ground that person has made complaint to industrial authority

550. Section 96D(4) will be amended to expand the grounds forbidden by section 96D. Discrimination will also be prohibited on the ground that a person has made, or intends to make, a complaint or inquiry to an industrial authority. New section 96D(1A) will define the term “industrial authority” to mean a person or body having the capacity under an industrial law to seek compliance with that law or an industrial instrument. The terms “industrial law” and “industrial instrument” will also be defined by new section 96D(1A).

When independent contractor is “prejudiced”

551. New section 96D(6) will be inserted to define what is meant by an independent contractor being “prejudiced”. It will include the principal terminating the relevant contract for services, refusing to use the independent contractor’s services and detrimentally altering the independent contractor’s position.

Clause 166 of the Bill – Section 96I amended

552. Clause 166 of the Bill will amend section 96I of the IR Act, which prescribes a reverse onus of proof in proceedings for offences against sections 96C, 96D and 96E. Section 96I will be amended to reflect the amendments to section 96D by clause 165 of the Bill. Specifically, section 96I will be amended to:

(a) reflect that section 96D will protect independent contractors from discrimination, as well as employees; and

(b) reflect that section 96D will also prohibit discrimination on the ground that a person has made, or intends to make, a complaint or inquiry to an industrial authority.

553. The onus will be on the accused to show that they did not engage in prohibited conduct after an employee or independent contractor has made (or disclosed an intention to make) a complaint or inquiry to an industrial authority.

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123 An “industrial authority” will include industrial inspectors, unions (registered under the IR Act) and the Registrar and deputy registrars of the Commission – all of whom have the capacity to seek compliance with industrial instruments under section 83 of the IR Act.

124 Section 96D(5) defines the term in the context of employees.

125 The term “principal” will be defined in section 96D(1A) to mean the person who engages the independent contractor under a contract for services.
PART 11 OF THE BILL – INDUSTRIAL AGENTS

Clause 167 of the Bill – IR Act amended

554. Clause 167 of the Bill provides that Part 11 of the Bill will amend the IR Act.

555. Part 11 of the Bill will insert new Part IX into the IR Act to improve the regulation of industrial agents. Industrial agents are authorised to provide advice and other services in relation to industrial matters. They are also authorised to appear in proceedings before the Commission, the Industrial Magistrates Court and the Industrial Appeal Court.\(^{126}\)

556. The current registration process for industrial agents has proven ineffectual in practice. There are currently no minimum qualification or experience requirements, or effective process for dealing with complaints against industrial agents.\(^{127}\) This is notwithstanding that industrial agents are granted an exemption from section 12 of the *Legal Profession Act 2008*, which generally prohibits legal practice by a person other than a legal practitioner. The type of work performed by industrial agents could be characterised as legal work.

557. It is intended that Part 11 of the Amendment Act will come into operation later than most other Parts. Once Part 11 comes into operation, industrial agents registered under the current scheme will have a prescribed amount of time to apply for and obtain registration under the new scheme.\(^{128}\)

Clause 168 of the Bill – Section 7 amended

558. Clause 168 of the Bill will replace the definition of “registered industrial agent” in section 7(1) of the IR Act.\(^{129}\) The new definition will specifically refer to a person registered under regulations made under new section 112D.

Clause 169 of the Bill – Section 42B amended

559. Clause 169 of the Bill will make a consequential amendment to section 42B(8) of the IR Act, to reflect that industrial agents will no longer be registered under section 112A (they will instead be registered under regulations made under new section 112D).

Clause 170 of the Bill – Section 97UJ amended

560. Clause 170 of the Bill will make a consequential amendment to section 97UJ(6) of the IR Act to reflect that industrial agents will no longer be registered under section 112A (they will instead be registered under regulations made under new section 112D).

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\(^{126}\) Sections 31, 81E and 91 of the IR Act respectively.

\(^{127}\) It cannot be inferred from the mere fact of registration that a person has any qualifications or experience in industrial relations at all – *Reynolds v The Minister for Health & Anor* [2010] FMCA 843 at paragraph 72.

\(^{128}\) Clause 17 of new Schedule 6 of the IR Act will enable regulations made under new section 112D to include provisions of a savings or transitional nature.

\(^{129}\) As inserted by clause 4(2) of the Bill. The definition inserted by clause 4(2) of the Bill will apply until Part 11 of the Bill comes into operation.
Clause 171 of the Bill – New Part IX heading inserted

561. Clause 171 of the Bill will insert new Part IX into the IR Act concerning the registration and regulation of industrial agents. New Part IX will consist of new sections 112A to 112F.

Clause 172 of the Bill – New sections 112A to 112F inserted

562. Clause 172 of the Bill will delete current section 112A of the IR Act and insert new sections 112A to 112F.

New section 112A – Carrying on business as an industrial agent

563. New section 112A will replace current section 112A of the IR Act. A person who “carries on business as an industrial agent” must be registered as an industrial agent (unless they are a legal practitioner). New section 112A(2) will define “carrying on business as an industrial agent” to mean:

(a) carrying on business as a person who appears in proceedings in the Commission, the Industrial Magistrates Court or the Industrial Appeal Court and/or provides advice or other services in relation to industrial matters;\(^\text{130}\) or

(b) an employee acting on behalf of a person who carries on business as an industrial agent by appearing in proceedings in the Commission, the Industrial Magistrates Court or the Industrial Appeal Court and/or providing advice or other services in relation to industrial matters.

564. New section 112A(2) differs from current section 112A by requiring employees of industrial agents to also register as industrial agents if they appear in proceedings and/or provide advice or other services. Employees who provide these services should similarly meet prescribed qualification, experience and character requirements. The integrity of the registration system could otherwise be undermined. New section 112A(2) will therefore close an existing loophole which allows employees of industrial agents to provide legal-type services without being registered as an industrial agent or legal practitioner.

565. As is currently the case,\(^\text{131}\) new section 112A(3) will provide that the reference to a person “carrying on business as an industrial agent” does not include:

(a) an organisation registered under the IR Act, UnionsWA, the Chamber of Commerce and Industry Western Australia or an employee of that body;\(^\text{132}\)

\(^\text{130}\) It should be noted that sections 31, 81E and 91 of the IR Act entitle a person to be represented in proceedings by an “agent” (not specifically a registered industrial agent). For example, an employee could be represented by a family member, while a small business could be represented by an employee of the business. Not every person who appears as an “agent” is required to be registered as an industrial agent – only those persons who fall within the definition of “carrying on business as an industrial agent”.

\(^\text{131}\) Current section 112A(1a).

\(^\text{132}\) The current reference in section 112A(1a)(a) to the Australian Mines and Metals Association will be removed, consequential to clause 65 of the Bill.
(b) a person who acts as a bargaining agent under section 42B(4) (for the purposes of negotiating an industrial agreement) or section 97UJ (for the purposes of negotiating and registering an EEA and doing other things in connection with EEAs); and

(c) a person who appears in proceedings under section 97WJ (proceedings arising under the dispute provisions of an EEA).

566. These persons are not required to register as industrial agents, notwithstanding that they could be characterised as “carrying on business as an industrial agent”.

567. Unlike current section 112A(1a), new section 112A(3) will also provide that the reference to a person “carrying on business as an industrial agent” does not include a public sector body or an employee of that body. This removes any doubt about whether a public sector body could properly be characterised as “carrying on business as an industrial agent”.

568. As is currently the case, a person will be prohibited under new section 112A(4) from carrying on business as an industrial agent (or holding themselves out as carrying on business as an industrial agent) if they are not a registered industrial agent or legal practitioner. A contravention of new section 112A(4) will constitute an offence and carry a maximum $2,000 penalty.

569. New section 112A(5) will prohibit a person from allowing an employee of that person to carry on business as an industrial agent unless the employee is a registered industrial agent or legal practitioner. A contravention of new section 112A(5) will constitute an offence and carry a maximum $2,000 penalty.

570. New section 112A(6) will exempt registered industrial agents and other prescribed persons from the prohibition in section 12 of the Legal Profession Act 2008, which generally prohibits legal practice by a person other than a legal practitioner. As is currently the case, the following persons will be exempted:

(a) registered industrial agents; and

(b) employees and officers of an organisation registered under the IR Act, UnionsWA, the Chamber of Commerce and Industry Western Australia or a body prescribed by the regulations.

571. New section 112A(6) will also exempt a person employed in a public sector body, acting on behalf of that body.

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133 New section 112A(1) will provide that the term “public sector body” has the same meaning as in section 3(1) of the PSM Act.
134 Current section 112A(2).
135 Current section 112A(3)(a) and (c).
136 They will only be exempted to the extent that they appear in proceedings in the Commission, the Industrial Magistrates Court or the Industrial Appeal Court and/or provide advice or other services in relation to industrial matters.
137 The current reference in section 112A(3)(c) to the Australian Mines and Metals Association will be removed, consequential to clause 65 of the Bill.
New section 112B – Eligibility for registration

572. New section 112B(1) will set out the eligibility requirements for registration as an industrial agent. A person will be eligible for registration if they:

(a) are not disqualified under the IR Act from applying for registration, or being registered, as an industrial agent; and

(b) meet any other criteria prescribed by regulations made under new section 112D.

573. New section 112B(2) will specifically provide that a person is not eligible for registration if they have been struck off the roll of legal practitioners or suspended from legal practice (whether in Western Australia or elsewhere in Australia). It is not appropriate that a person be able to circumvent being struck off or suspended by registering as an industrial agent, thereby being authorised to provide legal-type services in industrial matters.

574. New section 112B(3) will enable regulations made under new section 112D to specify other matters that disqualify a person from registration.

New section 112C – Professional indemnity insurance

575. New section 112C will replace current section 112A(4) of the IR Act, which prevents a person from registering as an industrial agent unless they have professional indemnity insurance or “sufficient material resources of a prescribed kind to provide professional indemnity”. The Industrial Relations (Industrial Agents) Regulations 1997 currently require professional indemnity insurance of at least $100,000 or “sufficient moneys or other financial resources, or other sufficient material resources in the form of real or personal property, to provide professional indemnity.”

576. Under new section 112C, a person will not be eligible for registration unless:

(a) they have professional indemnity insurance arrangements that comply with regulations made under new section 112D; or

(b) the person’s employer is a registered industrial agent who has professional indemnity insurance arrangements that comply with regulations made under new section 112D. Employees of industrial agents will not be required to hold their own professional indemnity insurance if their employer’s policy adequately covers them.

577. Unlike current section 112A(4), a person’s “sufficient material resources” will not suffice in lieu of professional indemnity insurance under new section 112C. A person’s material resources at the time of registration could change considerably during the period of registration and may be difficult to secure in the event of insolvency. Material resources do not provide the same security offered by professional indemnity insurance.

138 Unlike current section 112A(3)(b), new section 112A(6) will not exempt employees of registered industrial agents who appear in proceedings and/or provide advice or other services. This exemption is unnecessary as employees will now be required to register in their own right and will therefore be exempt by virtue of being an industrial agent.

139 Regulation 4(2)(b).
578. New section 112C(2) will require industrial agents to maintain professional indemnity insurance arrangements that comply with regulations made under new section 112D (unless they are an industrial agent employed by another industrial agent). Failure to comply will constitute an offence and carry a maximum $2,000 penalty.

New section 112D – Registration scheme

579. New section 112D(1) will enable regulations made by the Governor to provide for a scheme of registration of industrial agents. Among other things, the regulations may provide for:

(a) the application process;
(b) qualifications, experience and other criteria for registration;
(c) the imposition of conditions or restrictions to which registration is subject;
(d) disqualification from registration;
(e) professional indemnity insurance arrangements; and
(f) fees.

580. Regulations made under new section 112D will replace the registration scheme currently prescribed by the Industrial Relations (Industrial Agents) Regulations 1997.

New section 112E – Disciplinary inquiry

581. New section 112E(1) will enable the Registrar to inquire into the conduct of an industrial agent to determine whether proper grounds for disciplinary action exist. New sections 112E and 112F will replace the disciplinary process currently prescribed by the Industrial Relations (Industrial Agents) Regulations 1997. The current process has proven to be cumbersome and ineffectual in practice.

582. The power of the Registrar to conduct an inquiry under new section 112E(1) is intended to be broad. There is no requirement that the Registrar receive a complaint in order to conduct an inquiry. Members of the public could nonetheless make complaints to the Registrar, as could persons before whom industrial agents appear (i.e. commissioners, industrial magistrates and judges).

583. New section 112E(2) will provide that “proper grounds for disciplinary action exist” if:

(a) the industrial agent’s registration was improperly obtained; or
(b) the industrial agent has contravened the IR Act or a condition or restriction attached to their registration; or
(c) the industrial agent has done or omitted to do any thing, or engaged in any conduct, that renders the person unfit to be an industrial agent; or
(d) the industrial agent has engaged in conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent industrial agent.140

584. For the purposes of conducting an inquiry, new section 112E(3) will provide that the Registrar (or a delegate of the Registrar) is an "authorised person" within the meaning of Schedule 5 of the IR Act. Schedule 5 sets out the powers of authorised persons to obtain information.

585. New section 112E(4) will require the Registrar to refer the matter to the Commission in Full Session for hearing and determination if satisfied that proper grounds for disciplinary action exist.

New section 112F – Disciplinary action

586. The Commission in Full Session will be required to hear and determine any referral from the Registrar under new section 112E(4). The requirement for a hearing necessarily implies that the affected industrial agent will have the opportunity to be heard in the matter.

587. New section 112F(2) will set out the Commission in Full Session’s powers in the event it determines that proper grounds for disciplinary action exist against an industrial agent. The Commission in Full Session may do one or more of the following:

(a) decline to make an order;
(b) caution or reprimand the industrial agent;
(c) impose a condition or restriction on the industrial agent’s registration, or amend an existing condition or restriction;
(d) order that the industrial agent’s registration be suspended for a maximum period of 12 months;
(e) order that the industrial agent’s registration be cancelled.141

Clause 173 of the Bill – New Part X heading inserted

588. Clause 173 of the Bill will insert new “Part X – Miscellaneous” before section 113 of the IR Act.

Clause 174 of the Bill – Schedule 5 amended

589. Clause 174 of the Bill will amend Schedule 5 of the IR Act, which sets out the powers of authorised persons to obtain information. Schedule 5 will be amended to note that the Registrar (or a delegate of the Registrar) will be an authorised person for the purposes of conducting an inquiry under new section 112E(1).

140 This particular ground is based on the definition of “unsatisfactory professional conduct” for legal practitioners under section 402 of the Legal Profession Act 2008.
141 Decisions of the Commission in Full Session will be appealable to the Industrial Appeal Court under section 90 of the IR Act.
PART 12 OF THE BILL – AMENDMENTS ABOUT THE STATE EMPLOYMENT STANDARDS

Overview

590. Part 12 of the Bill will insert new Part XI – the SES into the IR Act.

591. The SES will be statutory minimum conditions of employment and will replace those contained in the MCE Act. The MCE Act, together with the Minimum Conditions of Employment Regulations 1993 (MCE Regulations), will be repealed by clause 177 of the Bill.

592. The SES will also replace the Termination, Change and Redundancy General Order (TCR General Order) of the Commission. The TCR General Order will be repealed by clause 21 of new Schedule 6 of the IR Act.

593. The SES will underpin all industrial instruments (as will be defined by new section 116(1), which will be inserted by clause 176 of the Bill) and contracts of employment. An industrial instrument or a contract of employment that provides a term or condition that is less favourable to the employee than an SES will be of no effect.

Clause 175 of the Bill – amendments to IR Act

594. Clause 175 of the Bill provides that Part 12 Division 1 of the Bill will amend the IR Act.

Clause 176 of the Bill – insertion of new Part XI

595. Clause 176 of the Bill will insert new Part XI – the SES into the IR Act. Part XI will consist of new sections 116 to 175.

New section 116 – Terms used in new Part XI

596. New section 116 will define the terms that will be used in new Part XI. The terms currently defined in the MCE Act that will not be included in section 116 are:

(a) those that are already defined in section 7(1) of the IR Act – apprentice", "employer", and "EEA";

(b) those that will be included elsewhere in Part XI – “annual leave” (new section 120); “carer’s leave” (new section 135), and “minimum condition of employment” (new section 117); and

(c) those that will no longer be necessary – “IR Act” (the minimum conditions will now be in the IR Act rather than the MCE Act), and “medical practitioner” (the SES will not include certain parental leave provisions currently contained in the MCE Act which refer to medical practitioners).
597. The following terms will be redefined (in contrast to their current definition in the MCE Act) or will be new terms.

**Authorised leave**

(a) “Authorised leave” is currently defined in section 9A(4) of the MCE Act, which deals with maximum hours of work.

(b) The definition of authorised leave will be included in new section 116 as it is a term that will be used in several sections within new Part XI.

**Continuous service**

(a) While the definition of “continuous service” will be fundamentally the same as the current definition in section 3(1) of the MCE Act, the definition in new section 116 will include provisions to enable the calculation of the length of an employee’s continuous service. It will also differentiate between breaking continuity of service and the length of continuous service. For example, while one week’s unpaid authorised leave will not break an employee’s period of continuous service, it will not count towards the length of the employee’s continuous service.

(b) New Part XI will include provisions relating to redundancy pay. These obligations are currently contained in clause 4.4 of the TCR General Order.

(c) The qualification in clause 4.4(c)(i) of the TCR General Order that an employee’s continuous service will not be broken where the employer has interrupted or terminated the employee’s employment for the sole reason of avoiding redundancy pay will be included in the definition of continuous service in new section 116.

(d) A note will be included in the definition of continuous service to ensure that employers and employees are aware that the length of an employee’s continuous service may also be affected by any transmission of business agreement.\(^{142}\)

**Employee**

(a) The wording of the definition of “employee” will not change from the MCE Act definition. That said, currently there are classes of persons who are excluded from the definition of employee (and who are therefore excluded from the application of the MCE Act) by virtue of regulation 3 and Schedule 1 of the MCE Regulations.

(b) The MCE Regulations will be repealed and the following classes of persons will **not** be excluded from new Part XI – those persons:

(i) whose services are remunerated wholly by commission or percentage reward, or wholly at piece rates; and

\(^{142}\) See new sections 172 to 175.
(ii) who receive a disability support pension under the Social Security Act 1991 (Commonwealth) and whose employment is supported by “supported employment services” within the meaning of the Disability Services Act 1986 (Commonwealth).

(c) The intention behind the coverage of these persons by Part XI and the SES is to provide consistency with the FW Act, which does not exclude such persons from the national employment standards. It is also consistent with the Long Service Leave Act 1958 (LSL Act), which applies to such persons.

(d) Although the repeal of the MCE Regulations will also repeal the exclusion of persons appointed under section 22(1) of the National Trust of Australia (WA) Act 1964 to carry out the duties of warden in relation to property that is managed, maintained, preserved or protected by the National Trust of Australia (WA), it is intended that an exclusion relating to National Trust wardens be included in the Industrial Relations (General) Regulations 1997. These employees will accordingly be excluded from the application of new Part XI.

(e) The MCE Regulations currently exclude volunteers, being persons who are not entitled to be paid for work done by them but who receive some benefit or entitlement in relation to the work.

(f) The repeal of this exclusion will not mean that new Part XI will automatically apply to volunteers. Part XI will apply only to employees, being a person who meets the definition of employee in section 7(1) of the IR Act. Volunteering arrangements, by their very nature, generally do not meet the necessary legal requirements to establish an employment relationship.

FW Act

There are provisions in the FW Act that apply to employees covered by the IR Act. For example, unpaid parental leave and notice of termination provisions. The IR Act will include references to the FW Act where relevant.

Industrial instrument

(a) The term “industrial instrument” will be included in lieu of the current definition of “award” contained in the MCE Act.143 This is necessary as section 7(1) of the IR Act defines award differently to the MCE Act.

(b) The definition of industrial instrument will also include an EEA. This will ensure that new Part XI will apply to EEAs in the same fashion as other industrial instruments and will avoid the need to refer to EEAs separately as currently occurs in the MCE Act.

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143 “Award” is defined as an award, industrial agreement or order of the Commission.
Member of the employee’s family or household

(a) The definition of this term will differ from its current definition in the MCE Act. It will now include an employee’s mother-in-law and father-in-law, sister-in-law and brother-in-law, grandmother-in-law and grandfather-in-law, and step-grandchild. This will be consistent with the definition of “immediate family” in section 12 of the FW Act.

Employee paid by results

(a) As noted above, employees who are paid wholly by commission, percentage reward or piece rates are not employees under the MCE Act. They will, however, be employees under new Part XI, except where otherwise provided.

(b) In some instances specific provisions relating to employees paid by results will be required – for example, for the purposes of calculating paid leave entitlements. For this reason, the term needs defining. The term “employee paid by results” will be defined as one who is wholly or partially paid by commission, percentage reward or piece rates.

State system employee

The IR Act will include references to the application of FW Act to “State system employees” (employees covered by the IR Act). For this reason, the term will be defined.

Transmission of business agreement

Division 13 of new Part XI will insert provisions about the making of an agreement between two employers relating to the transmission of a business from one employer to the other. The term “transmission of business agreement” will therefore be defined.

Public holiday

(a) The definition of “public holiday” in new section 116 will list the public holidays rather than include them in a Schedule to the IR Act (currently the MCE Act lists the public holidays in Schedule 1 of the MCE Act).

(b) The public holidays will not be altered, although Foundation Day will be renamed Western Australia Day in line with the Western Australia Day (Renaming) Act 2012.

New section 117 – the SES

598. The SES will comprise provisions relating to:

(a) calculating payment of paid leave;

(b) reasonable hours of work;

(c) minimum rates of pay;
(d) other requirement as to pay (for example, the method and frequency of payment of wages);

(e) personal/carer’s leave;

(f) annual leave;

(g) compassionate leave;

(h) bereavement leave;

(i) public holidays;

(j) parental leave;

(k) termination and redundancy (including redundancy pay);

(l) employment changes; and

(m) the minimum amount of pay for certain “under-rate employees”. 144

New section 118 – the SES apply to all employees and employers

599. New section 118 will provide that the SES will extend to and bind all employers and employees in the way prescribed by new Part XI.

600. In contrast to section 5(1) of the MCE Act, the SES will not be implied into industrial instruments or contracts of employment. Under the MCE Act this implication operates to ensure that the minimum conditions can be enforced under section 83 of the IR Act as a provision of an award or industrial agreement. The Bill will change this approach – clause 211 will amend section 83 of the IR Act to provide that the SES can be enforced simply as a provision to which section 83 applies. In other words, a SES will be able to be enforced directly. Section 118 will include a note signposting the applicability of section 83.

601. The Bill will substantively replicate the provisions currently contained in section 5(2), (3) and (4) of the MCE Act, that is:

(a) an industrial instrument or a contract of employment that provides a term or condition that is less favourable to an employee than an SES will be of no effect;

(b) an industrial instrument or contract of employment will not be able to exclude the operation of new Part XI; and

(c) a purported waiver of a right under Part XI will be of no effect.

602. Section 118 will be subject to new section 120, which will regulate the limited contracting out of annual leave, and to new section 159, which will regulate the withholding of monies by an employer due to an employee’s non-compliance with notice of termination provisions in an industrial instrument.

144 This relates to changes that will be made regarding the rate of pay for employees with a disability. See clause 20(3) and (5) of new Schedule 6 of the IR Act.
603. In terms of transitional arrangements, clause 19 of new Schedule 6 of the IR Act will provide that:

(a) any proceedings to enforce a minimum condition of employment that were started but not finalised before the commencement of section 177(a) of the Amendment Act must be dealt with after commencement as if the MCE Act and the MCE Regulations had not been repealed, and as if the IR Act had not been amended; and

(b) if immediately before the commencement of section 177(a) of the Amendment Act a minimum condition may have been enforced in accordance with section 7 of the MCE Act, but proceedings had not commenced, the minimum condition may be enforced after commencement under section 83 of the IR Act as if it were an SES.

New section 119 – Employment is permitted under the Supported Wage System (SWS)

604. New section 119 will provide that a person may be employed under the provisions of the SWS.

605. Clause 179 of the Bill will define the SWS in section 7(1) of the IR Act to mean the scheme established by the Commonwealth Government to enable the assessment of whether, and the extent to which, a person’s productive capacity is reduced because of a disability.

606. In accordance with the SWS Handbook, published by the federal Department of Education, Employment and Workplace Relations, before a person with a disability can be employed under the SWS, the job under consideration must be covered by an industrial instrument or legislative provision that permits employment under the SWS provisions. Section 119 will serve this purpose.

607. Employment under the SWS will be limited to certain employees with a disability. Clause 179 of the Bill will define the term “employee with a disability” in section 7(1) of the IR Act to mean an employee whose productive capacity:

(a) has been assessed under either the SWS or supported wage provisions; and

(b) is assessed as being reduced because of a disability.

608. Consequently, an employee with a disability who has not been assessed under the SWS or supported wage provisions (including an employee whose wage has been determined under section 9(1) of the MCE Act), or whose assessment under the SWS or supported wage provisions has determined that the employee’s productive capacity is not reduced because of their disability, is entitled to be paid in accordance with new section 124(1) of the IR Act (this section will provide the entitlement to be paid a minimum rate of pay. New section 124(2)(b) will not apply as an employee in this situation will not meet the definition of “employee with a disability”).

609. Clause 179 of the Bill will define the term “supported wage provisions” in section 7(1) of the IR Act to mean provisions in an industrial instrument that enable the assessment of whether, and the extent to which, a person’s productive capacity is reduced because of a disability.

610. The SWS will be the default wage tool for calculating the minimum wage for an employee with a disability where there is no wage tool contained in an industrial instrument that applies to the employee (the wage tool in an industrial instrument could, incidentally, be the SWS).

Under-rate employees

611. The situation will be different, however, for under-rate employees. Clause 20(1) of new Schedule 6 of the IR Act will define “under-rate employee” to mean an employee who was, immediately before the commencement of section 177(a) of the Amendment Act, entitled to be paid under an under-rate employee provision by reason of infirmity.

612. An “under-rate employee provision” will be defined as a provision in an award to the effect that an employee who by reason of old age or infirmity is unable to earn the minimum wage may be paid a lesser wage as is agreed in writing between a union and the employer.

613. An under-rate employee award provision will, from commencement of section 177(a) of the Amendment Act, be of no effect to the extent it applies to an employee who by reason of infirmity is unable to earn the minimum wage. An employer who wishes to continue paying an under-rate employee less than the minimum wage must ensure that an assessment of the employee under either supported wage provisions or the SWS is completed within six months. During this period, and until the assessment is completed, the employee will be entitled to either the wage they were entitled to before the commencement of section 177(a) of the Amendment Act or the minimum weekly amount payable under new section 129(3), whichever is the higher.

614. If an under-rate employee is not assessed, or their assessment is not completed within six months, the employee will be entitled to be paid the minimum rate of pay contained in new section 124(1). As noted above, this will be because the employee will not meet the definition of “employee with a disability” under the IR Act.

Employees receiving a disability support pension

615. In accordance with the MCE Regulations, a person who receives a disability support pension under the Social Security Act 1991 (Commonwealth) and whose employment is supported by “supported employment services” within the meaning of the Disability Services Act 1986 (Commonwealth) is excluded from the application of the MCE Act and therefore is not entitled to a statutory minimum wage.

616. The repeal of the MCE Regulations will mean these persons will be employees under the IR Act for the purposes of new Part XI. Where they meet the definition of “employee with a disability”, their rate of pay will be determined according to:
(a) supported wage provisions; or

(b) where there are no supported wage provisions, the SWS.

**New section 120 – Limited contracting out of annual leave conditions**

617. New section 120 will provide the parameters for limited contracting out of annual leave. It will replicate the parameters currently contained in section 8 of the MCE Act, with the addition of a definition of annual leave.  

618. Limited contracting out of annual leave will not be a SES.

**New section 121 – Calculation of payment for any period of paid leave**

619. New section 121 will provide that when an employee takes paid leave, they are to be paid the rate of pay they would have received under their industrial instrument or contract of employment at the time they take their leave.

620. This section will also include provisions regarding:

(a) how an employee’s rate of pay will be calculated when they are paid by results; and

(b) how the number of hours of leave an employee is entitled to will be calculated when such a number cannot be determined or the number of hours has varied over the employee’s period of employment.

621. The averaging of hours over either the previous 52 weeks, or the employee’s period of employment in the case of employees with less than 52 weeks’ service, will not result in a loss of accrued leave. This section will operate only to determine an employee’s payment when they take a particular period of annual leave.

**Illustrative examples**

**Scenario 1**
An employee has worked for one year at 25 hours per week. She has therefore accrued two weeks (being 50 hours) of personal leave.

The employee wishes to take one week’s personal/carer’s leave. She will be entitled to be paid for 25 hours’ leave. Having taken the leave, she will have 25 hours of personal leave remaining.

**Scenario 2**
An employee commenced employment working 30 hours per week and then, six months later, increased his hours to 35 hours per week. He therefore accrued 60 hours (two weeks) of annual leave in the first six months and 70 hours (two weeks) of annual leave in the second six months. By the end of his first year the employee has accrued four weeks (being 130 hours) of annual leave.

The employee wishes to take one week of annual leave.

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146 Annual leave is currently defined in section 3 of the MCE Act. The term will not be defined in new section 116 as the term applies only to new section 120.
As the employee’s hours have varied over his period of employment, the employer must average the hours worked by the employee over the previous 52 weeks to determine how many hours of annual leave the employee should be paid for. Accordingly, the employee will be entitled to be paid for 32.5 hours for his one week of leave. (This is the average of 26 weeks worked at 30 hours per week and 26 weeks worked at 35 hours per week.) Having taken the leave, the employee will have 97.5 hours of accrued annual leave remaining.

622. An employee will not be entitled under new Part XI to be paid any kind of loading, monetary allowance, overtime or penalty rates, or other separately identifiable amount (other than payment for results in the case of a person paid by results) as part of their rate of pay for the purpose of paid leave. An employee will therefore not be entitled to annual leave loading when taking a period of paid annual leave under Part XI.

623. As new section 121 will only relate to paid leave under the SES, section 121(4) will not affect any obligation an employer has under an industrial instrument or contract of employment to pay any kind of loading (including annual leave loading), monetary allowance, overtime or penalty rates, or any other amount when an employee takes a period of paid leave.

New section 122 – Maximum hours of work

624. New section 122 will include the same provisions as are currently contained in section 9A of the MCE Act. New section 122 will not, however, include the definition of “authorised leave” as this term will be defined in new section 116.

New section 123 – Reasonable additional hours of work

625. New section 123 will include the same provisions as are currently contained in section 9B of the MCE Act. There will be no change to these provisions.

New section 124 – Employees to be paid a minimum rate of pay

626. New section 124 will provide that, for each hour worked, an employee is entitled to be paid the minimum weekly rate of pay applicable to the employee under new section 126 (employees aged 21 or more), 127 (employees aged under 21) or 128 (apprentices), divided by 38. This will replicate the provisions of section 10 of the MCE Act.

627. This section will not apply to employees who are paid wholly by results or employees with a disability, although this will not prevent an industrial instrument from providing a minimum rate of pay for these employees.

628. Section 124 will not apply to employees paid wholly by results due to the very specific and unique nature of how such employees are paid. It is more appropriate that an industrial instrument provides for such minimum rates of pay.

629. Employees with a disability will be entitled to a minimum rate of pay in accordance with new 129 of the IR Act.
Employees paid partially by results

630. Section 124(2) will not exclude employees partially paid by results from the entitlement to a statutory minimum rate of pay. This will reflect the current position. The MCE Act and MCE Regulations only exclude persons paid wholly by commission, percentage reward or piece rates. Employees who are partially paid by results (that is, by both an hourly/weekly rate and by results) are entitled to the MCE Act minimum conditions, including the minimum rate of pay contained in section 10.

631. This will mean that the minimum rate of pay contained in new section 124 will apply to all the hours worked by an employee paid partially by results. Any payment by way of commission, percentage reward, piece rates or other methods of payment by results will be taken into account when determining whether the employee was paid their statutory minimum rate of pay for the hours they worked.

Employees with a disability

632. Under new section 124(4) an employee with a disability whose rate of pay is not provided for in an industrial instrument will be entitled to either:

(a) a minimum rate of pay calculated according to new section 129(1); or
(b) the minimum weekly amount payable in new section 129(3), regardless of the number of hours actually worked,

whichever is the highest.

633. Consistent with new section 124(4)(b), new section 124(5) will entitle an employee whose rate of pay is provided for in an industrial instrument which incorporates the SWS \textsuperscript{147} to be paid the minimum weekly amount payable in new section 129(3) regardless of the number of hours actually worked.\textsuperscript{148}

634. The minimum weekly amount payable will be initially set at $76.00 per week in line with the National Minimum Wage Order 2012. In accordance, however, with clauses 142 and 143 of the Bill, new sections 50B(1A)(c) and 50C(1)(b) of the IR Act will include the requirement for the Commission to set or adjust the minimum weekly amount payable to employees with a disability in section 129(3). This may then alter the amount of $76.00.

635. As the minimum weekly amount payable in new section 129(3) will not be affected by the number of hours actually worked by the employee, an employee with a disability covered by section 124(4) or 124(5) will be entitled to $76 per week (or something different if so set by the Commission) regardless of whether they work, for example, 5 hours or 25 hours per week.

\textsuperscript{147} Being “supported wage provisions”. As noted earlier, this will mean provisions in an industrial instrument that enable the assessment of whether, and the extent to which, a person’s productive capacity is reduced because of their disability.

\textsuperscript{148} This will not apply to employees whose productive capacity has been assessed under supported wage provisions that incorporate a wage tool other than the SWS. Rather, the supported wage provisions of that industrial instrument will determine that employee’s minimum rate of pay.
636. An employee with a disability who is being assessed under the SWS and who is employed for a trial period for this purpose will also be entitled to the minimum weekly amount payable in new section 129(3).

On call

637. New section 124(7) and (8) will include provisions relating to employees who work “on call”. Similar provisions are currently contained in section 3(2) and (3) of the MCE Act.

638. Section 124(7) will provide that only that period where an employee is on call and does not undertake any duty of employment (other than being on call) will be excluded from the calculation of the number of hours worked by an employee in a week. Where an employee who is on call undertakes any duty of employment (other than being on call), the time spent performing this duty must be counted as part of their hours worked, for which they must be paid.

639. To facilitate payment, clause 130 of the Bill will amend section 49D(2) of the IR Act to require an employer to keep a record of the times during which an employee was on call and the times during which the employee undertook a duty of employment other than being on call.

640. The SES will not prevent an industrial instrument for making provision regarding on call work – for example, the provision of an on call allowance. Such a provision will not, however, have the effect of removing the SES obligation for an employee to be paid for any other duty of employment performed during an on call period.

Illustrative example
An employee is on call for six hours. These hours are outside her ordinary hours of work. In the first three hours the employee does not undertake any other duty of employment. In the fourth hour she attends to clients’ needs for 30 minutes and in the fifth hour she attends to clients’ needs for 30 minutes. She undertakes no further duties of employment during the remainder of her on call period.

The one hour during which the employee undertook other duties of employment (attending to clients’ needs) must be counted when determining the number of hours she worked in a week. The remaining 5 hours (when the employee was on call but did not undertake any other duty of employment) must not be counted when determining the number of hours she worked in that week.

641. Consistent with section 3(2) and (3) of the MCE Act:

(a) the exclusion of time spent on call will relate only to a period of time that is outside the employee’s ordinary working hours; it will not apply to a period of time that is part of the employee’s ordinary working hours; and

(b) it will not matter whether the employee is required to be on call at their place of employment or elsewhere.
New section 125 – The minimum rate of pay for casual employees includes a loading

642. New section 125 will replicate the provisions currently contained in section 11 of the MCE Act requiring the payment of a casual loading to casual employees.

New section 126 – The minimum weekly rate of pay for employees aged 21 or more

643. New section 126 will replicate the provisions contained in section 12 of the MCE Act requiring the payment of a minimum rate of pay for an employee aged 21 or more who is not an apprentice (i.e. the adult rate of pay). It will include an additional provision stipulating that this minimum rate of pay will not apply to an employee with a disability.

New section 127 – The minimum weekly rate of pay for employees aged under 21

644. New section 127 will replicate the provisions contained in section 13 of the MCE Act requiring the payment of a minimum rate of pay for an employee aged under 21 who is not an apprentice (i.e. junior rates of pay). It will include an additional provision stipulating that this minimum rate of pay will not apply to an employee with a disability.

New section 128 – The minimum weekly rates of pay for apprentices

645. New section 128 will replicate the provisions contained in section 14 of the MCE Act requiring the payment of a minimum rate of pay for an apprentice.

New section 129 – The minimum weekly amount payable to certain employees with a disability

646. New section 129 will incorporate the provisions of the SWS that enable the calculation of a minimum rate of pay based on an employee’s assessed productive capacity. The percentage of an employee’s assessed productive capacity will determine the percentage of the minimum (adult) rate of pay to which they will be entitled.

647. Section 129 will also incorporate the SWS requirement that, notwithstanding the outcome of an employee’s assessed productive capacity, an employee with a disability is entitled to at least the minimum weekly amount payable (being $76 per week or a higher amount if so set by the Commission).

648. As previously noted, section 129(1) will apply only to those employees with a disability whose rate of pay is not provided for in an industrial instrument.

649. However, industrial instruments may also incorporate the SWS. Consequently, section 129(3)(b) will require the payment of the minimum weekly amount payable (being $76 or a higher amount set by the Commission) to an employee with a disability whose rate of pay is provided for in an industrial instrument which has incorporated the SWS. This will ensure that the same minimum amount payable applies to both employees covered by section 129 and employees covered by an industrial instrument that incorporates the SWS.
New section 130 – An employee cannot be compelled to spend their pay in a particular way

650. New section 130 will prevent an employer from requiring an employee to spend any part of their pay in a particular way. This section will replicate section 17B(2) and (3) of the MCE Act.

New section 131 – How an employee is to be paid and how often

651. New section 131 will provide the methods by which an employer must pay an employee. These new provisions will not replicate those contained in section 17C of the MCE Act. Rather, they will be based on the more contemporary requirements contained in section 323 of the FW Act.

652. New section 131 will include the requirement for an employee to be paid at least monthly. It will also provide that a provision in an industrial instrument that specifies a particular method by which the money must be paid must be complied with in lieu of the requirements of new section 131(1)(b).

653. Section 131 will not include any provision akin to section 17B(1) of the MCE Act, which provides that an employee cannot be compelled to accept goods, accommodation or other services instead of money as part of their pay unless this is authorised under an EEA, award, contract of employment or written law. Section 131 will require an employer to pay an employee in money.

New section 132 – Authorised deductions from an employee’s pay for the employee’s benefit

654. New section 132 will replicate the provisions contained in section 17D of the MCE Act. In addition, this section will include a requirement that any variation to the amount of an authorised deduction must also be authorised in writing by the employee.

655. The title of this section will differ from that of section 17D of the MCE Act. The reference to “for employee’s benefit” will draw a distinction between deductions that are for the benefit of an employee and those that are for the benefit of the employer.\(^\text{149}\) Section 132 will only relate to deductions for the employee’s benefit.

New section 133 – Impermissible deductions and payments from an employee’s pay for employer’s benefit and in relation to employees under 18

656. Under section 10 of the MCE Act, an employee is entitled to be paid for each hour worked in a week. Consequently, the deduction of money from an employee’s pay that is not authorised under section 17D is unlawful. Provisions allowing deductions from an employee’s pay for an employer’s benefit cannot therefore currently be included in industrial instruments and contracts of employment.

657. There may be circumstances in which deductions from an employee’s pay for the employer’s benefit are reasonable. New section 133 will permit the inclusion of provisions in an industrial instrument or written contract of employment that allow an employer to make certain deductions from an employee’s pay under specified conditions.

\(^{149}\) Refer to new section 133.
employee’s pay for the employer’s benefit. To ensure that such deductions are reasonable, new section 133 will render a provision in a written contract of employment or an industrial instrument of no effect to the extent that it purports to:

(a) allow an employer to make an impermissible deduction from an employee’s pay; or

(b) require the employee to make an impermissible payment to the employer or another person.

658. An impermissible deduction or payment will be defined as one that is directly or indirectly for the benefit of the employer or someone related to the employer and that is not reasonable in the circumstances. It will also mean a deduction or payment that is not agreed to in writing by the parent or guardian of an employee under the age of 18.

659. The effect of new section 133 will be that before an employer can lawfully make a deduction, or require a payment from an employee’s pay, that is for the employer’s benefit:

(a) a provision allowing the deduction or payment must be contained in an industrial instrument or written contract of employment; and

(b) acting upon the provision must be reasonable in the circumstances.

660. Consequently, while an industrial agreement or written contract of employment may have a provision that allows an employer to make deductions from an employee’s pay, that provision will have no effect to the extent that acting upon it would allow the employer to make an impermissible deduction. As to whether a deduction is impermissible will depend upon whether it is reasonable in the circumstances.

661. A deduction from an employee’s pay that is not authorised under new section 132 and which does not fall within the parameters of new section 133 will continue to be in breach of the requirement for an employee to be paid for each hour worked in a week.\textsuperscript{150}

\begin{table}[h]
\centering
\caption{Illustrative examples}
\begin{tabular}{|l|}
\hline
\textbf{Scenario 1} \\
An employee’s written contract of employment stipulates that the employer may deduct money from the employee’s pay if the employee has been overpaid. \\
The employer has, over time, unintentionally overpaid the employee a total of $1,000. When the employer discovers this, she deducts the $1,000 from the employee’s next pay. \\
Although the employee’s contract allows the employer to make a deduction for an overpayment of wages, as the employee is normally paid $1,200 per pay period, he could claim this particular deduction is unreasonable in the circumstances given he was only paid $200. He may therefore claim that the provision contained in his \\
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\textsuperscript{150} As this will be contained in new section 124(1).
written contract has no effect to the extent that it allowed the employer to make what amounted to an impermissible deduction.

Scenario 2
An employer deducts the cost of petrol stolen during an employee’s shift from the employee’s pay. The employee could challenge this deduction on the ground that it is not reasonable in the circumstances and is therefore an impermissible deduction.

Withholding money due to employee’s failure to provide notice

662. New section 133(3) will provide that withholding money from a non-complying employee’s unpaid wages or accrued annual leave entitlements for a no-notice period will be reasonable for the purposes of section 133.

663. New section 159 will define:

(a) a “non-complying employee” to mean an employee who does not comply with a requirement in an industrial instrument that specifies the amount of notice the employee must give in order to terminate their employment; and

(b) a “no-notice period” to mean the number of days’ notice of termination an employee is required to give their employer under their industrial instrument less the number of days’ notice actually given.

Illustrative example
An award requires an employee to give their employer two weeks’ notice of termination. Where an employee fails to provide such notice, the award allows the employer to withhold monies owing to the employee, equivalent to the period of notice the employee failed to provide.

An employee gives their employer one week’s notice rather than two.

Her employer may lawfully withhold monies from the employee’s wages or accrued annual leave equivalent to one week’s wages, this being an amount equivalent to the period of notice the employee failed to provide.

This will not contravene the requirement in new section 124 for an employer to pay an employee for each hour worked or the requirement in new section 142 for an employee to be paid for untaken accrued annual leave on termination.

664. The regulations will be able to prescribe other circumstances in which a deduction or payment is or is not reasonable for the purposes of section 133. For example, it may be appropriate to prescribe that a circumstance in which a deduction is:

(a) reasonable is that the deduction is for the purpose of recovering costs directly incurred by the employer as a result of the voluntary private use of particular property of the employer by an employee;

(b) unreasonable is that the deduction is for the purpose of recovering a shortfall in a cash till or recovering the cost of stolen stock.
Written authorisation of employee is required

665. New section 133(5) will include an additional requirement relating to reasonable deductions or payments. A deduction or payment that is directly or indirectly for the benefit of the employer or a party related to the employer will not be able to be made unless:

(a) the amount and purpose of the deduction or payment is first authorised in writing by the employee; or

(b) the parent or guardian of an employee under 18 has first authorised the amount and purpose of the deduction or payment in writing.

Illustrative example

An employee’s industrial agreement allows his employer to make deductions from his pay where the employee has been unintentionally overpaid.

The employee has been overpaid $1,600. The employer wishes to deduct $200 per pay period from his pay until the overpayment has been repaid.

Assuming this is reasonable in the circumstances, the employee must authorise each deduction from his pay in writing before the employer makes the deduction. The authorisation must include both the amount and purpose of the deduction.

If the employee does not first authorise the deduction in writing, the employer will be unable to lawfully deduct the money.

There will be nothing to prevent the employee from authorising each deduction in a single authorisation, if it is clear that this is what he is authorising, rather than having to authorise each deduction eight separate times.

666. New section 133 will not prevent an employer from recovering money, other property, damages or compensation from an employee in civil or criminal proceedings in respect of the loss of or damage to the employer’s property.

Illustrative example (continued)

The employee refuses to authorise the deduction of $200 per pay.

While the employer will be unable to lawfully deduct the overpayment from the employee’s pay, the employer has the right to seek to recover the overpayment via civil proceedings. The employer may therefore take legal action to recover the overpaid wages.

New section 134 – An employee’s payment of earnings during jury duty is not affected by the SES

667. New section 134 will clarify that nothing in Part XI is intended the affect the operation of section 58B(3), (5) or (7) of the Juries Act 1957. These provisions deal with payments for jury service.
New section 135 – Definition of personal/carer’s leave

668. New section 135 will define the term personal/carer's leave to collectively mean paid personal/carer's leave as per new section 136(2) and unpaid carer’s leave as per new section 138.

669. Personal/carer’s leave will be the term used in lieu of the term “leave for illness, injury or family care” that is currently used in Part 4 Division 2 of the MCE Act.

New section 136 – An employee’s entitlement to paid personal/carer’s leave

670. New section 136 will provide an employee (other than a casual employee) with an entitlement to paid personal/carer’s leave in the same substantive terms as section 19 of the MCE Act. That is, paid leave for the number of hours the employee is required to ordinarily work in a two week period during the year, up to 76 hours.

New section 137 – Grounds for taking paid personal/carer’s leave

671. New section 137 will provide that an employee may take paid personal/carer’s leave for the following reasons:

(a) if the employee is unable to work as a result of an illness or injury;

(b) to provide care and support to a member of their family or household when required because of an illness or injury or an unexpected emergency affecting that member.

672. The exceptions to the taking of paid sick leave that are currently contained in section 20(2) of the MCE Act will be replicated in new section 137(1). These being where an employee’s illness or injury is attributable to the employee’s serious and wilful misconduct, or the employee’s gross and wilful neglect, in the course of the employee’s employment.

673. The definition of carer’s leave that is currently contained in section 3(1) of the MCE Act will be replicated in section 137(2).

674. Section 137 will not include provisions akin to those contained in section 20A of the MCE Act. There will therefore be no limit on how much accrued personal/carer’s leave an employee will be able to use for any caring purpose that meets the requirements of new section 137(2).

New section 138 – An employee’s entitlement to unpaid carer’s leave

675. New section 138 will include an entitlement to unpaid carer’s leave in the same substantive terms as currently contained in section 20B of the MCE Act.

New section 139 – Certain matters relating to personal/carers leave are not SES

676. Section 139 will reflect section 21 of the MCE Act and specify that nothing in new Division 5 – Personal/carers leave will require:
(a) an employee to take personal/carer’s leave as a whole working day. That is, an employee will be able to have a part day absence on paid personal/carer’s leave; or

(b) an employer to pay out any untaken paid personal/carer’s leave to an employee on termination.

New section 140 – Personal/carer’s leave notice and evidence requirements

677. New section 140 will require an employee to give their employer notice of taking personal/carer’s leave (be this paid or unpaid), including specification of the period or expected period of leave and the purpose for which the leave is taken. The reference to “the purpose for which the leave is taken” is intended to require specification as to whether the leave is for personal illness or injury purposes (as per new section 137(1)) or for caring purposes (as per new section 137(2)).

678. An employee will be required to give notice as soon as practicable, which may be a time after the leave has started. What is meant by “as soon as practicable” will depend on the circumstances of each case.

679. Section 140 will include a requirement for an employee, where required by the employer, to provide evidence that would satisfy a reasonable person of the employee’s entitlement to the leave (be this paid or unpaid). This will be akin to the requirement currently contained in section 22 of the MCE Act.

680. An employee who fails to provide the requisite notice or evidence will not be entitled to take personal/carer’s leave. The employer will, however, have the discretion to provide the leave despite the employee’s non-compliance.

681. New section 140(4) will allow an industrial instrument to include provisions relating to the kinds of evidence an employee must provide. Where an industrial instrument provides for the kinds of evidence an employee must provide – for example, a medical certificate and/or a statutory declaration – those provisions will be able to apply instead of new section 140(2). This is based on section 107(5) of the FW Act.

New section 141 – An employee’s entitlement to paid annual leave

682. New section 141 will provide an employee (other than a casual employee) with an entitlement to paid annual leave in the same substantive terms as section 23 of the MCE Act. That is, paid leave for the number of hours the employee is required to ordinarily work in a four week period during the year, up to 152 hours.

New section 142 – When an employee is to be paid for annual leave and payment of annual leave on termination

683. New section 142(1) will provide that an employee must be paid annual leave at the time payment is normally made during the course of employment unless the employee has requested in writing that payment be made before the leave commences. This will be the same provision as that contained in section 24(1) of the MCE Act.
684. New section 142(2) will provide that, on termination, an employee is entitled to be paid for untaken accrued annual leave. An employee will be entitled to be paid the amount they would have been paid had they taken that period of leave.

685. An employee will not, however, be entitled to be paid for untaken annual leave that has accrued for a period of less than one year where their employment is terminated due to serious misconduct justifying dismissal without notice. The employee will remain entitled to be paid for untaken annual leave that relates to a completed year of service.

Illustrative example
An employee has worked for one year and six months and so has accrued six weeks’ annual leave. The employee has not taken any annual leave during her period of employment. On termination, the employee will be entitled to be paid for her six weeks’ untaken accrued annual leave.

If, however, the employee is terminated for serious misconduct justifying dismissal without notice, the employee will:
- be entitled to payment for untaken annual leave that relates to the first (i.e. complete) year of service, being four weeks’ pay; but
- not be entitled to payment for untaken annual leave that relates to the last six months (i.e. less than one year) of service, being two weeks’ pay.

686. An employee will not be entitled to be paid for untaken accrued annual leave in the situation where, in accordance with new section 173(3), an employer agrees under a transmission of business agreement to take responsibility for an employee’s annual leave entitlements accrued with the first employer. In this situation, an employee’s untaken annual leave will transfer with the employee to their employment with the second employer.

New section 143 – When annual leave may be taken, required to be taken or refused

687. New section 143 will provide that paid annual leave may be taken for a period agreed between an employer and employee. If agreement cannot be reached, leave may then be taken in accordance with any relevant provisions in an industrial instrument. If there are no relevant industrial instrument provisions, an employer will be unable to unreasonably refuse an employee’s request.

688. Section 143(3) will provide that an employer must not unreasonably refuse to agree to an employee’s request to take annual leave. Section 143(4) will provide that an employer’s compliance with an industrial instrument that deals with the taking of paid annual leave will not be considered an unreasonable refusal.

689. New section 143(6) will provide examples of provisions regarding the taking of paid annual leave that may be included in an industrial instrument or a contract of employment. These provisions are not intended to be exhaustive. However, any requirement in an industrial instrument or contract of employment for an employee to take paid annual leave in particular circumstances must be reasonable.
**Illustrative examples**

**Scenario 1**
An employee requests two weeks’ leave. The employer refuses. There is no provision in an industrial instrument or contract of employment that deals with the taking of leave.

Depending on the circumstances, the employer’s refusal may be considered unreasonable and the employee may seek to have their right to take this leave enforced as a SES.

**Scenario 2**
An industrial agreement provides that employees may not take more than one week’s leave in June due to key activities associated with the end of the financial year.

An employee asks to take three weeks’ leave in June. The employer refuses the request.

As the employer has complied with the provisions of the industrial agreement, the refusal is not considered to be unreasonable.

**Scenario 3**
An employee is not covered by an industrial instrument. She has accrued two weeks' annual leave.

The employer tells the employee that she must take this two weeks’ leave commencing the next week.

This requirement may be considered unreasonable given the limited notice given by the employer and the small amount of leave that the employee has accrued.

Should the employee challenge the request, it may be determined that the requirement is unreasonable and so the employer will be unable to lawfully require the employee to take this leave.

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**New section 144 – Entitlement to public holidays falling during an annual leave period**

690. New section 144 will provide that an employee will not be taken to be on paid annual leave on a public holiday that falls during a period of paid annual leave. That is, the employee will be entitled to be paid for that day as a public holiday, rather than as an annual leave day.

691. This will only apply if the employee would ordinarily work on that day and so would have been entitled to the public holiday had they not been on annual leave.

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**Illustrative examples**

**Scenario 1**
A full time employee who works Monday to Friday takes one week’s annual leave in the first week of June. She will be entitled to be paid for the Western Australia Day public holiday as it falls during the first week in June and this is a day she would ordinarily work. She will then only need to take four days’ annual leave to cover the remainder of her week’s absence.

**Scenario 2**
A part time employee who works on Tuesdays and Thursdays takes annual leave in the first week of June. He will not be entitled to be paid for the Western Australia Day
public holiday as this is not a day (being a Monday) that he is ordinarily required to work. He will therefore need to take 2 days’ annual leave to cover his absence for the week.

**New section 145 – An employee’s entitlement to compassionate leave**

692. The entitlement to compassionate leave in new Division 7 will apply to all employees, including casual employees. However, casual employees will only be entitled to unpaid compassionate leave. All other employees will be entitled to paid compassionate leave (but will not have an entitlement to unpaid compassionate leave once they have exhausted paid compassionate leave in any given case).

693. This entitlement, although based on the entitlement to compassionate leave contained in Part 2-2 – Division 7 of the FW Act, contains provisions that differ from the federal provisions.

694. New section 145 will entitle an employee to compassionate leave to allow them to spend time with a member of their family or household who has contracted or developed an illness, or who has sustained an injury, that poses a serious and imminent threat to their life.

695. An employee, if eligible under new Part XI Division 5, may be able to use paid personal/carer’s leave to provide care or support to such a person. Consequently, an employee will not be entitled to paid compassionate leave if they have at least two days’ paid personal/carer’s leave that they could use at the time they propose to take compassionate leave. If the employee has less than two days’ paid personal/carer’s leave they will be entitled to take paid compassionate leave.

696. Paid personal/carer’s leave will be defined to mean paid personal/carer’s leave authorised by the employer or by an industrial instrument, a contract of employment or new section 136(2) of the IR Act.

**Illustrative examples**

An employee’s father is seriously ill and the treating doctor has advised that he may soon die. The employee wants to take one week off to spend time with his father.

**Scenario 1**
The employee has sufficient personal/carer’s leave to take one week’s leave to provide support to his father. His employer agrees to the request and the employee takes the week off on personal/carer’s leave.

**Scenario 2**
The employer refuses to grant one week’s personal/carer’s leave to the employee on the grounds that the employee has not provided evidence to satisfy a reasonable person that he will be providing care or support to his father because of his father’s illness (as will be required under new section 140).

As the employee does not have an entitlement to personal/carer’s leave, subject to providing evidence that he will be spending time with his father whose illness poses a serious and imminent to his life (as will be required under new section 147), he is entitled to two days’ compassionate leave.
Scenario 3
The employee has only one day of accrued personal/carer’s leave. He is therefore entitled to two days’ paid compassionate leave.

The remainder of the week’s absence will need to be taken via another form of authorised leave. This may include his single day of accrued personal/carer’s leave.

Scenario 4
The employee has three days’ accrued personal/carer’s leave which he is able to take to provide support to his father.

The employee, having taken this personal/carer’s leave, may then take two days’ paid compassionate leave.

New section 146 – Taking compassionate leave

697. The intention underlying compassionate leave is to enable an employee to spend time with a family or household member whose life is at serious and imminent risk. It may be that there is some time between when an illness is contracted or injury sustained and when that illness or injury poses a serious and imminent threat to the person’s life. This will not of itself prevent an employee from being entitled to compassionate leave.

698. The entitlement will be for up to two days leave in relation to the same illness or injury and an employee will not be required to take the days consecutively. Should the household or family member die an employee will not be entitled to compassionate leave. This will not, however, affect their entitlement to bereavement leave.  

Illustrative examples
An employee’s mother-in-law sustained significant injuries in a car accident. Six weeks later the treating doctor advises her family that she may soon die from her injuries.

Scenario 1
The employee has no accrued personal/carer’s leave. He is therefore entitled to two days’ paid compassionate leave notwithstanding that six weeks have passed since his mother-in-law’s injuries were sustained.

Scenario 2
The employee takes one day’s paid compassionate leave.

Although his mother-in-law’s condition stabilises, it deteriorates after four weeks to the point that there is again an imminent risk of death.

The employee is entitled to another day’s paid compassionate leave, notwithstanding that ten weeks have passed since the injuries were sustained and four weeks have passed since the employee took a day’s compassionate leave to spend time with his mother-in-law.

The employee is, however, only entitled to a total of two days’ compassionate leave as the leave relates to the same injury.

151 Refer to new section 148.
New section 147 – Compassionate leave notice and evidence requirements

699. As with personal/carer’s leave, an employee will be required to give notice of their taking compassionate leave (be this paid or unpaid), including giving notice of the period or expected period of leave.

700. An employee will be required to give this notice as soon as practicable, which may be a time after the leave has started. What is meant by “as soon as practicable” will depend on the circumstances of each case.

701. New section 147 will include a requirement for an employee, where required by the employer, to provide evidence that would satisfy a reasonable person of their entitlement to the leave.

702. An employee who fails to provide notice or evidence will not be entitled to take compassionate leave. The employer will, however, have the discretion to provide the leave despite the employee’s non-compliance.

703. New section 147(4) will allow an industrial instrument to include provisions relating to the kinds of evidence an employee must provide. Where an industrial instrument provides for the kinds of evidence an employee must give – for example, a medical certificate and/or a statutory declaration – these provisions will be able to apply instead of new section 147(2).

New section 148 – An employee’s entitlement to and the taking of paid bereavement leave

704. As is currently provided in section 27 of the MCE Act, new section 148 will provide all employees, including casual employees, with paid bereavement leave on the death of a member of an employee’s family or household.

705. The entitlement will remain as up to 2 days’ leave, which need not be taken consecutively.

New section 149 – Bereavement leave notice and evidence requirements

706. As with personal/carer’s leave and compassionate leave, an employee will be required to give notice of their taking bereavement leave, including notice of the period or expected period of leave.

707. An employee will be required to give this notice as soon as practicable, which may be a time after the leave has started. What is meant by “as soon as practicable” will depend on the circumstances of each case.

708. New section 149 will include a requirement for an employee, if required by the employer, to provide evidence that would satisfy a reasonable person as to the death that is the subject of the leave sought and the relationship of the employee to the deceased person. This will be the same requirement as that currently contained in section 28 of the MCE Act.

709. An employee who fails to provide notice or evidence will not be entitled to take bereavement leave. The employer will, however, have the discretion to provide the leave despite the employee’s non-compliance.
710. New section 149(4) will allow an industrial instrument to include provisions relating to the kinds of evidence an employee must provide. Where an industrial instrument provides for the kinds of evidence an employee must give – for example, a statutory declaration – these provisions will be able to apply instead of new section 149(2).

**New section 150 – An employee’s entitlement to be paid for public holidays**

711. New section 150 will provide the same entitlement for an employee (other than a casual employee) to be paid for a public holiday as the entitlement currently contained in section 30 of the MCE Act.

712. An employee will only be entitled to be paid for a public holiday if they are not required to work solely because that day is a public holiday. If an employee is not required to work because that is a day which they would not ordinarily work, they will not be entitled to be paid for that day.

**New section 151 – Employers not required under the SES to pay penalty rates for work on public holidays**

713. As is currently provided for in section 31 of the MCE Act, new section 151 will clarify that new section 150 will not require an employer to pay a penalty rate to an employee in respect of any work they perform on a public holiday.

714. Nothing in new Part XI Division 9 will affect, however, any obligation an employer has under an industrial instrument or contract of employment to pay penalty rates in respect of work performed by the employee on a public holiday.

**New section 152 – Terms used in Division 10 – Parental leave**

715. New section 152 will define the terms that will be used in new Part XI Division 10 – Parental leave.

716. The term “modified basis” will be defined in the same way and with the same qualifications as it is currently defined and qualified in section 38(8) of the MCE Act. Working on a modified basis may therefore include working part time, or working shorter days and/or different times. It may also include working a different part time arrangement to the arrangement the employee worked immediately prior to taking parental leave.

717. New section 152 will define “pre-parental leave working arrangements” to mean an employee working on the same basis as they worked immediately before starting parental leave. That is, the days, times and/or hours they worked prior to parental leave.

**New section 153 – Scope of Division 10 – Parental leave**

718. Part 2-2 – Division 5 of the FW Act provides for parental leave and related entitlements. In accordance with Chapter 6 – Part 6-3 – Division 2 of the FW Act, employees covered by the IR Act (“State system employees”) are entitled to the parental leave provisions contained in the FW Act along with related provisions in section 744(2) of the FW Act, with some modifications.

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152 As will be defined in new section 116(1).
A note signposting the application of the FW Act unpaid parental leave provisions to State system employees will therefore be included in new section 153.

719. The key FW Act parental provisions are outlined below.

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720. Section 747 of the FW Act provides that the FW Act does not apply to the exclusion of a State law providing a more beneficial entitlement to State system employees. New section 153 will therefore provide that new Division 10 will provide entitlements to State system employees, in relation to the birth or adoption of children, that are more beneficial than the extended parental leave provisions as defined in section 744(3) of the FW Act. This will include a signpost to section 747 of the FW Act.

721. New Division 10 will replicate a number of the more beneficial provisions currently contained in Division 6 of the MCE Act. These provisions will only apply to State system employees. They will not apply to employees who are covered by the FW Act (“national system employees”).
New section 154 – An employee’s right to request a return to work on a modified basis

722. New section 154 will provide an employee finishing parental leave with the right to request a return to work on a modified basis to a position to which they are entitled to under section 84 of the FW Act.

723. Section 84 of the FW Act provides that, on ending parental leave, an employee is entitled to return to:

(a) the employee’s pre-parental leave position; or

(b) if that position no longer exists, an available position for which the employee is qualified and suited nearest in status and pay to the pre-parental leave position.

724. Under the FW Act an employee’s “pre-parental leave position” is the position the employee held before starting unpaid parental leave or, if the employee was transferred to a safe job or reduced her hours because of her pregnancy, the position she held immediately before the transfer or reduction.

725. Section 154 will be in substantively similar terms to section 38(4) of the MCE Act.

New section 155 – An employee’s right to request, and an employer’s right to require the employee’s resumption of pre-parental leave working arrangements

726. New section 155 will provide an employee who has been permitted by their employer to work on a modified basis under new section 154 with the right to subsequently request a resumption of their pre-parental leave working arrangements. This section will be in substantively similar terms to section 38(5) of the MCE Act.

727. Section 155 will also provide an employer with the capacity to require an employee who has been permitted to work on a modified basis to subsequently resume pre-parental leave working arrangements. This section will be in substantively similar terms to section 38(6) and (7) of the MCE Act.

New section 156 – Requirements relating to the making of a request or requirement under Division 10 – Parental leave

728. New section 156 will require an employee to give at least 6 weeks’ written notice to request to work on a modified basis or resume pre-parental leave working arrangements. Similarly, new section 156 will require an employer to give at least 6 weeks’ written notice to require an employee to resume pre-parental leave working arrangements.

729. An employer requiring an employee to resume pre-parental leave working arrangements must set out their reasons for the requirement in the written notice.
New section 157 – Requirements relating to a determination of a request or requirement under Division 10 – Parental leave

730. New section 157(1) will replicate the terms of section 38B of the MCE Act by requiring an employer to agree to an employee’s request to return to work on a modified basis unless:

(a) the employer is not satisfied that the request is genuinely based on the employee’s parental responsibilities; or

(b) agreeing to the request would have an adverse effect on the conduct of the employer’s business and such grounds are reasonable.

731. New section 157(2) will similarly replicate the terms of section 38B(2) of the MCE Act by requiring an employer to agree to an employee’s request to resume pre-parental leave working arrangements unless agreeing to the request would have an adverse effect on the conduct of the employer’s business and such grounds are reasonable.

732. As is currently required by section 38B(3) of the MCE Act, an employer will be required to give the employee a written notice of their decision on the employee’s request and, if an employee’s request is refused, the notice must set out the reasons for the refusal.

733. In addition to section 157(1) and (2), new section 157(4) will set out a number of grounds on which an employer’s decision may be based. This is not an exhaustive list. This will replicate the provisions of section 38B(4) of the MCE Act.

734. An employee will be able to seek to enforce the provisions of section 157 that require an employer to agree to their request. In such proceedings under section 83 of the IR Act, the onus will be on the employer to demonstrate that their refusal of the employee’s request was justified in accordance with section 157. This will substantively reflect the current provisions of section 38B(5) of the MCE Act.

New section 158 – Definitions used in Division 11 – Termination and Redundancy

735. New Part XI Division 11 will prescribe requirements and entitlements relating to termination and redundancy. A number of provisions currently contained within the TCR General Order (1 June 2005)\textsuperscript{153} will be incorporated in new Division 11.

Repeal of the TCR General Order

736. Clause 21 of new Schedule 6 of the IR Act will repeal the TCR General Order and prescribe savings provisions. An employee who was made redundant before the commencement of section 257 of the Amendment Act will be able, after commencement, to enforce any entitlement in relation to the redundancy that the employee had under the TCR General Order as if the Order had not been repealed.

\textsuperscript{153} Published in the \textit{Western Australian Industrial Gazette} on 22 June 2005 at page 1667 and the Schedule attached to that order published in the same Gazette on page 1682.
737. On and from the commencement of section 257 of the Amendment Act, any reference in an industrial instrument to a provision of the TCR General Order about redundancy will be required to be read as a reference to the provision of new Part XI Division 11 that most closely corresponds to the provision of the TCR General Order (unless the contrary intention appears or the context otherwise requires).

738. New section 158 will include a definition of “base rate of pay”. This term will be used when determining the quantum of an employee’s redundancy pay. The definition of base rate of pay will reflect the definition of “weeks’ pay” currently contained in clause 4.1 of the TCR General Order.

739. The definition of “redundant” will reflect the definition currently contained in section 40(1) of the MCE Act and clause 4.1 of the TCR General Order.

740. Part 2-2 – Division 11 of the FW Act requires the provision of notice of termination or payment in lieu of notice to national system employees. Part 6-3 – Division 3 of the FW Act provides that the provisions of Part 2-2 – Division 11 – Subdivision A and the related provisions identified in section 759(2) of the FW Act, with some modifications, apply to State system employees. A note signposting the application of the FW Act notice of termination provisions to State system employees will therefore be included in new section 158.

741. Part 6-4 – Division 2 of the FW Act makes it unlawful for an employer to terminate an employee’s employment on certain grounds. Section 772 of the FW Act sets out these grounds. They relate to:

(a) a person’s race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin;

(b) temporary absence from work because of illness or injury;

(c) trade union membership or participation in trade union activities;

(d) non-membership of a trade union;

(e) seeking office or acting as an employee representative;

(f) being absent from work during maternity or other parental leave;

(g) temporary absence from work to engage in a voluntary emergency management activity; and

(h) filing a complaint or participating in proceedings against an employer.

742. As section 770 of the FW Act gives the terms “employers” and “employees” their ordinary meaning in Part 6-4, these unlawful termination provisions apply to State system employers and employees. A note signposting this will therefore be included in new section 158 of the IR Act.

743. Part 6-4 – Division 3 of the FW Act sets out notification and consultation requirements relating to the termination of 15 or more employees for economic, technological, structural or similar reasons. These requirements, which must be met before terminating an employee, relate to:
(a) notifying Centrelink;
(b) notifying an employee’s union; and
(c) consulting with an employee’s union

744. As section 770 of the FW Act gives the terms “employers” and “employees” their ordinary meaning in Part 6-4, these redundancy notification and consultation provisions apply to State system employers and employees. A note signposting this will therefore be included in new section 158 of the IR Act.

New section 159 – Industrial instrument provisions about termination of employment at initiative of employee

745. Despite new section 118(1) and new section 118(2), new section 159 will provide that new section 124(1) will not entitle a non-complying employee to be paid for a period equivalent to the number of days’ notice they were required to give under an industrial instrument less the days’ notice actually given (termed the “no-notice period”).

746. A non-complying employee will be defined as an employee who does not comply with their notice of termination obligations under an industrial instrument. New section 159 will therefore not apply to an employee who is not required to provide notice of termination under an applicable industrial instrument, or who is not covered by an industrial instrument.

747. The intention behind new section 159 is to enable an employer to lawfully withhold pay from an employee where the employee fails to provide the required notice of termination under an industrial instrument that applies to the employee.

Illustrative examples

Scenario 1
An employee is required under an award to provide one week’s notice of termination to his employer.

The award also provides that an employer may withhold from any monies due to the employee on termination, an amount not exceeding the amount the employee would have been paid in respect of the period of notice less any period of notice actually given by the employee.

The employee gives his employer two days’ notice. The employer is therefore entitled under the award to withhold three days’ pay from the employee. Withholding this money will not be unlawful under the IR Act i.e. it will not contravene section 124(1) of the IR Act.

154 Which will provide that the SES extend to and bind all employers and employees.
155 Which will provide that a provision in an industrial instrument or contract of employment that is less favourable to an employee than a SES has no effect.
156 Which will entitle an employee to be paid a minimum rate of pay for each hour worked by the employee in a week.
157 Note also new section 133(3) of the IR Act, which will allow an employer to withhold monies from an employee’s unpaid wages or accrued annual leave entitlements due to the employee’s failure to provide the required notice of termination under an industrial instrument.
Scenario 2
A full time employee is not covered by an industrial instrument. She terminates her employment without notice.
Her employer cannot lawfully withhold monies owing to the employee under the IR Act for failing to provide notice.

New section 160 – Subdivision 3 – Redundancy will not apply to casuals or apprentices

748. New section 160 will provide that the provisions of new Subdivision 3 – Redundancy will not apply to casuals or apprentices. This will replicate section 40(1) of the MCE Act.

New section 161 – An employee is entitled to be informed of a proposed redundancy

749. New section 161 will require an employer to inform an employee of a proposed redundancy and to discuss how the employee is likely to be affected. This must occur as soon as reasonably practicably after the employer has decided to make an employee redundant.

750. An employer will not be required to disclose information that may seriously harm the employer’s business.

751. New section 161 will substantively reflect the provisions currently contained in sections 41 and 42 of the MCE Act.

752. The Public Sector Management (Redeployment and Redundancy) Regulations 1994 (PSM redundancy regulations) provide redundancy notification and consultation requirements including:

(a) a requirement for the notification to be written;
(b) the reasons why the job is to be abolished; and
(c) measures that could be taken to avoid the employee being made redundant.

753. Clause 195 of the Bill will amend section 95(1) of the PSM Act to ensure that where there is an inconsistency between the PSM Act and/or the PSM redundancy regulations, and new Part XI Division 11 of the IR Act, the PSM Act and/or the PSM redundancy regulations will prevail.

754. As previously noted, there are also notification and consultation requirements in Part 6-4 – Division 3 of the FW Act which apply to State system employers in relation to the termination of 15 or more employees for economic, technological, structural or similar reasons.

158 As per regulation 4, the PSM redundancy regulations apply to and in relation to all employees in departments or organisations and to all employing authorities of departments or organisations.
New section 162 – Entitlement to paid leave for job interviews for redundant employees

755. New section 162 will provide an employee (other than an employee employed for the duration of a specified season) who has been informed that they have been or will be made redundant with paid leave of up to 8 hours, for the purpose of being interviewed for further employment.

756. This will be the same provision as that currently contained in section 43 of the MCE Act.

New section 163 – Industrial instruments and contracts of employment may include provisions about redundancy

757. In the TCR General Order:

(a) clause 4.2 includes provisions regarding consultation before terminations due to redundancy;

(b) clause 4.3 provides for the transfer of a redundant employee to lower paid duties; and

(c) clause 4.5 allows an employee to leave during their notice period and retain their redundancy pay benefits.

758. New section 163 will specify that an industrial instrument or contract of employment may include provisions about redundancy. This will include provisions akin to those currently contained in clauses 4.2, 4.3 and 4.5 of the TCR General Order.

New section 164 – Subdivision 4 – Redundancy pay will not apply to certain employees

759. New section 164 will provide that the provisions of new Subdivision 4 – Redundancy pay will not apply to a number of employee types, including casuals, apprentices and fixed term employees. These exclusions will replicate the exclusions currently contained in clauses 1.2 and 4.9 of the TCR General Order.

760. New section 164(2) will ensure that an employee will be entitled to redundancy pay if their employer’s substantial reason for employing them for a specified period of time, for a specified task or for the duration of a specified season was to avoid redundancy pay. This is based on section 123(2) of the FW Act.

New section 165 – An employee’s entitlement to redundancy pay

761. New section 165 will provide an employee who is made redundant with redundancy pay. The amount of an employee’s redundancy pay will be set according to the length of the employee’s continuous service. An employee who has less than one year’s continuous service will not be entitled to redundancy pay as per new section 164(1)(d) of the IR Act.

159 “Continuous service” will be defined in new section 116(1).
762. The length of an employee’s continuous service will be calculated up to the end of the day on which the employee’s employment terminates. In contrast, the amount of an employee’s redundancy pay will be calculated according to the employee’s base rate of pay as at the day immediately before the day the employee was informed of the proposed redundancy (termed “redundancy day”).

763. Where an employee is paid by results, their rate of pay for the purpose of redundancy pay will be the average weekly rate earned by the employee in the 52 weeks ending the day before the employee was informed of the redundancy.

764. An employee’s base rate of pay will be defined in new section 158 to be the rate that applies to the employee for the employee’s ordinary hours of work. Where an employee’s hours of work cannot be determined or have varied, the employee’s total number of hours worked in the 52 weeks ending the day before the employee was informed of the redundancy will be averaged.

Illustrative example
Quantum of weeks
An employee commenced employment on 1 November 2009. At the end of August 2012 she is advised by her employer that she will be made redundant on 31 December 2012.

On 31 December 2012 the employee’s period of continuous service is three years and two months. The employee is therefore entitled to seven weeks’ redundancy pay (this will be the entitlement under new section 165 for an employee with three years’ service).

Base rate of pay
In August 2012 the employee’s weekly base rate of pay was $1,200. However, from 1 September 2012 the employee’s hours are reduced and so her base rate of pay drops to $1,000.

For the purpose of redundancy pay, the employee’s base rate of pay is $1,200, this being her weekly base rate of pay the day before she was informed of the proposed redundancy. It is not $1,000, this being the employee’s weekly base rate of pay on termination.

Redundancy pay for employees with 7+ years’ service
765. Prior to 2006 the LSL Act provided employees with pro rata long service leave on termination after 10 years’ service.

766. The amount of redundancy pay under the TCR General Order for an employee with less than 10 years’ service therefore included (and still includes) a sliding scale of compensation for lost pro rata long service leave. For employees with between seven and 10 years’ service, this compensation ranges from an extra two to six weeks’ pay, giving a total of 13 to 16 weeks’ redundancy pay depending on the length of service.

767. Employees with 10 or more years’ service receive a lesser amount – 12 weeks’ redundancy pay – as they were entitled to pro rata long service leave under the LSL Act after 10 years’ service.
In 2006 the LSL Act was amended to provide employees with pro rata long service leave on termination after seven years’ service. The TCR General Order was not, however, amended to reflect the fact that employees with between seven and 10 years’ service had become entitled to pro rata long service leave and so no longer required compensation for lost pro rata long service leave via redundancy pay. Consequently, eligible employees with seven to 10 years’ service receive both pro rata long service leave (as per the LSL Act) and a higher amount of redundancy pay (as per the TCR General Order).

To remedy this, new section 165(3) will provide employees with seven or more years’ service 12 weeks’ redundancy pay.

PSM Act and PSM Act redundancy regulations

As noted previously, the PSM Act will be amended to ensure that where there is an inconsistency between the PSM Act and/or PSM Act redundancy regulations, and new Part XI Division 11 of the IR Act, the PSM Act and/or the regulations will prevail. As the PSM Act redundancy regulations include severance pay, the severance pay provisions in the PSM Act redundancy regulations will prevail over any inconsistent redundancy pay provisions in new section 165 of the IR Act.

New section 166 – When an employer may pay a reduced amount of redundancy pay

New section 166 will allow an employer to apply to the Commission to seek a reduction in the amount of redundancy pay they are required to pay to an employee. The Commission will only be able to determine a reduction where the employer obtains other acceptable employment for an employee, or where the employer cannot pay the required amount of redundancy pay. This section will substantively reflect the provisions currently contained in clauses 4.6 and 4.11 of the TCR General Order.

New section 167 – When an employer does not have to pay redundancy pay

New section 167 will provide that an employee is not entitled to redundancy pay if their employer employs fewer than 15 employees. This will be determined as at the day before an employee is terminated or at the time an employee is given their required period of notice of termination, whichever occurs first. This will reflect the provisions currently contained in clause 4.10 of the TCR General Order.

A provision in an industrial instrument that purports to provide an employee of an employer with fewer than 15 employees with redundancy pay will be of no effect.

The PSM Act and the PSM redundancy regulations apply to employees employed by or under an employing authority in the public sector.
776. Employees who will be counted for the purpose of determining whether an employer employs fewer than 15 employees at a particular time will be:

(a) subject to paragraph (b), all employees employed by the employer;

(b) casual employees if they have been employed by the employer on a regular and systematic basis;

(c) the employee being terminated; and

(d) any other employee who is being terminated.

777. An industrial instrument will be able to include other situations where an employee is not entitled to redundancy pay under new section 165.

New section 168 – An employee is not entitled to redundancy pay if they accept or refuse employment in certain circumstances as to transmission of business

778. New section 168 will provide that an employee is not entitled to redundancy pay in certain transmission of business situations where the employee’s period of continuous service with their first employer is recognised, or would have been recognised but for a rejection of an offer of employment, by the second employer for the purpose of new Subdivision 4 – Redundancy pay. These situations will be where:

(a) an employee accepts employment with the second employer;

(b) an employee rejects an offer of employment made by the second employer that is on terms and conditions substantially similar to and overall no less favourable than the employee’s terms and conditions with the first employer.

New section 169 – Definition of employment change

779. New section 169 will define the term “employment change”. This will substantively reflect section 40(2) of the MCE Act, which currently specifies when an action of an employer is considered to have a significant effect on an employee.

New section 170 – Division 12 – Employment change will not apply to casuals or apprentices

780. New section 170 will provide that the provisions of new Division 12 – Employment change will not apply to casual employees or apprentices. This will replicate section 40(1) of the MCE Act.

New section 171 – An employee is entitled to be informed of a proposed employment change

781. New section 171 will require an employer to inform an employee of a proposed employment change, and to discuss how the employee is likely to be affected and measures that may be taken to avoid or minimise adverse effects on the employee. This will be required to occur as soon as reasonably practicably after the decision to make an employment change has been made.
782. An employer will not be required to disclose information that may seriously harm the employer’s business.

783. New section 171 will substantively reflect the provisions currently contained in sections 41 and 42 of the MCE Act.

784. Clauses 3.1 and 3.2 of the TCR General Order include provisions relating to the notification of and consultation with employees and their representatives regarding the introduction of change. New section 171 will provide that an industrial instrument may specify notification and consultation requirements. This may include matters akin to those contained in the TCR General Order.

**New section 172 – Definitions used in new Division 13 – Transmission of business agreements**

785. New section 172 will define terms that will be used in new Division 13:

(a) the definition of “business” – being any trade, process, profession, occupation or part thereof – will replicate the definition currently contained in clause 4.1 of the TCR General Order;

(b) “first employer” will mean the employer which is selling or otherwise transmitting their business;

(c) “leave entitlement” will mean personal/carer’s leave or annual leave, these being entitlements to leave under new Divisions 5 and 6 respectively. These will be the only SES leave entitlements that may be transferred to a second employer, as they are the only leave entitlements that will accrue. Other SES leave entitlements, such as compassionate leave and bereavement leave, will not accrue;

(d) “second employer” will mean the employer which is purchasing or otherwise acquiring the first employer’s business; and

(e) the definition of “transmit” will be substantively the same as that which applies to the term “transmission” in clause 4.1 of the TCR General Order.

**New section 173 – A transmission of business agreement may recognise an employee’s service and/or take responsibility for accrued SES leave entitlements**

786. New section 173 will create a form of enforceable written agreement – a “transmission of business agreement” – that may be made between two employers, one of which is selling or otherwise transmitting their business to the other. These provisions will therefore only apply where:

(a) a business is being transmitted from a first employer to a second employer; and

(b) the second employer employs or offers to employ an employee of the first employer.
787. These provisions will be facilitative only. The second employer will not be obliged to enter into a transmission of business agreement with the first employer.

788. The intent underpinning section 173 is to:

(a) allow an employee’s service to be recognised by the second employer and therefore be unbroken for the purposes of redundancy pay; and/or

(b) allow an employee’s accrued personal/carer’s leave and/or annual leave to be transferred to the second employer and so be retained by the employee.

789. If, in a transmission of business agreement, the employers agree that the second employer will take responsibility for an employee’s accrued leave, they will be required, as is relevant, to specify that the second employer will take responsibility for all the employee’s leave entitlements (that is, both accrued annual leave and accrued personal/carer’s leave entitlements), or alternatively specify that the second employer will take responsibility for the employee’s:

(a) accrued annual leave entitlements; or

(b) accrued personal/carer’s leave entitlements.

790. Alternatively, or in addition, the employers will be able to agree that the second employer will recognise the employee’s period of service with the first employer for the purpose of calculating the employee’s entitlement to redundancy pay under new Part XI.161

Illustrative example

Two employers make a transmission of business agreement which provides that the second employer agrees to recognise an employee’s two years of service with the first employer.

The employee is employed by the second employer for three years, after which time he is made redundant. For the purpose of calculating the employee’s amount of redundancy pay, the second employer must include the employee’s two years of service with the first employer. The employee therefore has five years of service and would be entitled to 10 weeks’ redundancy pay as per new section 165.

791. Where an employer agrees to take responsibility for accrued annual leave and/or personal/carer’s leave entitlements, the employer will be taken to be recognising the employee’s period of service with the first employer for that purpose.

792. A transmission of business agreement will need to be signed by both employers.

161 This being the only non-leave SES entitlement that is determined according to the length of an employee’s continuous service.
793. The second employer will be required to provide a copy of a transmission of business agreement to the employee to whom the agreement applies when the employee’s employment with the second employer starts. This will ensure that the employee understands which leave entitlements have been transferred and/or whether their service has been recognised. Failure to provide a transmission of business agreement to the affected employee will be subject to civil penalties under section 83E of the IR Act.

**New section 174 – Effects of a transmission of business agreement**

794. Regardless of any provision to the contrary in a transmission of business agreement, the first employer will remain obliged to provide an employee with notice or pay in lieu of notice of termination in accordance with section 117 of the FW Act.

795. Where a transmission of business agreement transfers responsibility for an employee’s accrued annual leave entitlements to the second employer, the first employer will not be required to pay out the employee’s accrued annual leave as would otherwise be required under new section 142(2) of the IR Act.

796. Where a relevant transmission of business agreement applies, an employee who has had the benefit of an entitlement with the first employer will not have the period of service which relates to that entitlement counted again when calculating the employee's entitlement with the second employer. This will mean, for example, accrued annual leave which the employee may take as an employee of the second employer will not include any period of paid annual leave that the employee already took as an employee of the first employer.

797. Where, under a transmission of business agreement, the second employer agrees to recognise an employee’s service with the first employer, any period between the employee ending their employment with the first employer and commencing employment with the second employer will not break the employee's continuous service with the second employer. This period will not, however, count towards the length of the employee’s period of continuous service with the second employer.

**PSM Act redundancy regulations**

798. The PSM redundancy regulations\(^\text{162}\) include provisions regarding the employment of certain redundant employees with a new employer (“employing authority”) and the requirement for the new employing authority to take responsibility for accrued annual, sick and long service leave.

799. New section 174(5) will provide that any provision in a transmission of business agreement that is inconsistent with the PSM Act or PSM redundancy regulations will be of no effect.

\(^{162}\) As noted previously, these regulations apply to and in relation to all employees in departments or organisations and to all employing authorities of departments or organisations.
**LSL Act**

800. Section 6 of the LSL Act defines what is meant by “continuous service” in the LSL Act. It deems service to be continuous notwithstanding a transmission of business, and it deems service with the first employer to be employment with the second employer. Nothing in new Part XI Division 13 will be intended to affect the operation of section 6 of the LSL Act.

**Enforcement of a transmission of business agreement**

801. Enforcement action under new section 83(3A)\(^{163}\) against the second employer must have regard to the provisions of any transmission of business agreement. A note signposting this will be included in section 174.

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**Illustrative example**

An employer signed a transmission of business agreement whereby he agreed to recognise an employee’s three years of service with her first employer.

When this (second) employer subsequently makes the employee redundant two years later, he fails to take in account her three years of service with the first employer when calculating the employee’s entitlement to redundancy pay. He therefore only pays her six weeks’ redundancy pay. This will be the entitlement under new section 165 of the IR Act for an employee with two years’ service.

In taking enforcement action against the employer for non-compliance with section 165, the employee will be able to rely upon the transmission of business agreement to establish that the second employer is obliged to recognise her three years of service with the first employer and so pay her an additional four weeks’ redundancy pay. An employee with five years’ service will be entitled to 10 weeks’ pay under new section 165.

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**New section 175 – Transfer of employee records in relation to an employee covered by a transmission of business agreement**

802. New section 175 will introduce requirements regarding the transfer of employee records where, under a transmission of business agreement, an employee’s service and/or their accrued leave entitlements are being recognised by a second employer.

803. An employer is currently required under section 49D of the IR Act to keep certain employment records for not less than seven years after they are made. This will remain the case. Consequently, an employer who is transmitting their business to another employer must keep an employee’s employment records, notwithstanding that the employee is now employed by the second employer. Keeping these records will ensure that any question concerning the first employer’s compliance with their obligations under the SES and/or an industrial instrument can be determined.

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\(^{163}\) Refer to clause 185 of the Bill.
804. However, the second employer who is recognising an employee’s service with, and/or leave accruals from, a first employer will require copies of the employee’s records in order to accurately ascertain the employee’s length of service and/or their leave accruals. To facilitate this the first employer will be required to provide a copy of each relevant record listed in section 49D of the IR Act relating to that employee together with a statutory declaration declaring that each record is a true copy.

805. On receipt of the copies of the employment records the second employer will be required to keep each record for not less than seven years after it was made by the first employer.

806. Clause 179 of the Bill will amend the definition of employment record to include a copy of an employment record. These records will be considered employment records for all purposes under the IR Act.

807. Failure to either transfer employment records or to keep them for the required period of time will be subject to civil penalties under section 83E of the IR Act.

Clause 177 of the Bill – MCE Act and MCE Regulations repealed

808. Clause 177 of the Bill will repeal the MCE Act and MCE Regulations. This will be consequential to the incorporation of minimum conditions of employment (the SES) into the IR Act.

Clause 178 of the Bill – IR Act amended

809. Clause 178 of the Bill will provide that Division 3 of Part 12 of the Bill will amend the IR Act.

Clause 179 of the Bill – Definitions in section 7 amended

810. Clause 179 of the Bill will make a number of amendments to the definitions in section 7 of the IR Act.

811. The definition of MCE Act will be deleted, as the MCE Act will be repealed by clause 177 of the Bill.

812. The following terms are existing terms in the IR Act that will be relocated to section 7 and redefined.

Supported wage provisions

(a) The definition of “supported wage provisions” currently contained in section 97U(1) of the IR Act will be deleted by clause 186 of the Bill. The new definition in section 7 will mean the provisions in an industrial instrument that enable the assessment of whether a person’s productive capacity is reduced because of a disability, and if so, the extent to which it is affected.

(b) The definition will be included in section 7 of the IR Act as it will apply to new Part XI – SES, Part VID – EEAs and Schedule 4 – Registration requirements for EEAs.
SWS

(a) The definition of SWS currently contained in section 97U(1) of the IR Act will be deleted by clause 186 of the Bill. The new definition in section 7 will mean the scheme established by the Commonwealth Government to enable the assessment of whether a person’s productive capacity is reduced because of a disability, and if so, the extent to which it is affected.

(b) The definition will be included in section 7 of the IR Act as it will apply to new Part XI – SES and Part VID – EEAs.

813. The following are new terms that will be included in section 7 of the IR Act.

(a) “employee with a disability” will mean an employee whose productive capacity has been assessed as being reduced under either supported wage provisions or the SWS. This definition will apply throughout the IR Act including in relation to Part II Division 3 – General orders and new Part XI – SES; and

(b) “State employment standard” will mean any of the SES within the meaning of new section 117.

Clause 180 of the Bill – IR Act binds the Crown

814. Clause 180 of the Bill will insert new section 8A into the IR Act to provide that the IR Act binds the Crown. This will replicate section 4 of the MCE Act for clarification purposes.

Clause 181 of the Bill – Consequential amendment to section 51B

815. Clause 181 of the Bill will amend section 51B of the IR Act to replace references to the MCE Act with references to the SES.

Clause 182 of the Bill – Consequential amendment to the heading of Part II Division 3A

816. Clause 182 of the Bill will amend the heading of Part II Division 3A of the IR Act to refer to SES functions rather than MCE Act functions.

Clause 183 of the Bill – Consequential amendment to section 51C

817. Clause 183 of the Bill will delete section 51C(2) of the IR Act, which refers to definitions in the MCE Act. This amendment is consequential to the MCE Act being repealed.

Clause 184 of the Bill – Consequential amendment to section 51I

818. Clause 184 of the Bill will replace the reference to the MCE Act in section 51I(1) of the IR Act with a reference to new section 125.

Clause 185 of the Bill – Consequential amendment to section 83

819. Clause 185 of the Bill will insert new section 83(3A) into the IR Act.
Clause 186 of the Bill – Consequential amendment to section 97U

Clause 186 of the Bill will delete the definition of supported wage provisions and SWS in section 97U(1) of the IR Act, as these definitions will be included in section 7(1).

Clause 187 of the Bill – Consequential amendment to section 97UE

Clause 187 of the Bill will replace the reference to the MCE Act in section 97UE(3) of the IR Act with a reference to new section 118 – SES.

Clause 188 of the Bill – Consequential amendment to sections 97VD and 97VN

Clause 188 of the Bill will replace the references to the MCE Act in sections 97VD(1)(c) and 97VN(1)(c) of the IR Act with references to the SES.

Clause 189 of the Bill – Consequential amendment to section 97VV(b)

Clause 189 of the Bill will replace the current reference in section 97VV(b) of the IR Act to the rate of pay set in accordance with the SWS with a reference to new section 124(4) or (5) (being the minimum rate of pay provisions for employees with a disability).

Clause 190 of the Bill – Consequential amendment to section 98

Clause 190 of the Bill will amend the term “instrument to which this section applies” in section 98(6) of the IR Act to remove the reference to a contract of employment.

As noted previously, the SES will no longer be implied into contracts of employment. Rather, the SES will be enforceable in accordance with section 83(2)(a) of the IR Act as a provision that is set out in new section 117.164

Industrial inspectors will be able to perform their duties and use their powers under section 98 in relation to the SES. For example, clause 226 of the Bill will amend section 98(2) of the IR Act to provide that an industrial inspector may carry out an investigation in relation to “compliance with this Act”. The reference to “compliance with this Act” will include compliance with the SES.

Clause 190 will also amend the term “instrument to which this section applies” to include a safety net contractual entitlement.165

Clause 191 of the Bill – Consequential amendment to section 113

Clause 191 of the Bill will amend section 113 of the IR Act to enable the Governor to make regulations relating to new Part XI – the SES.

164 See clause 211 of the Bill.
165 Refer to clause 213 of the Bill for details regarding safety net contractual entitlements.
Clause 192 of the Bill – Consequential amendment to Schedule 4 – Registration requirements for EEAs

829. Clause 192 of the Bill will amend clause 1(1)(f) of Schedule 4 – Registration requirements for EEAs of the IR Act to replace the reference to the MCE Act with a reference to the SES.

Clause 193 of the Bill – Consequential amendments to other statutes to replace references to MCE Act

830. Clause 193 of the Bill will amend a number of other statutes to replace references to the MCE Act with references to the SES.

Clause 194 of the Bill – Amendments to the Equal Opportunity Act 1984

831. Clause 194 of the Bill will amend the Equal Opportunity Act 1984 (EO Act) to replace the reference to the MCE Act with a reference to the SES. It will also include references to the federal Workplace Relations Act 1996, the FW Act and the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 in section 66ZS(2) of the EO Act.

Clause 195 of the Bill – Consequential amendment to the PSM Act

832. Clause 195 of the Bill will amend section 95(1) of the PSM Act to include a reference to new Part XI Division 11 – Termination and redundancy.

833. Section 95(1) of the PSM Act currently provides that where there is an inconsistency between Part 6 – Redeployment and redundancy – of the PSM Act and/or the PSM Act Regulations, and a General Order made under section 50 of the IR Act, the PSM Act and/or the PSM Act Regulations prevail to the extent of the inconsistency. The reference to a “General Order” includes the TCR General Order.

834. As redundancy provisions will be included in the IR Act and the TCR General Order will be repealed, it will be necessary to amend the PSM Act to ensure that it can prevail over inconsistent redundancy provisions in new Part XI Division 11.
PART 13 OF THE BILL – RIGHT OF ENTRY

Clause 196 of the Bill – IR Act amended

835. Clause 196 of the Bill provides that Part 13 of the Bill will amend the IR Act.

Clause 197 of the Bill – Consequential amendment to section 25

836. Clause 197 of the Bill will amend section 25(1) of the IR Act to reflect that Part II Division 2G, which currently deals with right of entry, will be deleted and replaced by new Part XII.

Clause 198 of the Bill – Consequential amendment to section 41

837. Clause 198 of the Bill will amend section 41(2) of the IR Act to replace the reference to section 49N with new section 212. Section 49N will be deleted by clause 200 of the Bill.

Clause 199 of the Bill – New section 49FA inserted

838. Clause 199 of the Bill will insert new section 49FA into the IR Act. New section 49FA will apply new section 212 to ensure that awards, orders and agreements that provide for powers of inspection are consistent with section 49E, which deals with access to employment records by prescribed persons.

Clause 200 of the Bill – Part II Division 2G deleted

839. Clause 200 of the Bill will delete Part II Division 2G of the IR Act, which currently deals with right of entry.

Clause 201 of the Bill – Section 96 amended

840. Clause 201 of the Bill will amend section 96(2) of the IR Act, which enables the Commission to make regulations to delegate certain functions to the Registrar. Section 96(2) will be amended to include prescribed functions under new Part XII, such as the issue of entry permits.

Clause 202 of the Bill – New Part XII inserted

841. Clause 202 of the Bill will insert new Part XII into the IR Act (new sections 176 to 214). New Part XII is largely based on the right of entry provisions in Part 3-4 of the FW Act, with some modifications.

New section 176 – Definitions

842. New section 176 will insert definitions for the purposes of new Part XII. These definitions are explained elsewhere in this Explanatory Memorandum.

New section 177 – Right of entry to investigate suspected contravention of industrial law or instrument

843. New section 177 will in part replace current section 49I of the IR Act, which deals with right of entry for the purpose of investigating a suspected contravention of an industrial law, an occupational safety and health law or an industrial instrument. New section 177 will deal with suspected
contraventions of an industrial law or an industrial instrument, while new section 181 will deal with suspected contraventions of an occupational safety and health law. New section 177 is based on section 481 of the FW Act.

844. New section 177(2) will provide that a “permit holder” may enter premises and exercise a right under new section 178 or 179 for the purpose of investigating a suspected contravention of:

(a) the IR Act;

(b) the LSL Act; or

(c) an industrial instrument (as will be defined by new section 177(1)).

845. The term “permit holder” will be defined in new section 176(1) to mean a person who holds an “entry permit”. The term “entry permit” will be defined in new section 202 to mean a permit issued to an official of an organisation by the Commission. New section 176(1) will define an “official” to mean a person who holds office in, or is an employee of, an organisation.

846. New section 177(3) will provide that the suspected contravention must relate to, or affect, a member of the permit holder’s organisation:

(a) whose industrial interests the organisation is entitled to represent; and

(b) who performs work on the premises.

847. New section 177(4) will provide that the industrial instrument must apply, or have applied, to the member. It is therefore irrelevant if the industrial instrument in question has been replaced or superseded by a subsequent instrument.

848. New section 177(5) will provide that where the suspected contravention concerns an industrial agreement, the permit holder’s organisation must be (or have been) a party to the agreement. This is considered appropriate given that industrial agreements are made between a particular employer(s) and union(s). Allowing other unions to investigate a suspected contravention in this context could give rise to industrial disharmony.

849. New section 177(6) will provide that where the suspected contravention concerns an EEA, the permit holder must be authorised in writing to investigate the suspected contravention by the employee who is party to the agreement. This is consistent with current section 49I(5) of the IR Act and reflects the fact that EEAs are individual agreements.

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166 Current section 49I(1) of the IR Act also refers to the MCE Act. New section 177(2) omits reference to the MCE Act, given that Part 12 of the Bill will repeal the MCE Act and incorporate minimum conditions of employment into the IR Act.

167 The terms “office” and “organisation” are currently defined in section 7(1) of the IR Act.

168 The conditions of eligibility for membership of a registered organisation define the class or classes of employees whose industrial interests the organisation may represent (Transport Workers’ Union of Australia v Budget Rent a Car Operations Pty Limited [2006] AIRC 91).
850. New section 177(7) will require the permit holder to reasonably suspect that the contravention has occurred, or is occurring. New section 177(8) will place the burden of proving the reasonableness of the suspicion on the permit holder. A reasonable suspicion could, for example, be based on a complaint from a member that they have been underpaid. A permit holder who enters premises without the requisite suspicion risks civil penalties under new section 195 and/or having their entry permit suspended or revoked.

**New section 178 – Rights that may be exercised by permit holder while on premises**

851. New section 178 will set out the rights of a permit holder once they have entered premises. While on the premises, a permit holder will be able to:

(a) inspect any work, process or object relevant to the suspected contravention;

(b) interview any person about the suspected contravention, provided the person agrees to be interviewed and the permit holder’s organisation is entitled to represent their industrial interests; and

(c) require the “occupier” or “affected employer” to allow the permit holder to inspect, and make copies of, records\(^\text{169}\) or documents that are directly relevant to the suspected contravention and are accessible on the premises. However, “non-member records or documents" will be exempt from this requirement.

852. The term “occupier” will be defined in new section 176(1) to include a person in charge of premises. The term “affected employer” will be defined in new section 176(2). For the purposes of new section 177, a person will be an affected employer if:

(a) they employ a member of the permit holder’s organisation whose industrial interests the organisation is entitled to represent; and

(b) the member performs work on the premises; and

(c) the suspected contravention relates to, or affects, the member.

853. The term “non-member record or document” will also be defined in new section 176(1), and will mean a record or document that:

(a) relates to an employee who is not a member of the permit holder’s organisation; and

(b) does not also substantially relate to an employee who is a member of the permit holder’s organisation.

854. In other words, permit holders’ access to non-members’ employment records will be restricted. This respects freedom of association and minimises privacy concerns. Permit holders will only be able to access non-members’ employment records if the record in question substantially relates to a member’s employment and is directly relevant to the suspected

\(^{169}\) The term “record” is currently defined in section 7(1) of the IR Act.
contravention. Permit holders will also be able to access non-members’ employment records if the non-member in question gives written consent.

855. New section 178(3) will be a civil penalty provision. It will prohibit an occupier or affected employer from contravening a requirement to allow a permit holder to inspect and make copies of relevant records under new section 178(1)(c).

**New section 179 – Later access to relevant records**

856. It will not always be possible or practicable for relevant records to be produced while a permit holder is on premises. For example, the records could be physically located offsite with the employer’s accountant. In such a situation, new section 179 will enable a permit holder to access the records at a later date. In order to do so, the permit holder must:

(a) provide the affected employer with written notice requiring them to produce the record;

(b) specify the date the record is to be produced in the written notice (the date cannot be earlier than 14 days after the notice is given); and

(c) give the written notice while the permit holder is on the premises, or within five days after the entry.\(^{170}\)

857. New section 179(5) will be a civil penalty provision. It will prohibit an affected employer from contravening a requirement to produce, or provide access to, relevant records under new section 179(1).

858. New section 179(6) will enable the permit holder to inspect and make copies of records produced under new section 179(1) at the relevant premises, or another place agreed upon with the affected employer.\(^{171}\)

**New section 180 – Right of entry to hold discussions with employees**

859. New section 180 will replace current section 49H of the IR Act, which deals with right of entry for the purpose of holding discussions with employees. New section 180 is based on section 484 of the FW Act.

860. A permit holder will be able to enter premises to hold discussions with employees:

(a) who perform work on the premises; and

(b) whose industrial interests the permit holder’s organisation is entitled to represent; and

\(^{170}\) Pursuant to section 76 of the *Interpretation Act 1984*, a written notice could be “given” by delivery to the affected employer personally, by post, or by leaving the notice at the employer’s usual or last known place of business.

\(^{171}\) There will be no obligation on the employer to agree to some other place. Failure to agree will not constitute hindering or obstructing the permit holder (see new section 194(2) of the IR Act).
(c) who wish to participate in those discussions. Employees cannot be compelled by threats, intimidation or otherwise to take part in discussions.

861. In accordance with new section 188(2), discussions will only be permitted during mealtimes or other breaks. They cannot occur during paid work time.

**New section 181 – Right of entry to investigate suspected contravention of occupational safety and health law**

862. New section 181 will provide a right of entry for the purpose of investigating a suspected contravention of the *Occupational Safety and Health Act 1984* or the *Mines Safety and Inspection Act 1994* (referred to collectively as “OSH laws”).

863. The suspected contravention must relate to, or affect, a person whose industrial interests the permit holder’s organisation is entitled to represent. Unlike new section 177 (suspected contravention of industrial law or instrument), the right of entry under new section 181 will not be limited to suspected contraventions that affect union members. This recognises the particular importance of workplace safety and the role of unions in upholding the observance of OSH laws for all employees.

864. It is important to note that new section 181 (and related provisions) will apply regardless of whether the employer or occupier in question is a constitutional corporation. In other words, right of entry for the purpose of investigating suspected contraventions of OSH laws in Western Australia will be governed primarily by the IR Act. Permit holders seeking to exercise rights in relation to constitutional corporations will also be governed by Part 3-4 Division 3 of the FW Act. Among other things, this means that:

(a) the permit holder must also be a permit holder under the FW Act; and

(b) the permit holder must give at least 24 hours’ written notice to inspect or otherwise access a relevant record.

865. New section 181(2) will require the permit holder to reasonably suspect that the contravention has occurred, or is occurring. New section 181(3) will place the burden of proving the reasonableness of the suspicion on the permit holder. A reasonable suspicion could, for example, be based on a complaint from an employee that provides details of incidents or events at the workplace. A permit holder who enters premises without the requisite suspicion risks civil penalties under new section 195 and/or having their entry permit suspended or revoked.

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172 The FW Act does not exclusively govern right of entry for occupational safety and health purposes – see section 27(2)(c) and Part 3-4 Division 3 of the FW Act, as well as regulation 3.25 of the *Fair Work Regulations*.
173 Section 494(1) of the FW Act.
174 Section 495 of the FW Act.
New sections 182 and 183 – Rights that may be exercised by permit holder while on premises and later access to relevant records

866. New section 182 will set out the rights of a permit holder when investigating a suspected contravention of an OSH law, while section 183 will enable a permit holder to access records at a later date. These sections will be materially the same as new sections 178 and 179 respectively.

867. In order to investigate suspected contraventions of OSH laws, a permit holder’s entry permit must specifically authorise them to do so. Authorisation will be recorded on the entry permit by the Commission.175

New section 184 – Requirements for permit holders

868. Division 3 of new Part XII will set out certain requirements for permit holders in order to validly exercise a right of entry.176 New section 184 will make it clear that a permit holder is not authorised to enter or remain on premises if they contravene Division 3 or any applicable regulations.

New section 185 – Entry notices

869. New section 185 will require a permit holder to give an “entry notice” before entering premises under new section 177 (suspected contravention of industrial law or instrument) or section 180 (discussions with employees). The only exception is where entry is sought under new section 177 and the Commission has issued an “exemption certificate”.

870. The content of the relevant entry notice will be prescribed by new section 209.

Entry notice for purposes of new section 177

871. In terms of an entry notice to enter premises under new section 177 (suspected contravention of industrial law or instrument):

(a) the permit holder must give the notice to the occupier and any affected employer before entering the premises – new section 185(2)(a); and

(b) the notice must be given during working hours at least 24 hours before the entry, but not more than 14 days beforehand – new section 185(3).

872. An entry notice to enter premises under new section 177 will not be required where an “exemption certificate” has been issued for the entry, as will be defined in new section 210(1). Under new section 210 an organisation will be able to apply to the Commission for an exemption certificate. The Commission must issue the certificate if it reasonably believes that advance notice of the entry might result in the tampering of relevant evidence.177 An exemption certificate must still contain particulars of the suspected contravention.

175 See new section 205.
176 Based on Part 3-4 Division 2 Subdivision C of the FW Act.
177 The Commission may make regulations under new section 96(2)(g) to delegate the issue of exemption certificates to the Registrar (see clause 201 of the Bill).
873. New section 185(4) will require the permit holder to give a copy of the exemption certificate to any of the following persons present at the premises:

(a) the occupier, or another person who apparently represents the occupier; and

(b) any affected employer, or another person who apparently represents the employer.

874. A copy of the exemption certificate must be given before, or as soon as practicable after, the permit holder enters the premises.

Entry notice for purposes of new section 180

875. In terms of an entry notice to enter premises under new section 180 (discussions with employees):

(a) the permit holder must give the notice to the occupier before entering the premises – new section 185(2)(b); and

(b) the notice must be given during working hours at least 24 hours before the entry, but not more than 14 days beforehand – new section 185(3).

Entry notice for purposes new section 181

876. New section 187(4), (5) and (6) will deal with an entry notice to enter premises under new section 181 (suspected contravention of OSH law).

New section 186 – Entry permit conditions

877. New section 186 will require permit holders to comply with any conditions imposed on their entry permit (the Commission will be able to impose conditions under new sections 197, 198, 199 and 206). A permit holder who contravenes a condition will not be authorised to enter or remain on premises by virtue of new section 184.

New section 187 – Authority documents

878. New section 187 will require permit holders who have entered premises under new sections 177 or 180 to produce prescribed documents on request (referred to as “authority documents”).

Authority documents for purposes of new section 177

879. In terms of entry under new section 177, an occupier or affected employer may require a permit holder to produce:

(a) their entry permit; and

(b) a copy of the entry notice or exemption certificate (as the case may be).

880. These authority documents must also be produced in order for a permit holder to require access to relevant records.
Authority documents for purposes of new section 180

881. In terms of entry under new section 180, an occupier may require a permit holder to produce their entry permit and a copy of the entry notice.

Entry notice for purposes of new section 181

882. New section 187 will also address entry under new section 181. Permit holders must, as soon as reasonably practicable after entering premises, give an entry notice to the occupier and any affected employer. This requirement will not apply, however, if to give the notice would unreasonably delay the permit holder in an urgent case. Advance notice of the entry will not therefore be required under new section 181, due to the typically spontaneous nature of safety incidents.

883. If the notice is not given because it would unreasonably delay the permit holder in an urgent case, it must still be given to the occupier and any affected employer within 24 hours of entry. Among other things, this will ensure that particulars of the suspected contravention are provided.

New section 188 – When rights may be exercised

884. New section 188 will stipulate that:

(a) a right of entry can only be exercised during working hours;

(b) discussions with employees under new section 180 can only occur during mealtimes or other breaks; and

(c) entry under new section 177 or 180 can only occur on a day specified in the entry notice or exemption certificate (as the case may be).

New section 189 – Occupational safety and health requirements

885. New section 189 will require permit holders to comply with any reasonable request of the occupier concerning occupational safety and health. For example, it may be reasonable for the occupier of a building and construction site to request that a permit holder:

(a) report to the occupier or a representative upon entry;

(b) be escorted and monitored on site;

(c) wear personal protective equipment;

(d) complete site-specific induction.

886. What is “reasonable” will necessarily depend on all relevant circumstances, including the legitimate interests of the occupier and employer, as well as the interests of the employees and permit holder. Relevant circumstances could include the nature of the industry, the nature of the work, the size and location of the site, and the site policies and practices concerning safety and security.
887. The Commission will be empowered to deal with disputes about whether or not an occupier’s request is reasonable.178

**New section 190 – Conduct of interviews in particular room**

888. New section 190(1) will give occupiers the right to require permit holders to comply with any reasonable request to:

(a) conduct interviews or hold discussions in a particular room or area of the premises; or

(b) take a particular route to reach a particular room or area of the premises.

889. New section 190(2) will outline circumstances in which a request will be unreasonable. These circumstances are not intended to be exhaustive.

890. In determining whether a request is unreasonable, it is intended that the occupier’s reasons for, or purpose in, making the request be the primary focus. In the case of new section 190(2)(b), the occupier must act with the intention of doing the proscribed thing. Absent the intention, there can be no act of unreasonableness. An occupier will have “intention” if they mean to bring a particular result about, or are aware that the result will occur in the ordinary course of events.

891. New section 190(3) will clarify that a request is not unreasonable only because the particular room, area or route is not the permit holder’s preference. A request will only be unreasonable therefore if it is objectively unreasonable – the mere preference of a permit holder for a different room etc. will be insufficient.

892. New section 190(4) will enable the Governor to make regulations prescribing circumstances in which a request is, or is not, reasonable.

893. The Commission will be empowered to deal with disputes about whether or not an occupier’s request is reasonable.179

**New section 191 – Residential premises**

894. New section 191 will replace current section 49K of the IR Act. Permit holders will be prevented from entering any part of premises that is used mainly for residential purposes.

**New sections 192 to 196 – Prohibitions**

895. Division 4 of new Part XII (new sections 192 to 196) will prohibit certain conduct in relation to right of entry.180 These prohibitions will expand upon the current prohibitions in section 49M of the IR Act and will be civil penalty provisions.181

178 See new section 197.

179 Ibid.

180 Based on Part 3-4 Division 4 of the FW Act.

181 Sections 49J(9) and 49M(1), (2) and (3) are currently civil penalty provisions under Part II Division 2G of the IR Act. Under clause 22(5) of new Schedule 6 of the IR Act,
896. The following conduct will be prohibited under Division 4:

(a) a permit holder must not intentionally hinder or obstruct any person, or otherwise act in an improper manner (new section 192);

(b) a person must not refuse or unduly delay entry onto premises by a permit holder (new section 193);

(c) a person must not intentionally hinder or obstruct a permit holder (new section 194). This includes hindering or obstructing that occurs after an entry notice is given, but before a permit holder enters premises. For example, it would capture the concealment or destruction of relevant records by an employer;

(d) a person must not misrepresent that the doing of a thing is authorised under new Part XII if it is not so authorised (new section 195). This would capture, for example, a permit holder investigating a suspected contravention of an OSH law without the appropriate authorisation on their entry permit (see new section 205). The action can be intentional or reckless. However, the prohibition will not apply if the person reasonably (albeit wrongly) believes that the doing of the thing is authorised;

(e) a person must not disclose information obtained while investigating a suspected contravention for a purpose that is not related to the investigation or rectifying the suspected contravention (new section 196). However, the prohibition will not apply if the disclosure is authorised by law or an order of the Commission.

Powers of Commission

897. Division 5 of new Part XII will prescribe specific powers of the Commission in relation to right of entry.

**New section 197 – Commission may deal with dispute**

898. New section 197 will empower the Commission to deal with a dispute about the operation of new Part XII on the application of a permit holder, a permit holder’s organisation, an employer or an occupier.

899. The IR Act will apply as if the dispute were an industrial matter referred to the Commission under section 32. Among other things, this will enable the Commission to exercise its powers of conciliation and arbitration to resolve the dispute.

900. New section 197(3) will outline the types of orders that the Commission may make to deal with a dispute. These orders are not intended to be exhaustive. The Commission will be able to impose conditions on an entry permit, as well as suspend or revoke a permit.

Contraventions of these sections that occur before section 200 of the Amendment Act comes into operation can still be dealt with as if they were civil penalty provisions.
In dealing with a dispute, the Commission will be prevented from conferring rights on a permit holder that are additional to, or inconsistent with, the rights under new Part XII. This limitation on the Commission's powers will not apply to disputes about the reasonableness of a request for a permit holder to use particular rooms or routes, or to comply with occupational safety and health requirements. For example, the Commission could make an order that a specific room be used for a meeting. Without this ability, the Commission may be unable to effectively resolve a dispute about what is or is not "reasonable".

New section 198 – Commission may take action against permit holder

New section 198 will enable the Commission to take action against a permit holder on the application of an industrial inspector or a person with a sufficient interest in the matter. The Commission will be able to:

(a) impose conditions on the permit holder’s entry permit;
(b) suspend the entry permit;
(c) revoke the entry permit.

In accordance with new section 201(b), the Commission could, should it choose to do so, both suspend an entry permit and impose conditions on the permit.

In deciding whether to take action against a permit holder, the Commission will be required to consider the “permit qualification matters” set out in new section 203.

New section 199 – Commission may restrict rights if organisation or official has misused rights

New section 199 will enable the Commission in Full Session to restrict the rights exercisable under new Part XII by an organisation or officials of an organisation if satisfied that those rights have been misused. An industrial inspector or a person with a sufficient interest in the matter will be able to apply to the Commission in Full Session.

New section 199(3) will outline the sort of action that the Commission in Full Session may take against an organisation or officials, including (but not limited to):

(a) imposing conditions on entry permits;
(b) suspending entry permits;
(c) revoking entry permits;
(d) requiring future entry permits of the organisation to be subject to specified conditions;

This will be consistent with new section 212.
(e) banning the issue of entry permits to the organisation for a specified period.

907. Action under new section 199 will generally be directed at dealing with more than a “one off” misuse of rights by an organisation or official, although this possibility is not excluded depending on the circumstances. Action under new section 199 may have particularly serious consequences for an organisation that has a history of misusing rights, whether perpetuated by a number of officials or a single official. It is for this reason that applications under new section 199 will be dealt with by the Commission in Full Session rather than a single commissioner.

908. New section 199(4) will set out circumstances in which an official is deemed to “misuse” rights, namely where the official:

(a) exercises those rights repeatedly with the intention or with the effect of hindering, obstructing or otherwise harassing an occupier or employer; or

(b) encourages a person to become a member in an unduly disruptive way (when exercising a right to hold discussions with employees).

909. These circumstances are not intended to be exhaustive. A right of entry will be misused if it has been utilised for purposes beyond or inconsistent with those intended by new Part XII, or in a manner inconsistent with the statutory rights and limitations attached to them.

**New section 200 – When Commission must revoke or suspend entry permit**

910. New section 200(1) will set out circumstances in which the Commission must revoke or suspend an entry permit. The circumstances are:

(a) the permit holder was found in proceedings under the IR Act to have contravened new section 195 (misrepresentation);

(b) the permit holder has contravened new section 196 (unauthorised disclosure of information);

(c) the permit holder or another person (such as the permit holder’s organisation) was ordered to pay a pecuniary penalty under new Part XII in relation to a contravention by the permit holder;\(^{183}\)

(d) the permit holder has been disqualified (whether temporarily or permanently) from exercising a right of entry under an industrial law. The term “industrial law” will be defined in new section 176(1) to have the same meaning as in section 12 of the FW Act;\(^{184}\)

(e) the permit holder has taken unauthorised action when exercising a right of entry under a State or Territory OHS law. The term “State or Territory OHS law” will be defined in new section 176(1) to mean a law prescribed by regulations. It is intended that the other States’ and

\(^{183}\) As per clause 22(4)(a) of new Schedule 6 of the IR Act, this will include any pecuniary penalty ordered under current Part II Division 2G of the IR Act.

\(^{184}\) The term includes the FW Act and other States’ industrial relations laws.
Territories’ occupational safety and health laws will be prescribed, to the extent that they contain right of entry provisions.

911. The Commission will be able to take action under new section 200(1) on its own motion or on application.\textsuperscript{185} The Commission will be obliged to perform its functions under the section once it becomes aware that a matter specified in section 200(1)(a) to (e) has occurred.

912. The Commission will have discretion whether to revoke or suspend an entry permit in the circumstance where the permit holder has been ordered to pay a penalty, or where the permit holder has taken unauthorised action under a State or Territory OHS law. The Commission must be satisfied that the suspension or revocation would be harsh or unreasonable. For example, the Commission may decline to suspend or revoke an entry permit where a permit holder was ordered to pay a pecuniary penalty for a relatively minor contravention in the circumstances.

913. New section 200(3) will ensure that a permit holder is not subject to “double jeopardy” under new section 200(1). Once an entry permit is suspended or revoked because of a circumstance outlined in new section 200(1), then that circumstance cannot be the subject of any further action under the section. However, the circumstance could potentially be considered in proceedings under another section which gives the Commission discretion whether to revoke or suspend an entry permit (such as new section 198). For example, the circumstance could help establish a “pattern of behaviour” by the permit holder.

914. New section 200(4) will prescribe minimum periods for which an entry permit must be suspended. The minimum suspension periods are based on whether (and how many times) the Commission has taken previous action against the permit holder under new section 200(1) or current section 49J(5).\textsuperscript{186}

915. New section 200(5) will require the Commission to ban the issue of any further entry permit to a permit holder for a specified period (the “ban period”) where action is taken under new section 200(1). The ban period cannot be shorter than the relevant minimum suspension period (although it could conceivably be longer). The permit holder will be unable to circumvent new section 200(1) by obtaining a new entry permit during the ban period.

\textit{New section 201 – General rules for suspending entry permits}

916. New section 201 will set out general rules for where the Commission suspends an entry permit, namely:

\textsuperscript{185} Although there is no specific mechanism for activating the Commission’s powers in new section 200, the power to exercise the jurisdiction will be implied (\textit{Parker and others} [2011] FWA 2577, in the context of section 510 of the FW Act). The Chief Commissioner will be able to make regulations under section 113 of the IR Act to prescribe the form of any application under new section 200.

\textsuperscript{186} Clause 22(4)(b) and (c) of new Schedule 6 of the IR Act will require the Commission to also consider any previous action taken against the permit holder under current section 49J(5) of the IR Act.
(a) the suspension must be for a specified period;

(b) during the suspension period, the entry permit can still be revoked or have conditions imposed upon it;

(c) the suspension does not affect when the entry permit would otherwise expire (for example, the entry permit could expire during the suspension period).

Entry permits, entry notices and certificates

917. Division 6 of new Part XII will deal with the issue of entry permits by the Commission, the expiry of entry permits, the content of entry notices, and the issue of exemption certificates and affected member certificates by the Commission.

New section 202 – Issue of entry permits by Commission

918. New section 202 will authorise the Commission to issue an entry permit to an official on the application of an organisation, if the Commission is satisfied that the official is a "fit and proper person".187

New section 203 – Permit qualification matters

919. New section 203 will require the Commission to consider certain matters (referred to as the "permit qualification matters") in deciding whether an official is a fit and proper person. Right of entry confers officials with the significant privilege of being able to enter someone else’s property. It is appropriate that an official be a fit and proper person in order to exercise this right.

920. Clause 22 of new Schedule 6 of the IR Act will contain transitional provisions for people who currently hold an authority under Part II Division 2G of the IR Act. An authority will continue in force as if it were an entry permit until:

(a) the holder of the authority is issued with an entry permit under new Part XII; or

(b) the authority is suspended or revoked under new Part XII; or

(c) a period of six months elapses after the coming into operation of new section 200 of the Amendment Act.

New section 204 – When Commission must not issue entry permit

921. New section 204 will prevent the Commission from issuing an entry permit while a permit holder is suspended or disqualified from exercising a right of entry under another industrial law (including the FW Act) or a State or Territory OHS law.

187 The Commission may make regulations under new section 96(2)(c) to delegate the issue of entry permits to the Registrar (see clause 201 of the Bill).
New section 205 – Entry permit must authorise official to investigate suspected contraventions of OSH laws

922. New section 205 will prevent the Commission from issuing an entry permit that authorises an official to investigate suspected contraventions of OSH laws, unless the Commission is satisfied that the official has satisfactorily completed training prescribed by the regulations. It is intended that the prescribed training will be relevant to officials’ functions and responsibilities under new Part XII.

923. Authorisation to investigate suspected contraventions of OSH laws must be recorded on an official’s entry permit. Without this authorisation, officials will be unable to exercise the rights under new sections 181, 182 and 183.

New section 206 – Conditions on entry permits

924. New section 206 will enable the Commission to impose conditions on an entry permit when it is issued\(^\text{188}\) (conditions can also be imposed subsequent to issue – see new sections 197, 198 and 199). The Commission must consider the permit qualification matters in new section 203 when deciding whether to impose conditions.

New section 207 – Expiry of entry permits

925. New section 207 will set out when an entry permit expires. An entry permit will generally expire three years from issue, or when a permit holder ceases to be an official of the organisation that applied for the permit. The Commission will be able to extend the three-year period in limited circumstances.\(^\text{189}\)

926. It is implied that an entry permit will automatically expire if revoked.

New section 208 – Return of entry permits to Commission

927. New section 208(1) will require a permit holder to return their entry permit to the Commission within seven days of:

(a) the permit being revoked or suspended;

(b) conditions being imposed on the permit subsequent to issue; or

(c) the permit expiring.

928. New section 208(1) will be a civil penalty provision.

\(^{188}\) The Commission may make regulations under new section 96(2)(d) to delegate the imposition and recording of conditions to the Registrar (see clause 201 of the Bill).

\(^{189}\) The Commission may make regulations under new section 96(2)(e) to delegate the extension of entry permits to the Registrar (see clause 201 of the Bill).
New section 208(2) will require the Commission to return an entry permit to a permit holder on application after a suspension period, provided the permit has not expired or been revoked (either of these things could occur while a permit is suspended).

**New section 209 – Entry notice requirements**

930. New section 209 will set out the content requirements for entry notices.

*Entry notice to enter premises under new section 177*

931. In terms of an entry notice to enter premises under new section 177 (suspected contravention of industrial law or instrument):

(a) the notice must specify the relevant premises, the day of entry and the permit holder’s organisation – new section 209(1);

(b) the notice must specify section 177 as the authorising provision for entry - new section 209(2)(a);

(c) the notice must specify particulars of the suspected contravention – new section 209(2)(b). The particulars should provide sufficient information to enable the occupier to be satisfied that the entry is properly authorised by section 177. Failure to provide adequate particulars could indicate that the permit holder does not possess the requisite suspicion of a contravention;

(d) the notice must contain a declaration that the permit holder’s organisation is entitled to represent the industrial interests of a member who performs work on the premises, and further that the suspected contravention relates to or affects the member – new section 209(2)(c); and

(e) the notice must specify the provision of the permit holder’s organisation’s rules that entitles the organisation to represent the member – new section 209(2)(d).

*Entry notice to enter premises under new section 180*

932. In terms of an entry notice to enter premises under new section 180 (discussions with employees):

(a) the notice must specify the relevant premises, the day of entry and the permit holder’s organisation – new section 209(1);

(b) the notice must specify section 180 as the authorising provision for entry - new section 209(3)(a);

(c) the notice must contain a declaration that the permit holder’s organisation is entitled to represent the industrial interests of an employee who performs work on the premises – new section 209(3)(b); and

190 The Commission may make regulations under new section 96(2)(f) to delegate the return of entry permits to the Registrar (see clause 201 of the Bill).
(d) the notice must specify the provision of the permit holder’s organisation’s rules that entitles the organisation to represent the employee – new section 209(3)(c).

Entry notice to enter premises under new section 181

933. In terms of an entry notice to enter premises under new section 181 (suspected contravention of OSH law):

(a) the notice must specify the relevant premises, the day of entry and the permit holder’s organisation – new section 209(1);

(b) the notice must specify section 181 as the authorising provision for entry – new section 209(4)(a);

(c) the notice must specify particulars of the suspected contravention – new section 209(4)(b). Failure to provide adequate particulars could indicate that the permit holder does not possess the requisite suspicion of a contravention;

(d) the notice must contain a declaration that the permit holder’s organisation is entitled to represent the industrial interests of an employee who performs work on the premises, and further that the suspected contravention relates to or affects the employee – new section 209(4)(c); and

(e) the notice must specify the provision of the permit holder’s organisation’s rules that entitles the organisation to represent the employee – new section 209(4)(d).

New section 210 – Exemption certificates

934. New section 210 will require the Commission to issue an exemption certificate to an organisation in certain circumstances. These circumstances are outlined in paragraph 872 above.

New section 211 – Affected member certificates

935. New section 211 will enable an organisation to apply for an “affected member certificate” from the Commission. The Commission will be required to issue a certificate if satisfied that:

(a) a member performs work on the particular premises; and

(b) the organisation is entitled to represent the industrial interests of the member; and

(c) a suspected contravention of an industrial law or instrument relates to, or affects, the member.

191 The Commission may make regulations under new section 96(2)(g) to delegate the issue of exemption certificates to the Registrar (see clause 201 of the Bill).
192 The Commission may make regulations under new section 96(2)(h) to delegate the issue of affected member certificates to the Registrar.
936. Permit holders will only be able to enter premises under new section 177 if these conditions are met. An affected member certificate will provide evidence to an occupier or employer of the existence of these conditions. A permit holder could seek an affected member certificate in anticipation of any of these conditions being disputed or questioned by the occupier or employer. A permit holder could also seek a certificate to protect the identity of the member in question, as an affected member certificate must not reveal the identity of the member.

937. An affected member certificate will provide similar information as an entry notice, but will be issued with the authority of the Commission. An occupier or employer who refuses entry to a permit holder under new section 177, after being provided with an affected member certificate, risks unlawfully refusing the permit holder entry.193

Miscellaneous

938. Division 7 of new Part XII will deal with miscellaneous issues relating to right of entry.

New section 212 – Certain powers of Commission restricted

939. New section 212(1) will replace current section 49N(1) of the IR Act. New Part XII, as well as section 49E of the IR Act, are intended to be statutory codes for entry and inspection. The Commission will accordingly be unable to make awards and orders or register industrial agreements containing entry and inspection provisions that are additional to, or inconsistent with, new Part XII or section 49E. For example, the Commission could not make an award enabling permit holders to enter premises to hold discussions with employees without prior notice to the occupier. This would be inconsistent with new section 185(3).

940. Provisions of awards, orders and industrial agreements that offend new section 212(1) will be of no effect.

New section 213 – Civil penalty provisions

941. New section 213 will conveniently identify those provisions in new Part XII that are civil penalty provisions for the purposes of section 83E of the IR Act.

New section 214 – Regulations

942. New section 214 will enable the Chief Commissioner to make regulations under section 113 of the IR Act in relation to entry permits, entry notices, exemption certificates and affected member certificates. For example, the regulations may prescribe the form of these documents.

193 See new section 193.
PART 14 OF THE BILL – COMPLIANCE, ENFORCEMENT AND APPEALS

Clause 203 of the Bill – IR Act amended

943. Clause 203 of the Bill provides that Part 14 of the Bill will amend the IR Act.

Clause 204 of the Bill – Commission must not determine denied contractual benefits claim where application made under new section 83BA

944. Clause 204 of the Bill will insert new section 29AA(5A) and (5B) into the IR Act.

945. New section 29AA(5A) will prevent the Commission from determining an employee’s denied contractual benefits claim under section 29(1)(b) if an application concerning the benefit has also been made to the Industrial Magistrates Court under new section 83BA. Employees will be required to choose one or the other jurisdiction to seek enforcement.

946. Notwithstanding new section 29AA(5A), new section 29AA(5B) will enable the Commission to determine the claim if the employee’s application to the Industrial Magistrates Court is withdrawn or struck out.

Clause 205 of the Bill – Enterprise orders enforceable under section 83

947. Clause 205 of the Bill will replace section 42J(4) of the IR Act to signpost that enterprise orders are enforceable under section 83.

Clause 206 of the Bill – Industrial Magistrates Court’s jurisdiction

948. Clause 206 of the Bill will replace section 81A of the IR Act to identify those sections of the IR Act that confer jurisdiction on the Industrial Magistrates Court. The current list in section 81A will be updated consequential to other amendments in the Bill.

Clause 207 of the Bill – Appointment of industrial magistrates

949. Clause 207 of the Bill will delete section 81B(2) to (6) of the IR Act, which deals with the appointment of industrial magistrates. The current appointment process is time consuming and cumbersome, requiring the Governor’s approval. In practice, all newly appointed magistrates are also appointed as industrial magistrates. To reflect this practice and to streamline the appointment process, new section 81B(2) will simply provide that all magistrates are, by virtue of their office, industrial magistrates.

Clause 208 of the Bill – Section 81CA(1)(a) replaced

950. Clause 208 of the Bill will replace section 81CA(1)(a) of the IR Act to identify those sections of the IR Act that prescribe the Industrial Magistrates Court’s

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194 New section 83BA will enable the Industrial Magistrates Court to make orders concerning “safety net contractual entitlements” of employees (see clause 213 of the Bill).
195 Currently under section 42J(4), enterprise orders are enforceable as if they were an award. New sections 42J(4) and 83(2)(b)(iv) will provide for the enforcement of enterprise orders in their own right.
“general jurisdiction” (i.e. civil jurisdiction). The current list in section 81CA(1)(a) will be updated consequential to other amendments in the Bill.

Clause 209 of the Bill – Full Bench enforcement functions to be performed by Industrial Magistrates Court

951. Clause 209 of the Bill will delete section 82 of the IR Act, which confers enforcement jurisdiction on the Full Bench under section 84A. Section 84A will be deleted by clause 220 of the Bill. Enforcement functions currently performed by the Full Bench will be performed by the Industrial Magistrates Court. This will help to streamline enforcement processes under the IR Act. It is also considered more appropriate that enforcement functions be performed by a court.

Clause 210 of the Bill – Section 82A replaced

952. Clause 210 of the Bill will replace section 82A of the IR Act, which prescribes the timeframe for making applications under various sections of the IR Act. Section 82A will be amended to delete reference to section 84A (which will be deleted by clause 220 of the Bill) and to insert reference to new section 83BA (which will be inserted by clause 213 of the Bill).

Clause 211 of the Bill – Proceedings for enforcement of certain provisions under section 83

953. Clause 211 of the Bill will amend section 83 of the IR Act, which deals with the Industrial Magistrates Court’s jurisdiction to enforce provisions of prescribed instruments.

954. Clause 211(1)(a) of the Bill will amend section 83(1), which currently applies “where a person contravenes or fails to comply with a provision of an instrument to which this section applies”. Section 83(1) will be amended to more simply apply “where a person contravenes a provision to which this section applies”.

955. The term “contravene” will be defined in new section 83(2A) to include “a failure to comply”. The term “provision to which this section applies” will be defined in new section 83(2A) to have the meaning given in new section 83(2). The term will include the SES, as well as provisions of industrial instruments.

956. Clause 211(1)(b) of the Bill will delete paragraphs (c) to (f) of section 83(1), and insert new paragraphs (c) to (i). Section 83(1) sets out who may apply to the Industrial Magistrates Court for enforcement under section 83. New paragraphs (c) to (i) will update the list of persons who may apply, consequential to other amendments in the Bill. In particular:

(a) new paragraph (d) will enable an organisation or association entitled to represent the industrial interests of one or more employers or employees to apply for the enforcement of an award. This reflects that

196 For example, the Full Bench is currently responsible for enforcing certain orders of the Commission under section 84A, while the Industrial Magistrates Court is responsible for enforcing other orders under section 83. There is no cogent reason for this delineation.
new modern State awards will not name organisations or associations as a party to the award;\textsuperscript{197}

(b) new paragraph (f) will enable an organisation or association specified in an enterprise order to apply for enforcement of the order; and

(c) new paragraph (g) will enable a person to whom a SES applies to apply for enforcement of the standard.

957. Clause 211(2) of the Bill will insert new sections 83(2A) to (2E):

(a) new section 83(2A) will define the terms “contravene” and “provision to which this section applies”;

(b) new section 83(2B) will extend liability under section 83 to persons who are “involved” in a contravention of a provision. New section 83(2C) will define what is meant by being “involved” and will include a person aiding or inducing a contravention, or conspiring with others to effect a contravention;

(c) new section 83(2D) will provide that two or more contraventions of a provision are taken to constitute a single contravention if they:

(i) are committed by the same person; and

(ii) arose out of a course of conduct by that person.

958. It will be relevant to consider whether the contraventions arose out of separate acts or decisions, or out of a single act or decision such as to constitute a course of conduct. Contraventions of a provision affecting a number of employees could, depending on the circumstances, be treated as a single contravention. For example, if an employer contravened the shift provision of an award by failing to pay 10 employees the appropriate shift loading, those 10 contraventions of the provision could constitute a single contravention.

959. New section 83(2D) will be subject to new section 83(2E). New section 83(2D) will not apply to a contravention of a provision that occurs after a person is penalised under section 83(4)(a)(ii) for an earlier contravention of the same provision. In such a case, the person’s continued contravention of the provision is likely to be flagrant and should not be mitigated under new section 83(2D).

960. Clause 211(3) of the Bill will replace section 83(2) to prescribe those provisions to which section 83 applies. The current list of instruments in section 83(2) will be updated consequential to other amendments in the Bill. In particular:

(a) new paragraph (a) will provide that section 83 applies to the SES; and

\textsuperscript{197} New paragraph (c) will enable organisations and associations that are named as a party to apply for enforcement. Public sector awards, enterprise awards and pre-modern State awards will continue to name parties.
(b) new paragraph (b)(v) will provide that section 83 applies to orders, directions and declarations of the Commission (other than orders made under new Part II Division 2AA dealing with unfair dismissal, which are enforceable under section 83B of the IR Act).198

961. Clause 211(4) of the Bill will amend section 83(3) to replace the reference to “an instrument” with “a provision” (consequential to the amendments in clause 211(1)(a) of the Bill).

962. Clause 211(5) of the Bill will amend section 83(4)(a) to delete the words “or failure to comply” (consequential to the amendments in clause 211(1)(a) of the Bill).

963. Clause 211(6) of the Bill will increase the current maximum penalties in section 83(4)(a)(ii). The maximum penalty for an employer, organisation or association will be increased from $2,000 to $5,000, while the maximum penalty in any other case will be increased from $500 to $1,000. This will be consistent with the maximum penalties for contravention of a civil penalty provision under section 83E of the IR Act.

964. Clause 211(7) of the Bill will amend section 83(5) to delete certain words (consequential to the amendments in clause 211(1)(a) of the Bill).

Clause 212 of the Bill – Consequential amendment to section 83A

965. Clause 212 of the Bill will amend section 83A(1) of the IR Act to replace the reference to “an instrument” with “a provision” (consequential to the amendments in clause 211(1)(a) of the Bill).

Clause 213 of the Bill – New section 83BA inserted concerning “safety net contractual entitlements”

966. Clause 213 of the Bill will insert new section 83BA into the IR Act. New section 83BA will enable the Industrial Magistrates Court to make an order in relation to “safety net contractual entitlements” of employees in certain circumstances. The Industrial Magistrates Court does not currently have jurisdiction to enforce contractual entitlements.199

967. New section 83BA will only apply where an application is made to the Industrial Magistrates Court under section 83 (e.g. for enforcement of an award provision or SES). Where an application is made under section 83, an application may also be made under new section 83BA in relation to a “safety net contractual entitlement”. The Industrial Magistrates Court will be able to deal with the two applications in the one proceeding. New section 83BA is primarily intended to streamline and consolidate enforcement proceedings for employees.

198 Most orders, directions and declarations of the Commission are currently enforceable by the Full Bench under section 84A of the IR Act. Section 84A will be deleted by clause 220 of the Bill.
199 Employees can currently seek enforcement of contractual entitlements in the civil courts (e.g. the Magistrates Court) or the Commission pursuant to section 29(1)(b) of the IR Act.
968. New section 83BA(1) will define “safety net contractual entitlement” to mean an entitlement of an employee under a contract of employment that relates to any of the subject matters described in a provision to which section 83 applies. The “subject matters” of awards, agreements and the SES are potentially broad and include minimum wages, allowances, penalties and leave conditions.

969. New section 83BA(6) will enable the Industrial Magistrates Court to order an employer to pay an employee an amount owing under the relevant safety net contractual entitlement.

Illustrative example

An employee is paid $30 per hour by her employer. Under the applicable award, her minimum rate of pay is $25 per hour. She therefore receives an over-award payment of $5 per hour.

The employer experiences a downturn in business and reduces the employee’s pay to $20 per hour. The employee questions the reduction with the employer, but the employer fails to rectify the situation.

The employee makes a complaint to the Department of Commerce. An industrial inspector investigates her complaint and is satisfied that she has been underpaid. The industrial inspector applies under section 83 of the IR Act for enforcement of the wages provision of the applicable award (entitling the employee to $25 per hour). The industrial inspector also makes an application under new section 83BA in relation to the over-award payment of $5 per hour.200 The over-award payment is a “safety net contractual entitlement” within the meaning of new section 83BA(1).

In the absence of new section 83BA, the industrial inspector would only be able to investigate and seek enforcement of the wages provision of the applicable award in the Industrial Magistrates Court.201 The employee would have to take separate proceedings in another jurisdiction for the over-award payment.

970. If the employee’s pay was reduced to $25 per hour (rather than $20 per hour) there would be no contravention of the applicable award. The industrial inspector would be unable to make an application under new section 83BA in this scenario, as new section 83BA will only apply where an application has been made under section 83. The employee would have to seek enforcement of the over-award payment in another jurisdiction.

971. New section 83BA(4) will require the Industrial Magistrates Court to dismiss an application if the employee has made a denied contractual benefits claim to the Commission concerning the safety net contractual entitlement. Employees will be required to choose one or the other jurisdiction to seek enforcement. New section 83BA(5) will enable the Industrial Magistrates Court to deal with the application, however, if the employee’s claim to the Commission is withdrawn or struck out.202

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200 The industrial inspector’s application will be taken to have been made on the employee’s behalf – new section 83BA(3).
201 New section 98(6)(e) of the IR Act will enable industrial inspectors to investigate suspected contraventions of safety net contractual entitlements (see clause 190 of the Bill).
202 See also new section 29AA(5A) and (5B) of the IR Act (clause 204 of the Bill).
Clause 214 of the Bill – Section 83C deleted

972. Clause 214 of the Bill will delete section 83C of the IR Act, which deals with costs in enforcement proceedings in the Industrial Magistrates Court. Section 83C will be replaced by new section 83FB.203

Clause 215 of the Bill – Consequential amendment to section 83D

973. Clause 215 of the Bill will amend section 83D of the IR Act, which deals with proceedings for offences in the Industrial Magistrates Court. The reference in section 83D(1) to “Act other than an offence under section 80(3)” will be deleted. This amendment is consequential to clause 159 of the Bill, which will delete section 80.

Clause 216 of the Bill – Proceedings for contravention of civil penalty provision under section 83E

974. Clause 216 of the Bill will amend section 83E of the IR Act, which deals with the Industrial Magistrates Court’s jurisdiction to deal with contraventions of civil penalty provisions.

975. Clause 216(1) of the Bill will insert new section 83E(2A) and (2B). New section 83E(2A) will extend liability under section 83E to persons who are “involved” in a contravention of a civil penalty provision. New section 83E(2B) will define what is meant by being “involved” and will include a person aiding or inducing a contravention, or conspiring with others to effect a contravention.

976. Clause 216(2) of the Bill will insert new section 83E(4A) and (4B). New section 83E(4A) will provide that two or more contraventions of certain civil penalty provisions are taken to constitute a single contravention if they:

(a) are committed by the same person; and

(b) arose out of a course of conduct by that person.

977. New section 83E(4A) will only apply to the following civil penalty provisions under the IR Act:

(a) amended section 49D(2), which requires employers to keep certain employment records;

(b) section 49D(3), which requires employment records to be in a certain form and retained for a minimum seven-year period; and

(c) new section 49EA,204 which will require employers to provide employees with pay slips.

203 See clause 218 of the Bill.
204 See clause 131 of the Bill.
978. It will be relevant to consider whether the contraventions arose out of separate acts or decisions, or out of a single act or decision such as to constitute a course of conduct. For example, an employer failing to provide all of its employees with pay slips because the employer was unaware of this new obligation could constitute a course of conduct.

979. New section 83E(4A) will be subject to new section 83E(4B). New section 83E(4A) will not apply to a contravention of a civil penalty provision that occurs after a person is penalised under section 83E(1) for an earlier contravention of the same provision. In this case, the person’s continued contravention of the provision is likely to be flagrant and should not be mitigated under new section 83E(4A).

980. Clause 216(3) of the Bill will amend section 83E(6), which sets out who may apply to the Industrial Magistrates Court for an order under section 83E. The list will be updated to include an “authorised officer” under the CCS Act (for the purposes of Part 7 of that Act).205 This amendment is consequential to clause 135 of the Bill, which will amend the CCS Act to require employers to make, retain and provide access to certain employment records if they employ children (these new provisions will be civil penalty provisions). Authorised officers will be able to investigate suspected contraventions of the new record-keeping requirements for children206 and will accordingly have standing under section 83E.

981. Clause 216(4) of the Bill will amend section 83E(6a), consequential to the MCE Act being repealed and the SES being included in the IR Act.

982. Clause 216(5) of the Bill will amend section 83E(10) to also make reference to section 83E(7A).207

983. Clause 216(6) of the Bill will delete current section 83E(11) and (12), which deal with costs in civil penalty proceedings. Costs will instead be dealt with by new section 83FB.208

984. Clause 216(6) will insert new section 83E(11) so that a person is not subject to “civil double jeopardy”. If a person is penalised under section 83E(1) in relation to particular conduct, they will not be liable to pay a pecuniary penalty under another enactment for the same conduct.209 They will still be liable, however, to pay a fine in relation to that conduct (i.e. for committing an offence).

**Clause 217 of the Bill – New section 83FA inserted concerning “infringement notices”**

985. Clause 217 of the Bill will insert new section 83FA into the IR Act to enable the Governor to make regulations providing for infringement notices. An infringement notice will allow a person who is alleged to have

205 The term “authorised officer” includes industrial inspectors and designated officers of the Department for Child Protection.
206 See clause 136 of the Bill.
207 See clause 136 of the Bill.
208 Section 83E(7A) was inserted in 2012 by the Industrial Legislation Amendment Act 2011.
209 See clause 218 of the Bill.
209 An “enactment” refers to a Western Australian law – section 5 of the Interpretation Act 1984.
contravened a civil penalty provision to pay a penalty as an alternative to civil proceedings. Any such penalty would be limited to one-tenth of the maximum penalty under section 83E(1), namely $500 for an employer, organisation or association and $100 in any other case.

986. It is intended that industrial inspectors will be responsible for the issuing and management of infringement notices under the applicable regulations.

987. Infringement notices may be appropriate for contraventions of some civil penalty provisions, but not others. For example, an infringement notice could be an effective and efficient way of dealing with an employer who has failed to keep the correct employment records. On the other hand, it might not be appropriate for an employer who has engaged in proscribed conduct such as wilfully misleading an industrial inspector, or intentionally obstructing a permit holder.

Clause 218 of the Bill – New section 83FB inserted concerning Industrial Magistrates Court’s powers to order costs

988. Clause 218 of the Bill will insert new section 83FB into the IR Act. New section 83FB will replace various sections in Part III of the IR Act which deal with the Industrial Magistrates Court’s powers to order costs in proceedings.

989. New section 83FB(2) will enable the Industrial Magistrates Court to order a party (the first person) to pay another party’s costs if the Court is satisfied that:

(a) the first person initiated proceedings, or responded to proceedings, vexatiously or without reasonable cause; or

(b) it should have been reasonably apparent to the first person that the proceedings initiated by them, or their response to the proceedings, had no reasonable prospect of success.210

990. As is currently the case:

(a) the Industrial Magistrates Court will be able to order costs for the services of a legal practitioner or industrial agent in proceedings; and

(b) there will be no capacity for costs to be given against the Registrar, a deputy registrar, an industrial inspector or an authorised officer.

Clause 219 of the Bill – Consequential amendment to section 83F

991. Clause 219 of the Bill will amend section 83F(1) of the IR Act to make reference to new section 83BA.

Clause 220 of the Bill – Section 84A deleted

992. Clause 220 of the Bill will delete section 84A of the IR Act, which currently prescribes the Full Bench’s enforcement functions. These functions will instead be performed by the Industrial Magistrates Court. In terms of

210 This will be consistent with the powers of the Commission and the Industrial Appeal Court to order costs – see clauses 20 and 222 of the Bill.
transitional arrangements, clause 23 of new Schedule 6 of the IR Act will provide for continuity in proceedings. Any proceedings commenced under section 84A before section 219 of the Amendment Act comes into operation will continue to be dealt with as if section 84A had not been deleted.

Clause 221 of the Bill – New section 85A inserted concerning prohibition on contracting out

993. Clause 221 of the Bill will insert new section 85A into the IR Act to prohibit the contracting out of industrial instruments and orders of the Commission. New section 85A will replace current section 114(1) of the IR Act, which will be deleted by clause 230 of the Bill. Although expressed in modernised terms, section 85A is intended to have the same effect as section 114(1) and will be more conveniently located in Part III of the IR Act.

Clause 222 of the Bill – Section 86 amended concerning Industrial Appeal Court’s powers to order costs

994. Clause 222 of the Bill will delete section 86(2) of the IR Act, which deals with the Industrial Appeal Court’s powers to order costs in proceedings.

995. As is currently the case, the Industrial Appeal Court will be able to make “such orders as it thinks just as to costs and expenses (including expenses of witnesses) of proceedings before the Court”. This includes costs for the services of a legal practitioner or industrial agent in proceedings.

996. New section 86(4) will enable the Industrial Appeal Court to order a party (the first person) to pay another party’s costs if the Court is satisfied that:

(a) the first person initiated proceedings, or responded to proceedings, vexatiously or without reasonable cause; or

(b) it should have been reasonably apparent to the first person that the proceedings initiated by them, or their response to the proceedings, had no reasonable prospect of success.\(^{211}\)

Clause 223 of the Bill – Section 90 amended concerning appeal grounds to Industrial Appeal Court

997. Clause 223 of the Bill will replace section 90(1)(a) and (b) of the IR Act to broaden appeal grounds to the Industrial Appeal Court. Currently, only certain decisions that are erroneous in law or in excess of jurisdiction can be appealed.

998. New section 90(1)(a) and (b) will enable all relevant decisions that are in excess of jurisdiction or erroneous in law to be appealed to the Industrial Appeal Court. These grounds are considered to be fundamental appeal grounds which should not properly be restricted. The new appeal grounds will reflect the Industrial Appeal Court’s appellate jurisdiction prior to 2002.

\(^{211}\) This will be consistent with the powers of the Commission and the Industrial Magistrates Court to order costs – see clauses 20 and 217 of the Bill.
Clause 224 of the Bill – Amendment to section 97WQ

Clause 224 of the Bill will amend section 97WQ of the IR Act to signpost that EEAs are enforceable under section 83.

Clause 225 of the Bill – Part VII titled “Industrial inspectors and other staff”

Clause 225 of the Bill will delete the current heading to Part VII of the IR Act titled “Miscellaneous” and replace it with “Industrial inspectors and other staff”. This will more accurately reflect the content of Part VII. 212

Clause 226 of the Bill – Amendments to section 98 concerning powers of industrial inspectors

Clause 226 of the Bill will amend section 98 of the IR Act, which deals with the functions and powers of industrial inspectors.

\[No\text{ requirement that Minister direct industrial inspectors}\]

Clause 226(1) of the Bill will replace section 98(2), which currently provides that industrial inspectors “shall perform such duties and shall make such investigations and reports in relation to the observance of the provisions of this Act and of any instrument to which this section applies as the Minister directs” (emphasis added).

Industrial inspectors’ functions and powers are comprehensively prescribed by the IR Act and other relevant laws. The requirement that the Minister “direct” industrial inspectors is therefore unnecessary. New section 98(2) will simply provide that, in addition to their statutory functions, industrial inspectors may:

\begin{itemize}
  \item[(a)] carry out investigations concerning compliance with the IR Act and instruments outlined in section 98(6); and
  \item[(b)] report to the CEO of the Department of Commerce about the investigation.
\end{itemize}

\[Minister\text{ may direct industrial inspector to carry out specific investigation}\]

While the Minister will be unable to direct industrial inspectors generally in the performance of their functions, new section 98(3A) will enable the Minister to direct that a specific investigation be carried out and a report provided about the investigation. New section 98(3B) will require an industrial inspector to comply with any such direction.

\[Definition\text{ of “produce”}\]

New section 98(3C) will define the term “produce” for the purposes of section 98(3) and (4B) to (4E). The term will mean “produce, exhibit, send or deliver”.

\[212\text{ A new Part VIII titled “Miscellaneous offences, proceedings and other provisions” will be inserted into the IR Act (see clause 228 of the Bill).}\]
1006. Clause 226(2) of the Bill will amend section 98(3)(a) to replace the term “subsection” with “section”. The effect of the amendment will be to define the term “industrial location” for the purposes of section 98 generally, rather than just for section 98(3).

*Industrial inspectors’ powers clarified*

1007. Clause 226(3) and (4) of the Bill will clarify industrial inspectors’ powers under section 98. Among other things:

(a) new section 98(3)(e) will enable an industrial inspector to require a person to produce a record\(^{213}\) for inspection by giving the person written or oral notice;\(^{214}\) and

(b) new section 98(3)(f) will enable an industrial inspector to inspect and seize, retain (for however long is necessary) and take extracts from any record that is:

(i) kept at an industrial location, or is accessible from a computer at the industrial location; or

(ii) produced for an industrial inspector’s inspection under new section 93(3)(e).\(^{215}\)

*Production of records*

1008. New section 98(4A) will clarify that an industrial inspector’s power under new section 98(3)(e) to require the production of records can be exercised whether or not the inspector has entered an industrial location. Furthermore, if an industrial inspector has entered an industrial location, the power can be exercised in relation to any record whether or not it is kept at the location.

1009. In terms of a person producing a record for inspection under new section 98(3)(e), new section 98(4B) and (4C) will require the industrial inspector to specify the way in which the record is to be produced. This will help to ensure the person is clear about their obligations.

1010. Where the record is kept at an industrial location at which the industrial inspector is present, the inspector may require the record to be produced while they are present. If the industrial inspector does not require the record to be produced while they are present, they must specify a period of at least seven days for the record’s production.

1011. Where the record is not kept at an industrial location, or where the industrial inspector is not present at an industrial location, then the inspector must specify a period of at least seven days for the record’s production.

\(^{213}\) The term “record” is currently defined in section 7(1) of the IR Act.

\(^{214}\) New section 98(3)(e) in part reflects current section 98(3)(e).

\(^{215}\) New section 98(3)(f) is an amalgam of current section 98(3)(e) and (3)(f).
When privilege against self-incrimination does not apply

1012. New section 98(4D) will clarify that a person is not excused from producing a record under new section 98(3)(e) on the ground that it might incriminate them or expose them to a penalty. This will abrogate the common law privilege against self-incrimination. The production of records is critical to most investigations under section 98 and to the success of any ensuing proceedings.

Records not admissible in certain criminal proceedings

1013. New section 98(4E) will ensure, however, that a record produced is not admissible in criminal proceedings (unless those proceedings are for an offence under the IR Act or Part 7 of the CCS Act. The act of producing the record, and anything obtained as a consequence of producing the record, will also be inadmissible.

1014. New section 98(4F) will provide that new section 98(4E) does not apply to proceedings for an offence under the IR Act or Part 7 of the CCS Act. If relevant records were inadmissible in these proceedings, it would be difficult to gather the necessary evidence to successfully prosecute offences.

Clause 227 of the Bill – New section 99 inserted to give industrial inspectors specific power to require person’s name and address

1015. Clause 227 of the Bill will delete current section 99 of the IR Act and replace it with a new section 99.

1016. Current section 99 of the IR Act is a savings provision, inserted to save wage rates in awards and industrial agreements expressed as a “basic wage” under the Industrial Arbitration Act 1912-1979 (which was repealed in 1980). The “basic wage” is no longer a component of awards and industrial agreements. As such, current section 99 is obsolete.

1017. New section 99(1) will provide industrial inspectors with a specific power to require a person to provide their name and address. The industrial inspector must reasonably believe that the person has contravened a provision to which section 83 applies (e.g. a provision of an award or State employment standard) or a civil penalty provision.

1018. New section 99(2) will enable an industrial inspector to require evidence of the person’s name or address (e.g. driver’s licence) if they reasonably believe that the information provided is false.

1019. New section 99(3) will require a person to comply with a requirement under new section 99(1) or (2) if:

(a) the industrial inspector advises the person that they may contravene a civil penalty provision if they fail to comply; and

216 Consistent with clause 6 of Schedule 5 of the IR Act, which deals with the powers of certain authorised persons to obtain information.

217 See new section 98(4F).
(b) the industrial inspector shows their identity card to the person.\(^{218}\)

1020. New section 99(3) will be a civil penalty provision. A person will not contravene new section 99(3), however, if they have a reasonable excuse for not complying with the requirement. A reasonable excuse could include, for example, that the person is not carrying evidence of their name and address at the time the requirement is made. In this situation, the industrial inspector could require the person to provide evidence at a later time.

1021. New section 99 is not intended to limit in any way industrial inspectors’ powers under section 98 of the IR Act. Failure to provide basic details, such as a person’s name and address, can unnecessarily delay and frustrate an investigation. A specific power may assist industrial inspectors to elicit these details.

Clause 228 of the Bill – New Part VIII heading inserted

1022. Clause 228 of the Bill will insert new Part VIII into the IR Act titled “Miscellaneous offences, proceedings and other provisions”.

Clause 229 of the Bill – New section 102(2A) and (4) inserted

1023. Clause 229 of the Bill will insert new section 102(2A) and (4) into the IR Act. Section 102 prohibits a person from engaging in certain obstructive conduct under the IR Act.

1024. Section 102(1)(a) currently prohibits a person from failing to comply with a lawful requirement to produce a record. New section 102(2A) will provide that this prohibition does not apply, however, if the person has a reasonable excuse for not complying with the requirement. For example, the person simply may not be in possession of, or have access to, the record.

1025. New section 102(4) will provide the Industrial Magistrates Court with flexibility in civil penalty proceedings for a contravention of section 102(1)(a). As an alternative to finding a contravention of section 102(1)(a), the Industrial Magistrates Court will be able to determine that a contravention of section 49D has occurred. Section 49D deals with employers’ record-keeping obligations under the IR Act and is also a civil penalty provision.

1026. For example, it could be established in proceedings for a contravention of section 102(1)(a) that an employer failed to comply with a lawful requirement to produce an employment record because they failed to make the record in the first place. In this case, the Industrial Magistrates Court could determine that the employer contravened section 49D as an alternative to section 102(1)(a). This determination could be made without separate proceedings having to be commenced under section 83E for a contravention of section 49D.

Clause 230 of the Bill – Section 114 deleted

1027. Clause 230 of the Bill will delete section 114 of the IR Act, which currently prohibits contracting out of industrial instruments and orders of the Commission. Section 114 will be replaced by new section 85A.\(^{219}\)

\(^{218}\) Identity cards are issued to industrial inspectors under section 99A of the IR Act.
Clause 231 of the Bill – Consequential amendments to various sections

1028. Clause 231 of the Bill will amend various sections of the IR Act to delete references to section 84A. These amendments are consequential to section 84A being deleted by clause 220 of the Bill.

219 See clause 221 of the Bill.
PART 15 – MISCELLANEOUS AMENDMENTS

Clause 232 of the Bill – IR Act amended

1029. Clause 232 of the Bill provides that Part 15 Division 1 of the Bill will amend the IR Act. The amendments are miscellaneous in nature and/or consequential to other amendments in the Bill.

Clause 233 of the Bill – Definitions in section 7 amended

1030. Clause 233 of the Bill will amend section 7 of the IR Act, which defines certain terms for the purposes of the IR Act.

Definition of “Commonwealth Act” deleted

1031. Clause 233(1) of the Bill will delete the definition of “Commonwealth Act” in section 7(1), which is defined to mean the “Workplace Relations Act 1996 of the Commonwealth”.

1032. The term “Commonwealth Act” is defined for the purposes of Part II Division 3B of the IR Act. Part II Division 3B will be deleted by clause 235 of the Bill. As such, the definition of “Commonwealth Act” is no longer required.

Incorrect reference in section 7(4) amended

1033. Clause 233(2) of the Bill will amend an incorrect reference in section 7(4). The current reference to “subsection (3)(b)” will be replaced with “subsection (3)”. 

Consequential amendment to section 7(5)

1034. Clause 233(3) of the Bill will amend section 7(5)(a) and (b) to delete the reference to “collective agreement (as that term is defined in the Commonwealth Act)”.

1035. This amendment is consequential to Part II Division 3B of the IR Act being deleted by clause 235 of the Bill.

Clause 234 of the Bill – Section 49E amended

1036. Clause 234 of the Bill will amend an incorrect reference in section 49E(4) of the IR Act. The current reference in paragraph (d) to “an officer referred to in section 93 authorised in writing by the Registrar” will be replaced with “a Registrar’s department officer authorised in writing by the Registrar”.220

Clause 235 of the Bill – Part II Division 3B deleted

1037. Clause 235 of the Bill will delete Part II Division 3B of the IR Act, which deals with good faith bargaining for a collective agreement under the “Commonwealth Act” (defined as the Workplace Relations Act 1996). Division 3B is redundant as a result of the Workplace Relations Act being repealed and the FW Act exclusively regulating industrial relations matters

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220 This amendment is consequential to amendments made to the IR Act in 2012 by the Industrial Legislation Amendment Act 2011.
(including good faith bargaining) for employers that are constitutional corporations.

Clause 236 of the Bill – Section 93 amended

1038. Clause 236 of the Bill will amend section 93 of the IR Act, which deals with the appointment and duties of the Registrar and deputy registrars of the Commission.

1039. Clause 236(1) of the Bill will amend section 93(4) to clarify that the Registrar may publish the *Industrial Gazette* in electronic form.

1040. Clause 236(2) of the Bill will:

   (a) delete section 93(6a), which is a transitional provision and is no longer relevant;

   (b) delete section 93(7), which requires the Registrar to notify the Chief Commissioner of industrial action that the Registrar is aware of. A legislative requirement of this nature is unnecessary and can be achieved administratively;

   (c) replace current section 93(6) with a new section 93(6) and (7). New section 93(6) and (7) will be the same in substance as current section 93(6), and will require the Registrar to keep awards under review and to publish consolidations of awards in certain circumstances.

Clause 237 of the Bill – Section 97VQ amended

1041. Clause 237 of the Bill will amend section 97VQ(1) of the IR Act to reflect that it is the Chief Commissioner (rather than the Commission generally) who is responsible for making regulations under section 113.

Clause 238 of the Bill – Section 97XW amended

1042. Clause 238 of the Bill will amend section 97XW(1) of the IR Act to reflect that it is the Chief Commissioner (rather than the Commission generally) who is responsible for making regulations under section 113.

Clause 239 of the Bill – Section 97YI amended

1043. Clause 239 of the Bill will replace section 97YI(2) of the IR Act. Section 97YI(2)(a) currently requires a review of certain EEA provisions to be carried out as soon as practicable after the provisions have been in operation for 12 months, while section 97YI(2)(b) requires a review at such other times as the Minister requests in writing.

1044. Current section 97YI(2)(a) will be deleted as a review was carried out under the provision as required and it is therefore redundant.

1045. New section 97YI(2) will replicate current section 97YI(2)(b) by providing that a review is to be carried out at such times as the Minister requests in writing.
Clause 240 of the Bill – Section 98 amended

1046. Clause 240 of the Bill will amend an incorrect reference in section 98(7) of the IR Act. The current reference to “subsection (1)” will be replaced with “subsection (2A)”.

Clause 241 of the Bill – Section 99D amended

1047. Clause 241 of the Bill will amend an incorrect reference in section 99D(5) of the IR Act. The current reference to “Minister” will be replaced with “CEO”.

Clause 242 of the Bill – Section 108 deleted

1048. Clause 242 of the Bill will delete section 108 of the IR Act, which provides that organisations and associations will not be affected by “any Act of the Imperial Parliament” (i.e. British Parliament). This section is obsolete as there is no imperial legislation that affects organisations or associations in Western Australia.

Clause 243 of the Bill – Section 111 replaced

1049. Clause 243 of the Bill will replace current section 111 of the IR Act, which prohibits premiums for employment. The section prohibits an employer or employee (or person acting on their behalf) from demanding, receiving or paying any premium in relation to employment. The section provides protection to vulnerable categories of employees, as well as other employees in a tight labour market, who might otherwise be susceptible to paying a premium in exchange for employment.

1050. New section 111 will similarly prohibit premiums for employment, but will be expressed in modernised terms.

1051. New section 111(1) will provide that a person must not ask for, or receive, a premium concerning the employment or engagement of any employee.

1052. New section 111(2) will provide that new section 111(1) is a civil penalty provision. Among other things, this will enable industrial inspectors to take proceedings under section 83E for a contravention of new section 111(1).

1053. New section 111(3) will clarify that the prohibition in section 111(1) does not apply to:

(a) employment or engagement through an employment agent acting in the ordinary course of business under the Employment Agents Act 1976;

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221 This amendment is consequential to amendments made to the IR Act in 2012 by the Industrial Legislation Amendment Act 2011.
222 This amendment is consequential to amendments made to the IR Act in 2012 by the Industrial Legislation Amendment Act 2011.
223 Current section 111(1) is not a civil penalty provision, however, it is enforceable by the Full Bench under section 84A as a contravention of the IR Act. As section 84A will be deleted by clause 220 of the Bill, it is necessary to designate new section 111(1) as a civil penalty provision.
224 Consistent with current section 111(1). No fee can be chargeable to an employee under section 36 of the Employment Agents Act.
(b) the payment or receipt of a premium under an arrangement approved by the Minister. For example, the Minister could exempt “employer apprenticeship grants” designed to provide financial incentives to employers to engage apprentices.

1054. New section 111(4) will enable any money received in contravention of section 111(1) to be recovered as a debt in the Industrial Magistrates Court. 225

Clause 244 of the Bill – Section 113 amended

1055. Clause 244 of the Bill will make minor amendments to section 113 of the IR Act, which deals with regulations.

1056. Section 113(2) will be amended to reflect that it is the Chief Commissioner (rather than the Commission generally) who is responsible for making regulations under section 113(1).

1057. Section 113(4) will be amended to increase the maximum penalty that may be prescribed for contravention of a regulation from $1,000 to $2,000. 226

Clause 245 of the Bill – Part VIII deleted

1058. Clause 245 of the Bill will delete Part VIII of the IR Act, which has been omitted in reprints of the IR Act for some time but never formally deleted.

Clause 246 of the Bill – Litter Act 1979 amended

1059. Clause 246 will amend an incorrect reference in section 9(2) of the Litter Act 1979. 227

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225 Consistent with current section 111(3).
226 Clause 211 of the Bill will similarly increase penalties under section 83 of the IR Act.
227 This amendment is consequential to amendments made to the Litter Act in 2012 by the Industrial Legislation Amendment Act 2011.
PART 16 OF THE BILL – REPEALS

Clause 247 of the Bill – Coal Industry Tribunal of Western Australia Act 1992 and Coal Industry Tribunal of Western Australia Regulations 1992 repealed

1060. Clause 247 of the Bill will repeal the Coal Industry Tribunal of Western Australia Act 1992 and the Coal Industry Tribunal of Western Australia Regulations 1992. A number of consequential amendments to other Acts will be necessary as a result.

1061. The Coal Industry Tribunal of Western Australia Act is obsolete as a result of federal industrial laws exclusively regulating industrial relations matters since 2006 for employers that are constitutional corporations. The two coal mining employers operating in Western Australia are both covered by the FW Act.

Clause 248 of the Bill – Consequential amendments to Constitution Acts Amendment Act 1899

1062. Clause 248 of the Bill will make consequential amendments to the Constitution Acts Amendment Act 1899 as a result of the Coal Industry Tribunal of Western Australia Act being repealed.

Clause 249 of the Bill – Consequential amendments to IR Act

1063. Clause 249 of the Bill will make consequential amendments to the IR Act as a result of the Coal Industry Tribunal of Western Australia Act being repealed.

Clause 250 of the Bill – Consequential amendment to Workers’ Compensation and Injury Management Act 1981

1064. Clause 250 of the Bill will make a consequential amendment to the Workers’ Compensation and Injury Management Act 1981 as a result of the Coal Industry Tribunal of Western Australia Act being repealed.

Clause 251 of the Bill – Conspiracy and Protection of Property Act of 1900 repealed

1065. Clause 251 of the Bill will repeal the Conspiracy and Protection of Property Act of 1900. At common law, two or more persons who agreed or combined together to take industrial action were liable to be convicted of the crime of conspiracy. The Act overcame that by excluding criminal liability for acts done in contemplation or furtherance of a trade dispute between employers and workmen (section 2 of the Act).

1066. The Conspiracy and Protection of Property Act of 1900 also expressly provides that the purposes of a trade union shall not, by reason of the fact that they are in restraint of trade, be deemed to be unlawful (section 5 of the Act).228

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228 Unions inherently operate in restraint of trade by seeking to create monopolies of labour and uniform rates and conditions among comparable employees working in an industry (e.g. level playing field in labour markets and between competing businesses).
1067. Most sections of the *Conspiracy and Protection of Property Act of 1900* are obsolete, aside from sections 2 and 5. As such, the Act will be repealed and modernised versions of sections 2 and 5 incorporated into the IR Act.

Clauses 252 and 253 of the Bill – New sections 108A and 108B inserted into IR Act

1068. Clauses 252 and 253 of the Bill will amend the IR Act to insert new sections 108A and 108B.

1069. New section 108A will replace section 2 of the *Conspiracy and Protection of Property Act of 1900* to afford acts done in contemplation or furtherance of an industrial dispute protection from the crime of conspiracy.\(^{229}\) New section 108A is similar to protections provided in other States’ laws.\(^{230}\)

1070. New section 108B will replace section 5 of the *Conspiracy and Protection of Property Act of 1900* to ensure that the purposes of organisations and associations of employers or employees (whether registered under the IR Act or not) are not unlawful by reason only that they are in restraint of trade. New section 108B is similar to protections provided in other States’ laws.\(^{231}\)

Clause 254 of the Bill – *Labour Relations Reform Act 2002* repealed

1071. Clause 254 of the Bill will repeal the *Labour Relations Reform Act 2002*. The Act is obsolete, aside from section 100.

1072. Section 100 of the *Labour Relations Reform Act* is a savings provision which had the effect of preserving “statutory contracts of employment” incorporating the terms of workplace agreements made under the repealed *Workplace Agreements Act 2003*. Section 100 was designed to ensure that employees were not disadvantaged as a result of workplace agreements being phased-out in 2003. Employees are entitled to be paid the greater amount arising under their statutory contract of employment or applicable award/industrial agreement.

1073. Given workplace agreements were repealed almost 10 years ago, it is appropriate that statutory contracts of employment also be repealed. It is unlikely there would be any statutory contract of employment remaining that would contain superior entitlements to any applicable award or industrial agreement (assuming there are in fact statutory contracts of employment still in existence).

\(^{229}\) New section 108A will not protect persons from liability in tort, including the tort of conspiracy.

\(^{230}\) See for example section 258 of the *Criminal Code (SA)* and section 543A of the *Criminal Code (Qld)*.

\(^{231}\) See for example section 304 of the *Industrial Relations Act 1996 (NSW)*.
PART 17 OF THE BILL – TRANSITIONAL PROVISIONS

Clause 255 of the Bill – IR Act amended

1074. Clause 255 of the Bill provides that Part 17 of the Bill will amend the IR Act.

Clause 256 of the Bill – New section 115A inserted

1075. Clause 256 of the Bill will insert new section 115A into the IR Act. New section 115A will provide that transitional provisions concerning amendments to the IR Act are set out in new Schedule 6 of the IR Act.

1076. New section 115A will also cater for unanticipated problems that might emerge in moving from one legislative scheme to another under the IR Act, and provide a convenient means of resolving the problems. For example:

(a) new section 115A(3) will enable the Governor to make regulations to deal with transitional matters not sufficiently provided for by new Schedule 6; and

(b) new section 115A(4) will enable the Governor to make regulations to deal with any anomaly that, in the opinion of the Minister, arises in the carrying out of any provision of new Schedule 6 or the Interpretation Act 1984 (as it applies to the amendments made to the IR Act).

Clause 257 of the Bill – New Schedule 6 inserted

1077. Clause 257 of the Bill will insert new Schedule 6 into the IR Act. New Schedule 6 will contain transitional provisions for the Amendment Act. The various clauses of Schedule 6 are explained elsewhere in this Explanatory Memorandum.