1993

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

# INDUSTRIAL RELATIONS AND OTHER LEGISLATION AMENDMENT BILL 1993

EXPLANATORY MEMORANDUM

(Circulated on the authority of the Minister for Industrial Relations,
the Honourable Laurie Brereton MP)

51530 Cat. No. 93 4430 3

9 780644 318501

## INDUSTRIAL RELATIONS AND OTHER LEGISLATION AMENDMENT BILL 1993

## OUTLINE

This Bill will amend eight Acts.

### Anti-discrimination provisions

The ***Sex Discrimination Act 1984*** and the ***Remuneration Tribunal Act 1973*** are to be amended to provide a mechanism for the removal of discriminatory provisions from determinations of the Remuneration Tribunal.

This follows amendments made by the ***Sex Discrimination and Other Legislation Amendment Act*** (No. 179 of 1992) to the ***Industrial Relations Act 1988*** in relation to discriminatory provisions in awards of the Australian Industrial Relations Commission.

### Removal of gender-specific title

The ***Defence Act 1903*** is to be amended to replace the title "Chairman" with the gender-neutral title "President".

### Remuneration Tribunal advice

The ***Remuneration Tribunal Act 1973*** will also be amended to require superannuation entitlements to be taken into account by the Tribunal when providing advice on the remuneration of principal executive officers of Government Business Enterprises.

### Complementary Federal and State IR arrangements; common rules

The ***Industrial Relations Act 1988*** is to be amended to:

- enable the Australian Industrial Registry to act as registry for State industrial authorities by agreement between the Commonwealth and the State concerned;
- to ensure that the complementary registration system established under Schedule 4 of the Act does not apply to Federally registered unions that do not wish to take advantage of it; and
- to limit the time within which an objection to a variation of a common rule award must be made.

### Powers of Parliamentary officers to grant maternity leave

The ***Maternity Leave (Commonwealth Employees) Act 1973*** will be amended to give the President of the Senate and the Speaker of the House of Representatives

the same powers as are currently exercised by the Public Service Commissioner under the Act and to give the Heads of the five Parliamentary departments the powers currently vested in the Secretary to the Department of Industrial Relations under the Act.

**Minor amendments to the Commonwealth's OHS legislation**

The ***Occupational Health and Safety (Commonwealth Employment) Act 1991*** is amended to:

- clarify the application of the Act to employees who do not work in the traditional office or factory workplace;
- enhance reporting requirements in relation to accidents and dangerous occurrences; and
- enable standards or codes of practice of the National Occupational Health and Safety Commission to be adopted as regulations, codes of practice or both.

**R covery of compensation overpayments**

The ***Safety Rehabilitation and Compensation Act 1988*** is to be amended to enable an overpayment of compensation, in circumstances where a Commonwealth employee has retired and is entitled to superannuation benefits, to be recovered directly from the superannuation fund.

**Partial cost r covery under the TRR Act**

The ***Tradesmen's Rights Regulation Act 1946*** is to be amended to enable regulations to be made prescribing fees to be payable on a partial cost–recovery basis for certain functions carried out by the Department of Industrial Relations in respect of the Act (e.g., assessments for Trades Committees).

## FINANCIAL IMPACT STATEMENT

The Bill will have no significant impact on Commonwealth expenditure. It is expected that revenue collected under the proposed amendments of the ***Tradesmen's Rights Regulation Act 1946*** will be approximately $180,000 per annum.

## NOTES ON CLAUSES

### PART 1 – PRELIMINARY

**Clause 1: Short title**

1.1 This is a formal provision specifying the short title of the Bill.

**Clause 2: Commencement**

2.1 This clause specifies when the various provisions of the Bill are to commence.

2.2 Subclause 2(1) provides that sections 1, 2 and 58 commence on Royal Assent.

2.3 Subclause 2(2) provides that section 32 will commence on the 14th day after Royal Assent, or on 1 January 1994, whichever is the later. Section 32 revises certain reporting requirements, under the *Occupational Health and Safety (Commonwealth Employment) Act 1991* in relation to work related accidents. The delay in commencement will allow new requirements to be explained to employers and will allow them to put any necessary procedures in place.

2.4 Subclause 2(3) deems section 34, which corrects a drafting error in the *Occupational Health and Safety (Commonwealth Employment) Act 1991*, to have commenced on 6 September 1991, the date the Act containing the error commenced. The retrospective operation of the provision will not adversely affect any person's interest.

2.5 Subclause 2(4) deems section 47, which also corrects a drafting error in the *Safety Rehabilitation and Compensation Act 1988*, to have commenced on 24 December 1992, the date the amending Act (Act no. 264 of 1992) containing the error commenced. The retrospective operation of the provision will not adversely affect any person's interest.

2.6 Subclause 2(5) provides that the remaining sections will commence on the 28th day after Royal Assent.

### PART 2 – AMENDMENTS OF THE DEFENCE ACT 1903

This Part deals with the Defence Force Remuneration Tribunal.

The title of the Chairman of the Tribunal is to be changed to "President", which requires amendments to all provisions referring to the "Chairman". By virtue of section 25B of the *Acts Interpretation Act 1901*, the current Chairman will continue in office with the title "President", without need for express provision to that effect.

**Clau e 3: Principal Act**

3.1 This is a formal provision.

**Clause 4: Interpretation**

4.1 This clause omits the definition of "Chairman" and inserts a corresponding definition of "President", and amends a reference to "Chairman" in another definition.

**Clau e 5: Establishment of Defence Force Remuneration Tribunal**
**Claus 6: Functions and powers of Tribunal**
**Clause 7: Reports by Tribunal**
**Clause 8: Procedure of Tribunal**
**Claus 9: Single member may conduct Tribunal's business**
**Claus 10: Review of action etc. of single member**
**Clause 11: Terms and tenure of office**
**Claus 12: Acting appointments**

5.1 These clauses amend references to "Chairman" in sections 58G, 58H, 58J, 58K, 58KA, 58KC, 58L and 58P of the Act, respectively.

**PART 3 – AMENDMENTS OF THE INDUSTRIAL RELATIONS ACT 1988**

**Clause 13: Principal Act**

13.1 This is a formal provision.

**Claus 14: Interpretation**

14.1 This clause inserts a definition of 'prescribed' in section 4 of the Act. This amendment must be read in conjunction with clause 19 of the Bill.

**Clause 15: Ins rtion of new Division**

***New Division 1A: Interpretation - new section 61A: definition of State industrial body***

15.1 The division inserts a definition of "State industrial body". Refer to paragraph 16.4 below for more detail.

15.2 This amendment is part of a package of amendments, contained in clauses 15 to 18, that will enable the Australian Industrial Registry (AIR) to act as the registry for and provide administrative support (registry functions) to State industrial bodies. These bodies will mainly be State industrial relations commissions but may also include other tribunals, boards, or courts such as industrial courts.

**Clause 16: Functions of the Industrial Registry**

16.1 This clause will enable the AIR to perform registry and administrative support functions for a State industrial body (as defined) where:

- proposed paragraph 63(1A)(a) - the Commonwealth and a State agree that the Industrial Registrar or Deputy Industrial Registrar be appointed as the registrar of a State industrial body.

- proposed paragraph 63(1A)(b) - the Commonwealth and a State agree that the Industrial Registrar or the Deputy Industrial Registrar will perform or exercise any functions, duties or powers of the registrar of a State industrial body.

- proposed paragraph 63(1D)(a) - the Commonwealth and a State agree that the AIR may act as a registry and provide administrative support to a State industrial body and a State confers such functions on the AIR either in that agreement or under a State law.

16.2 Proposed subsections 63(1A) and 63(1D) require that any agreement between the Commonwealth and a State shall be between the Minister and an appropriate authority of a State, after the Minister has consulted with the President of the Australian Industrial Relations Commission (AIRC). The appropriate authority of a State is identified by relevant State legislation; it will usually be the State Governor or relevant State Minister.

16.3 Proposed subsection 63(1C) and proposed paragraph 63(1D)(b) provide that if a State industrial body, in relation to which such an agreement exists, is replaced by another State industrial body, the AIR may continue to act as a registry and provide administrative support for the new body if the Minister agrees, after consulting the President.

16.4 'State industrial body' is defined broadly in proposed section 61A to mean a court, tribunal, board, authority or other body of a State. This includes bodies exercising judicial powers. It is contemplated that an agreement may operate in relation to more than one State industrial body, for instance the State industrial relations commission and the State industrial court or workers' compensation tribunal.

**Clause 17: Industrial Registrar**

17.1 Proposed subsection 67(2A) provides that the Industrial Registrar has and must perform, any functions or duties and may exercise any powers of the registrar of a State industrial body in the following circumstances:

- proposed paragraph 67(2A)(a) – if the Industrial Registrar is appointed as the registrar of a State industrial body [under proposed paragraph 63(1A)(a)]; and

- proposed paragraph 67(2A)(b) – if the Industrial Registrar is authorised to perform or exercise any functions, duties or powers of the registrar of a State industrial body [under proposed paragraph 63(1A)(b)].

17.2 Proposed subsection 67(2B) operates to confer on the Industrial Registrar powers to perform or exercise those powers, duties and functions where the AIR has the function of performing registry functions for a State industrial body [under proposed subsection 63(1D)] and those powers, duties and functions are conferred on the registrar under the State legislation.

17.3 The Industrial Registrar must perform the functions and duties and may exercise the powers subject to the terms of the agreement – refer to proposed subsections 63(1A) and 67(2B).

17.5 Proposed subsections 67(2A) and 67(2B) also operate where the Industrial Registrar's powers relate to a body that has replaced a State industrial body under proposed paragraphs 63(1C)(a) or 63(1D)(b).

17.6 Clause 17(b) of the Bill inserts a new subsection 67(4A) that requires the Industrial Registrar, when performing or exercising functions, duties or powers of a State industrial body to comply with lawful directions of that body. This is consistent with the existing requirement in subsection 67(4) of the Act for the Industrial Registrar to comply with directions of the President of the AIRC.

17.7 Clause 17(c) of the Bill inserts into subsection 67(5) of the Act the requirement that, in the allocation and management of the resources of the AIR, the Industrial Registrar must take into account the needs of any State industrial body in relation to which the Industrial Registrar or a Deputy Industrial Registrar performs functions.

**Clau 18: D puty Industrial Registrar**

18.1 This clause adds new subsections 75(3) and 75(4) to the Act.

18.2 Proposed subsection 75(3) parallels proposed subsection 67(2A) and confers on a Deputy Industrial Registrar, who is appointed as the registrar of a State industrial body [under proposed subparagraph 63(1A)(a)] or authorised to perform the functions of Registrar of such a body [under proposed subparagraph 63(1A)(b)], the powers, duties and functions of registrar of the State industrial body.

18.3 Proposed subsection 75(4) parallels proposed subsection 67(2B). It confers on Deputy Registrars the relevant powers where the AIR performs registry functions for a State industrial body where two preconditions are met:

. the AIR has those functions under proposed subsection 63(1D); and

. a law of the State authorises the Industrial Registrar or a registrar to perform those functions.

18.4 The powers, duties and functions of Deputy Industrial Registrars must be performed or exercised subject to the directions of the Industrial Registrar and to the agreement between the State and the Commonwealth.

**Clause 19: Variation of common rules**

19.1 This clause amends section 142 of the Act to provide that an objection to the variation of an award that is a common rule must be lodged within a prescribed time. At present no time limit is prescribed for the lodging of such objections, yet subsection 142(7) provides that where an objection to a variation of a common rule award has been lodged by an organisation or person the variation is not enforceable against that organisation or person until the objection has been determined. This has caused problems with the enforcement of common rule awards. The proposed amendments of subsection (5) and paragraph (7)(b) would require objections to variations of common rule awards to be lodged "within the prescribed time". Proposed subsection (8) defines "the prescribed time" to mean the period prescribed by the Rules of the Australian Industrial Relations Commission.

**Clause 20: Repeal and substitution of new section**

20.1 The clause repeals section 293 of the Principal Act and substitutes a new section 293.

20.2 Section 293 and Schedule 4 of the Act comprise the Commonwealth's part of a legislative scheme to overcome the legal problems that can arise when a branch of a federally registered union is registered as a State union (South Australia, Queensland, New South Wales and Western Australia have such

systems of registration) These problems (highlighted in *Moore v Doyle* (1969) 15 FLR 59) arise because the one body has two separate legal personalities. Invalidities and anomalies can arise, for example, in elections for office, membership and the ownership of funds and property.

20.3 The Act allows for a branch of a federally registered union and a State registered union to amalgamate, where the relevant State has provided for the amalgamated body to have "non-corporate registration", i.e., not to have separate legal personality and to be able to be registered as a non-corporate body for the purpose of participation in the State's industrial relations system. Various legal requirements about branch autonomy have to be met.

20.4 So far, only South Australia has enacted complementary legislation and has been prescribed under the Act as a prescribed State for these purposes. The scheme will have full effect in South Australia from 1 January 1994.

20.5 At present, section 293 and Schedule 4 have indiscriminate application to all federally registered organisations which have branches whose operations are confined to a prescribed State (i.e., South Australia), even if that federally registered organisation is not proposing that a branch and a counterpart State registered union amalgamate in that State so that the branch can secure non-corporate registration. Each organisation must, in accordance with Part 2 of Schedule 4, ensure that its rules comply with the branch autonomy requirements under the Schedule. Substantial rule changes may be necessary for an organisation wishing to comply with these requirements.

20.6 The amendments provide that only those organisations wishing to take advantage of the system of complementary registration will be required to have rules that conform with Part 2 of Schedule 4.

**Claus 21: Prosecutions**

21.1 This clause repeals section 341 of the Act, which provides that a prosecution for an offence against the Act may be instituted by summons issued on information, without indictment. The reason for the repeal is that section 341 is redundant. This is because section 4H of the *Crimes Act 1914* already provides that offences against a law of the Commonwealth, other than offences punishable by imprisonment for a period exceeding 12 months, are summary offences (unless the contrary intention is expressed in the legislation creating the offence). Because no offence under the Industrial Relations Act is punishable by imprisonment for a period exceeding 12 months, section 4H of the Crimes Act already has the effect that all of the offences under the Industrial Relations Act are summary offences. Therefore section 341 of the Industrial Relations Act should be repealed.

**Clause 22: Schedule 4**

22.1 The amendments in clause 22 of the Bill complement those in clause 20.

22.2 Subclause 22(1) amends subclause 2(3) of Schedule 4 to provide that the designated Presidential Member, and not a Registrar, may exempt a federally registered organisation from some or all of the provisions of clause 2 of Part 2 of Schedule 4. "Designated Presidential Member" is defined in subsection 4(1) to be a Presidential Member designated by the President under section 38 of the Act to be responsible for the exercise of the power or the performance of the function in question. This amendment is consistent with the scheme of the Act in relation to the responsibilities of designated Presidential Members.

22.3 Subclause 22(2) inserts a new subclause 7(3A) which will apply to a federally registered organisation that is proposing to use the Schedule 4 scheme. Such an organisation which does not already have rules that comply with Part 2 of Schedule 4 [and has not been granted an exemption under subclause 2(3)] will be required to lodge proposed alterations to the rules with a Schedule 4 application. Where the rules already comply, no amendments will be required. The effect of the new subclause, when read with existing paragraph 7(8)(b) of Schedule 4, is that the Presidential Member will need to be satisfied that on the date an amalgamation takes effect the rules of the organisation will comply with Part 2 of the Schedule.

22.4 Subclause 22(3) omits Part 4 of Schedule 4 because the provision is, in practice, not relevant. Part 4 of Schedule 4 was inserted to provide organisations with branches in a prescribed State with a twelve month period of grace in which to effect necessary changes to its rules without being in breach of the Act. The amendments under clauses 20 and 22 of this Bill overtake this provision.

## PART 4 – AMENDMENTS OF THE MATERNITY LEAVE (COMMONWEALTH EMPLOYEES) ACT 1973

**Clause 23: Principal Act**

23.1 This is a formal provision.

**Clause 24: Interpretation**

24.1 This clause inserts two new definitions in section 3 of the Act, to put beyond doubt that the terms "Department of the Australian Public Service" and "Secretary" are to have the same meaning as these terms have under the *Public Service Act 1922* for the purposes of sections 11 and 12 of the Act.

**Clause 25: Insertion of new ction**

***New section 5A: How Act applies to persons employed in Parliamentary Departments.***

25.1 Clause 25 inserts a new section 5A. The effect of the proposed section is to:

> place the Heads of the Parliamentary Departments in the same position under the Act as that of the Secretary to the Department of Industrial Relations; and,
>
> place the President of the Senate and the Speaker of the House of Representatives in the same position under the Act as the Public Service Commissioner;

in relation to persons employed in the Parliamentary Departments.

25.2 Proposed new subsection 5A(1) is an interpretation provision.

25.3 Proposed new paragraph 5A(2)(a) provides that the Presiding Officers of the Senate and the House of Representatives may, in relation to their own Departments, exercise the power currently exercised by the Public Service Commissioner under section 8 of the Act. The paragraph provides for them to jointly exercise those powers in relation to those Departments of the Parliament for which they have joint responsibility. (Section 8 of the Act provides that the Public Service Commissioner may declare an office, occupied by an officer of the Australian Public Service who is absent on maternity leave without pay, to be vacant, with the consequence that the woman who occupied the office becomes an unattached officer for the purposes of the Act.)

25.4 Proposed new paragraph 5A(2)(b) enables the powers and functions presently exercised by the Secretary to the Department of Industrial Relations to be exercised by the Head of the Parliamentary Department in relation to the officers of that Parliamentary Department. This does not include the power of delegation under section 11, which is separately provided for in proposed subsections 5(3), 5(4) and 5(5). Subsections 6(4C), 6(4F), 7A(4), 7A(5) and 7A(6) of the Act vest certain powers in the Secretary to the Department of Industrial Relations. (These subsections refer to the "Secretary to the Department". By virtue of section 19A(3) of the *Acts Interpretation Act 1901*, this is the Secretary to the Department of Industrial Relations).

25.5 Proposed new subsections 5A(3), 5A(4) and 5A(5) vest in the Heads of the Parliamentary Departments a power of delegation that mirrors the powers of delegation held by the Secretary to the Department of Industrial Relations under subsections 11(1), 11(2) and 11(3) of the Act, except that the Head of a Parliamentary Department may only delegate to an officer or person employed in his or her own Parliamentary Department. (Section 11 of the Act vests in the Secretary to the Department of Industrial Relations the power to delegate his or her

powers under the Act to officers or employees of the Department, or to the Secretary of another Department or to the chief executive officer of a prescribed authority).

**Clause 26: Officers of the Public Service on maternity leave**

26.1 Paragraph 26(a) of the Bill is a technical amendment to clarify the existing provisions. Paragraph 8(1)(a) is amended by the substitution of the words "Australian Public Service". The amendment will put beyond doubt that the power exercised by the Public Service Commissioner extends to all women employed under the *Public Service Act 1922* who are covered by the Act, and is not limited to only those women who are employed by Commonwealth Departments of State.

26.2 Paragraph 26(b) of the Bill is a technical amendment to simplify subsection 8(2A).

**Clause 27: Delegation by Secretary**

27.1 The amendment to section 11 is a technical drafting amendment to clarify that the term "Secretary of another Department" in section 11 of the Act means a Secretary of a Department of the Australian Public Service.

**Clause 28: Sub-delegation by delegate of Secretary**

28.1 The comments in relation to clause 27 also apply to clause 28.

**PART 5 - AMENDMENTS OF THE OCCUPATIONAL HEALTH AND SAFETY (COMMONWEALTH EMPLOYMENT) ACT 1991**

**Clause 29: Principal Act**

29.1 This is a formal provision.

**Clause 30: Interpretation**

30.1 Most employers' duties imposed by the Act apply in relation to employees "at work". However, some duties (refer to sections 16(2), 17, 20 and the inspection provisions of Part 4) apply only in relation to a "workplace".

30.2 "Workplace" is defined as "any Commonwealth premises in which employees or contractors work, other than any part of such premises that is primarily used for a private dwelling".

30.3 "Commonwealth premises" is also defined to be "premises owned or occupied by the Commonwealth or by a Commonwealth authority". However, "premises" is not defined. This has caused some uncertainty in relation to employees performing their duties outside the traditional office or factory, for instance in aircraft or mobile staff facilities.

30.4 Clause 30 of the Bill defines "premises" in the Act to be any place, whether or not it is built on, enclosed, under ground or under water. The definition will clarify the scope of employers' duties of care.

30.5 The definition specifically provides that buildings, aircraft, vehicles and vessels are premises. It also provides that moveable structures, including tents, will be premises. The definition is inclusive and it is intended that it will be read widely; for instance, it is intended that it apply to aircraft, vessels and vehicles of any size.

30.6 The requirement for Commonwealth ownership of the premises must be satisfied before premises will be a "workplace" for the purpose of the Act.

**Clause 31: Regulations relating to occupational health and safety**

31.1 This clause amends section 23 to expand the regulation making powers under the Act. Currently regulations may be made in relation to the occupational health and safety of employees or contractors. The amendment will enable regulations to be made in relation to the occupational health and safety of employees, contractors or "other persons at or near a workplace".

31.2 The amendment is consistent with the objects of the Act and the scope of the duties imposed in Part 2 of the Act. For instance section 17 of the Act imposes on employers a duty to take all reasonably practicable steps to ensure that persons, who are not the employer's employees or contractors, and who are "at or near a workplace under the employer's control... are not exposed to risk...".

**Clause 32: Notification and reporting of accidents and dangerous occurr nces**

32.1 This clause proposes an amendment to section 68 of the Act and requires employers to report to Comcare certain accidents or dangerous occurrences that arise out of the conduct of an undertaking or out of work performed by an employee in connection with an undertaking.

32.2 Currently, the Act only requires that such accidents or occurrences be reported if they occur at or near a workplace. The information is used by Comcare to help employers reduce the incidence and cost of work related accidents. Such information is relevant wherever the accident occurs.

**Claus 33: Cod s of practice**

33.1 Paragraph 33(a) of the Bill is a drafting amendment.

33.2 Paragraph 33(b) of the Bill will amend subsection 70(2) of the Act, which deals with the incorporation of standards or codes of the National Occupational Health and Safety Commission (NOHSC) into codes of practice prepared by the Safety, Rehabilitation and Compensation Commission (SRC Commission) for Ministerial approval.

33.3 Currently, the SRC Commission is required to incorporate "in a code of practice" the relevant NOHSC code "to the extent that it is capable of applying to Commonwealth employment". This leaves no scope for a NOHSC code to be made a regulation. The amendment will enable the Commonwealth to adopt, in regulations, to the fullest extent possible, standards declared by the National Occupational Health and Safety Commission (NOHSC) and will assist the Government to meet its commitment to achieve a national, uniform system of OHS regulation.

33.4 To the extent that NOHSC standards and codes may relate not only to the health and safety of employees and contractors but third persons who may be at or near a workplace, the amendment complements the amendments proposed in clause 31 above.

**Clause 34: Certain matters to be included in Annual Reports**

34.1 This clause corrects a typographical error in the Act. By proposed subclause 2(3), its commencement is backdated to 6 September 1991, the date the Act commenced.

## PART 6 – AMENDMENTS OF THE REMUNERATION TRIBUNAL ACT 1973

This Part deals with the Remuneration Tribunal.

The title of the Chairman of the Tribunal is to be changed to "President". This requires amendments to all provisions referring to the "Chairman". By virtue of section 25B of the *Acts Interpretation Act 1901*, the current Chairman will continue in office with the title "President", without need for express provision to that effect.

New sections relating to discriminatory determinations of the Tribunal are to be inserted. These will operate in conjunction with the new sections to be inserted in the *Sex Discrimination Act 1984* ("the SDA") by clause 56. These amendments are closely comparable to the amendments to the *Industrial Relations Act 1988* and the SDA made by the *Sex Discrimination and other Legislation Amendment Act 1992.*

A new provision is to be inserted so that where the Tribunal is advising public authorities on remuneration for principal executive officers, it must have regard to the superannuation entitlements of the holders of those offices.

**Clause 35: Principal Act**

35.1 This is a formal provision.

**Claus 36: Interpretation**

36.1 This clause omits the definition of "Chairman" and inserts a corresponding definition of "President", and amends other references to "Chairman" in section 3 of the Act.

**Claus 37: Establishment of Remuneration Tribunal**
**Clause 38: Acting President**
**Claus 39: Disclosure of interest by Tribunal members**

37.1 These clauses amend references to "Chairman" and "acting Chairman" in sections 4, 4A and 4B of the Act, respectively.

**Claus 40: Functions of Tribunal**

40.1 This clause inserts proposed subsection 5(3), which will require the Tribunal to have regard to superannuation entitlements, when advising on remuneration for principal executive officers under subsection 5(2).

**Claus 41: Inquiries and reports by Tribunal**
**Claus 42: Inquiries and determinations by Tribunal**

41.1 These clauses amend references to "Chairman" in sections 6 and 7 of the Act, respectively.

**Clause 43: Insertion of new sections**

43.1 These new sections relate to the new complaint mechanism under the SDA: see also notes on clause 56 of this Bill.

***New section 8B – Hearings in relation to discriminatory determinations***

43.2 This proposed section requires the Tribunal to hold a hearing to review a determination where it has been referred to the Tribunal under new section 50C of the SDA (that is, where a complaint has been lodged with the Human Rights and Equal Opportunity Commission alleging that a person has done a discriminatory act under the determination, and it appears to the Sex Discrimination Commissioner that the act is a discriminatory act). The proposed section provides for the conduct of the hearing; proposed subsection 8B(5) provides that the Sex Discrimination Commissioner is entitled to be present at the hearing and make submissions to the Tribunal.

***New section 8C – Review of discriminatory determinations***

43.3 This proposed section provides that where a determination has been referred under the new provisions and the Tribunal considers it to be discriminatory, it must take appropriate action to remove the discrimination.

43.4 Proposed subsection 8C(2) defines "discriminatory determination" by reference to the new referral process under proposed section 50C of the SDA and by reference to other aspects of Part II of the SDA. To constitute a discriminatory determination, the determination must require a person to do an act that would, except for the fact that the act would be done in direct compliance with the determination, be unlawful under the SDA (the SDA contains an exemption for acts done by a person in direct compliance with a determination). Proposed subsection 8C(3) makes plain that the fact that an act is done in direct compliance with the determination does not of itself mean that the act is reasonable. The "reasonableness" issue arises because of the indirect discrimination test in the SDA (see for example subsection 5(2) of the SDA). This amendment will therefore facilitate the consideration of indirect discrimination issues in determinations.

**Clause 44: Meetings of the Tribunal**

44.1 This clause amends references to "Chairman" in section 10 of the Act.

## PART 7 – AMENDMENTS OF THE SAFETY REHABILITATION AND COMPENSATION ACT 1988

This part amends the *Safety Rehabilitation and Compensation Act 1988* (the Act) by inserting a mechanism to allow Comcare to recover overpayments of compensation direct from superannuation fund administrators where an overpayment arises as a result of an employee's retirement. The mechanism will not be available where Comcare seeks to recover the overpayment after the employee has received a superannuation payment or if all the employee's superannuation benefits are deferred.

Under sections 20, 21 and 21A of the Act, an employee's entitlement to compensation is reduced if that employee retires and receives lump sum and/or pension superannuation benefits.

In practice, there is often a lag time between the retirement of an employee and the commencement of superannuation payments. If Comcare continues to pay full compensation during this period overpayment will result. Under existing provisions Comcare must seek to recover such an overpayment but is only able to do so from the retired employee (refer to section 114 of the Act). This is administratively difficult and may cause hardship to the employee.

The amendments proposed will allow Comcare and licensed authorities to recover such overpayments direct from superannuation fund administrators in certain circumstances. Unless payment of superannuation is deferred, the amendments ensure that the employee continues to be paid full compensation benefits until the superannuation fund administrator is able to commence paying the employee's superannuation entitlement.

**Clause 45: Principal Act**

45.1 This is a formal provision

**Claus 46: Short title**

46.1 The amendment corrects a grammatical error in the Act.

**Claus 47: Employees**

47.1 Clause 47 amends section 5 of the Principal Act to reflect the fact that the Act applies to Commonwealth authorities and licensed corporations as well as to the Commonwealth.

**Claus 48: Reduction of compensation in certain cases**

48.1 The amendment correct a grammatical error in the Act.

**Claus 49: Interpretation**

49.1 Paragraph 49(a) of the Bill corrects a grammatical error in the Act.

49.2 Paragraph 49(b) of the Bill has the effect that a determination by Comcare that an amount of compensation has been overpaid and is recoverable under proposed section 114B, is reviewable. Refer below to paragraph 52.11 for more detail.

**Clause 50: Provisions applicable on death of beneficiary**

50.1 This amendment corrects a drafting error in the Act.

**Clause 51: Recovery of overpayments**

51.1 Paragraphs 51(a) and (b) of the Bill have the effect that if Comcare is entitled to recover an overpayment of compensation direct from a superannuation fund administrator (under the mechanism proposed in section 114B), it is not entitled to recover the overpayment from the employee (through the mechanism currently provided in section 114).

**Clause 52: Insertion of new sections**

***New section 114A: Notice to Comcare of retirement of employee***

52.1 Proposed subsection 114A(1) requires certain employers to inform Comcare of the retirement of employees who are in receipt of compensation from Comcare. The proposed subsection requires an 'appropriate officer' of the employer to notify Comcare of the date of retirement and the identity of the superannuation scheme to which the employee belongs.

52.2 Employers covered by this subsection are the Commonwealth departments and Commonwealth authorities (including an authority holding a class 2 licence, but not an authority holding any other licence under parts VIIIA or VIIIB of the Act).

52.3 The Commonwealth authorities that hold class 1 or 3 licences under part VIIIA of the Act or class A or B licences under part VIIIB are not required to provide such a notice to Comcare because Comcare is not liable to pay compensation to their employees; the authority itself is liable for compensation payments. Such licensed authorities will also be able to recover any overpayment of compensation direct from the administrator of the relevant superannuation scheme under proposed section 114B. The expression 'administrator of the scheme' is intended to be read broadly to include any person who is responsible for the administration of the scheme, whether or not that person personally undertakes such administration.

52.4 Proposed subsection 114A(2) defines 'appropriate officer' for the purposes of proposed subsection 114A(1).

***New section 114B: Recovery of overpayment to retired employee***

52.5 Proposed subsection 114B(1) sets out three preconditions for the operation of the proposed mechanism to recover overpayments from superannuation fund administrators:

- an employee retires;
- the retired employee is entitled to a superannuation benefit (a pension, a lump sum or a combination of the two);
- the person liable for payment of compensation, either Comcare or a licensed authority, considers that it has overpaid, or may overpay, compensation because of the operation of sections 20, 21 or 21A of the Act.

52.6 Proposed subsection 114B(2) entitles Comcare, or a licensed authority, to issue a notice to the administrator of a retired employee's superannuation fund stating that Comcare or the authority has made or may make overpayments of compensation. The notice requires the administrator to advise Comcare whether the employee has received any payment in respect of the employee's superannuation entitlement or payment of all the employee's entitlement has been deferred. If no payments have been received and payment of the benefit has not been deferred, the notice will also have the effect of requiring the administrator:

- not to commence payment of superannuation benefits, until it receives a notice under proposed subsection 114B(5); and
- to provide Comcare or the authority with particulars of the superannuation benefits payable as at the date of retirement.

52.7 Proposed subsection 114B(3) provides that if Comcare or a licensed authority gives a notice to an administrator under proposed subsection 114B(2), Comcare or the licensed authority will also be required to advise the retired employee, in writing, of such notification and of how the proposed method of recovery operates.

52.8 By virtue of proposed subsection 114B(4), the remaining provisions of the section will apply to enable Comcare or a licensed authority to recover overpayments direct from administrators only where the employee has not:

(a) received any superannuation benefit (a benefit will not be taken to be received unless a cash benefit is actually paid); and

(b) the payment has not been deferred (a benefit will not be taken to be deferred if it is rolled over).

52.9 If the administrator advises Comcare or the authority that superannuation payments have commenced, the existing requirements of the Act apply and Comcare or the authority will have to seek to recover the overpayment from the employee.

52.10 Proposed subsection 114B(5) requires Comcare or the licensed authority, within 2 working days after it has received advice from the administrator as to the benefits payable to an employee, to determine, and notify the administrator whether any overpayment has been made, and if so the amount. If an overpayment has been made the administrator must repay that amount in accordance with proposed subsection 114B(8).

52.11 Comcare's determination of whether an overpayment has occurred is a reviewable decision under section 60 of the Act. The usual notification requirements will apply.

52.12 By virtue of proposed subparagraph 114B(2)(c)(i), the effect of the notice issued under proposed subsection 114B(5) is that the administrator can commence payment of superannuation benefits to the retired employee. The administrator, who will have provided information to Comcare or the licensed authority on the employee's entitlement [under proposed subsection 114B(2)], should be in a position to commence payments immediately upon receiving the notice.

52.13 Proposed subsection 114B(6) specifies the other effect of the notice issued under proposed subsection 114B(5). It is only after issue of that notice that Comcare or the licensed authority can reduce compensation payments to the retired employee in line with section 20, 21 or 21A of the Act. The intention of this subsection is to ensure that until payment of superannuation benefits commences, the retired employee's weekly income is unaffected by the proposed method of recovery. If the retired employee had received superannuation benefits prior to the issue of the notice under proposed subsection 114B(2), Comcare or the authority would be entitled to reduce compensation payments immediately it became aware of this.

52.14 Proposed subsection 114B(7) specifies the method of calculation of the overpayment. It provides that the overpayment is the amount by which the sum of compensation paid after the date of retirement is greater than the amount that should have been paid under section 20, 21 or 21A or the Act, as the case requires.

52.15 Proposed subsections 114B(8), (9), (10) and (11) specify how the administrator must repay amounts to which this section applies. Where the sum of the superannuation entitlements, which are unpaid because of proposed subsection 114B(2) [the backpayment], is greater than the amount of the overpayment of compensation, the backpayment is reduced by the amount of overpayment. If the amount of backpayment is less than the overpayment, the full amount is paid directly to Comcare or the licensed authority. The balance of the overpayment is then deducted from subsequent superannuation payments until the overpayment has been repaid in full to Comcare or the licensed authority.

52.16 Proposed subsection 114B(12) provides that payment of an amount by the administrator to Comcare or a licensed authority discharges the administrator's liability to Comcare or the licensed authority and to the retired employee for that amount.

52.17 Proposed subsection 114B(13) requires the administrator to comply with the requirements of Comcare and licensed authorities under this section. However, failure to do so is not an offence.

52.18 It is intended that proposed subsection 114B will have effect whether the superannuation fund is administered under an Act of Parliament, a trust deed or otherwise. Several Commonwealth Acts limit the circumstances in which an administrator may pay a retired employee's superannuation benefits to another person to satisfy a debt of a retired employee. But for proposed subsection 114B(14), those Acts would prevent the operation of the method of recovery proposed by section 114B. Proposed subsection 114B(14) provides that proposed section 114B prevails over specified provisions of those Acts.

52.19 Proposed subsection 114B(15) defines 'working day'.

**Clau 53: Comcare may write off debt**
**Claus 54: Comcare may waive debt**

53.1 These clauses renumber sections 104A and 104B of the Act. Those sections will now be numbered 114C and 114D respectively.

## PART 8 - AMENDMENTS OF THE SEX DISCRIMINATION ACT 1984

This Part amends the *Sex Discrimination Act 1984* ("the SDA"), in conjunction with the Bill's amendments to the *Remuneration Tribunal Act 1973*, so as to provide a new complaint mechanism in respect of discriminatory acts under determinations of the Remuneration Tribunal: see also notes on clause 43 of the Bill.

These amendments are closely comparable to the amendments effected by the *Sex Discrimination and other Legislation Amendment Act 1992*, which provided a complaint mechanism in respect of discriminatory acts under awards of the Australian Industrial Relations Commission.

### Clause 55: Principal Act

55.1 This is a formal provision.

**Clause 56: Insertion of new sections**

56.1 These new sections provide for the new complaint mechanism and related matters under the SDA.

***New section 50C – Referral of discriminatory determinations to the Remuneration Tribunal***

56.2 Proposed subsection 50C(1) provides that a complaint alleging that a person has done a discriminatory act under a determination may be lodged with the Human Rights and Equal Opportunity Commission ("HREOC") and specifies the persons who may lodge a complaint. Under proposed subsections 50C(2) and 50C(3), if such a complaint is received HREOC must notify the Sex Discrimination Commissioner ("the Commissioner"), who must refer the determination to the Tribunal if it appears to the Commissioner that the act is discriminatory, unless the Commissioner is of the opinion that the complaint is frivolous, vexatious, misconceived or lacking in substance. (Upon referral of a determination, the Tribunal is required to review the determination, under proposed sections 8B and 8C of the *Remuneration Tribunal Act 1973*: see notes on clause 43 of the Bill.)

56.3 Proposed subsection 50C(4) requires the Commissioner to give written notice to the complainant if the Commissioner decides not to refer the determination. The notice must specify the reasons for the decision. Proposed subsection 50C(5) enables the complainant, having received such a notice, to require the Commissioner to refer the decision to the President of HREOC under proposed subsection 50C(6), for review by the President under proposed section 50D.

56.4 Proposed subsection 50C(7) requires the Commissioner to notify the complainant of the outcome of a referral to the Tribunal. This provision is needed because the complainant will not be a party to the hearing in the Tribunal.

56.5 Proposed subsection 50C(8) will enable the Commissioner to obtain documents or information under section 54 of the SDA, for the purposes of new section 50C.

56.6 Proposed subsection 50C(9) defines the terms "determination" and "discriminatory act under a determination".

56.7 Proposed subsection 50C(10) makes plain that the fact that an act is done in direct compliance with a determination does not of itself mean that the act is reasonable. The "reasonableness" issue arises because of the indirect discrimination test in the SDA (see for example subsection 5(2) of the SDA). This amendment will therefore facilitate the consideration of indirect discrimination issues in determinations.

***New s ction 50D – President may review a decision of the Commissioner not to refer a determination to the Remuneration Tribunal***

56.8 Proposed section 50D provides details of the review procedure to be followed by the President of HREOC where the Commissioner decides not to refer a determination to the Remuneration Tribunal. This review procedure will arise where a complainant gives notice to the Commissioner requiring review by the President, under proposed subsection 50C(5), and the Commissioner then refers the decision to the President as required by proposed subsection 50C(6).

56.9 Proposed subsection 50D(3) has the effect that the President may seek relevant information from the complainant, and may refuse to review the Commissioner's decision unless the information is provided. Otherwise, the President must review the Commissioner's decision, and must decide either to confirm it or to set it aside, by proposed subsection 50D(2). If the Commissioner's decision is set aside the Commissioner must also be directed to refer the determination to the Remuneration Tribunal in accordance with proposed section 50C.

56.10 Proposed subsection 50D(4) requires the President to give written notice of a decision under proposed subsection 50D(2), setting out the reasons for the decision, to the complainant and to the Commissioner.

## PART 9 – AMENDMENTS OF THE TRADESMEN'S RIGHTS REGULATION ACT 1946

### Clause 57: Principal Act

57.1 This is a formal provision.

### Claus 58: Regulations

58.1 Clause 58 adds a number of subsections to section 51A of the Act. The purpose of the new subsections is to enable regulations to be made prescribing fees to be payable to the Department of Industrial Relations, on a cost recovery basis, for certain functions performed by the Department to facilitate the operation of the Act. The Department acts as a secretariat to the local and central trades committees established by the Act and, amongst other things, receives and assesses applications for trades certificates and arranges for applicants to undertake trade tests where a committee decides that such a test is required. Trade tests are carried out by a variety of public and private bodies ("trade test providers") such as TAFE colleges and private companies which charge the Department a fee. In addition, officers of the Department sometimes accompany employers to assist in recruiting suitably skilled tradespersons overseas. The Department has been charging fees on a partial cost-recovery basis for these

functions, but was recently advised that, at present, the Act does not authorise the Department to charge such fees. It is proposed that the Department be authorised to charge fees, to be prescribed by regulation, to enable partial recovery of the costs associated with processing applications under the Act, and to recover the full cost of trade tests and of providing the above-mentioned service to employers.

58.2 The regulation making power in existing section 51A of the Act does not extend to the making of regulations prescribing fees. Proposed subsections 51A(2) and (3) when read together would authorise the making of regulations prescribing fees to be paid to the Department to reimburse it for the costs and expenses incurred in, or in connection with, performing the functions described in the preceding paragraph.

58.3 Proposed subsection 51A(4) would enable various levels of fees to be charged. This flexibility is necessary because the fees charged by trade test providers vary depending on the number of applicants, the location of the trade test provider and the skills which are being tested, and because the cost to the Department of providing the above-mentioned service to employers can also vary.

58.4 Proposed subsections 51A(5) and (6) would empower the Secretary to the Department of Industrial Relations to waive or defer payment of fees in cases of hardship, such as where the applicant is a refugee or is unemployed, and to delegate that power.

58.5 Proposed subsection 51A(7) provides for decisions concerning the waiver or deferment of fees to be reviewable by the Administrative Appeals Tribunal.

58.6 Proposed subsections 51A(8) and (9), when read together, would require the Secretary to the Department of Industrial Relations to give written notice to any person affected by a decision concerning the waiver or deferral of fees, and to include in the notice a statement informing the person of his or her right to apply for a review of the decision by the Administrative Appeals Tribunal.

58.7 Proposed subsection 51A(10) provides that a failure to include in a notice to any person affected by a decision to waive or defer the payment of fees a statement informing the person of their right to apply for a review of the decision will not render the decision invalid.

---

Printed by Authority by the Commonwealth Government Printer