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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

SEX DISCRIMINATION AND OTHER LEGISLATION
AMENDMENT BILL 1992

EXPLANATORY MEMORANDUM

(circulated by the authority of
the Attorney-General the Honourable Michael Duffy MP)



SEX DISCRIMINATION ACT AND OTHER LEGISLATION AMENDMENT BILL 1992Outline

This Bill makes a number of amendments to the *Sex Discrimination Act 1984* (the SDA) and to the Commonwealth's other Human Rights legislation namely the *Racial Discrimination Act 1975* (the RDA), the *Human Rights and Equal Opportunity Commission Act 1986* (the HREOC Act) and the *Disability Discrimination Act 1992* (the DDA). The Bill also makes amendments to the *Industrial Relations Act 1988* (the IRA) relating to sex discrimination and industrial awards.

1. The definition and procedures relating to representative complaints contained in the RDA, the SDA and the DDA are to be brought more closely into line with provisions relating to representative actions under the *Federal Court of Australia Act 1976*. The amendments provide for a more comprehensive regime for representative complaints by defining when a representative complaint may be lodged, specifying the criteria for when a complaint is not to continue as a representative complaint, providing for replacement of the complainant by another class member in certain circumstances and for more appropriate determination powers in regard to the complaints.
2. The RDA, SDA and DDA are also all to be amended to provide for the registration in the Federal Court of Australia of determinations of the Human Rights and Equal Opportunity Commission (the HREOC) made under those Acts. The determinations are to be deemed to be orders of the Federal Court but will not be enforceable until after the end of the review period - which is a period of 28 days from the date that the determination is registered- has elapsed, or an application for review of a determination (made within the period of 28 days) has been dealt with.
3. The same three pieces of legislation are also to be amended to provide that determinations of the HREOC are to be binding on Commonwealth agencies subject to limited review relating to determinations that declare damages to be payable.
4. The HREOC Act, the SDA and the RDA are also to be amended to provide that where victimisation of a person involved in some action under any of those pieces of legislation occurs the person victimised will be able to lodge a complaint which would be dealt with in the same way as any other complaint. This will not affect the bringing of any criminal proceedings under the relevant sections of those Acts.

5. The *Industrial Relations Act 1988* is to be amended to provide a mechanism for the review of industrial awards by the Australian Industrial Relations Commission (AIRC) where an award has been referred to the Commission by the Sex Discrimination Commissioner under amendments to the SDA being made in this Bill. Where the Commission receives a complaint alleging that a person has done a discriminatory act under an award, and it appears to the Commissioner that the act is a discriminatory act, the Commissioner must refer the award to the AIRC. Where an award has been referred under the new provisions the AIRC must take appropriate action to remove the discrimination - unless it is of the view that to do so would not be in the public interest.

6. Finally the SDA is to be amended to introduce a new definition of sexual harassment and to extend the areas in which sexual harassment is to be made unlawful. The new areas include provision of goods and services, Commonwealth programs and provision of accommodation.

Financial Impact Statement

7. Whilst there will be some cost implications for relevant agencies in the current financial year these are not expected to be significant and no direct allowance has been made. In relation to following years, any additional allocations will be subject to the usual budgetary processes in the relevant financial years.

Short title

Section 1 specifies the citation of the Act

Section 2 - Commencement

Section 2 states that, subject to subsection (2), the Act will commence on the 28th day after it receives the Royal Assent. Subsection 2(2) states that the amendment of a provision of the Disability Discrimination Act 1992 will commence on the 28th day after this Act receives the Royal Assent or on the commencement of the relevant provision of the Disability Discrimination Act 1992, whichever is the later. The reason for this subsection is to overcome a possible difficulty if the amendments to the Disability Discrimination Act were to commence before the provisions of the Disability Discrimination Act 1992 commenced.

Section 3 - Amendment of Acts

Section 3 states that the Acts specified in the Schedule are amended as set out in the Schedule. The Acts amended are the Disability Discrimination Act 1992(DDA) the Human Rights and Equal Opportunity Commission Act 1986 (HREOC Act), the Industrial Relations Act 1988 (IRA), the Racial Discrimination Act 1975 (RDA), and the Sex Discrimination Act 1984 (SDA).

Section 4 - Application of amendments

Subsection 4(1) specifies that the amendments made in the Schedule in relation to the enforcement of Human Rights and Equal Opportunity Commission (HREOC) determinations as if they were orders of the Federal Court will not apply to determinations made before the commencement of the amendment. This has the effect of ensuring that determinations which have been made by the HREOC before the commencement of the enforcement amendments will not be subject to the new procedures concerning registration of the determinations in the Federal Court.

Determinations made under the existing legislation will still be able to be enforced under the existing enforcement provisions. For example, an HREOC determination under section 81 of the SDA prior to the commencement of the amendment will still be enforceable under existing section 82 of the SDA.

Subsection 4(1) also specifies that the amendments made in the Schedule in relation to the enforcement of HREOC determinations as if they were orders of the Federal Court will not apply to a determination made after the commencement of the

amendment in respect of a representative complaint lodged before the commencement of the amendment.

Subsection 4(2) specifies that the amendments made in the Schedule in relation to the review and enforcement of determinations involving Commonwealth agencies does not apply to determinations made before the commencement of the amendment.

This has the effect of ensuring that determinations involving a Commonwealth agency which have been made by the HREOC before the commencement of the new review and enforcement provisions will not be subject to the new review and enforcement provisions. Nevertheless, determinations made under the existing provisions will still be enforceable under the existing enforcement provisions.

Subsection 4(2) also specifies that the amendments made in the Schedule in relation to the review and enforcement of determinations involving Commonwealth agencies does not apply to a determination made after the commencement of the amendment in respect of a representative complaint lodged before the commencement of the amendment.

Subsection 4(3) provides that the new scheme for representative complaints does not apply to complaints lodged before the commencement of the Act. Any existing complaints will still be subject to the existing legislative provisions.

Subsection 4(4) provides that the amendments relating to the review of discriminatory awards by the Australian Industrial Relations Commission are to apply to awards and variations to awards made after commencement of the Act.

Schedule

AMENDMENT TO ACTS

DISABILITY DISCRIMINATION ACT 1992

Subsection 4(1)

Subsection 4(1) is to be amended to define 'class member' and 'representative complaint' for the purposes of the revised representative complaint procedure and 'Commonwealth agency' and 'principal executive'.

'class member' is defined to mean any of the persons on whose behalf a representative complaint is lodged other than those persons who have withdrawn from the representative complaint under new section 90A.

'Commonwealth agency' has the same meaning as an "agency" as defined in the *Privacy Act 1988*. The definition is necessary to determine what Commonwealth agencies will be covered by the new Part 4 Division 4 of the Act.

'principal executive', in relation to a Commonwealth agency is defined to have the same meaning as Part V of the *Privacy Act 1988*. The definition is necessary to determine what principal executives of Commonwealth agencies will be covered by the new Part 4 Division 4 of the Act.

Subsection 4(1) (definition of "representative complaint"):

The current definition is to be replaced by a new definition.

'representative complaint' is to be defined to mean a complaint where the persons on whose behalf the complaint was made include persons other than the complainant. It does not include a complaint which has been lodged under subsection 69(1) on behalf of only one person or a complaint that the Commission has determined should no longer be continued as a representative complaint under new section 90.

Subsection 69(1A)

The new subsection 69(1A) lists who may lodge a complaint with the Commission alleging the doing of an unlawful act under Part II of the Act. It provides for lodging a representative complaint and is to be amended to make it subject to new section 89 (Conditions for making a representative complaint).

Sections 89 and 90:

Sections 89 and 90 of the Act are to be repealed and replaced by new provisions governing the lodgment and determination of representative complaints.

Conditions for making a representative complaint.

The new provisions draw, where appropriate, on the representative proceedings provisions in Part IVA of the *Federal Court of Australia Act 1976* which came into force earlier this year.

New section 89 provides the conditions that must be satisfied in order for a representative complaint to be lodged under section 69 of the Act. All the persons concerned must have complaints against the same person; the complaints of all the

members of the class must be in respect of, or arise out of, the same, similar, or related circumstances and they must give rise to a substantial common issue of law or fact.

The new section also provides for the additional information (description of the class, nature of the class members' claims, nature of the relief sought and the common issues for determination) that must be set out in the representative complaint lodged with the Commission. In describing or otherwise identifying class members it will not be necessary to name, or specify the number of, class members.

Under the new section a representative complaint can be lodged without the consent of class members.

Commission may determine that a complaint is not to continue as a representative complaint.

New section 90 enables the Commission to determine that a complaint no longer continue as a representative complaint where the Commission is satisfied that it is in the interests of justice to do so because the complaint satisfies one of the four criteria set out in subsection 90(2). These criteria are:

that it would be less costly to have separate proceedings;

that the complaints of class members will not be efficiently and effectively dealt with by the representative complaint;

that the complaint was not brought in good faith as a representative complaint;
or

it is otherwise inappropriate that the complaints be pursued by means of a representative complaint.

Subsection 90(3) enables a complainant, where the Commission determines that a complaint not continue as a representative complaint, to continue the complaint as an individual complaint. The subsection will also enable the Commission to join a class member as a complainant.

Section 90A - Additional rules applying to the determination of representative complaints.

New section 90A contains additional rules for the determination of representative complaints. Subsection 90A(1) enables the Commission to substitute another class member as complainant where it considers that the complainant is not able to adequately represent the interests of the class members.

Subsection 90A(2) enables a class member to withdraw from a representative complaint at any time before the Commission begins its inquiry.

Subsection 90A(3) empowers the Commission to direct that notice of any matter be given to class members.

Subsection 91(2) - Omit

Subsection 91(2), which empowers the Commission to, in effect, turn a representative complaint into an individual complaint, is to be repealed. It has been replaced by new section 90.

Section 92 - Class member for representative complaint not entitled to lodge individual complaint.

Section 92 (Ordinary complaints not precluded by representative complaints) is to be repealed and replaced by a new provision which will, in effect, prevent a person who is a class member in a representative complaint from lodging an individual complaint unless that person withdraws from the representative complaint.

Section 98

Subsection 98(1) is to be amended to give the Commission power to give directions as to procedure to ensure that justice is done in an inquiry.

Section 102

A new subsection 102(3) is to be added to ensure that interim determinations also cover class members in a representative complaint.

Section 103

Subparagraph 103(1)(b)(iv) is to be amended to remove the restriction on the Commission making a declaration for the payment of damages in a representative complaint.

Subsection 103(5) of the Act (which defines 'complainant' for the purposes of the section) is to be repealed and replaced with a provision enabling the Commission, when making a declaration for payment of damages, to provide either for specified amounts of damages or for such amounts to be worked out in a specified manner. For example, the Commission may wish to make an award consisting of amounts determined by reference to a mathematical formula or by reference to records of the respondent.

Under new subsection 103(6), where the Commission makes a declaration for the payment of damages on a representative complaint, it may give directions as to the way in which a class member is to establish an entitlement to damages and the means by which any disputes about entitlement are to be determined.

New subsection 103(7) defines 'complainant' to mean class members, for the purposes of the section, in a representative complaint.

Section 104 - Determination must identify the class members who are to be affected by the determination.

Section 104 (Proceedings in Federal Court) is to be repealed. New section 104 provides that an interim determination under section 102(1) or a determination under section 103(1) on a representative complaint must describe or otherwise identify the class members who will be affected by it.

Section 104A - Registration of determination.

New subsection 104A(1) provides that the section applies to a determination made under subsections 102 or 103 except where the respondent is a Commonwealth agency or the principal executive of a Commonwealth agency. Under subsection 102 the Commission, or the President on behalf of the Commission may, on the application of a party to an inquiry at any time after the lodgement of the complaint, make an interim determination seeking to preserve the status quo between the parties to the complaint or the rights of the parties to the complaint. Under section 103, after the Commission finds the complaint substantiated it may make a determination which may include a number of declarations. The section does not apply to a

Commonwealth agency or the principal executive of a Commonwealth agency as respondent. Proposed new Part 4 Division 4 below applies to these cases.

Under new proposed subsection 104A(2) the Commission will be required to lodge the determination, as soon as practicable after the determination is made, in a Registry of the Federal Court.

Under new subsection 104(3) a Registrar must register the determination upon lodgement. 'Registrar' is defined to have the same meaning as in section 35A of the *Federal Court of Australia Act 1976*.

Under new subsection 104(4) the Commission will be required to forward a written notice of the registration to the complainant and respondent to the determination as soon as possible but in all cases of registration within 7 days. The notice must specify the date of registration and must include a copy of the determination. The notice requirement is to ensure that the parties to the inquiry have notice of the date of registration. The date of registration of the determination is particularly important as under the proposed subsection 104B(5) the respondent, if he or she wishes to review a determination, must apply to the Federal Court for review of the determination within 28 days after the date of registration of the determination.

Section 104B - Registered determination has effect as an order of the Federal Court.

Under new subsection 104B(1), upon registration of a determination under section 104A, the determination of the Commission (including an interim determination) will have effect as if it were an order made by the Federal Court, but subject to the qualifications set out in the rest of the section.

New Subsection 104B(2) will ensure that where a determination was made on a representative complaint, each class member described or identified as being affected by the determination is bound by it.

New Subsection 104B(3) provides no action for enforcement of the determination may be taken before the end of the review period. 'Review period' is defined in the section to mean the period of 28 days starting on the day the determination is registered (refer 104B(6)). However, if the respondent to the determination applies to the Court under subsection 104B(5) for review of the determination, the review period commences on the day the determination is registered and ends at the time when proceedings on that review are completed or otherwise terminated.

Under proposed subsection 104B(4), in the case of a determination made under subsection 103(1) (that is a determination made by the Commission after holding an inquiry), a failure by the respondent to comply with a positive requirement of the determination during the review period does not count as a contravention of the determination. For example, if a determination under section 103 which has been registered under new section 104A specifies that the respondent should pay to the complainant damages by a date falling within the review period, a failure to comply with this requirement during this period would not be a contravention of the determination. On the other hand, action taken by the respondent to frustrate the terms of the determination after registration and during the review period, for example by dismissing an employee, may amount to contravention of the determination. The provisions of subsection 104B(4) will not apply in the case of an interim determination under subsection 102 which is limited to maintaining the status quo between the parties to the complaint or the rights of the parties. A respondent who seeks a review of an interim or a final determination may, however, apply to the Court for an order suspending the operation of the whole or any part of the determination (see subsection 104C(3)).

Under new subsection 104B(5) the respondent to a registered determination may apply to the Federal Court for review of the determination. The application must be made within 28 days after the date of registration of the determination.

Section 104C - Review of registered determination.

New subsection 104C(1) states that the section applies if an application is made to the Federal Court under section 104B for review of a determination.

Under new subsection 104C(2) the parties to the review are the applicant, who was the respondent to the registered determination, and the complainant to the determination, who will be the respondent to the application for review.

New subsection 104C(3) provides that the Court may at any time make an interim order that suspends the operation of the whole or any part of the determination. This will enable the applicant to seek a suspension of the operation of the whole or any part of the determination pending the outcome of the review of the determination. If the Court makes an interim order under this subsection, the order may be made on such conditions, if any, as the Court thinks fit.

Under new subsection 104C(4) the Court, in reviewing the determination, may review all issues of fact and law.

Under new subsection 104C(5) a party cannot adduce new evidence in the review of the determination except by the leave of the Court.

New subsection 104C(6) provides that the Court, after reviewing the determination, may make such orders as it thinks fit including a declaration of right. The orders may confirm a determination that has been registered under section 104A.

New subsection 104C(7) provides that the Court may dismiss the application for review at any time if it considers that the applicant is not prosecuting the application with due dispatch. The Court may do this either of its own motion or on the application of the respondent. The aim of this provision is to ensure that the applicant for the review of the determination prosecutes the application with due dispatch. This provision is necessary as action for enforcement of a determination that has been registered under section 104A may not be taken before the end of the review period (subsection 104B(3)).

Paragraphs 106(1)(a) and (b)

These paragraphs provide for application to the Attorney-General for the provision of financial assistance and are consequential upon the changed processes for enforcement of determinations in the Federal Court.

Part 4 - Division 4 - Review and enforcement of determinations involving Commonwealth agencies.

Section 106A - Application of Division.

This new section provides that the new Division will apply only to determinations where the respondent is either a Commonwealth agency or a principal executive of a Commonwealth agency.

Section 106B - Obligations of respondent agency.

Under this new section, Commonwealth agencies which are respondents to determinations covered by this Division must cease, and not repeat, any conduct which led up to the determination and must perform any act or course of conduct that the determination may require. This provision does not cover an award of damages under Paragraph 103(1)(b)(iv); that matter is dealt with in new section 106D.

Section 106C - Obligation of principal executive of agency.

This clause requires that a principal executive of a Commonwealth agency who is the respondent to a determination must take all reasonable steps to ensure that the terms of the determination are brought to the notice of all members, officers and employees of the agency who may be engaged in conduct to which the determination relates.

Further, the principal executive must take all reasonable steps to ensure that relevant officers, etc. cease and do not repeat such conduct and, finally, where actions or a course of conduct is required by a determination that that act or conduct is actually performed.

Section 106D - Damages

This new section provides that where the payment of damages is part of a determination against a Commonwealth agency or principal executive of a Commonwealth agency the complainant is entitled to be paid that amount.

New Subsection 106D(2) makes those damages a debt due to the complainant by either a Commonwealth agency which has the capacity to sue and be sued or by the Commonwealth where an agency does not have that capacity.

Section 106E - Review of determinations regarding damages.

This new section makes provision for an application to be made to the Administrative Appeals Tribunal (AAT) for review of a determination relating to a decision to provide or not provide for damages.

Under subsection 106E(2) a Commonwealth agency or a principal executive officer of such an agency can only seek review by the AAT where the Minister has given permission.

Where the AAT considers such an application, subsection 106E(3) provides that the Tribunal must be made up of a presidential member who is also a Judge, and 2 other members who are not Judges.

Section 106F - Enforcement of determination against Commonwealth agency.

Under subsections 106F(1) and (2), where a Commonwealth agency or a principal executive of such an agency fails to carry out their obligations in relation to a

determination, as set out in sections 106B and 106C, then an application can be made to the Federal Court for an order directing that either the agency or the principal executive of the agency comply.

Subsection 106F(5) indicates that an application under this clause cannot be made until either the time for making an application for review to the AAT under section 106E has expired or any decision of the AAT, should an application be made, has come into operation.

Human Rights and Equal Opportunity Commission Act 1986

Section 19A - Division applies to victimisation offences.

This new section will allow a person, who is the victim of action which may amount to an offence under Subsection 26(2) of the Act, to lodge a complaint with the Commission, which will then be dealt with in the usual way. This will not affect any criminal proceedings that may be undertaken under section 26.

Subsection 30(1A)

This new subsection will have a similar effect to the new section 19A but will apply to victimisation of people who may be involved in some form of action under the Act relating to the Commission's functions in the area of equal opportunity in employment.

Industrial Relations Act 1988

New paragraph 45(1)(ed)

New paragraph 45(1)(ed) provides for an appeal to a Full Bench against a decision of the Australian Industrial Relations Commission (AIRC) under the new provisions.

New paragraph 45(3)(bb)

New paragraph 45(3)(bb) provides that a party to the review under new section 111A may institute an appeal.

Section 111A - Hearings in relation to discriminatory awards.

New section 111A provides for a hearing to be convened where an award has been referred to the AIRC under the new section 50A of the SDA. The section also provides that the Sex Discrimination Commissioner is a party to the proceeding. This means that where a matter has been referred under new section 50A, the

Commissioner will have the rights accorded to parties to proceedings under section 42 of the IRA, including a right of appearance.

Section 113

Section 113 is amended to provide that where an award has been referred under the new provisions and the AIRC considers it to be discriminatory, it must take appropriate action to remove the discrimination. New subsection 113(2B) provides that the AIRC is not required to take action which would not be in the public interest. New subsection 113(2C) provides for the parties to a certified agreement to be given an opportunity to amend the agreement before action is taken under subsection 113(2A). The provision is consistent with subsection 134G(b) of the Act, which requires the AIRC to give the parties an opportunity to amend an agreement before refusing to certify it.

Subsection 113(5)

The term “discriminatory award” is defined in new subsection 113(5) as an award which has been referred to the Commission under proposed section 50A of the SDA and is further defined by reference to the SDA. To constitute a discriminatory award, the award must require a person to do an act that would be unlawful under the SDA, except for the fact that the act would be done in direct compliance with the award. The SDA contains an exemption in paragraph 40(1)(e) for acts done by a person in direct compliance with an award.

The definition also makes it plain that the fact the an act is done is direct compliance with the award does not of itself mean that the act is reasonable. The “reasonableness” issue arises because of the indirect discrimination test of discrimination in the SDA (see for example subsection 5(2) of the SDA). This amendment will therefore facilitate the consideration of indirect discrimination issues in awards.

Paragraph 134L(1)(b)

This new paragraph, which deals with the variation of certified agreements, is to be amended to ensure that certified agreements can be varied by the parties in accordance with subsection 113(2C).

Subsection 134L(1)

New subsection 134L(1) is intended to make it clear that the AIRC can vary a certified agreement under subsection 113(2A).

Racial Discrimination Act 1975

Subsection 3(1) is to be amended to define 'class member' and 'representative complaint' for the purposes of the revised representative complaint procedure and 'Commonwealth agency' and 'principal executive'.

'class member' is defined to mean any of the persons on whose behalf a representative complaint is lodged other than those persons who have withdrawn from the representative complaint under new section 25MA.

'representative complaint' is defined to mean a complaint where the persons on whose behalf the complaint was made include persons other than the complainant. It does not include a complaint that the Commission has determined should no longer continue as a representative complaint under new section 25M.

'Commonwealth agency' and 'principal executive' are to have the same meaning as provided for in the *Privacy Act 1988*. The new definitions are necessary to determine what Commonwealth agencies and principal executives of Commonwealth agencies will be covered by the new Division 4 of Part III of the Act.

New clause 19A - Part applies to victimisation offences.

This provision will allow a person who is the victim of action which may amount to an offence under subsection 27(2) of the Act to lodge a complaint with the Commission which would be dealt with in the usual way. This would not affect any criminal proceedings that may be undertaken under section 27.

New subsection 22(1A)

Section 22 lists who may lodge a complaint with the Commission alleging the doing of an unlawful act under Part II of the Act. New subsection 22(1A) provides for lodging a representative complaint and is to be amended to make it subject to new section 25L (Conditions for making a representative complaint).

Sections 25L and 25M:

Section 25L and 25M of the Act are to be repealed and replaced by new provisions governing the lodgment and determination of representative complaints.

Conditions for making a representative complaint.

The new provisions draw, where appropriate, on the representative proceedings provisions in Part IVA of the *Federal Court of Australia Act 1976* which came into force earlier this year.

New section 25L provides the conditions that must be satisfied in order for a representative complaint to be lodged under section 22 of the Act. All the persons concerned must have complaints against the same person; the complaints of all the members of the class must be in respect of, or arise out of, the same, similar, or related circumstances; and they must give rise to a substantial common issue of law or fact.

The new section also provides for the additional information (description of the class, nature of the class members' claims, nature of the relief sought and the common issues for determination) that must be set out in the representative complaint lodged with the Commission. In describing or otherwise identifying class members it will not be necessary to name, or specify the number of, class members.

Under the new section a representative complaint can be lodged without the consent of class members.

Commission may determine that a complaint is not to continue as a representative complaint.

New section 25M enables the Commission to determine that a complaint no longer continues as a representative complaint where it is satisfied that it is in the interests of justice to do so because it falls within one of the four criteria set out in subsection 25M(2). These criteria are: that it would be less costly to have separate proceedings; that the complaints of class members will not be efficiently and effectively dealt with by the representative complaint; that the complaint was not brought in good faith as a representative complaint or it is otherwise inappropriate that the complaints be pursued by means of a representative complaint.

Subsection 25M(3) enables a complainant, where the Commission determines that a complaint not continue as a representative complaint, to continue the complaint as an

individual complaint. This will not apply where the complainant is a trade union. The subsection will also enable the Commission to join a class member as a complainant.

Section 25MA - Additional rules applying to the determination of representative complaints.

New section 25MA contains additional rules for the determination of representative complaints. It will enable the Commission to substitute another class member as complainant where it considers that the complainant is not able to adequately represent the interests of the class members.

Subsection 25MA(2) enables a class member to withdraw from a representative complaint at any time before the Commission begins its inquiry.

Subsection 25MA(3) empowers the Commission to direct that notice of any matter be given to class members.

Section 25N(2) - omit

Subsection 25N(2) which empowers the Commission to, in effect, turn a representative complaint into an individual complaint is to be repealed. It has been replaced by new section 25M.

Section 25P - Class member for representative complaint not entitled to lodge individual complaint

Section 25P (Ordinary complaints not precluded by representative complaints) is to be repealed and replaced by a new provision which will, in effect, prevent a person who is a class member in a representative complaint from lodging an individual complaint unless that person withdraws from the representative complaint.

Subsection 25V(1)

Subsection 25V(1) is to be amended to give the Commission power to give directions as to procedure to ensure that justice is done in an inquiry.

Section 25Y

A new subsection 25Y(3) is to be added to ensure that interim determinations also cover class members in a representative complaint.

Section 25Z

Subparagraph 25Z(1)(b)(iv) is to be amended to remove the restriction on the Commission making a declaration for the payment of damages on a representative complaint.

Subsection 25Z(5) of the Act (which defines 'complainant' for the purposes of the section) is to be repealed and replaced with a provision enabling the Commission, when making a declaration for payment of damages, to provide either for specified amounts of damages or for such amounts to be worked out in a specified manner. For example, the Commission may wish to make an award consisting of amounts determined by reference to a mathematical formula or by reference to records of the respondent.

Under new subsection 25Z(6), where the Commission makes a declaration for the payment of damages on a representative complaint, it may give directions as to the way in which a class member is to establish an entitlement to damages and the means by which any disputes about entitlement are to be determined.

New subsection 25Z(7) defines 'complainant' in a representative complaint for the purposes of the section to mean class members.

Section 25ZA - Determination must identify the class members who are to be affected by the determination.

Section 25ZA (Proceedings in Federal Court) is to be repealed. New section 25ZA provides that an interim determination under section 25Y(1) or a determination under section 25Z on a representative complaint must describe or otherwise identify the class members who will be affected by it.

Section 25ZAA - Registration of determination.

Subsection 25ZAA(1) provides that the section applies to a determination made under subsections 25Y(1) or 25Z(1) except where the respondent is a Commonwealth agency or the principal executive of a Commonwealth agency. Under subsection 25Y(1) the Commission, or the President on behalf of the Commission, may on the application of a party to an inquiry at any time after the lodgement of the complaint make an interim determination seeking to preserve the status quo between the parties to the complaint or the rights of the parties to the complaint. Under section 25Z, after the Commission finds the complaint substantiated it may make a determination which may include various declarations.

The section does not apply to a Commonwealth agency or the principal executive of a Commonwealth agency as respondent as in that case proposed new Part III Division 4 below applies.

Under new subsection 25ZAA(2) the Commission will be required to lodge the determination as soon as practicable after the determination is made in a Registry of the Federal Court.

Under new subsection 25ZAA(3) a Registrar must register the determination upon lodgement. The Registrar is defined to have the same meaning as in section 35A of the *Federal Court of Australia Act 1976*.

Under new subsection 25ZAA(4) the Commission will be required to forward a written notice of the registration to the complainant and respondent to the determination as soon as possible but within 7 days. The notice must specify the date of registration and must include a copy of the determination. The notice requirement is aimed at ensuring that the parties to the inquiry have notice of the date of registration. The date of registration of the determination is particularly important as under the new subsection 25ZAB(5) the respondent, if he or she wishes to do so, must apply to the Federal Court for review of the determination within 28 days after the date of registration of the determination.

Section 25ZAB - Registered determination has effect as an order of the Federal Court.

Under new subsection 25ZAB(1), upon registration of a determination under section 25ZA, the determination of the Commission (including an interim determination) will have effect as if it were an order made by the Federal Court, but subject to the qualifications set out in the rest of the section.

New subsection 25ZAB(2) will ensure that where a determination was made on a representative complaint each class member described or identified as being affected by the determination are bound by it.

Under new subsection 25ZAB(3) no action for enforcement of the determination may be taken before the end of the review period. 'Review period' is defined in the section to mean the period of 28 days starting on the day the determination is registered. However, if the respondent to the determination applies to the Court under subsection 25ZAB(5) for review of the determination, the period commences on the day the determination is registered and ends at the time when proceedings on that review are completed or otherwise terminated.

Under proposed subsection 25ZAB(4) in the case of a determination made under subsection 25Z, (that is a determination made by the Commission after holding an inquiry) a failure by the respondent during the review period to comply with a positive requirement of the determination does not count as a contravention of the determination. Thus, for example, if a determination under 25Z(1) which has been registered under new 25ZAA specifies that the respondent should pay to the complainant damages by a date falling within the review period, a failure to comply with this requirement during this period, would not be a contravention of the determination. On the other hand, action taken by the respondent to frustrate the terms of the determination after registration and during the review period, for example, by dismissing an employee, may amount to contravention of the determination. The provisions of subsection 25ZAB(4) will not apply in the case of an interim determination under subsection 25Y(1) which is limited to maintaining the status quo between the parties to the complaint or the rights of the parties. A respondent who seeks a review of an interim or a final determination may, however, apply to the Court for an order suspending the operation of the whole or any part of the determination (see subsection 25ZAC(3))

Under new subsection 25ZAB(5) the respondent to a registered determination may apply to the Federal Court for review of the determination. The application must be made within 28 days after the date of registration of the determination.

Section 25ZAC - Review of registered determination.

New subsection 25ZAC(1) states that the section applies if an application is made to the Federal Court under section 25ZAB for review of a determination.

Under new subsection 25ZAC(2) the parties to the review are the applicant who was the respondent to the registered determination and the complainant to the determination who will be the respondent to the application for review.

New subsection 25ZAC(3) provides that the Court may at any time make an interim order that suspends the operation of the whole or any part of the determination. This will enable the applicant to seek a suspension of the operation of the whole or any part of the determination pending the outcome of the review of the determination. If the Court makes an interim order under this subsection, the order may be made on such conditions, if any, as the Court thinks fit.

Under new subsection 25ZAC(4) the Court in reviewing the determination may review all issues of fact and law.

Under proposed subsection 25ZAC(5) a party cannot adduce new evidence in the review of the determination except by the leave of the Court.

New subsection 25ZAC(6) provides that the Court, after reviewing the determination, may make such orders as it thinks fit including a declaration of right. The orders may confirm a determination that has been registered under section 104A.

New subsection 25ZAC(7) provides that the Court may dismiss the application for review at any time if it considers that the applicant is not prosecuting the application with due dispatch. The Court may do this either of its own motion or on the application of the respondent. The aim of this provision is to ensure that the applicant for the review of the determination prosecutes the application with due dispatch. This provision is necessary, as action for enforcement of a determination that has been registered under section 25ZAA, may not be taken before the end of the review period (subsection 25ZAB(3)).

Paragraphs 25ZC(1)(a) and (b)

The paragraphs provide for application to the Attorney-General for the provision of financial assistance and are consequential upon the changed processes for enforcement of determinations in the Federal.

Part III - Division 4 - Review and enforcement of determinations involving Commonwealth agencies.

Section 25ZD - Application of Division

This new section provides that the new division will apply only to determinations where the respondent is either a Commonwealth agency or a principal executive of a Commonwealth agency.

Section 25ZE - Obligations of respondent agency

Under this new section Commonwealth agencies which are respondents to determinations covered by this division must cease, and not repeat, any conduct which led up to the determination and must perform any act or course of conduct that the determination may require. This provision does not cover an award of damages under Paragraph 25Z(1)(b)(iv) as that matter is dealt with in new section 25ZG.

Section 25ZF - Obligations of principal executive of agency

This new section requires that a principal executive of a Commonwealth agency who is the respondent to a determination must take all reasonable steps to ensure that the terms of the determination are brought to the notice of all members, officers and employees of the agency who may be engaged in conduct to which the determination relates.

Further the principal executive must take all reasonable steps to ensure that relevant officers, etc. cease and do not repeat such conduct and finally, where actions or a course of conduct is required by a determination, that that act or conduct is actually performed.

Section 25ZG - Damages

This new section provides that where the payment of damages is part of a determination against a Commonwealth agency the complainant is entitled to be paid that amount.

New subsection 25ZG(2) makes those damages a debt due to the complainant by either a Commonwealth agency which has the capacity to sue and be sued or by the Commonwealth where an agency does not have that capacity.

Section 25ZH - Review of determinations regarding damages

This new section makes provision for an application to be made to the Administrative Appeals Tribunal (AAT) for review of a determination relating to a decision to provide or not provide for damages.

Under subsection 25ZH(2) a Commonwealth agency or a principal executive officer of such an agency can only seek review by the AAT where the Minister has given permission.

Where the AAT considers such an application subsection 25ZH(3) provides that the Tribunal must be made up of a presidential member who is also a Judge, and 2 other members who are not Judges.

Section 25ZI - Enforcement of determination against Commonwealth agency

Under new subsections (1) and (2) where a Commonwealth agency or a principal executive of such an agency fails to carry out their obligations in relation to a

determination as set out in section 25ZE or section 25ZF then an application can be made to the Federal Court for an order directing that either the agency or the principal executive comply.

Subsection 25ZI(5) indicates that an application under this clause cannot be made until either the time for making an application for review to the AAT under clause 25ZH has expired or any decision of the AAT, should an application be made, has come into operation.

Sex Discrimination Act 1984

Section 3 - Objects Paragraph 3(c)

Paragraph 3(c) of the objects section of the SDA is to be amended to reflect the extension of the prohibition against sexual harassment to other areas of public life.

Section 4 - Interpretation

Subsection 4(1) is to be amended to define 'class member' and 'representative complaint' for the purposes of the revised representative complaint procedure and 'Commonwealth agency' and 'principal executive'.

'class member' is defined to mean any of the persons on whose behalf a representative complaint is lodged other than those persons who have withdrawn from the representative complaint under new section 70A.

'representative complaint' is defined to mean a complaint where the persons on whose behalf the complaint was made include persons other than the complainant. It does not include a complaint that the Commission has determined should no longer continue as a representative complaint under new section 70.

'Commonwealth agency' and 'principal executive' are to have the same meaning as provided for in the Privacy Act 1988. The new definitions are necessary to determine what agencies and principal executives will be covered by the new Division 4 of Part III of the Act.

Section 9 - Application of Act

Section 9, which deals with the application of the SDA, is to be amended to reflect the extension of the operation of the prohibitions against sexual harassment proposed in Division 3 of Part II. The amendments seek to ensure that the sexual harassment

provisions will have the same operation as the current prohibitions against the other forms of discrimination under the SDA. Amendments are to be made to subsections 9(5)(6)(8)(9)(10)(12)(14)(16)(18) and (20). The application section of the SDA seeks to ensure that the SDA does not exceed the Commonwealth's power.

Division 3 of Part II- sexual harassment

Division 3 of Part II is to be repealed. A new Division 3 is to be substituted.

Section 28 - Meaning of "sexual harassment"

Sexual harassment is defined to mean the making of an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed or engaging in other unwelcome conduct of a sexual nature in relation to the person harassed, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed, would be offended, humiliated or intimidated. The test is an objective test of what a reasonable person in all the circumstances would have anticipated. 'Conduct of a sexual nature' is also defined to include making a statement of a sexual nature to a person or in the person's presence, whether the statement is made orally or in writing.

Section 28B - Employment , partnerships etc.

Under new section 28B it will be unlawful for a person to sexually harass a person at work. The areas in which sexual harassment is covered are specified in the subsections.

In relation to employment, subsections 28B(1) and (2) will provide that it is unlawful for an employer to sexually harass an employee or a person seeking to become an employee. It will also be unlawful for an employee to sexually harass a fellow employee or a person seeking employment with the same employer.

New subsection 28B(3) will make it unlawful for a person to sexually harass a commission agent or contract worker or a person who is seeking such employment.

New subsection 28B(4) will make it unlawful for a commission agent or contract worker to sexually harass a fellow commission agent or fellow contract worker.

New subsection 28B(5) will make it unlawful for a partner to sexually harass another partner or a person who is seeking to become a partner in the same partnership.

New subsection 28B(6) will make it unlawful for a worker (called in the Bill a 'workplace participant') at his or her place of work to sexually harass another worker at his or her place of work. The amendment is necessary to ensure that sexual harassment at work is made unlawful without regard to the particular employment or professional relationship between the two persons. For example, it will be unlawful for an partner at work to sexually harass at work a contract worker. 'Workplace' is defined to mean a place at which a workplace participant works or otherwise carries out functions in connection with being a workplace participant.

Section 28C - Members of bodies with power to grant etc. occupational qualifications etc.

New section 28C will make it unlawful for a member of an authority or body, that has power to confer, renew, extend, revoke or withdraw an occupational qualification, to sexually harass a person who is seeking conferral, renewal, extension, revocation or withdrawal of an occupational qualification . An occupational qualification is an authorisation or qualification that allows or assists a person to practise a profession, carrying on a trade or engage in an occupation.

Section 28D - Registered organisations

New section 28D will make it unlawful for a member of an organisation registered under the IRA (such as a union) or a member of the staff of a registered organisation to sexually harass a member of the organisation or a person who is seeking to become a member.

Section 28E - Employment agencies

New section 28E will make it unlawful for a person who operates an employment agency or a member of the staff of an employment agency to sexually harass another person in the provision of that agency's services.

Section 28F - Educational institutions

New section 28F will make it unlawful for a member of staff of an educational institution to sexually harass a student or a person who is seeking to become a student at that institution. The section will also make it unlawful for an adult student to sexually harass another adult student or a member of the staff of the institution. Adult student is defined for the purpose of this section to mean a student who has attained the age of 16 years.

Section 28G - Provision of goods, services and facilities

New section 28G will make it unlawful for a person to sexually harass another person in the provision of goods, services or facilities to that other person.

Section 28H - Provision of accommodation

New section 28H will make it unlawful for a person to sexually harass another person in the provision of accommodation. The prohibition applies whether the person providing the accommodation is acting as a principal or agent. The section does not apply to anything done by a person in the course of providing accommodation to a near relative. The exception to the prohibition in relation to family members and near relatives reflects the policy that human rights legislation should not extend to the private realm.

Section 28J - Land

New section 28J makes it unlawful for a person to sexually harass another person in dealing with land. The prohibition applies to persons who are buyers or sellers and also applies whether the person dealing with the land is a principal or an agent.

Section 28K - Clubs

New section 28K makes it unlawful for a member of the committee of management of a club to sexually harass a member of the club or a person seeking to become a member of the club. 'Club' is defined in section 4 which requires, in part, that the club must be an association of not less than 30 persons that sells or supplies liquor for consumption on its premises.

Section 28L - Commonwealth laws and programs

New section 28L makes sexual harassment unlawful in the course of carrying out Commonwealth programs. The prohibition relates to performing any function, or exercising any power under a Commonwealth law or in the course of carrying out any other responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth program

New section 47A - Part applies to victimisation offences

This provision will allow a person who is the victim of action which may amount to an offence under section 94 of the Act to be able to lodge a complaint with the

Commission which will then be dealt with in the usual way. This will not affect any criminal proceedings that may be undertaken under section 94.

After paragraph 48(1)(c) - new function for the Commission

This paragraph confers a new function on the Human Rights and Equal Opportunity Commission to handle complaints regarding discriminatory awards lodged under section 50A.

Section 49

The amendment to section 49 will provide that the function of the Commission under paragraph 48(1)(ca), dealing with complaints lodged under section 50A, will be included in the functions to be performed by the Sex Discrimination Commissioner on behalf of the Commission.

After subsection 50

Section 50 of the Act lists who may lodge a complaint with the Commission alleging the doing of an unlawful act under Part II of the Act. It provides for lodging a representative complaint and is to be amended to make it subject to new section 69 (Conditions for making a representative complaint).

Section 50A - Referral of discriminatory awards to the Australian Industrial Relations Commission

New subsection 50A(1) provides that a complaint alleging that a person has done a discriminatory act under an award may be lodged with the HREOC and specifies the persons who may lodge a complaint. Under new subsections 50A(2) and 50A(3), if such a complaint is received, HREOC must notify the Sex Discrimination Commissioner, who must refer the award to the AIRC 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.

New subsection 50A(4) requires the Commissioner to give written notice to the complainant if the Commissioner decides not to refer the award. The notice must specify the reasons for the decision. Proposed subsection 50A(5) enables the complainant who has received such a notice to require the Commissioner to refer the decision to the President of the HREOC under proposed subsection 50A(6).

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

Proposed subsection 50A(8) will enable the Commissioner to obtain documents or information under section 54 for the purposes of the section.

Proposed subsection 50A(9) defines the terms “award”, “discriminatory act under an award” and “trade union”.

President may review a decision of the Commissioner not to review an award

Proposed section 50B provides details of the review procedure to be followed where a notice has been provided by the Commissioner under subsection 50A(6).

Sections 69 and 70 - lodgement and determination of representative complaints

Section 69 and 70 of the Act are to be repealed and replaced by new provisions governing the lodgment and determination of representative complaints. The new provisions draw, where appropriate, on the representative proceedings provisions in Part IVA of the *Federal Court of Australia Act 1976* which came into force earlier this year.

Conditions for making a representative complaint

New section 69 provides the conditions that must be satisfied in order for a representative complaint to be lodged under section 50 of the Act. All the persons concerned must have complaints against the same person; the complaints of all the members of the class must be in respect of, or arise out of, the same, similar, or related circumstances and they must give rise to a substantial common issue of law or fact.

The new section also provides for the additional information (description of the class, nature of the class members’ claims, nature of the relief sought and the common issues for determination) that must be set out in the representative complaint lodged with the Commission. In describing or otherwise identifying class members it will not be necessary to name, or specify the number of, class members.

Under the new section a representative complaint can be lodged without the consent of class members.

Commission may determine that a complaint is not to continue as a representative complaint

New section 70 enables the Commission to determine that a complaint no longer continue as a representative complaint where it is satisfied that it is in the interests of justice to do so because it falls within one of the four criteria set out in subsection 70(2). These criteria are that it would be less costly to have separate proceedings; that the complaints of class members will not be efficiently and effectively dealt with by the representative complaint; that the complaint was not brought in good faith as a representative complaint or it is otherwise inappropriate that the complaints be pursued by means of a representative complaint.

Subsection 70(3) enables a complainant, where the Commission determines that a complaint not continue as a representative complaint, to continue the complaint as an individual complaint. This will not apply where the complainant is a trade union. The subsection will also enable the Commission to join a class member as a complainant.

Section 70A - Additional rules applying to the determination of representative complaints

New section 70A contains additional rules for the determination of representative complaints. It will enable the Commission to substitute another class member as complainant where it considers that the complainant is not able to adequately represent the interests of the class members.

Subsection 70A(2) enables a class member to withdraw from a representative complaint at any time before the Commission begins its inquiry.

Subsection 70A(3) empowers the Commission to direct that notice of any matter be given to class members.

Subsection 71(2)

Subsection 71(2) which empowers the Commission to, in effect, turn a representative complaint into an individual complaint is to be repealed. It has been replaced by new section 70.

Section 72 - Class member for representative complaint not entitled to lodge individual complaint

Section 72 (Ordinary complaints not precluded by representative complaints) is to be repealed and replaced by a new provision which will, in effect, prevent a person who is a class member in a representative complaint from lodging an individual complaint unless that person withdraws from the representative complaint.

Subsection 77(1)

Subsection 77(1) is to be amended to give the Commission power to give directions as to procedure to ensure that justice is done in an inquiry.

Subsection 80(3)

A new subsection 80(3) is to be added to ensure that interim determinations also cover class members in a representative complaint.

Section 81

Subparagraph 81(1)(b)(iv) is to be amended to remove the restriction on the Commission making a declaration for the payment of damages on a representative complaint.

Subsection 81(5) of the Act (which defines 'complainant' for the purposes of the section) is to be repealed and replaced with a provision enabling the Commission, when making a declaration for payment of damages, to provide either for specified amounts of damages or for such amounts to be worked out in a specified manner. For example, the Commission may wish to make an award consisting of amounts determined by reference to a mathematical formula or by reference to records of the respondent.

Under new subsection 81(6), where the Commission makes a declaration for the payment of damages on a representative complaint, it may give directions as to the way in which a class member is to establish an entitlement to damages and the means by which any disputes about entitlement are to be determined.

New subsection 81(7) defines 'complainant' in a representative complaint for the purposes of the section to mean class members.

Section 82 - Determination must identify the class members who are to be affected by the determination

Section 82 (Proceedings in Federal Court) is to be repealed. New section 82 provides that an interim determination under section 80 or a determination under

section 81 on a representative complaint must describe or otherwise identify the class members who will be affected by it.

Section 82A - Registration of determination.

New subsection 82A(1) provides that the section applies to a determination made under subsections 80 or 81 except where the respondent is a Commonwealth agency or the principal executive of a Commonwealth agency. Under subsection 80 the Commission, or the President on behalf of the Commission may, on the application of a party to an inquiry at any time after the lodgement of the complaint, make an interim determination seeking to preserve the status quo between the parties to the complaint or the rights of the parties to the complaint. Under section 81, after the Commission finds the complaint substantiated it may make a determination which may include a number of declarations. The section does not apply to a Commonwealth agency or the principal executive of a Commonwealth agency as respondent. Proposed new Part 4 Division 4 below applies to these cases.

Under new proposed subsection 82A(2) the Commission will be required to lodge the determination as soon as practicable after the determination is made, in a Registry of the Federal Court.

Under new subsection 82A(3) a Registrar must register the determination upon lodgement. 'Registrar' is defined to have the same meaning as in section 35A of the *Federal Court of Australia Act 1976*.

Under new subsection 82A(4) the Commission will be required to forward a written notice of the registration to the complainant and respondent to the determination as soon as possible but in all cases of registration within 7 days. The notice must specify the date of registration and must include a copy of the determination. The notice requirement is to ensure that the parties to the inquiry have notice of the date of registration. The date of registration of the determination is particularly important as under the proposed subsection 82B(5) the respondent if he or she wishes to review a determination, must apply to the Federal Court for review of the determination within 28 days after the date of registration of the determination.

Section 82B - Registered determination has effect as an order of the Federal Court.

Under new subsection 82B(1), upon registration of a determination under section 82A, the determination of the Commission (including an interim determination) will

have effect as if it were an order made by the Federal Court, but subject to the qualifications set out in the rest of the section.

New subsection 82B(2) will ensure that where a determination was made on a representative complaint, each class member described or identified as being affected by the determination is bound by it.

New subsection 82B(3) states that no action for enforcement of the determination may be taken before the end of the review period. 'Review period' is defined in the section to mean the period of 28 days starting on the day the determination is registered (refer 82B(6)). However, if the respondent to the determination applies to the Court under subsection 82B(5) for review of the determination, the review period commences on the day the determination is registered and ends at the time when proceedings on that review are completed or otherwise terminated.

Under proposed subsection 82B(4), in the case of a determination made under subsection 81(1) (that is a determination made by the Commission after holding an inquiry), a failure by the respondent to comply with a positive requirement of the determination during the review period does not count as a contravention of the determination. For example, if a determination under section 81 which has been registered under new section 82A specifies that the respondent should pay to the complainant damages by a date falling within the review period, a failure to comply with this requirement during this period would not be a contravention of the determination. On the other hand, action taken by the respondent to frustrate the terms of the determination after registration and during the review period, for example, by dismissing an employee, may amount to contravention of the determination. The provisions of subsection 82B(4) will not apply in the case of an interim determination under subsection 80 which is limited to maintaining the status quo between the parties (to the complaint) or the rights of the parties. A respondent who seeks a review of an interim or a final determination may, however, apply to the Court for an order suspending the operation of the whole or any part of the determination (see subsection 82C(3)).

Under new subsection 82B(5) the respondent to a registered determination may apply to the Federal Court for review of the determination. The application must be made within 28 days after the date of registration of the determination.

Section 82C - Review of registered determination.

New subsection 82C(1) states that the section applies if an application is made to the Federal Court under section 82B for review of a determination.

Under new subsection 82C(2) the parties to the review are the applicant, who was the respondent to the registered determination, and the complainant to the determination, who will be the respondent to the application for review.

New subsection 82C(3) provides that the Court may at any time make an interim order that suspends the operation of the whole or any part of the determination. This will enable the applicant to seek a suspension of the operation of the whole or any part of the determination pending the outcome of the review of the determination. If the Court makes an interim order under this subsection, the order may be made on such conditions, if any, as the Court thinks fit.

Under new subsection 82C(4) the Court, in reviewing the determination, may review all issues of fact and law.

Under new subsection 82C(5) a party cannot adduce new evidence in the review of the determination except by the leave of the Court.

New subsection 82C(6) provides that the Court, after reviewing the determination, may make such orders as it thinks fit including a declaration of right. The orders may confirm a determination that has been registered under section 82A.

New subsection 82C(7) provides that the Court may dismiss the application for review at any time if it considers that the applicant is not prosecuting the application with due dispatch. The Court may do this either of its own motion or on the application of the respondent. The aim of this provision is to ensure that the applicant for the review of the determination prosecutes the application with due dispatch. This provision is necessary as action for enforcement of a determination that has been registered under section 82A may not be taken before the end of the review period (subsection 82B(3)).

Paragraphs 84(1)(a) and (b)- financial assistance

These paragraphs provide for application to the Attorney-General for the provision of financial assistance and are consequential upon the changed processes for enforcement of determinations in the Federal Court.

Part III - Division 4 - Review and enforcement of determinations involving Commonwealth agencies.

Section 84A - Application of Division

New section 84A provides that the new division will apply only to determinations where the respondent is either a Commonwealth agency or a principal executive of a Commonwealth agency.

Section 84B - Obligations of respondent agency

Under this new section, Commonwealth agencies which are respondents to determinations covered by this division must cease, and not repeat, any conduct which led up to the determination and must perform any act or course of conduct that the determination may require. This provision does not cover an award of damages under paragraph 81(1)(b)(iv) of the Act that matter is dealt with in new section 84E.

Section 84C - Obligation of principal executive of agency

This new section requires that a principal executive of a Commonwealth agency who is the respondent to a determination must take all reasonable steps to ensure that the terms of the determination are brought to the notice of all members, officers and employees of the agency who may be engaged in conduct to which the determination relates.

Further the principal executive must take all reasonable steps to ensure that relevant officers etc cease and do not repeat such conduct and finally, where actions or a course of conduct is required by a determination, that that act or conduct is actually performed.

Section 84D - Damages

This new section provides that where the payment of damages is part of a determination against a Commonwealth agency the complainant is entitled to be paid that amount.

Subsection 84D(2) makes those damages a debt due to the complainant by either a Commonwealth agency which has the capacity to sue and be sued or by the Commonwealth where an agency does not have that capacity.

Section 84E - Review of determinations regarding damages

This new section makes provision for an application to be made to the Administrative Appeals Tribunal (AAT) for review of a determination relating to a decision to provide or not provide for damages.

Under subsection 84E(2) a Commonwealth agency or a principal executive officer of such an agency can only seek review by the AAT where the Minister has given permission.

Where the AAT considers such an application subsection 84E(3) provides that the Tribunal must be made up of a presidential member who is also a Judge, and 2 other members who are not Judges.

Section 84F - Enforcement of determination against Commonwealth agency

Under subsections 84F (1) and (2) where a Commonwealth agency or a principal executive of such an agency fails to carry out their obligations in relation to a determination as set out in sections 84B or 84C, respectively, then an application can be made to the Federal Court for an order directing that either the agency or the principal executive comply.

Sub-clause (5) indicates that an application under this clause cannot be made until either the time for making an application for review to the AAT under clause 84E has expired or any decision of the AAT, should an application be made, has come into operation.

