Second Reading

The Hon. JOHN HATZISTERGOS (Attorney General, Minister for Industrial Relations, and Vice President of the Executive Council) [8.29 p.m.]: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

The purpose of the Industrial Relations (Commonwealth Powers) Bill 2009 is to refer certain matters relating to industrial relations to the Commonwealth for the purpose of section 51 (37) of the Australian Constitution and to amend the Industrial Relations Act 1996.

The primary role of this bill is to refer to the Commonwealth sufficient power to enable the creation of a national industrial relations system for the private sector.

The establishment of this system is an event of great historical significance.

It represents an unprecedented willingness of Governments across Australia to work in the national interest.

It demonstrates the very best aspects of cooperative federalism.

It demonstrates an unwavering commitment to fairness and decency in the workplace.

The national industrial relations system will be based on the Fair Work Act 2009—the legislation that revoked the Work Choices laws.

This legislation will extend the coverage of the Fair Work Act to all private sector employees and employers in New South Wales.

Employers who are sole traders, partnerships or non-trading corporations are currently covered by the New South Wales industrial relations system and will be referred into the national system.

There is a seminal difference between what is happening today in 2009, and what happened in 2006 under the former Federal Government.

In 2006 the Commonwealth legislated against the wishes of the States to unilaterally seize powers and impose the WorkChoices laws on the Australia people.

WorkChoices did not merely impose on the Australian people a system that was both mired in complexity and fundamentally unfair, it failed in its attempt to create a national industrial relations system.

WorkChoices redrew the basis on what was covered by federal industrial laws.

The corporation's power of the constitution was used to extend the application of federal laws overriding the limitations on the conciliation and arbitration power that had traditionally been the basis for federal industrial laws.

However this left many organisations in limbo not knowing what laws they were covered by. This uncertainty prevailed most strongly in the charitable services sector amongst those employers and employees with the lowest capacity to seek legal advice or mount legal challenges.

The unilateralism of WorkChoices was equally offensive.

The Howard Government had no mandate from the Australian people.

Nor did they make any attempt to seek common ground in developing a national industrial relations system. Had they done so their laws would have been fundamentally different from WorkChoices.

WorkChoices was a much a result of the Howard Government feeling unencumbered by checks and balances as it was of the Howard Government having an ideological obsession with removing fairness from the workplace.

Today, in 2009, the situation is the antithesis of 2006.

The Rudd Government has a clear electoral mandate from the Australian people and they have engaged with the community, employer associations, unions, industry and State Governments in developing the Fair Work Act.

The national industrial relations system, which is in part created by this legislation, removes once and for all, the ebb and flow of businesses between federal and State laws.

Determining which industrial rules applying to a particular workplace will no longer turn on arcane and legalistic

questions of whether or not an employer is a constitutional corporation.

Similarly, this bill removes the need to apply a constitutional test as to whether an employer was genuinely part of an interstate industrial dispute. This referral will eliminate any uncertainty about the status of the employers and ensure that all employers and employees in the private sector are covered by the same broad industrial relations framework.

It will bring unincorporated businesses and charities into the system which will, from 1 January 2010, also cover all private sector organisations in Queensland, Victoria, Tasmania, South Australian and the two Territories.

The House will surely appreciate the historic significance of this occasion.

On the commencement of the provisions of this bill, New South Wales will join the national industrial relations system and a new era will be established in this country.

Given that this bill moves the bulk of the New South Wales industrial relations system into a national framework it is apposite to examine the rich traditions of this State's industrial jurisdiction.

There are several excellent historical records available of industrial relations in this State including the book edited by Mr Greg Patmore on the occasion of the centenary of the Industrial Relations Commission of New South Wales.

That book notes Professor Ron McCallum's view that New South Wales has the longest continuing industrial court or tribunal in the world.

The first sitting of an industrial court in this State occurred on 16 May 1902 but the antecedents for our industrial relations system can be traced back as far as 1873.

In that year the Hunter Valley coal miners' union and employers negotiated an agreement which provided for a disputes resolution committee.

This was not the only example of our emerging and uniquely Australian industrial relations system.

In 1882 the colonial Government adopted an employer proposal for the creation of industrial 'conciliation boards', based on the 1867 English legislation and the French local labour courts.

While this law was not enacted, a further attempt to introduce voluntary conciliation of industrial disputes by statute was attempted in 1888.

This law too was not enacted.

In late 1890 the Parkes Government held a royal commission into strikes following the year-long maritime strike.

This royal commission led to the introduction of voluntary conciliation under the Trades Disputes Conciliation and Arbitration Act 1892.

The 1892 legislation was not a success and was largely ignored by employers.

In 1895 the Reid Free Trade Government, supported by Labor members, introduced a bill providing for compulsory arbitration. Again, this bill did not proceed through the Legislative Council.

By 1899 another attempt at introducing compulsory arbitration was made.

This time the arbitration had to be initiated by the Minister.

Unfortunately, despite a series of significant and protracted disputes, arbitration was ordered on only four occasions.

So, by the close of the nineteenth century, there had been a series of marginally successful attempts at creating a workable industrial relations system.

At this time the remarkable Bernard Ringrose Wise became colonial Attorney General.

In 1900 he introduced a bill for compulsory arbitration, enforceable awards and common-rule effect of tribunal decisions.

It was then, and remains to this day, the blueprint for modern industrial relations statutes.

This bill too was defeated in the Legislative Council in November 1900.

However elections in July 1901 centred on the reforms proposed by Attorney General Wise.

A reintroduced bill was this time passed by the Legislative Council, on 10 December 1901.

So, almost precisely 107 years ago to the day, New South Wales became the first Australian State with a modern industrial relations system.

The 1901 New South Wales legislation also became the first modern industrial relations statute in the new

Commonwealth.

It should be noted that Australia's Conciliation and Arbitration Act 1903 drew heavily from this New South Wales legislation.

The course of New South Wales industrial relations has had its high and low points but has generally remained in advance of all other Australian jurisdictions for more than a century.

In 1905 Justice Heydon of the New South Wales industrial court created the first 'living wage' determination in Australia, a full two years before the internationally celebrated Harvester judgement of Justice Higgins in the Commonwealth court.

Justice Heydon's decision in the 1905 Sawmillers Case ordered a minimum wage sufficient for a married man and four children to live a 'human life'.

Notably, Heydon's decision took account of the industry's capacity to pay, demonstrating a balance to New South Wales industrial jurisprudence.

Thus, New South Wales provided the first modern industrial law and the modern concept of a living wage.

This Parliament and the New South Wales Commission have not been idle since in developing a balanced, productive and fair body of law.

In terms of reasonable wages, I have noted that unlike its Commonwealth counterpart, the New South Wales Commission has always upheld the concept of a balanced minimum level.

The interests of industry have been considered, with the recognition that employers have only a limited capacity to pay in some circumstances.

However, since 1958 New South Wales laws have obliged the setting of 'fair and reasonable' rates of pay. Not just the lowest rate of pay.

New South Wales has also pioneered the reduction of maximum weekly working hours.

In 1920 the Commission was permitted to introduce a 44 hour week into State awards.

Six years later the 44 hour week was legislated directly as a right to all workers in the State.

In 1948 the working week was reduced to 40 hours.

This State has also introduced leave entitlements well before other jurisdictions.

In 1944 the Labor Government provided two weeks paid leave to all workers.

This was extended to three weeks in 1958 and four weeks by 1974.

This State also pioneered long service leave entitlements.

In 1951 an entitlement to three months paid long service leave was created by statute after a worker completing 20 consecutive years of service with the same employer.

In 1963 this entitlement was increased to two months' leave after ten consecutive years of service.

In 1974 the creation of a ground-breaking portable long service leave scheme enabled construction workers to gain due recognition for extended periods of service within that industry.

The New South Wales jurisdiction has led the way in extending recognition of industrial rights to people engaged in working activities even though they are not considered to be employees under a strict legal definition.

Amendments to New South Wales legislation in 1943, 1951 and 1957 extended industrial coverage to owner-drivers and taxi drivers.

In 1959 New South Wales became the first Australian jurisdiction to recognise quasi-employment relationships by deeming certain workers in certain occupations to be employees.

In the same year the first unfair contracts jurisdiction in Australia was established in New South Wales.

In the area of job security and dealing with the impact of technological change New South Wales has also been a pioneer jurisdiction.

In 1964 the first mandatory notice obligations were placed on employers who were instituting technological change.

In the middle of the recession caused by the global oil crisis in the mid-1970s the New South Wales Commission became the first tribunal to deal with the effects of widespread workplace redundancies.

The New South Wales Employment Protection Act 1982 was the first legislation of its type in Australia and created a template for the Commonwealth and other State jurisdictions.

Much more recently the 2006 State Secure Employment Test Case dealt with the conversion of casual employment to permanent employment, as well as the treatment of labour hire and contracting out arrangements.

It is in the area of equal rights that New South Wales has played the national leader, in a number of respects.

In 1958 the Cahill Labor Government legislated directly for equal pay for women in this State seventeen years prior to the equivalent federal standard becoming law.

In 1996 the Carr Labor Government brought New South Wales into compliance with the International Labour Organisation standard becoming the first Australian jurisdiction to do so.

The 1996 Act legislated for equal pay for men and women performing work of equal or comparable value.

It is pleasing to note that these same words now appear in the Fair Work Act 2009 some thirteen years later.

In recognising the leadership of the New South Wales in this area Justice Michael Kirby stated that the 1996 Act and the 2000 Pay Equity Principle established under the legislation was 'founded squarely on a human rights approach'.

Justice Kirby stated: "I am aware of no more explicit recognition by an industrial tribunal in Australia of the significance of international human rights norms for Australian industrial relations law and practice."

These are just some of the examples of the proud industrial relations history of New South Wales which will infuse the new national system.

Over the past century the laws passed by this House have provided a framework for minimum wages, maximum working hours, leave entitlements and equality for men and women doing work of equal or comparable value.

The creation of the national industrial system clearly marks the end of one era of State industrial relations however, it also is the start of a new era in which New South Wales will play a significant part in a national system.

Under this referral of powers, the core concepts of New South Wales law and jurisprudence will go into the national law.

The Industrial Relations Commission of New South Wales has served our State with distinction for more than a century, is recognised internationally for its expertise in resolving disputes and developing community standards and has provided us with many of the industrial relations principles we now take for granted.

Amongst the greatest of these industrial relations principles is the concept of a 'fair go all round', which was first enunciated in the New South Wales Industrial Commission in 1971.

The 'fair go all round' concept is the very essence of industrial justice.

It sets the jurisprudence in a bed-rock of balanced interests and common human decency.

This concept endures today, informing decision-making with respect to unfair dismissals and other matters nationwide.

In July of this year, the Rudd Government's Fair Work Act 2009 commenced, putting an end to the divisive era of WorkChoices which undermined the principle of 'fair go all round'.

The Fair Work Act restored fairness and balance to the national system.

The Fair Work Act and its associated legislation were the result of extensive consultation between the Commonwealth Government and business, unions and state and territory Governments.

Significantly, the Commonwealth Government recognised that it could not create a truly national system other than by co-operation with the States and Territories.

Consequently, extensive discussions have taken place between the Governments about how to shape a new national system that will be fair, balanced and enduring.

I wish to take this opportunity to put on the record the Government's appreciation of the considerable personal efforts of the Deputy Prime Minister and her personal staff along with other State ministers and their respective officials from across Australia in these consultations.

The contrast between this process and the unilateralism of WorkChoices could not be more stark.

The Commonwealth Government drew on the vast reservoir of experience in this State to inform its legislative framework.

These discussions have not only improved the quality of the Commonwealth's industrial relations law, they have clarified the demarcation point with many State laws.

Through these discussions it has been possible to sensibly agree that by deliberate exclusion, this referral will not apply to the New South Wales public service or the New South Wales local Government sector.

An agreed mechanism will ensure that State laws continue to regulate local Government and local Government corporations.

Similarly, through discussions, we have been able to agree on how to deal with the interaction between the Commonwealth's Fair Work Act 2009 and State laws dealing with matters such as public holidays, business trading hours, essential services and victims of crime leave.

Unlike Work Choices, which encouraged corporations to make Australian Workplace Agreements overriding these State laws the Fair Work Act 2009 clearly recognises the continuing operation of these important State laws.

These 'non-excluded matters' are set out in the bill, and in the corresponding Commonwealth legislation.

An important aspect of this bill, and an aspect that it is supported in the Commonwealth bill that accepts the referral of powers by this and other States is the recognition that there are areas of law of relevance to employers and employees that remain within the power of the States to regulate.

The list of so-called 'non-excluded matters'—that is areas of law which are 'not excluded' from applying to employers and employees in the national system—includes such important issues as the following:

Anti-discrimination laws

Occupational health and safety laws

Workplace surveillance laws

The regulation of children's employment and

Trading and business hours.

I draw attention to two areas in particular.

Firstly, I can confirm that the State's outworker laws are not affected by the referral.

Honourable members will recall that New South Wales was the first State to enact innovative and significant protections for outworkers in the clothing trades.

Matters relating to outworkers (within the ordinary meaning of the term) remain matters about which this State can make laws.

This is reinforced in the referral bill (see clause 3 of the bill) and confirmed in the Commonwealth bill that accepts this State's referral.

Secondly, I would note that this State is the only jurisdiction that affords protection to an employee in the unfortunate circumstance that he or she, or a member of their immediate family, is a victim of serious crime. Part 4B of Chapter 2 of the Industrial Relations Act 1996 ensures that where such employees attend court proceedings in relation to such a crime they are entitled to unpaid leave for such attendance and the time taken to travel to and from the proceedings.

Leave for victims of crime is confirmed in this referral bill and in the Commonwealth bill accepting the referral as a matter which the State law continues to regulate.

The Government took the necessary time to determine to participate in the national industrial relations system. We took a prudent approach.

While the overall shape of the national system framework has been evolving for some time it is only with the introduction of the Commonwealth's Fair Work Amendment (State Referrals and Other Measures) Bill that the final piece of the jigsaw puzzle is now in place.

That bill shows us how it is that referrals by the States will be accepted by the Commonwealth to establish a truly cooperative national system.

The Commonwealth bill also establishes how the transition to the new system will operate for the thousands of private sector employers and their employees who are the subject of this referral.

Furthermore, we have been able to observe the initial operation of the Fair Work Act.

The decision of the Government to participate in the national industrial relations system was made after it was certain what laws would be in place in the national system.

It is also apposite at this juncture to make a few comments about the modern award system being created as part of the transition to the Fair Work laws.

These modern awards are being created by the Australian Industrial Relations Commission.

The dimensions of the task being undertaken in this process should not be underestimated.

The Commission is consolidating literally thousands of industrial standards into approximately 120 new awards.

The changes to pay rates, leave entitlements and employment conditions are quite significant in some industries and occupations.

I am satisfied that the Commonwealth laws now include a range of measures which will ameliorate the transitional difficulties that some commentators have associated with the award modernisation process.

First, employers and employees affected by this referral will, by and large, retain their State award entitlements for at least one year.

There are exceptions to this—all employees will be entitled to the benefit of the new National Employment Standards and Fair Work Australia will be able to periodically adjust these conditions.

Second, the transition to modern awards will be managed by Fair Work Australia over a full five-year period to 2015.

This will give employers and employees a reasonable period to adjust to the new awards.

Take home pay orders will be able to be made by Fair Work Australia in order to ensure that no existing employees will suffer a reduction in net pay.

Finally, Fair Work Australia is fully empowered to adjust the scope of modern awards throughout the transitional period to ensure that any unforeseen ambiguities are properly resolved.

Another area of concern to this Government is the way in which the pay and conditions of low paid workers are adjusted.

Low paid workers are to be found in a diverse range of industries retail and hospitality, child care, cafes and restaurants and many others.

Workers in these industries are most likely to be women, young people, recently arrived migrants or casual employees; often the lowest paid workers belong to several of these categories of worker simultaneously.

It is well established that these workers strongly rely on existing awards and have difficulty bargaining for enterprise agreements.

There are a number of mechanisms in the Fair Work system that will particularly assist low paid workers.

I will refer to two in particular.

First, the Fair Work system incorporates ten legislated minima, called the National Employment Standards.

These Standards provide a range of conditions that apply to all employees in the Fair Work system, including maximum weekly ours, personal/carer's leave, public holidays, parental leave, redundancy pay, and so on.

These National Employment Standards provide the 'floor' of the Fair Work system, and can't be avoided.

Second, the Fair Work system provides special provisions to assist low paid workers to bargain.

The Fair Work Act allows low paid employees working for two or more employers to bargain together so, for example, employees of a group of child care centres could bargain for a single agreement with their employer or employers, if Fair Work Australia authorises them to do so.

The Act also provides for Fair Work Australia to assist the bargaining parties in whatever manner it considers appropriate.

The key strength of these provisions is that they recognise the workplace reality that, in some industries, bargaining is difficult.

Workplaces such as childcare centres, cafes, small shops and hairdressers have not been prominent in the bargaining stream so far.

These provisions give employees in these kinds of workplaces a new and unprecedented opportunity to bargain with their employers.

Employers get a new opportunity to improve workplace productivity, and their employees get a chance to improve their pay and conditions.

While the New South Wales Industrial Relations Act has worked well to provide an industrial relations framework that is fair, just, efficient and productive, the Fair Work laws provide similar outcomes.

The Fair Work system is based on fundamental workplace relations principles that have been agreed between the

Commonwealth and the States and Territories.

These fundamental principles are the basis upon which the national system is built.

They are:

a strong, simple and enforceable safety net of minimum employment standards,

genuine rights to ensure fairness, choice and representation at work,

collective bargaining at the enterprise level with no provision for individual statutory agreements,

fair and effective remedies available from an independent industrial umpire,

protection from unfair dismissal,

an ongoing commitment to an independent tribunal system, and

an independent authority able to assist employers and employees within the national system.

These principles are mirrored in the Commonwealth's Fair Work Amendment (State Referrals and Other Measures) Bill.

The principles are also established in the referring legislation of each of the other participating States.

They are also set out in the multilateral intergovernmental agreement that all States participating in the national system will sign, or have already signed.

The multilateral intergovernmental agreement is a very important document.

It emphasises that the new national system will be a joint endeavour amongst the participating jurisdictions.

It commits all participating jurisdictions, the Commonwealth and the States and the Territories, to support the fundamental industrial relations principles.

Importantly, if any future Commonwealth Government seeks to introduce an amendment to the Fair Work Act that would undermine the fundamental workplace relations principles that issue will be able to be debated at the Workplace Relations Ministerial Council.

If necessary, a vote of the Council will be taken on whether the amendment or proposed amendment undermines the principles.

If a two-thirds majority does not support the amendment, the Commonwealth has committed to not proceed with it.

This political commitment is reinforced in the legislation I am introducing today, and also in the Commonwealth bill that will accept State referrals.

If the New South Wales Government is of the view that an amendment or proposed amendment to Commonwealth legislation undermines the fundamental principles a proclamation may be made declaring that that particular amendment will have no effect in the State of New South Wales.

But this partial termination of the reference of powers will not affect the overall reference—that is, the rest of the national system as it operates in this State will not be affected by such a proclamation.

This mechanism permits the State to precisely identify and quarantine any objectionable amendments to the Fair Work Act.

This promotes the stability of the system whilst also providing the Government with the capacity to target WorkChoices style laws.

The consultative and deliberative arrangements in the multilateral intergovernmental agreement will ensure that the national industrial relations system evolves in a manner consistent with the fundamental principles of that system.

All the referring States, together with the Commonwealth and the Territories, are committed to working together to ensure that the new national system works effectively for all private sector employers and employees.

I can inform members that New South Wales and the Commonwealth are close to finalising arrangements that will underpin this cooperative relationship.

The Commonwealth has agreed that seven members of the New South Wales Industrial Relations Commission will be appointed to positions in Fair Work Australia , the tribunal that administers the Fair Work Act.

Three of these members will work in Fair Work Australia on a fulltime basis, four on a part-time basis.

All will maintain their membership of the Industrial Relations Commission.

This will provide a significant boost to the membership of Fair Work Australia in New South Wales after the membership of its predecessor, the Australian Industrial Relations Commission, was eroded by the Howard Government.

It will ensure that the skills and knowledge of State tribunal members continue to be available to employers and employees throughout New South Wales.

It also facilitates the establishment of Fair Work Australia in the vital industrial centres of Newcastle and Wollongong where Fair Work Australia will share premises with the Industrial Relations Commission.

There will also be considerable cooperation between the Commonwealth and New South Wales in the provision of education and compliance services.

Inspectors from New South Wales Industrial Relations and the Fair Work Ombudsman will work together to deliver information and educational services to the workplaces of New South Wales.

State inspectors will be trained and dual-badged as inspectors under the Commonwealth's Fair Work Act 2009.

Currently, the agencies are preparing an educational program which will be delivered in a variety of ways to employers in this State.

This will ensure, as far as is practicable, that businesses are well equipped during the transition to the new national system.

I am advised that the program will particularly focus on unincorporated employers who are the subject of this bill.

Employers in regional areas of New South Wales will also be a key target for this program.

I now turn to detail the major provisions contained within this bill concerning the operation of this referral of power. The major elements of the bill are:

the creation of fundamental workplace relations principles in clause 4, reflecting those principles I have described earlier;

the creation of an initial reference of powers, a referral of the power to amend the referred laws and a referral of power to make transitional laws about the referred matters;

the exclusion of a specified range of matters in clause 6; and

the process for the termination of the reference in clauses 7 to 9 of the bill.

Schedule 1 of the bill sets out the text which is required to be inserted in the Commonwealth Fair Work Act 2009 in order to effect the referral of powers.

I now turn to detail the major provisions contained within this bill concerning consequential amendments to New South Wales legislation.

Schedule 2 of the bill sets out the amendments to New South Wales law considered to be necessary to align State law with the national industrial relations system.

Schedule 2 repeals section 146A of the Industrial Relations Act 1996 and amends section 1468 of the Industrial Relations Act 1996.

In the case of the repeal of section 146A, the commencement of the Fair Work Act 2009 clearly overrides the operation of these laws. The section is, accordingly, redundant.

The amendment to section 146B will permit members of the Industrial Relations Commission of New South Wales to be nominated as dispute resolution providers in federal enterprise agreements.

This will ensure that many companies who continue to use the expertise of the Industrial Relations Commission will be able to continue these arrangements.

The implementation period in 2010, and the transitional period through to 2015, will also require a positive contribution from unions, business and employer associations across New South Wales.

In order to ensure that the Government receives comprehensive advice on the operation of this new set of laws, the Government will form an Industrial Relations Advisory Committee.

This body will provide an independent and regular source of advice to Government.

Members will be drawn from employer and employee organisations, as well as professional bodies.

This will ensure that the Government can respond quickly to any issues that arise during the implementation of the new system.

There is an unprecedented level of support for the national industrial relations system.

This significance was recognised last Friday by Australia's peak industrial organisations.

The ACTU, the Australian Chamber of Commerce and Industry and others agreed that this national industrial relations system represents a step forward for co-operative federalism.

This is indeed the case.

I am reminded that the review of industrial relations undertaken by Professor John Niland 20 years ago for the Greiner Government had, as one of its primary recommendations, that New South Wales should seek a uniform national set of laws.

More than two decades later, the future has arrived.

Today this House can heed that guiding principle from Professor Niland and from many other learned commentators.

New South Wales should be proud to take its place amongst the referring States and to contribute positively to the implementation of this new national workplace relations system.

I commend this bill to the House.