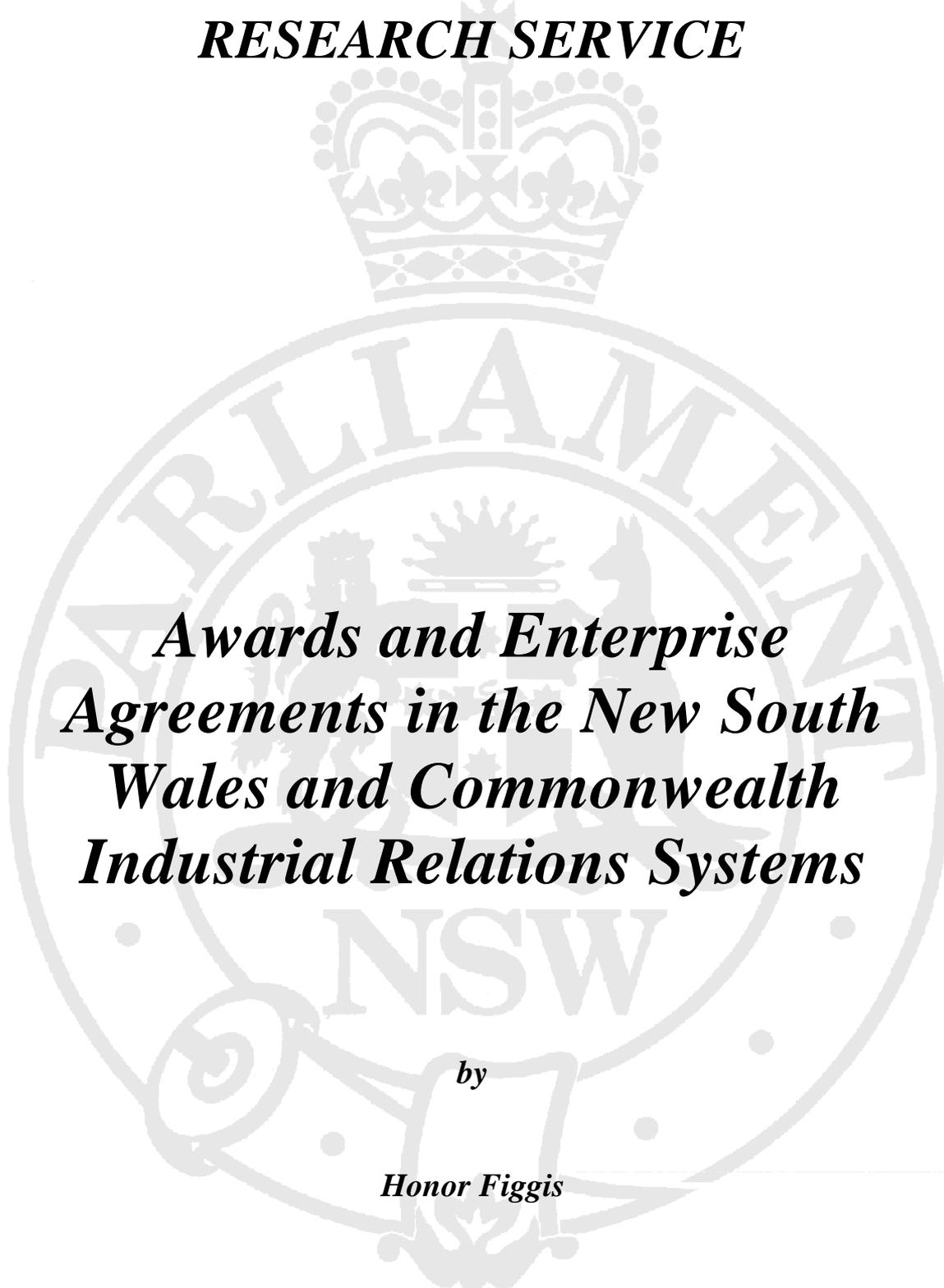


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***Awards and Enterprise  
Agreements in the New South  
Wales and Commonwealth  
Industrial Relations Systems***

*by*

*Honor Figgis*

***Briefing Paper No 3/97***

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***ISSN 1325-5142***

***ISBN 0 7310 5798 6***

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February 1997

### ***ACKNOWLEDGEMENT***

I would like to acknowledge the helpful contributions of Professor George Winterton of the University of New South Wales and Mr Don Jones of the New South Wales Department of Industrial Relations

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## ***EXECUTIVE SUMMARY***

This paper begins with summaries of the systems of awards and enterprise agreements in New South Wales and the Commonwealth. It then looks at how federal and state awards and agreements are likely to interact, with some legal analysis. The paper also discusses some factors that influence whether industrial parties end up in the Commonwealth or the New South Wales systems.

- The ***New South Wales Industrial Relations Act 1996*** retains a strong conciliation and arbitration system, with awards as its central feature. Enterprise agreements can be made with unions or directly with employees (pp 3-8).
- The ***Commonwealth Workplace Relations Act 1996*** has reduced the scope of the conciliation and arbitration system. The Act provides for awards, certified agreements (usually collective agreements with unions), and Australian Workplace Agreements (agreements which may be made with individual employees or groups of employees). The Act encourages certified and workplace agreements, and restricts the scope and coverage of awards (pp 8-16).
- In general, ***federal awards and agreements continue to prevail*** over New South Wales awards and agreements. However, there are ***significant exceptions*** in the federal Act that protect some elements of the State systems from being overridden by the federal system (pp 16-24). For example, the federal Australian Industrial Relations Commission cannot now make an award if the employees whose wages and conditions are the subject of the dispute are covered by a NSW award or enterprise agreement, unless the Commission considers that a federal award would be in the public interest.
- Federal awards will prevail over NSW awards, but they may be displaced by NSW enterprise agreements. Federal certified agreements will prevail over New South Wales awards and enterprise agreements to the extent of any inconsistency, with some limited exceptions. Australian Workplace Agreements will completely exclude the operation of New South Wales awards and enterprise agreements, again with some limited exceptions (pp 16-24).
- There are several mechanisms in Commonwealth and New South Wales legislation to ***prevent and minimise conflicts*** between the federal and NSW industrial relations systems (pp 24-29). Despite these provisions, the two systems do not sit easily together, and the complexity of the relationship between the systems will almost certainly lead to litigation to determine how the systems will work together.
- As a result of a combination of factors, there is likely to be increased interest by unions and employees in moving to, or remaining in, the New South Wales industrial relations system. These factors include the increased scope of operation that the federal Act affords to the NSW system; the barriers erected by the federal Act to prevent parties covered by State awards or agreements moving into the federal jurisdiction; and the greater protection offered to employees by the NSW legislation (pp 28-30).

## 1. INTRODUCTION

In 1996 both New South Wales and the Commonwealth introduced new industrial relations systems. Both governments had inherited systems that were inconsistent with their political philosophy, and they altered the industrial relations laws to conform with their political programs. In New South Wales the Carr Labor Government repealed the previous Coalition's *Industrial Relations Act* 1991 and passed the *Industrial Relations Act* 1996. The Commonwealth Howard Coalition Government substantially amended the previous Labor Government's *Industrial Relations Act* 1988 and renamed it the *Workplace Relations Act* 1996.

This paper begins with summaries of the systems of awards and enterprise agreements in New South Wales and the Commonwealth. It then looks at how federal and state awards and agreements are likely to interact, with some legal analysis. The paper also discusses some factors that influence whether industrial parties end up in the Commonwealth or the New South Wales systems. The following abbreviations are used:

WR Act	<i>Workplace Relations Act</i> 1996 (Cth)
WROLA Act	<i>Workplace Relations and Other Legislation Amendment Act</i> 1996 (Cth)
1991 Act	<i>Industrial Relations Act</i> 1991 (NSW)
NSW Act	<i>Industrial Relations Act</i> 1996 (NSW)
IRC	Industrial Relations Commission of New South Wales
AIRC	Australian Industrial Relations Commission
CA	Certified Agreement (under the <i>Workplace Relations Act</i> 1996)
AWA	Australian Workplace Agreement (under the <i>Workplace Relations Act</i> 1996)

## 2. NEW SOUTH WALES INDUSTRIAL RELATIONS ACT 1996

A new industrial relations scheme commenced in New South Wales on 2 September 1996, when the *Industrial Relations Act* 1996 came into operation. An Industrial Relations Bill was introduced into Parliament in November 1995, but lapsed with the prorogation of Parliament. The Bill was reintroduced with some amendments in April 1996. Further amendments were made in the Legislative Council, and after much debate the Bill was passed, and received assent on 13 June 1996.

## 2.1 *Broad themes of the NSW Act*

The NSW Act is:

based upon the presumption that a strong conciliation and arbitration system (with a system of award prescriptions as its central feature) is essential for the protection of workers' wages and conditions of employment, and to provide fairness in the workplace.<sup>1</sup>

Awards made through collective negotiation and arbitration remain at the centre of the industrial relations system, as 'the essential underpinning for the protection of the wages and conditions of working men and women'.<sup>2</sup> However, the NSW Act allows employers to reach collective enterprise agreements with unions or their employees, rather than relying on awards.

The underlying philosophy of the NSW Act is that employees are generally better off dealing with their employer collectively, rather than individually. The NSW Act assumes that individual employees tend to have less bargaining power, fewer resources and fewer alternatives than their employer. It is said that:

In the context of this disequilibrium between individuals equipped with only limited means and firms representing huge aggregations of shareholder wealth and knowledge, the ordinary worker cannot hope to negotiate favourable terms and conditions on his or own. Rather, the obvious course for employees is to band together and present a united front to management, thereby acting as a powerful counterpoise to the natural economic advantages wielded by employers.<sup>3</sup>

Other themes of the NSW Act are:

- A strong role for the Industrial Relations Commission, giving it comprehensive powers in a range of areas such as making awards, approving enterprise agreements, dealing with breaches of awards and agreements; dealing with industrial action and hearing unfair dismissal and unfair contracts claims.
- A simplified conciliation-based approach to industrial dispute and industrial action, emphasising conciliation at first instance rather than immediate legal

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<sup>1</sup> Hon J Shaw MLC, "A Balanced Industrial Relations Reform Package for New South Wales", (1996) 38 *Journal of Industrial Relations* 57 p 57.

<sup>2</sup> Hon J Shaw MLC, Minister for Industrial Relations, *NSWPD*, 23/11/1995, Second Reading Speech for the 1995 Bill, p 3485.

<sup>3</sup> M Moir, "Individual and Collective Bargaining in Australian Labour Law: The *CRA Weipa* case" (1996) 18 *Sydney Law Review* 350 p 362.

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action to prevent and punish industrial action.

- A consultative role for unions in the industrial relations system. Union membership is encouraged, but there is a ban on compulsory unionism and preference to union members.<sup>4</sup>
- An emphasis on the elimination of discrimination in employment and on pay equity for men and women doing work of equal or comparable value.
- Encouragement of workplace-level industrial relations, and workplace reforms to promote efficiency.

Key changes effected by the NSW Act include<sup>5</sup>:

- Abolition of the distinction drawn in the 1991 Act between disputes concerning ‘settled rights’ and ‘non-settled rights’. Under the 1991 Act, unions and employees were given a limited protection against liability for industrial action taken when negotiating the terms of an award or agreement. Industrial action taken when the parties’ rights were settled, that is, during the term of an award or agreement, was not protected. The NSW Act establishes a single regime of conciliation and arbitration for industrial action, regardless of whether an award or agreement is being negotiated or is in place.
- Integration of the Industrial Relations Commission and the Industrial Relations Court into a single tribunal, the Industrial Relations Commission. Judicial functions under the NSW Act are exercised by the judicial members of the IRC sitting as the Commission in Court Session.
- The Industrial Relations Commission is given more flexible powers to make awards on conditions of employment and to deal with industrial disputes. The NSW Act removes restrictions on powers exercisable during the ‘settled rights’ phase of an award or agreement.
- Less emphasis on criminal sanctions for the purposes of enforcement.

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<sup>4</sup> The Industrial Relations Bill 1996 originally allowed preference to union member clauses to be incorporated in awards and agreements with the consent of the parties. The Bill was amended in the Legislative Council to prohibit preference clauses: *NSWPD 22/5/96* pp 1290- 1296.

<sup>5</sup> Extracted from the Explanatory Note to the Industrial Relations Bill 1996 p 2.

## 2.2 Awards

The Industrial Relations Commission has comprehensive award-making powers to set fair and reasonable conditions of employment. An *application* for an award may be made by an employer, an employer association, a union, or a State peak council. The Minister may also apply for an award to be made (s 167). An award may be made on the IRC's own initiative, or in the course of an arbitration by the IRC to resolve an industrial dispute (s 11). An award binds all employees and employers to which it relates, whether or not they were a party to the making of the award. Awards may be 'common rule' awards (applying to all employers and employees in an industry or occupation) or they may be specific to particular enterprises or projects (or parts of enterprises or projects).

An award must contain *dispute resolution procedures* (with limited exceptions for employers with fewer than 20 employees)(s 14). An award must have a *term* of not less than 1 year and not more than 3 years, although an award in connection with a project may have a term up to the expected duration of the project (s 16). Interim awards may be made for periods of less than 1 year.

The IRC must *review* each award at least once in every 3 years (s 19). The purpose of a review is to modernise awards, to consolidate awards relating to the same industry and to rescind obsolete awards. The goal is to ensure that: awards are kept 'contemporary and relevant';<sup>6</sup> that they do not restrict productivity or efficiency; that they are free from discrimination; that they do not contain archaic language;<sup>7</sup> and to prevent a multiplicity of single-issue awards (known as 'splinter awards').

The NSW Act states the *minimum conditions* of employment that may be set by an award, such as the maximum hours of employment (s 22) and minimum sick leave entitlements (s 26).

## 2.3 Enterprise agreements

Enterprise agreements are available under the NSW Act. They may supplement or override award terms. An enterprise agreement must not result in a net detriment to the employees covered by it in comparison with the relevant award.

An enterprise agreement may be made for any group of employees, including some or all employees of a single employer, the employees of two or more associated employers, and employees engaged in a project (s 30). An enterprise agreement cannot be made with a group of employees that is limited to the members of a union (s 30).

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<sup>6</sup> Hon J Shaw MLC, Minister for Industrial Relations, *NSWPD*, Second Reading Speech for the 1995 Bill, 23/11/1995 p 3846.

<sup>7</sup> Hon K Yeadon MP, Minister for Land and Water Conservation, *NSWPD*, Second Reading Speech for the 1996 Bill, 29/5/96 p 1715.

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There is no provision for individual enterprise agreements made directly between an employer and an employee similar to the individual agreements available under the Commonwealth Workplace Relations Act 1996 (see p 14). However, there are circumstances where an enterprise agreement under the NSW Act may cover just one employee.<sup>8</sup>

The NSW Act provides for two kinds of enterprise agreements: agreements between employers and one or more unions (*union agreements*); and agreements between employers and their employees (*non-union agreements*). The *term* of an agreement must be more than 1 year and less than 3 years, although an agreement for a project may have a term up to the expected duration of the project. Interim awards may be made for periods of less than 1 year.

All enterprise agreements must be *approved* by the IRC. The NSW Act sets out the requirements for approval of agreements (s 35). The IRC must also develop principles that it will follow in deciding whether to approve an enterprise agreement.<sup>9</sup> The IRC is to follow those principles unless satisfied that any departure from them would not prejudice the interests of any of the parties to the agreement.

The requirements in the NSW Act for approval of a *union agreement* are that:

- the agreement complies with all relevant statutory requirements;
- the agreement does not, on balance, provide a net detriment to the employees when compared with the aggregate package of conditions of employment under relevant awards that would otherwise apply to the employees;
- the parties understand the effect of the agreement; and
- the parties did not enter the agreement under duress.

Under the NSW Act the IRC may approve a *non-union agreement* if, in addition to the approval requirements for a union agreement:

- before or at the time of commencement of formal negotiations, the employer has advised the Industrial Registrar both that an agreement is being negotiated, and which awards or enterprise agreements currently apply to the employees; and

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<sup>8</sup> For example, where an employer with one employee makes an agreement with the employee's union.

<sup>9</sup> The principles were set in a decision on 19 December 1996 (Principles for Approval of Enterprise Agreements: Application by the Minister for Industrial Relations pursuant to sections 33(4) and 167 of the Industrial Relations Act 1996, Matter No. IRC 5032 of 1996).

- the agreement has been approved in a secret ballot by at least 65% of the employees who are to be covered by the agreement.

The Registrar is to advise such persons or bodies as are prescribed by the regulations of the proposed enterprise agreement. The Registrar is also to prepare a report for the IRC comparing the conditions of employment under the agreement and the conditions of employment that would otherwise apply to the employees under the relevant awards.

Special conditions for approval apply where an enterprise agreement covers some but not all the employees of an employer (unless the employees who are covered are a distinct geographic, operational or organisational unit). The IRC must *not* approve such an enterprise agreement if it is satisfied that

- the agreement fails to cover employees who would reasonably be expected to be covered; and
- it is unfair not to cover the employees excluded from the agreement.

Certain persons have a *right to be heard* at approval hearings before the IRC. These are: any party to the agreement; a union if its members or persons eligible to become members are affected by the agreement; the Minister; and (with leave of the IRC), a State peak council and the President of the Anti-Discrimination Board. No party has a veto over approval of an enterprise agreement.

#### **2.4 Relationship between awards and enterprise agreements**

An enterprise agreement prevails over an award in so far as the agreement deals with the same matters as the award, subject to the terms of the enterprise agreement (s 41). An enterprise agreement can expressly allow award terms to continue to operate. The section is intended to allow enterprise agreements to interact closely with awards. Where an enterprise agreement and an award deal with the same matter, the enterprise agreement will prevail to the extent it deals with a particular provision. However, the enterprise agreement must make explicit what matters it intended to cover.<sup>10</sup>

### **3. COMMONWEALTH WORKPLACE RELATIONS ACT 1996**

A new federal industrial relations scheme commenced on 1 January 1997, when most of the *Workplace Relations and Other Legislation Amendment Act 1996* (WROLA Act) came into operation. The WROLA Act amends the *Industrial Relations Act 1988* and renames it the *Workplace Relations Act 1996* (WR Act). The WROLA Bill was substantially amended in the Senate following agreement between the Government and

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<sup>10</sup> For example, if an enterprise agreement provides for pay increases of 20%, which includes a component for 'buying out' an industry allowance prescribed in the award, the terms of the enterprise agreement must specifically state that the industry allowance will not apply.

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the Australian Democrats. The WROLA Act received assent on 25 November 1996.

### 3.1 *Broad themes of the WR Act*

The underlying philosophy of the WR Act is that employers and employees can reach agreements satisfactory to both sides, and such agreements are better for all concerned than a decision of an outside arbiter. The intervention of an arbiter interferes with the freedom of all individuals to negotiate a contract that is as advantageous as possible. It is said that:

The immediate participants in an enterprise will have best knowledge of their own specific and unique circumstances. Employers and employees are in the best position to know what is in their interests and can be expected to agree upon pay and conditions that best suit their day-to-day activities. In a centralised system of workplace regulation, it is simply not possible to take account of individual knowledge and preferences.... Further, the policy of freedom of contract requires employers and employees to take direct responsibility for forming and maintaining their relationship, thereby enhancing communication, co-operation and trust.<sup>11</sup>

The WR Act provides for three kinds of industrial instruments: awards, certified agreements (usually collective agreements with unions) and Australian Workplace Agreements (agreements which may be made with individual employees or groups of employees). The Act encourages certified and workplace agreements, and restricts the scope and coverage of awards.

Other themes of the new workplace relations legislation are:<sup>12</sup>

- A narrowing of the federal jurisdiction, principally by confining reliance on international treaties and the external affairs power as a source of domestic law.
- A re-orientation of the role of trade unions - emphasising a contractual relationship between a union and its members, and converting trade unions in many instances from parties principal to mere bargaining agents.
- Lowering the 'centre of gravity' of day to day industrial relations (encouraging workplace by workplace agreements, rather than industry-wide arrangements).
- Seeking a more market driven approach to wages and employment conditions.

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<sup>11</sup> M Moir, "Individual and Collective Bargaining in Australian Labour Law: The *CRA Weipa* case" (1996) 18 *Sydney Law Review* 350 p 358.

<sup>12</sup> Bills Digest for the Workplace Relations and Other Legislation Amendment Bill, prepared by the Commonwealth Parliamentary Research Service, No.96 1996 p 2.

- Providing for greater competition and diversity in relation to union representation rights.
- Greater emphasis on formal legal sanctions as a means of securing preferred workplace outcomes and minimising strikes and other forms of industrial action.

The WR Act is complicated and convoluted, largely due to the necessity to refer every provision back to the powers of the Commonwealth in the Constitution. The industrial arbitration power in the Constitution<sup>13</sup> imposes a number of constraints on the Commonwealth Parliament. In recent years the Commonwealth has also relied on other constitutional heads of power so as to expand its ability to legislate on industrial matters - most notably the external affairs power,<sup>14</sup> but also the corporations power,<sup>15</sup> and the trade and commerce power.<sup>16</sup> The WR Act relies less on the external affairs power, and more on the corporations and trade and commerce powers, than did the *Industrial Relations Act* 1988.

### 3.2 Awards

Awards under the WR Act are intended to act as a safety net of minimum wages and conditions, not as a comprehensive statement of all or most employment conditions. The WR Act encourages employers and employees to reach agreements at the workplace or enterprise level. To this end the Act makes significant changes to the scope of awards.

The AIRC's jurisdiction to make awards is limited to 20 matters, although in exceptional circumstances the AIRC can arbitrate beyond these core conditions to settle disputes. The 20 *allowable award matters* are set out in s 89A of the WR Act:

- |   |  |
|---|--|
| • classifications of employees and skill-based career paths | • ordinary hours of work, rest breaks, notice periods, variations to hours |
| • rates of pay  | • piece rates, tallies and bonuses   |
| • annual leave and leave loadings                           | • long service leave   |

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<sup>13</sup> Section 51(xxv): Power to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

<sup>14</sup> Section 51(xxix).

<sup>15</sup> Section 51(xx).

<sup>16</sup> Section 51(i).

- 
- classifications of employees and skill-based career paths
  - personal/carer's leave (such as sick leave, family leave, cultural leave)
  - parental leave
  - public holidays
  - redundancy pay
  - stand-down provisions
  - jury service
  - type of employment, such as full-time employment, casual employment, regular part-time employment and shift work
  - ordinary hours of work, rest breaks, notice periods, variations to hours
  - loadings for overtime, casual or shift work
  - allowances
  - penalty rates
  - notice of termination
  - dispute settling procedures
  - superannuation
  - pay and conditions for outworkers (to a limited extent)

In *exceptional circumstances* the AIRC will be able to make an award about a matter that is not one of the 20 allowable award matters (s 89A(7)). The circumstances are that:

- a party to the dispute has made a genuine attempt to reach agreement on the matter;
- there is no reasonable prospect of agreement being reached on the matter by conciliation;
- it is appropriate to settle the matter by arbitration;
- the matter involves exceptional issues; and
- a harsh or unjust outcome would apply if the industrial dispute were not to include the matter.

The AIRC may also arbitrate outside the 20 allowable award matters where industrial action is threatening to endanger the life, personal safety or health, or the welfare of the population, or is threatening to cause significant damage to the Australian economy (the *essential services* exception) (s 170MX).

The AIRC will only be able to make minimum rates awards, not *paid rates awards*. However, it has a limited ability to make a paid rates award to settle a dispute where the employees have been customarily covered in the past by a paid rates award and there is

no reasonable prospect of the parties reaching an agreement (s 170MX).

Existing awards will be reviewed and simplified over an 18-month period, and their content will be stripped back to the allowable award matters.<sup>17</sup> At the end of the 18 months any term in an award that is not one of the allowable award matters will cease to have effect (WROLA Act Sch 5 Item 50). The intention is that other employment matters will be determined by agreement at the enterprise or workplace level, whether in formal agreements or informally. If no agreement can be reached the parties may agree to allow the AIRC to make recommendations to resolve a dispute (s 111AA of the WR Act).

As part of the *award simplification* process, the AIRC has to make sure that awards:

- do not include matters of detail or process that would be better dealt with by agreement at the enterprise or workplace level;
- do not prescribe work practices or procedures that restrict productivity or efficiency;
- allow for local agreement about how the award provisions are to apply;
- are in plain English, are easy to understand and do not contain obsolete or discriminatory conditions; and
- provide for training wages and a supported wage system for people with disabilities.

### 3.3 *Certified Agreements (CA)*

Certified agreements are collective agreements between an employer and a union (or unions), or between an employer and a group of employees. An agreement must be certified by the AIRC to take effect.

The WR Act encourages CAs at the level of a ‘single business’ or part of a single business. A single business is a ‘business project or undertaking that is carried on by an employer’ (s 170LB). In restricted circumstances the WR Act allows ‘multiple business’ agreements to cover more than one employer, more than one single business, or more than one part of a single business (s 170LC).

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<sup>17</sup> The AIRC is currently preparing to hear a test case to set principles for the process of stripping back awards, and to determine the ambit of the 20 ‘allowable award matters’: S Long and M Davis, ‘Test cases on Howard’s IR law reforms’, *Australian Financial Review* 27/2/97.

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The constitutional limitations on the federal government prevent certified agreements being available to all employers. The government has relied on several heads of constitutional power to support the CA provisions, and has developed two streams of CAs.

The first stream is for agreements where the employer is a constitutional corporation,<sup>18</sup> or the Commonwealth, or a Territory, or involving certain classes of employment relating to interstate or international trade and commerce (a '*Division 2 CA*'). This CA stream relies on the Commonwealth's corporations power, the Territories power and the interstate trade and commerce power. It is not necessary for there to be a pre-existing or likely interstate industrial dispute. The CAs may cover all employees in a business. A Division 2 CA may be made between an employer and either:

- a) one or more unions (where each union has at least one member employed in the single business); or
- b) a majority of the employees who will be covered by it.

The second stream is for agreements made to prevent, settle or maintain the settlement of an interstate industrial dispute (a '*Division 3 CA*'). This CA stream relies on the Commonwealth's industrial arbitration power (see footnote 13). The coverage of a CA made on this basis is limited by the scope of the dispute. A Division 3 CA may be made between an employer and one or more unions with whom the employer is in dispute.

For a CA made with a union, employers must take reasonable steps to ensure that employees have at least 14 days access to the agreement and that its terms are explained to them. For non-union agreements, the employer must, in addition to these requirements, take reasonable steps to ensure that each employee has at least 14 days notice of the intention to make the agreement. The *certification requirements* are fairly complex. Section 170LT provides that the AIRC must certify an agreement if, and must not certify an agreement unless, it is satisfied that:

- The agreement passes the 'no disadvantage' test (that is, it must not result, on balance, in a reduction in the overall terms and conditions of employment of the employees under the relevant awards and under any other relevant law of the Commonwealth, or a State or Territory). If it fails the 'no disadvantage' test, the agreement must be certified if it is not contrary to the public interest (for example, the agreement is part of a reasonable strategy to deal with a short term business crisis);
- A majority of employees genuinely approve or make the agreement;

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<sup>18</sup> The WR Act s 4(1) defines a 'constitutional corporation' as a foreign, trading or financial corporation within the meaning of s 51(xx) of the Commonwealth Constitution.

- The agreement includes dispute settling procedures;
- The term of the agreement is not more than 3 years;
- The employer has not coerced (or attempted to coerce) the employees in relation to union representation of the employees;
- The explanation given to employees has taken place in an appropriate way, having regard to the particular circumstances of the employees.

Under s 170LU the AIRC must refuse to certify an agreement if:

- In the case of a Division 3 CA, it is not satisfied that the agreement will contribute to preventing or settling the industrial dispute;
- A provision of the agreement is inconsistent with a provision of the WR Act in relation to termination of employment or an order by the AIRC;
- The employer has discriminated against unionists or non-unionists or contravened any of the freedom of association provisions;
- The agreement discriminates against an employee on prescribed grounds (such as race or sex);
- If the agreement applies to part of a single business that is not a geographically or operationally distinct part, the agreement *unfairly* fails to cover employees who it would be reasonable for the agreement to cover.

### **3.4 Australian Workplace Agreements (AWAs)**

An employer and employee can make an individual employment agreement, known as an Australian Workplace Agreement. AWAs are intended to meet the objective of placing primary responsibility for industrial relations with employers and employees at the workplace. AWAs may be negotiated with employees on an individual or collective basis, but they must be signed individually by each employee.

The employees must understand the agreement and genuinely consent to it. Both the employer and the employees are entitled to appoint a bargaining agent to negotiate an AWA on their behalf (which can be a union or a group of individuals) (s 170VK).

The *availability* of AWAs is limited by the Commonwealth Constitution. An AWA may only be made where the employer is a constitutional corporation, or the Commonwealth, or a Territory, or for certain classes of employment relating to interstate or international

trade or commerce. The AWA provisions rely on the Commonwealth's corporations power, the Territories power and the interstate trade and commerce power. It is not necessary for there to be a pre-existing or likely interstate industrial dispute.

There are several matters which must be included in an AWA (s 170VG):

- it must not discriminate against an employee on prescribed grounds (such as race or sex);
- there must be no provision prohibiting disclosure of the terms of the agreement;
- there must be a dispute resolution procedure;
- it must specify a term of at most 3 years.

For an AWA to be validly *lodged* with the Employment Advocate, under s 170VO the AWA must be signed and dated by both parties, be witnessed and be accompanied by a declaration by the employer that:

- the agreement contains the matters which must be included in it;
- the employee has been given prescribed details about the services of the Employment Advocate; and
- states whether or not other comparable employees have been offered an AWA in the same terms.

The employer must have provided any information required by the Employment Advocate. An AWA must be *approved* by the Employment Advocate to take effect. A union does not have a right to be heard in relation to the approval of an AWA unless it is a bargaining agent. In order to be approved by the Employment Advocate, under ss 170VPA and VPB:

- the agreement must contain the matters which must be included in it;
- the employee must have been given the agreement at least 5 days (for a new employee) or 14 days (for an existing employee) before signing it;
- the employer must have explained the agreement to the employee and the employee must have genuinely consented to it;
- if an employer does not offer an agreement in the same terms to all comparable employees, the employer must not have acted unfairly or unreasonably in making

the selective offer;

- the AWA must pass the ‘no disadvantage’ test;
- if the AWA does not pass the ‘no disadvantage’ test, it will be approved if it is not contrary to the public interest.

### **3.5 Relationship between awards, Certified Agreements and Australian Workplace Agreements**

A workplace may be covered by a combination of awards, CAs and AWAs. The relationship between these instruments is complicated. As a general guide:

- A CA prevails over a subsequent AWA to the extent of any inconsistency, unless the CA expressly allows an AWA to prevail over it: s 170VQ(6).
- An AWA excludes the operation of a subsequent CA: s 170VQ(6).
- A CA prevails over an award to the extent of any inconsistency: s 170LY(1). However, a CA made before or during the term of an essential services or paid rates award does not operate while the award operates: s 170LY(2). An exceptional matters award prevails over a pre-existing CA to the extent of any inconsistency (s 170LY(3)).
- An AWA excludes the operation of an award: s 170VQ(1). However, an AWA is of no effect if it is made during the term of an essential services or paid rates award: s 170VQ(2). An AWA prevails over an exceptional matters award to the extent of any inconsistency: s 170VQ(3).

## **4. RELATIONSHIP BETWEEN COMMONWEALTH AND NEW SOUTH WALES AWARDS AND AGREEMENTS**

The background to a discussion of the relationship between the Commonwealth and State industrial relations systems is that valid Commonwealth laws (which effectively extends to federal awards and agreements) prevail over inconsistent State laws (and awards and agreements) to the extent of the inconsistency.<sup>19</sup> A federal award or agreement displaces any inconsistent State law, award or agreement, so that State industrial instruments can operate only where they are not excluded by the existence of a federal industrial instrument.

Inconsistency between Commonwealth and State laws can arise in three ways:

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<sup>19</sup> Section 109 of the Commonwealth Constitution states that when a law of a State is inconsistent with a law of the Commonwealth, the Commonwealth law will prevail and the State law will be invalid to the extent of the inconsistency.

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- It is impossible to obey both the Commonwealth and the State laws at the same time.
  - The State law impairs or detracts from the Commonwealth law (for example, the Commonwealth law grants a right that a State law does not permit);
  - The Commonwealth law is intended to be the complete statement of the law on a particular subject that a State law deals with (the Commonwealth law ‘covers the field’).

The first two situations are known as ‘direct inconsistency’; the third is known as ‘indirect inconsistency’.

The Commonwealth can draft its laws so as deliberately to create inconsistency with State laws, for example by expressly providing that a Commonwealth law is the exclusive law on a subject. Equally, the Commonwealth can deliberately avoid creating an inconsistency, for example by providing that a Commonwealth law will operate concurrently with a State law. In this case, the State law and the Commonwealth law will both have effect unless there is a direct inconsistency between them. It is possible for a federal award to make a provision on the same subject as a State law (or award) so that the federal provision is intended to operate cumulatively upon the State provision, and then there will be no inconsistency.

#### **4.1 Federal awards and NSW awards**

Under the WR Act, a federal award prevails over inconsistent State laws and awards. The WR Act provides that if a State law or award is inconsistent with, or deals with a matter dealt with in a federal award, the federal award prevails and the State law or award is invalid to the extent of the inconsistency or in relation to the matter dealt with (s 152(1)).

Section 152 and its forbears have traditionally been given a restrictive interpretation:

It is reasonably well settled ... that where a federal award or agreement is concerned, a State law should only be invalidated on the ground of direct inconsistency, if at all. In most cases, an award or agreement ought not to be construed as manifesting an intention to cover the field.<sup>20</sup>

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<sup>20</sup> B Creighton and A Stewart, *Labour Law: An Introduction*, Federation Press, 1994 p 90. Cases include *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237; *Collins v Marshall Pty Ltd* (1954) 92 CLR 529; *TA Robinsons & Sons Pty Ltd v Haylor* (1957) 97 CLR 177.

Nevertheless, on occasion the courts have found that a federal award is an exhaustive statement on the employment relationship such as to invalidate a State law. Particular problems have been encountered in relation to the consistency of State employment protection laws with federal awards which do no more than regulate limited aspects of the employer's power to terminate employment.<sup>21</sup>

*Exception for State termination of employment provisions*

The WR Act contains a limited exception that prevents federal awards prevailing over State laws and awards dealing with termination of employment. If a State law or award deals with termination of employment, any provision in the federal award dealing with termination is not to be taken to cover the field to the exclusion of the State law (s 152(1A)).

The intention behind this provision seems to be that the State and Commonwealth provisions will operate concurrently unless they are directly inconsistent, in which case the Commonwealth provisions will prevail. The Commonwealth has expressly indicated that it is not excluding the States from dealing with the field of termination of employment.

*Restriction on making a federal award where a State award exists*

The WR Act contains provisions designed to ensure that federal award coverage will only displace State awards and agreements where the public interest is served by federal award coverage. The AIRC must not make an award if it is satisfied that a State award (or State employment agreement) covers employees whose wages and conditions are the subject of an interstate industrial dispute, unless the AIRC is satisfied that ceasing would not be in the public interest (WR Act s 111AAA) (see p 28).

*Protecting employers covered by federal awards from State awards*

As discussed earlier (see p 10), over an 18 month period the content of federal awards will be reduced to the twenty allowable award matters. It has been argued that stripping back federal awards will leave a vacuum which will be filled by State awards. That is, an employer currently covered by a federal award will, when the award is stripped back, be bound by the provisions of an applicable State award, to the extent that the State award is consistent with the federal award.<sup>22</sup> An employer would then be bound by a simplified federal award **and** a comprehensive state award, rather than one simplified

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<sup>21</sup> Ibid p 80. For example, *Metal Trades Industry Association of Australia v Amalgamated Metal Workers and Shipwrights Union* (1983) 152 CLR 632.

<sup>22</sup> S Long, 'Major loophole in federal award plans', *Australian Financial Review* 10/12/96.

federal award.

This situation arises because State awards generally have a much wider area of coverage than federal awards. A federal award can only bind the parties to the award, due to constitutional limitations on the powers of the AIRC. However, State industrial tribunals are not restricted in the same way, and can make awards that bind all employers in a particular geographical area or particular industry, whether or not the employers were parties to the making of the award. It is these awards of general application (known as ‘common rule’ awards) that are capable of binding an employer to comply with employment conditions that are not dealt with in a stripped back federal award.

The federal government opposes comprehensive awards, and the prospect of State common rule awards frustrating the process of stripping back federal awards has led the government to legislate to restrict the application of State awards. However, constitutional limitations prevent the Commonwealth from protecting all employers covered by federal awards. The Commonwealth’s industrial arbitration power<sup>23</sup> does not support a provision that all employers bound by federal awards will not be bound by State awards.<sup>24</sup>

Nevertheless, by using its corporations power the Commonwealth has protected employers who are ‘*constitutional corporations*’<sup>25</sup> bound by a federal award from also being bound by State awards. The WROLA Act<sup>26</sup> provides that if:

- a constitutional corporation is bound by a federal award; and
- during the 18 month interim period, the award is varied to contain only the twenty allowable matters, or at the end of the interim period, the terms of the award that are not allowable award matters cease to have effect; and
- as a result of the stripping back, the corporation would become bound by a State

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<sup>23</sup> The power to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State: Commonwealth Constitution s 51(xxxv).

<sup>24</sup> The industrial arbitration power does not give the Commonwealth a general power to legislate on the topic of industrial relations. Laws based on this head of power must be laws for the prevention and settlement of interstate industrial disputes *by means of* conciliation and arbitration. The Commonwealth cannot provide that a federal award is the exclusive source of industrial rights and obligations for an employer, because under the industrial arbitration power the Commonwealth can only determine employment conditions by means of the determinations of the AIRC resolving industrial disputes (that is, awards and certified agreements). Matters that have not been dealt with by the AIRC cannot be regulated by the Commonwealth, and therefore there can be no Commonwealth law that would render invalid an inconsistent State law or award.

<sup>25</sup> Foreign, trading and financial corporations within the meaning of s 51(xx) of the Commonwealth Constitution: WR Act s 4(1).

<sup>26</sup> Schedule 5, Item 52.

award;

then the corporation is not bound by the State award (unless it applies to the relevant State industrial authority to become bound by the State award).

The effect of this provision is that corporations bound by a federal award will not be bound by a State common rule award. This protection has no application to employers who are not corporations. Unincorporated employers bound by federal awards are therefore vulnerable to State common rule awards. Further, corporations formed after the 18-month interim period, and corporations who move into federal award coverage after the 18-month period will experience the same problem, as the protection only applies to the corporations covered by awards that are varied or that cease to have effect during or at the end of the 18-month stripping back period.

#### **4.2 Federal awards and NSW enterprise agreements**

In general, federal awards prevail over State enterprise agreements to the extent of any inconsistency. However, the WR Act allows employers and employees who are covered by federal awards to opt out of federal award coverage into State employment agreements, if they wish to do so. Where an employee enters into a 'State employment agreement', and if the agreement meets certain conditions, a federal award does not bind the employer in respect of the employee while the State employment agreement is in force (ss 152(2) and (3)).

The federal award is in effect suspended in its operation for the employer and employee during the term of the State employment agreement. When the employment agreement ends, the federal award automatically begins to operate again in respect of the employer and employee.

*Are NSW enterprise agreements 'State employment agreements'?*

A **State employment agreement** is defined in the WR Act<sup>27</sup> as an agreement:

- between an employer and one or more employees, or one or more unions;
- that regulates the wages and conditions of employment of one or more employees;
- that is made under a State law that provides for such agreements; and
- that prevails over an inconsistent State award.

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<sup>27</sup>

Section 4(1).

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NSW enterprise agreements clearly meet the first three conditions. In relation to the fourth condition, section 41(1) of the NSW Act states that an enterprise agreement prevails over an award of the IRC to the extent that they deal with the same matters, subject to the terms of the enterprise agreement (see p 8).

An argument has been raised by Associate Professor Greg McCarry (in a paper commenting on the Workplace Relations Bill 1996 and the Industrial Relations Bill 1996) that:

What this seems to mean is that the NSW enterprise agreement will not prevail over the NSW award if the agreement itself says it is not to so prevail. So, if an enterprise agreement contained such a provision, it would not meet the last requirement in the proposed definition in the Commonwealth 1996 Bill with the result that the Commonwealth award will not, by virtue of the proposed Commonwealth s 152, 'roll back' so as not to apply. In that case, any inconsistency between the Commonwealth award and the State enterprise agreement would be resolved in favour of the Commonwealth award.

It is the view of the New South Wales Department of Industrial Relations that the effect of s 41(1) of the NSW Act is to ensure that enterprise agreements make explicit what matters they are intended to cover and what matters the award will cover. Officers of the DIR are of the opinion that an enterprise agreement which says that an award (or part of an award) still applies qualifies as an enterprise agreement that overrides an inconsistent award.

*Can NSW enterprise agreements override federal awards?*

Section 152(5) of the WR Act provides that for a State employment agreement to override a federal award, the agreement must be approved by a State industrial authority (such as the NSW IRC) under legislation that requires the authority to be satisfied that:

- the employees to be covered by the agreement are not disadvantaged in comparison to their entitlements under their award;
- the agreement was made with genuine consent and without coercion; and
- the agreement covers all the employees which it would be reasonable for the agreement to cover, having regard to any matters specified in the State Act.

**No disadvantage:** NSW enterprise agreements probably comply with the requirement for a State employment agreement not to disadvantage employees. Under the NSW Act, the IRC is to approve an enterprise agreement if the agreement does not, on balance, provide a net detriment to the employees when compared with the aggregate package of conditions of employment under relevant awards (s 35(1)(a)).

The WR Act does not specify in s 152(5) what kind of no disadvantage test a State employment agreement must meet. It seems that the AIRC is to develop principles for determining whether employees have been disadvantaged. Whether NSW enterprise agreements will comply with the no disadvantage test depends on the view that the AIRC takes of what is meant by the requirement. The NSW 'no net detriment' test for enterprise agreements is a global test. That is, the test is that the employees not be disadvantaged *overall*. If the AIRC took a strict approach to the question of 'no disadvantage', requiring no reduction in entitlements, the NSW provision for no overall detriment may fail to comply with s 152(5). However, the AIRC seems unlikely to take such an approach, given that the test for no disadvantage for CAs and AWAs under s 170XA of the WR Act is also a global no disadvantage test.

**No coercion:** NSW enterprise agreements clearly meet the requirement that State employment agreements must be made without coercion. The NSW Act requires as a condition for approval that the parties did not enter the agreement under duress (s 35(1)(d)).

**All appropriate employees covered :** Under the NSW Act (s 35(2)), the IRC can approve an enterprise agreement that *fairly* excludes employees who would reasonably be expected to be covered. Does the fairness proviso disqualify NSW enterprise agreements from overriding federal awards? The WR Act in s 152(5)(c) asks whether an agreement covers all employees that it would be reasonable to cover. Agreements that *fairly* fail to cover some employees do not seem to pass this test. However, s 152(5)(c) of the WR Act states that a State industrial authority must be satisfied that the agreement covers all the employees whom it would be reasonable to cover, *having regard to the matters (if any) specified in the State Act*. The fairness proviso could be considered as one of the matters to which the IRC must have regard under the NSW Act. It should be noted that this question will only be relevant to a small percentage of NSW enterprise agreements.

Overall, it seems that NSW enterprise agreements are in general capable of binding employers and employees to the exclusion of a federal award under s 152 of the WR Act.

*Restriction on making a federal award where a State employment agreement exists*

The WR Act contains provisions designed to ensure that federal award coverage will only displace State awards and agreements where the public interest is served by federal award coverage. The AIRC must not make an award if the AIRC is satisfied that a 'State employment agreement' (or State award) covers employees whose wages and conditions are the subject of the interstate industrial dispute (WR Act s 111AAA) (see p 28).

The result is that even if a State employment agreement does not meet the conditions required to override a federal award, as set out above, the WR Act limits the ability of

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employees under a State employment agreement to move out of the State system to a federal award.

#### **4.3 Federal certified agreements and State laws, awards, enterprise agreements**

The WR Act provides that a CA prevails over any terms and conditions of employment set out in a State law,<sup>28</sup> State award or State employment agreement, to the extent of any inconsistency (s 170LZ(1)). There are two exceptions to this:

1. A CA operates subject to any provisions in a State law dealing with occupational health and safety; workers' compensation; apprenticeship; and any other matters prescribed in the regulations (s 170LZ(2)).
2. If a State law, State award or State employment agreement provides a remedy for the termination of employment, and a CA also provides a remedy for termination, then the provisions of the State law, award or employment agreement continue to have effect so far as they are able to operate concurrently with the CA (s 170LZ(3)).

The NSW Act provides a remedy for termination of employment in Part 6. The provisions of the NSW Act will therefore operate concurrently with any provisions about termination of employment in a CA.

It should be noted that CAs prevail over 'State employment agreements', as defined by the WR Act s 4(1). Whether NSW enterprise agreements are 'State employment agreements' is discussed above (p 20). The WR Act does not specify the relationship between a CA and an employment agreement that is not a 'State employment agreement'. Presumably a CA would prevail over a NSW enterprise agreement that is not a 'State employment agreement' to the extent of any inconsistency, due to the operation of section 109 of the Commonwealth Constitution (see p 16).

#### **4.4 Australian Workplace Agreements and State awards and agreements**

An AWA operates to the exclusion of any State award or State agreement that would otherwise apply (s 170VQ(4) of the WR Act). The effect of this section is that the State award or agreement has no operation at all while the AWA exists, whether or not the AWA and the State award or agreement could have operated concurrently. The AWA is the sole source of industrial rights and obligations for the employer.<sup>29</sup>

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<sup>28</sup> 'State law' in this context means a law of a State (including any regulations), but does not include a State award or a State employment agreement: WR Act s 170LZ(5).

<sup>29</sup> The corporations power supports legislation as to the industrial rights and obligations of constitutional corporations, and it enables the Commonwealth to make those rights and obligations exclusive of any State provisions: *Victoria v Commonwealth* (1996) 138 ALR

There is an exception to the rule that an AWA excludes the operation of a State award. If a State award provides a remedy for termination of employment, those provisions of the State award continue to have effect so far as they are able to operate concurrently with the AWA (s 170 VQ(5)).

The WR Act provides that an AWA prevails over a 'State agreement', which is defined as an employment agreement made under or for the purposes of a State law (s 170VA). A 'State agreement' is different from a 'State employment agreement' (the concept used in the federal awards and certified agreements provisions). A 'State agreement' is not required to prevail over an inconsistent State award. A NSW enterprise agreement appears to fit clearly within the definition of a 'State agreement'.

The result is that an AWA will completely exclude the operation of any NSW enterprise agreement. A CA, on the other hand, is only prevails over State employment agreements to the extent of any inconsistency (see p 23).

#### **4.5 *Australian Workplace Agreements and State laws***

An AWA prevails over conditions of employment set out in a State law,<sup>30</sup> to the extent of any inconsistency (s 170VR(1)). There are two exceptions to this:

1. An AWA operates subject to any provisions in a State law dealing with occupational health and safety; workers' compensation; apprenticeship; and any other matters prescribed in the regulations (s 170VR(2)).
2. If a State law provides a remedy for the termination of employment, and an AWA also provides a remedy for termination, then the provisions of the State law, award or employment agreement continue to have effect so far as they are able to operate concurrently with the AWA (s 170VR(3)).

The NSW Act provides a remedy for termination of employment (Part 6). The provisions of the NSW Act will therefore operate concurrently with any provisions about termination of employment in an AWA.

## **5. *CHOICE OF FEDERAL OR STATE JURISDICTION***

### **5.1 *Awards and agreements***

Most workers in Australia are covered by some form of award. The Commonwealth Department of Industrial Relations estimates that in 1996 across Australia 40% of

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129 p 189.

<sup>30</sup> 'State law' in this context means a law of a State, but does not include a State award or a State employment agreement: s 170VR(5).

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employees are covered by federal awards, 40% are covered by State awards, and 20% are not covered by any award.<sup>31</sup> Whether employees are covered by federal or state awards is determined by the parties to the award (employers and unions) and also by the industrial tribunals in each jurisdiction. In 1985 the Committee of Review of the Australian Industrial Relations Laws and Systems<sup>32</sup> commented that:

The recent survey data indicate a confused situation as to the coverage of particular industries and occupations by both federal and state industrial tribunals, and wide divergences in the incidence of federal awards from one state to another.

There is often no rational or clearly established basis why a particular workplace is covered by a federal award or a state award. Indeed there are many workplaces where some employees are covered by federal awards and some by state awards ... While the relative coverage of federal and state industrial tribunals is haphazard and conflicting, it must be accepted that, by and large, it reflects the wishes of the parties, particularly the trade unions. While we have identified a number of factors contributing to the current division of coverage, it could be said that, as a general rule, parties which have wished to be in the federal system have found their way into it and parties which have chosen to stay within the states' framework have stayed there.

Movement between the federal and State systems is not frequent. Access to the federal jurisdiction is not always available, as the constitutional limitations on the AIRC mean that there must be an interstate industrial dispute before it can make an award.

There will always be disputes which lack the necessary element of interstate nature, either because inherently local factors are involved or because the parties have refrained, deliberately or otherwise, from creating the conditions necessary to attract federal jurisdiction. In such circumstances, the matter will fall to be determined in accordance with the relevant State provision.<sup>33</sup>

The AIRC also has a discretion to decline to deal with matters that it has jurisdiction to hear.<sup>34</sup>

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<sup>31</sup> According to the Australian Bureau of Statistics, in 1990 in NSW 32% of employees were covered by federal awards and 48.8% were covered by NSW awards: Cat. No 6315.

<sup>32</sup> *Report of the Committee of Review of the Australian Industrial Relations Law and Systems* (Hancock Report) AGPS 1985 Vol 2 pp 254-246. For information on the political and industrial factors behind jurisdictional choice, see S O'Neill, *The Development of Federal Industrial Powers*, Background Paper No 33 1993, Commonwealth Parliamentary Library.

<sup>33</sup> B Creighton and A Stewart, *Labour Law: An Introduction*, Federation Press, 1990 p 42.

<sup>34</sup> Section 111(1)(g) of the WR Act.

Traditionally, once a federal award has been made for a particular industry, then almost inevitably federal award regulation of that industry is permanent. It is common for a section of employment to be shifted by a new interstate dispute from State award coverage to a new federal award, but it is almost unknown for a section of employment to be shifted from federal to State award coverage.<sup>35</sup>

This situation is likely to change over the next few years, for several reasons. First, the WR Act limits the power of the AIRC to make an award where the employees whose terms and conditions are the subject of the dispute are covered by a State award or agreement (see p 28). This makes it difficult to move from a State award or agreement to a federal award. Second, unions are likely to consider moving from the federal jurisdiction to NSW, to take advantage of the increased protection of employees offered in NSW by the NSW Act. Greater recourse to State tribunals may also result from the provisions of the WR Act that facilitate the disamalgamation of federally registered unions to their State branches,<sup>36</sup> and the creation of enterprise unions.<sup>37</sup>

It is usually trade unions who determine whether an award is federal or State, as they decide in which jurisdiction to make an application for an award. It is not easy for an employer to compel a union into or out of a federal award. In the absence of a federally registered union, it is difficult in practice for employers regularly to ensure the existence of the necessary interstate dispute with the relevant union. Conversely, it is harder for an unwilling employer to escape the federal system, since an interstate dispute can readily be created by a federal union.<sup>38</sup>

Enterprise agreements are often made on the initiative of the employer, rather than the employees or unions, and the employer may have a greater influence in determining in which system an agreement is made. Where the employer is a corporation, an interstate industrial dispute is not necessary to make a federal CA or an AWA. Access to federal CAs and AWAs is generally limited to employers who are corporations, or where there is an interstate industrial dispute, or where the employment is in certain classes of interstate or international trade or commerce (see pages 12 and 14). In other cases only State enterprise agreements will be available to the parties.

The limited availability and the complexity of the federal workplace agreement provisions may encourage parties to move to NSW enterprise agreements. The WR Act increases the scope of operation of NSW enterprise agreements by providing that State employment agreements can override federal awards (see page 20).

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<sup>35</sup> Mills, C, *Industrial Relations in NSW 1901-1989*, NSW Library Research Service Background Paper 1989/4 pp 6-7.

<sup>36</sup> Division 7A, Subdivision A.

<sup>37</sup> Sections 187B and 188(1)(c).

<sup>38</sup> B Creighton and A Stewart, *Labour Law: An Introduction*, 1990 Federation Press, p 39.

## 5.2 *Minimising conflict between jurisdictions*

The existence of two systems that to some extent overlap raises the possibility of conflict and competition between the systems. As discussed above (see p 16), where there is a conflict between a federal law and a State laws, the federal law will prevail to the extent of the inconsistency. In order to prevent and minimise conflicts, and to avoid forum-shopping, the WR Act and the NSW Act contain formal mechanisms to resolve and minimise conflict between State and federal jurisdictions. These mechanisms are described below. As well, both the WR Act and the NSW Act promote co-operation between the AIRC and the IRC to avoid conflicts and inconsistencies.<sup>39</sup>

### *The AIRC and the IRC may defer to each other*

The AIRC may dismiss or refrain from hearing a matter if it appears that the industrial dispute has been dealt with, is being dealt with or is proper to be dealt with by a State industrial authority.<sup>40</sup> The NSW IRC has general powers to refrain from hearing matters (and must do so in the case of unfair dismissal claim commenced under another statute).<sup>41</sup>

### *AIRC may restrain a State tribunal*

The AIRC has a general power to order a State industrial authority not to hear certain matters. The AIRC can only restrain the IRC with respect to matters that are within the AIRC's jurisdiction; that is, matters involving an interstate industrial dispute. The Commonwealth legislation's respect for workplace agreements, even State ones, is such that the WR Act prevents the AIRC from intervening where a State industrial authority is dealing with a workplace agreement that the AIRC could deal with. The WR Act<sup>42</sup> provides that if it appears to the AIRC that a State industrial authority is dealing with or is about to deal with:

- an industrial dispute;<sup>43</sup>

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<sup>39</sup> WR Act Part VII; NSW Act Chapter 4, Part 9.

<sup>40</sup> Section 111(1)(g)(ii). A 'State industrial authority' means a board or court of conciliation and arbitration, or tribunal, body or persons having authority under a State Act to exercise any power of conciliation or arbitration in relation to industrial disputes within the limits of the State: s 4(1). This definition clearly includes the NSW Industrial Relations Commission.

<sup>41</sup> NSW Act s 162(g) and (h), s 90.

<sup>42</sup> Section 128.

<sup>43</sup> As defined in s 4(1) of the WR Act.

- a matter provided for in an award, an order of AIRC or a certified agreement; or
- a matter that is the subject of a proceeding before the AIRC

*other than by* facilitating the entering into of a State employment agreement, or approving a State employment agreement, then the AIRC may make an order restraining the State industrial authority from dealing with the industrial dispute or matter.

The AIRC therefore can restrain the NSW IRC from dealing with certain matters that the AIRC could handle, or is handling. However, the section prevents the AIRC from restraining the IRC where the IRC is dealing with an application to approve a State employment agreement. Whether NSW enterprise agreements are ‘State employment agreements’ is discussed above (p 20).

#### *Restrictions on making a federal award where a State award or agreement exists*

If the AIRC is satisfied that a State award or State employment agreement<sup>44</sup> governs the wages and conditions of particular employees whose wages and conditions are the subject of an industrial dispute, the AIRC must cease dealing with the industrial dispute in relation to the employees, unless the AIRC is satisfied that ceasing would not be in the public interest (WR Act s 111AAA). In determining the public interest, the AIRC must consider the views of the employees and the views of the employer(s).<sup>45</sup>

This provision is designed to ensure that federal award coverage will only displace State awards and agreements where the public interest is served by federal award coverage. It sets up a barrier to employees under State awards and agreements moving into the federal jurisdiction. The provision is a reversal of the provisions placed in the former *Industrial Relations Act* 1988 by the previous Labor Government that were designed to help employees covered by the Victorian system to move into the federal system, in order to avoid the disadvantageous effects of the Victorian *Employee Relations Act* 1992.<sup>46</sup> Those ‘fast tracking’ provisions have been repealed in the WR Act.

It has been said that:

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<sup>44</sup> The meaning of ‘State employment agreement’ is discussed at p 20.

<sup>45</sup> The AIRC is currently preparing to hear a test case to set principles as to what constitutes the ‘public interest’ in this context: S Long and M Davis, ‘Test cases on Howard’s IR law reforms’, *Australian Financial Review* 27/2/96.

<sup>46</sup> The *Industrial Relations Act* 1988 (Cth) provided that the discretion of the AIRC to dismiss or refrain from hearing a matter on public interest grounds only applies when a state industrial authority has power compulsorily to arbitrate on a dispute: s 111(1)(g)(ii). The *Employee Relations Act* 1992 (Vic) abolished compulsory arbitration and awards in Victoria.

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Proposed section 111AAA casts the onus on the AIRC to demonstrate that it is in the public interest (not just in the interest of the parties) that current State award employees ought to be covered by a federal award. The main effect of section 111AAA may be to insulate State Government employees from Commonwealth awards.<sup>47</sup>

## 6. CONCLUSION

Although federal awards and agreements will continue to dominate the industrial relations systems of the States, the extent of that dominance will be reduced by the new federal workplace relations legislation. The WR Act increases to some extent the scope of operation of the States systems, as described below. In contrast, the previous Commonwealth legislation sought to expand the coverage of the Commonwealth system, testing the limits of the Constitution in the process.

Federal awards will have a reduced role under the WR Act. They will be stripped back to core conditions, raising the possibility of State common rule awards applying to employers who are not corporations and who are bound by a federal award (p 18). Federal awards may also be displaced by New South Wales enterprise agreements, depending on the terms of the agreement (p 20). Federal certified agreements will prevail over New South Wales awards and enterprise agreements to the extent of any inconsistency, with limited exceptions (p 22). Federal Australian Workplace Agreements (individual agreements) will completely exclude the operation of New South Wales awards and enterprise agreements, again with limited exceptions (p 23).

The ability of the federal Australian Industrial Relations Commission to prevail over the New South Wales Industrial Relations Commission has been reduced by the WR Act. The AIRC will not be able to order the NSW IRC to cease dealing with a New South Wales enterprise agreement even if the AIRC considers that it can and should be dealing with matters covered by the agreement (p 27). Further, if the AIRC is dealing with an industrial dispute, and a New South Wales award or agreement covers employees whose wages and conditions are the subject of the dispute, the AIRC must cease dealing with the dispute unless it is satisfied that ceasing would not be in the public interest (p 28).

The Commonwealth and New South Wales systems for awards and agreements do not sit easily together, despite these efforts by the Commonwealth to reverse to some extent the decades-long dominance of the federal system over the States. The interaction of the two systems creates a 'technical maze'<sup>48</sup> that will almost certainly lead to litigation as

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<sup>47</sup> See the Bills Digest for the Workplace Relations and Other Legislation Amendment Bill, prepared by the Commonwealth Parliamentary Research Service, No.96 1996 p 16.

<sup>48</sup> G McCarry, 'Relationships Between the Federal and NSW Industrial Relations Systems', Paper presented at the Australian Centre for Industrial Relations Research and Training (ACIRRT) Conference, Sydney, 29 July 1996.

the precise boundaries between the systems are worked out.

The Commonwealth government has proposed that State governments enact legislation that complements the WR Act, to fill in some of the gaps in federal coverage that result from Commonwealth constitutional restrictions. The matters on which the Federal Minister for industrial relations has requested State governments to legislate include:

- preventing State awards binding unincorporated employers covered by federal awards;
- allowing unincorporated employers to use Certified Agreements and Australian Workplace Agreements; and
- stripping back State awards to contain only the twenty allowable award matters available under the WR Act

The Queensland Government has enacted complementary legislation,<sup>49</sup> and the Coalition Governments in other States are considering their responses. The Victorian government has gone beyond co-operating with the Commonwealth government - it has referred many of its industrial relations powers to the Commonwealth. The Commonwealth can use the powers referred to it to pass legislation regulating a range of employment matters in Victoria that would not be supported by the industrial arbitration head of power in the Constitution.<sup>50</sup>

The NSW Government has indicated that it will not pass complementary legislation depriving New South Wales workers of State awards at a time when they are losing comprehensive federal award coverage.<sup>51</sup> In fact, the Government is encouraging workers to move to the NSW system.<sup>52</sup> The NSW Opposition has said that it would consider following Victoria's lead in handing over industrial relations powers to the federal government if a Coalition Government were elected in New South Wales.<sup>53</sup>

As a result of a combination of factors, there is likely to be increased interest (particularly by unions and employees) in moving to, or remaining in, the New South Wales industrial relations system. These factors include:

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<sup>49</sup> *Workplace Relations Act 1997* (Qld).

<sup>50</sup> *Workplace Relations and Other Legislation Amendment Act (No.2) 1996* (Cth); *Commonwealth Powers (Industrial Relations) Act 1996* (Vic).

<sup>51</sup> M Davis, 'New South Wales to be odd State out in IR agreement' *Australian Financial Review* 19/12/96.

<sup>52</sup> Hon J Shaw MLC said that 'I have made it clear that if employees consider that they would be disadvantaged by remaining in the Federal System, then we are prepared to welcome them into the State system. Any such moves would be likely to benefit all parties...', *NSWPD* 17/4/96 p 83

<sup>53</sup> Hon C Hartcher MP addressing the NSW Labor Council, reported in *Workforce (New South Wales)*, Issue 1105, 28/2/97.

- the increased scope of operation that the federal Act affords to the NSW system (NSW enterprise agreements can now override federal awards, and the AIRC cannot restrain the IRC from dealing with NSW enterprise agreement);
- the barriers erected by the federal Act to restrict parties covered by State awards or agreements moving into the federal jurisdiction;
- the greater protection offered to employees by the NSW legislation; and
- the complexity of the federal workplace agreement provisions, and the restrictions on access to them.