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**Commentary on the Exposure
Draft of the Industrial Relations
Bill 1995**

by

Vicki Mullen and Marie Swain

Briefing Paper No 38/95

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1. INTRODUCTION

Following on from election commitments, and as part of the ongoing evolution of Australia's distinctive approach to the regulation of industrial relations, the NSW Government released an Exposure Draft of the Industrial Relations Bill 1995 (the 'Exposure Draft') for public consultation on Monday, 23 October 1995, which will completely repeal and substantially reform the current system in NSW under the *Industrial Relations Act 1991* (NSW) ('*IR Act 1991*').

Main elements of the forthcoming legislation were announced by the Minister for Industrial Relations, the Hon Jeff Shaw QC, MLC on 28 September 1995, which can be summarised as follows:

- the integration of the Industrial Relations Commission (the 'current IRC') and the Industrial Court into a single body named the Industrial Relations Commission of New South Wales (the 'proposed IRC');
- the retention and expansion of the scope for employers to negotiate enterprise agreements either with unions or directly with their employees;
- the expansion of the role of the proposed IRC so that it would (i) be responsible for approving all enterprise agreements (so that no worker is left worse off under a negotiated agreement than she or he would have been under the relevant award); (ii) be empowered to make and vary awards on a flexible basis to suit the circumstances of an individual enterprise or industry; (iii) have a positive power to review awards and take action to eliminate discriminatory provisions in awards, including gender wage inequities; (iv) have increased powers in relation to dealing with industrial disputes, including the power to prevent, restrain, or penalise industrial action; (v) have an enhanced role in relation to dealing with discrimination in employment-related matters, including awards, enterprise agreements and pay equity issues;
- the retention and improvement of the unfair dismissals system, allowing people to apply for compensation only where reinstatement is impracticable;
- the alteration of the system relating to the right of union officers to enter workplaces to bring NSW more into line with other States and federally (authorised union officers will be required to give employers at least 24 hours notice when they want to inspect records of wages paid);
- the allowance of preference of employment for union members but limited to the point of engagement and subject to the merit-engagement principle;
- the entitlement of male employees to a maximum period of 52 weeks' unpaid paternity and adoption leave, equal to the maternity leave entitlement for female employees; and

- the provision of a streamlined, workable and efficient system for registration of industrial organisations which promotes accountability, democratic control and effective administration.¹

2. BACKGROUND

Industrial Relations in NSW: 1988-1995

For a useful and concise history of industrial relations in NSW from the inception of the conciliation and arbitration system in NSW, please refer to the Library's *Background Paper* 'Industrial Relations in New South Wales, 1901-1989', by CP Mills, (No 4/89), September 1989.

As a means of providing the recent context to the Exposure Draft, the following is a 'time-line' summary of policy and legislative developments that have *substantially* influenced (or may substantially influence) the industrial relations system in NSW, from 1988 (when the Niland Report was commissioned which recommended major reforms to the system that was in place under the *Industrial Arbitration Act 1940* (NSW)).

- 1988 - John Fahey MP, the (then) Minister for Industrial Relations commissioned Professor John Niland to prepare a Green Paper on Industrial Relations in NSW.
- 1989 - Volume 1 of the Green Paper 'Transforming Industrial Relations in New South Wales' was released.
- 1990 - Volume 2 of the Green Paper was released (January). The Green Paper (Volumes 1 and 2) addressed eleven major policy areas as follows: an enterprise focus; the industrial tribunal system; trade unions; employers and management; industrial action, compliance and enforcement; anti-discrimination and industrial relations; training for skills and industrial stability; equity considerations; productivity, efficiency and participative practices; occupational health and safety; Department of Industrial Relations and Employment.²
- The Industrial Relations Bill 1990 was introduced but failed to pass.

¹ The Hon JW Shaw, QC MLC, Attorney General and Minister for Industrial Relations, 'Labor's Industrial Relations Legislative Reform Program', *News Release*, 28 September 1995.

² Niland, J, 'Transforming Industrial Relations in New South Wales', *A Green Paper*, Volume 1, 1989, pp 12-13.

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- 1991 - The *Industrial Arbitration (Enterprise Agreements) Amendment Act 1990* commenced on 25/1/91.
- The *Industrial Arbitration (Unfair Dismissal) Amendment Act 1991* commenced on 5/7/91.
- The Industrial Relations Bill 1991 was passed and received assent on 11/11/91.
- 1992 - The *Industrial Relations Act 1991* commenced on 31/3/92, which repealed the *Industrial Arbitration Act 1940* (and the *Trade Union Act 1881*).
- 1993 - The *Industrial Relations (Sick Leave) Amendment Act 1992* commenced on 15/2/93 (which prohibited the cashing-in of accumulated sick leave).
- The *Industrial Relations (Public Vehicles and Carriers) Amendment Act 1993* commenced on 10/12/93.
- 1994 - The *Industrial Relations (Contracts of Carriage) Amendment Act 1994* commenced on 1/8/94.
- The *Courts Legislation (Mediation and Evaluation) Amendment Act 1994* commenced on 14/11/94 (which inserted Division 4 of Part 1 of Chapter 4 of the *Industrial Relations Act 1991* for the purpose of enabling the Industrial Court to refer matters for mediation or neutral evaluation if the parties to the proceedings concerned have agreed to that course of action).
- 1995 - The 'NSW Labor's Industrial Relations Policy' is released - 21/2/95.
- The Exposure Draft of the Industrial Relations Bill 1995 is released for public comment prior to the introduction of the Bill in Parliament - 23/10/95.

Further background information

For more detailed information on key areas of industrial relations law and practice in NSW, please refer to the following *Briefing Papers*, as published by the NSW Parliamentary Library:

- 'Enterprise Bargaining in New South Wales: An Overview', by Vicki Mullen (No 5/95);
- 'Industrial Regulation in NSW: The Difficult Dichotomy of Judicial and Arbitral Power', by Vicki Mullen (No 25/95);
- 'Unfair Dismissal: International Obligations and Jurisdictional Issues', by Vicki Mullen (No 35/95); and

- 'Compulsion, Preference or Voluntarism: Options for Trade Union Law in NSW', by Gareth Griffith (No 37/95).

3. MAIN PROVISIONS

Proposed section 3 of the Exposure Draft sets out the objects of the 'Act' as follows:

- (a) to provide a framework for the conduct of industrial relations that is fair and just,
- (b) to promote efficiency and productivity in the economy of the State,
- (c) to provide for the conduct of industrial relations at an enterprise or workplace level,
- (d) to encourage participation in industrial relations by representative bodies of employees and employers and to encourage the responsible management and democratic control of those bodies,
- (e) to facilitate appropriate regulation of employment through awards, enterprise agreements and other industrial instruments,
- (f) to prevent and eliminate discrimination in the workplace and in particular to ensure equal remuneration for men and women doing work of equal or comparable value;
- (g) to provide for the resolution of industrial disputes by conciliation and, if necessary, by arbitration in a prompt and fair manner and with a minimum of legal technicality.

It should be noted that certain provisions of the Exposure Draft provide essentially for the continuation of the current law under the *IR Act 1991*. For this reason, the following section of this *Briefing Paper* will discuss those parts or provisions of the Exposure Draft that effect a *substantial* departure from the current legislative scheme.

(a) Industrial Relations Commission

The Summary of Main Provisions of the Exposure Draft states:

The Industrial Relations Commission of [NSW] will occupy a central role in the regulation of industrial affairs in this State. The present Commission and Industrial Court will be integrated to form a single, independent tribunal. The new Commission will conduct its proceedings in a non-technical and expeditious manner.

The functions of the present Industrial Court will be assumed by judicial members of the Commission, sitting as the 'Commission in Judicial Session'. The title, status, and remuneration of all judges of the existing Court and members of the existing Commission will be retained.

For further detail as to the constitutional issues surrounding the proposed amalgamation of the current Industrial Court and Industrial Relations Commission, please see the Parliamentary Library's *Briefing Paper*, 'Industrial Regulation in NSW: The Difficult Dichotomy of Judicial and Arbitral Power', by Vicki Mullen (No 25/95). This *Paper* also summarises the current division of powers and functions between the Industrial Court and the Industrial Relations Commission (see pages 6-11) and the philosophy behind the separation of judicial and arbitral power through the use of a dual tribunal structure.

In contrast, Chapter 4 of the Exposure Draft provides for the organisation, powers and functions of the proposed IRC, as a single tribunal structure, with provision for the Committee in Judicial Session. This Chapter is divided into the following Parts:

- Part 1 - Establishment and functions of Commission;
- Part 2 - Membership of Commission;
- Part 3 - The Commission in Judicial Session;
- Part 4 - Organisation of Commission;
- Part 5 - Procedure and powers of the Commission;
- Part 6 - Rules of Commission;
- Part 7 - Appeals and references to Commission;
- Part 8 - Industrial Committees; and
- Part 9 - Co-operation between State and Federal tribunals.
- Part 10 - Industrial Registrar

As the provisions of the Exposure Draft concerning the proposed IRC seek to establish a new regulatory structure, the following section will attempt to highlight the more substantial characteristics (as compared with the provisions dealing with administrative or operational features) of the new scheme, in particular, as they relate to the division of arbitral and judicial power. However, in many respects, it seems that the proposed IRC in Judicial Session would operate in a similar manner to the current Industrial Court.

Part 1 - Establishment and functions of Commission

The general functions of the proposed IRC are set out in proposed section 132. Subsection (2) states that the proposed IRC must take into account the public interest in the exercise of its functions. However, this provision is not to apply to proceedings before the proposed IRC in Judicial Session that are criminal proceedings 'or that it determines are not appropriate to be included'. This provision seeks to protect the independent exercise of judicial power by the proposed IRC, although protection of non-criminal proceedings from public interest considerations (such as the objects of the 'Act' or the state of the economy of NSW) is subject to the discretion of the proposed IRC. No such provision has been necessary under the *IR Act 1991* because of the formal separation of the Industrial Court and the current IRC.

Part 2 - Membership of Commission

A Presidential member of the proposed IRC may be appointed as a judicial member of the proposed IRC. A similar situation exists under the *IR Act 1991* whereby Industrial Court Judges may also act as Presidential Members of the current IRC (see section 290 of the *IR Act 1991*).

Part 3 - The Commission in Judicial Session

As a result of proposed (and constitutionally required) amendments to Part 9 of the *Constitution Act 1902* (NSW) (see Schedule 6 of the Exposure Draft), the independence of the proposed IRC in Judicial Session will be constitutionally protected, in the same way as that of the current Industrial Court Judges.

Subsection (1) of proposed section 139 lists those functions of the proposed IRC that are to be exercised only by the Commission in Judicial Session. These functions involve the exercise of judicial power, which has been defined as being 'concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist or are deemed to exist at the moment the proceedings are instituted'.³

The rules of evidence and other formal procedures of a superior court of record apply to the Commission in Judicial Session (see proposed section 149(2)).

Part 5 - Procedure and powers of Commission

Proposed section 153 provides for the intervention in any proceedings before the proposed IRC by the Minister, at any stage of the proceedings; the President of the Anti-Discrimination Board 'if the President establishes that the proceedings concern unlawful

³ *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 463.

discrimination under the *Anti-Discrimination Act 1977*;⁴ and a State peak council⁴ 'if it establishes that it or any one or more of its members has a sufficient interest in the proceedings.'

Currently under the *IR Act 1991*, the Industrial Court and the IRC must take into account the principles contained in the *Anti-Discrimination Act 1977* relating to discrimination with respect to employment (see sections 300 and 351). In addition, the Crown (including a specific reference to the Minister for Industrial Relations) may appear before the Industrial Court and the IRC 'in any case in which the public interest or any right or interest of the Crown may be involved' (see sections 305 and 360). No provision is currently made specifically for the Anti-Discrimination Board or a State peak council in relation to intervention in proceedings.

Proposed section 158, provides the proposed IRC with a power to order that a secret ballot be taken of any group of employees in order to find out their opinion about any industrial matter that affects or may affect them. It is suggested that this provision would be an interesting extension of the powers of the proposed IRC to order a secret ballot, as compared with the powers of the current IRC under section 229 of the *IR Act 1991*⁵. Notable subsections of this proposed section 158 are thus set out:

158 Power to order secret ballot

- (1) The Commission may order that a secret ballot be taken of any group of employees in order to find out their opinion about an industrial matter that affects or may affect them.

⁴ 'State peak council' is defined in the Dictionary of the Exposure Draft to mean (a) the Labor Council of New South Wales (being the State peak council for employees), or (b) an organisation approved for the time being by the Commission under section [202] as a State peak council for employers.

⁵ Section 229 of the *IR Act 1991* currently provides:

- (1) The Commission may order that a secret ballot of the members of an industrial organisation of employees, or of a class or section of the members of the organisation, be taken in order to find out their opinion in relation to an industrial matter that affects them or may affect them, whether or not the matter is before the Commission.
- (2) By its order the Commission must:
 - (a) direct the manner in which the secret ballot is taken; and
 - (b) give directions for the conduct of the ballot; and
 - (c) direct whether the ballot is to be taken by the industrial organisation of employees, or by the Electoral Commissioner, or by the organisation in co-operation with the Electoral Commissioner; and
 - (d) give such other directions as to the Commission appear to be necessary to ensure that the ballot is effectively taken and conducted.

- (2) The Commission may order a secret ballot for the purpose of the exercise of **any of its functions** (emphasis added), for example, the resolution of industrial disputes, the approval of enterprise agreements and the registration of organisations.
- (3) The Commission is to have regard to the result of a secret ballot under this section when exercising a function relating to any matter on which persons expressed an opinion in the ballot.
- ...
- (6) The Commission may order a secret ballot on the Commission's own initiative or on application by:
- (a) any industrial organisation of employees, or
 - (b) at least 5% of the members of an industrial organisation of employees or 250 members of that organisation (whichever is the lesser number), or
 - (c) an employer of the employees concerned or an industrial organisation of employers a member of which is such an employer.
- ...
- (9) This section does not apply to criminal proceedings.

As a result of the exercise by the proposed IRC of both arbitral and judicial power, the potential to hold a secret ballot in relation to a hearing before the proposed IRC in Judicial Session is a curious feature of this provision. Criminal proceedings are excluded. However, it seems that the power to hold secret ballots is to otherwise apply to any of the functions of the Commission. It is assumed that this includes the functions of the proposed IRC in Judicial Session (see proposed section 139), for example proceedings in relation to unfair contracts. It is suggested that this power could, in practice, impinge on the independent exercise of the judicial power of the proposed IRC, which should be exercised in a manner free of subjective influences and according to established legal principle. The proposed IRC in Judicial Session is to be established as a superior court of record of equivalent status to the Supreme Court of NSW (see proposed section 138). By way of comparison, it would be an unacceptable practice for the Supreme Court of NSW to order a secret ballot of relevant parties for the purpose of the exercise of any of its functions.

Part 7 - Appeals and references to Commission

It is of particular note that proposed section 173 of the Exposure Draft provides that an appeal to the Full Bench of the proposed IRC may be made only with the leave of the Full Bench, if, in its opinion, the matter is of such importance that, in the public interest, leave should be granted. Currently, section 382 of the *IRC Act 1991* provides for an appeal from

a decision of the Commission at the suit of a party or an industrial organisation affected by the decision, or an association of contractors, drivers and carriers. It seems that, currently, leave of the Full Bench is not required for an appeal to lie against the decision of the current IRC.

Other powers and functions of the proposed IRC

In addition, it should be noted that other provisions of the Exposure Draft provide for specific powers and functions of the proposed IRC. For example, see the following proposed provisions:

- Part 1, Chapter 2, dealing with the power of the proposed IRC to make and review awards (discussed further below);
- Division 2 of Part 2, Chapter 2, dealing with the mandatory role of the proposed IRC in the approval of enterprise agreements (discussed further below);
- Part 3 of Chapter 2 concerning the adoption by the proposed IRC of decisions of the Australian Industrial Relations Commission (National decisions);
- Part 7 of Chapter 2 which covers the role of the proposed IRC in relation to the protection of injured employees and its power to make a reinstatement order; and
- Part 1 of Chapter 3 dealing with the conciliation and arbitration of industrial disputes (discussed further below).
- The proposed IRC will gain additional powers to make ancillary orders for the recovery of small claims relating to underpayment of wages and other entitlements - proposed sections 382 and 383. Under the *IR Act 1991* this function is currently undertaken by the Chief Industrial Magistrate or the Industrial Court - section 151.

(b) Awards

The Summary of Main Provisions of the Exposure Draft states:

The Commission will have comprehensive powers to make and vary awards on a flexible basis to suit the circumstances of an individual enterprise or industry. The 'interests/rights' dichotomy...will not be carried forward into the new legislation.

Ordinarily, an award will apply for not less than one year and not more than three years, or for a period not exceeding the anticipated life of a project. Awards will contain appropriate procedures for dealing with industrial disputes. The Commission will have an expanded role in ensuring that awards are kept up-to-date, relevant and consistent with the objects of the new industrial legislation and anti-discrimination legislation.

‘Award’ is defined in the Dictionary of the Exposure Draft to mean ‘an award made, or taken to be made, by the Commission under this Act, and includes any order of the Commission under this Act that sets conditions of employment.’

Of particular note in the proposed provisions, is the mandate of the proposed IRC (see proposed section 18) to review each award *at least once in every 3 years*, for the purpose of modernising awards, consolidating awards relating to the same industry and rescinding obsolete awards. In doing so, the proposed IRC is to have regard to:

- (a) rates of remuneration and other minimum conditions of employment;
- (b) part-time work arrangements;
- (c) dispute resolution procedures;
- (d) any issue of discrimination under the award, including pay equity;
- (e) any obsolete provisions or unnecessary technicalities in the award and the ease of understanding the award,
- (f) any other matter that relates to the objects of the Act that the Commission determines.

The proposed IRC is also to have regard to the effect of the award on productivity and efficiency in the industry concerned, and make such changes to awards as it considers necessary as a result of the review.

Currently, the IRC has no such positive power to systematically review existing awards. The current IRC can only vary an award without the consent of the parties, if the variation is made in the course of an arbitration under Part 2 (Conciliation and Arbitration by Commission on Disputes not concerning Settled Rights) of Chapter 3 (see section 112), or, in certain circumstances, if the award is at the end of its nominal term (section 113).

The proposed IRC also must ensure (see proposed section 22) that an award provides for equal remuneration *and other conditions of employment* for men and women doing work of equal or comparable value. Currently, the IRC (under the *IR Act 1991*), on application, is required to insert in an award provisions for *equal pay* for employees of either sex (see section 100). One of the objects of the *IR Act 1991* is the promotion of the conduct of industrial relations in a non-discriminatory manner and the provision for equality of opportunity in employment matters.

In addition, under the Exposure Draft, an application for an award may be made by ‘an employer’ (see proposed section 10). Under the *IR Act 1991*, in relation to employers, an award can only be made on the application of an employer or employers of not less than 20 employees in an industry (see section 108).

In relation to the breach of an award (or agreement), the following differences (from the *IR Act 1991*) have been noted in the Exposure Draft:

- it has been made clear that the penalty for a breach of an award (or agreement) is a civil penalty;
- the maximum penalty for a breach of an award or agreement is \$10,000 (under the *IR Act 1991*, it is 50 penalty units (\$5000)); and
- a person must not advertise, or cause to be advertised that the person is offering or seeking employment on terms that would constitute a contravention of an award or enterprise agreement (proposed section 350).

(c) Enterprise Agreements

It has been said in comment that ‘the enterprise bargaining provisions in the [NSW] *Industrial Relations Act 1991* were regarded as extremely radical at the time of their introduction, but in retrospect seem fairly mild when compared with what has been introduced elsewhere in recent years [for example in Victoria].’⁶

For a discussion of the current operation of enterprise bargaining in NSW, please see the Parliamentary Library’s *Briefing Paper*, ‘Enterprise Bargaining in New South Wales - An Overview’, by Vicki Mullen (No 5/95).

The Summary of Main Provisions of the Exposure Draft indicates the following changes to the current system of enterprise bargaining.

- The use of enterprise agreements will be expanded to multi-employer projects (see proposed section 29). Currently an enterprise agreement can only be implemented in relation to a single enterprise⁷ (see section 115 of the *IR Act 1991*).
- Industrial organisations of employers or a State peak council will be able to sign agreements on behalf of their member organisations, which will simplify major project agreements involving a multiplicity of employers (see proposed section 30).
- All enterprise agreements will be approved by the proposed IRC (see proposed sections 31-35) on the basis that they do not (inter alia), on balance, provide a net detriment to employees when compared with the aggregate package of employment conditions that would otherwise be available under relevant awards (proposed

⁶ Creighton, B and Stewart, A, *Labour Law* (Second Edition), The Federation Press, 1994, pp 123-124.

⁷ ‘Enterprise’ is defined by section 4 of the *IR Act 1991* to mean a business, undertaking or project. See also section 116 which states that ‘Enterprises carried on by corporations that are related to each other for the purposes of the Corporations Law may, for the purposes of this Act, be regarded as either one enterprise or separate enterprises.’

section 34).

This provision of the Exposure Draft introduces what has been called a 'no disadvantage' test⁸ in relation to employees covered by awards, who are seeking to have employment conditions covered by an enterprise agreement. The federal provisions under the *Industrial Relations Act 1988* (Cth) covering certified agreements and enterprise flexibility agreements (see Divisions 2 and 3 of Part VIB of the federal Act) provide for a 'no disadvantage' test in relation to the provisions of the award that would otherwise govern the employment relationship.⁹

In addition, in approving enterprise agreements, the proposed IRC must be satisfied that: the agreement complies with all relevant statutory requirements (including the *Anti-Discrimination Act 1977*); the parties understand the effect of the agreement, and the parties did not enter the agreement under duress. The proposed IRC must also follow the principles for approval set under proposed section 32, unless satisfied that any departure from those principles has not prejudiced the interests of any of the parties to the agreement.

Currently, the Industrial Court has the power, in certain circumstances, to declare an enterprise agreement void or to vary an agreement (see sections 133 and 134 of the *IR Act 1991*); the functions of the current IRC relating to conditions of employment fixed by the agreement are exercisable *only with the concurrence of each party to the agreement* (see section 118 of the *IR Act 1991*); and an enterprise agreement does not need to be compared with a relevant award¹⁰.

- Under the Exposure Draft, when negotiating an enterprise agreement without union involvement, an employer must notify the proposed IRC's Industrial Registrar who will then notify any relevant industrial organisations - the Registrar will also assist the Commission to determine whether the agreement should be approved, by preparing a report comparing the proposed agreement against the prevailing award conditions, or if there are no relevant awards, the report is to outline any relevant employment conditions of the employees¹¹ (see proposed section 35).

⁸ See Shaw QC, MLC, J, Attorney General and Minister for Industrial Relations, "Hands On" IRC Will Target Awards, Productivity', (1995) 7 *southland magazine*, p 6.

⁹ See *Commonwealth Parliamentary Debates*, 28/10/93, p 2781.

¹⁰ Although, one of the functions of the Commissioner for Enterprise Agreements under the *IR Act 1991* is 'when asked for assistance in that regard, to advise any such person about conditions of employment under any award or former industrial agreement that currently apply to that person' (see section 144).

¹¹ Currently, an enterprise agreement can only be registered by the Industrial Registrar, *inter alia*, if the Industrial Registrar is satisfied that the agreement complies with the requirements of Division 2 of Part 3 of the *IR Act 1991*. This includes minimum conditions of employment for enterprise agreements, which are set out in section 122 of the *IR Act 1991*.

- Relevant unions (or generally industrial organisations, if members or persons eligible to become members are affected by the agreement) will have a right to be heard when the proposed IRC is processing an agreement (see proposed section 33¹²), but will not have a right of veto over the agreement.

It could be generally said that the provisions of the Exposure Draft covering enterprise agreements reflect more closely the approach towards enterprise bargaining under the *Industrial Relations Act 1988* (Cth).

Further reading:

- Creighton, B and Stewart, A, *Labour Law* (Second Edition), The Federation Press, 1994, Chapter 6 (for commentary on the federal and NSW provisions covering enterprise bargaining)
- *Industrial Law, New South Wales* (Looseleaf Service), Butterworths, 1992, paras [s 115.0.1] - [s 132.1] (for commentary on the current scheme in NSW for enterprise bargaining)
- Cahill, G, 'Will employers want to use the new federal enterprise agreement?', (1994) 32(8) *Law Society Journal* 37 (a discussion of the relative advantages of enterprise agreements under the *IR Act 1991* (NSW))
- Ronfeldt, P and McCallum, R (Eds), *A New Province for Legalism: Legal Issues and the Deregulation of Industrial Relations*, ACIRRT, Monograph No 9, University of Sydney, 1993

(d) Industrial Disputes and Industrial Action

The Summary of the Main Provisions of the Exposure Draft states:

The powers of the Commission to deal with industrial disputes and industrial action will be simplified and enhanced, emphasising the role of conciliation.

Initially, the Commission will deal with all industrial disputes by conciliation. However, if it comes to the conclusion that conciliation will not result in a settlement of the dispute, a *certificate of attempted conciliation* may be issued. The Commission will be obliged to take account of the effect that any industrial action is having on the parties and the public generally in determining whether to issue such a certificate.

¹² In addition, with the leave of the Commission, under the Exposure Draft the State peak council and the President of the Anti-Discrimination Board are able to appear or be represented at proceedings relating to the approval of an enterprise agreement (see proposed section 33).

Arbitration proceedings before the Commission may proceed once this certificate has been issued. The Commission will be equipped with a range of powers to deal with industrial disputes, including dispute orders preventing or restraining industrial action. It will also be empowered to order reinstatement or re-employment as part of its arbitral powers concerning dispute resolution, thereby re-investing the Commission with a useful pre-1991 Act jurisdiction. The Commission will have a range of measures available to punish a breach of a dispute order, including substantial fines against industrial organisations and employers.

The *certificate of attempted conciliation* will be of significance in another respect. A person may not bring or continue a common law tort action arising from an industrial dispute while the Commission is attempting to resolve the dispute by conciliation, and has not issued such a certificate.

Currently, Chapter 3 of the *IR Act 1991* makes a distinction between disputes and industrial action concerning **settled rights** under awards and agreements (Part 1), and conciliation and arbitration by the current IRC on disputes **not concerning settled rights** (Part 2). This distinction was made as a result of recommendations made in the Niland Report that the 'work of the [IRC] should serve to distinguish interest disputes (which relate to the making of terms of employment) from rights disputes (which relate to the interpretation of the rights of the parties to an agreement or award).'¹³ The philosophy behind this was the sanctity of awards and the deterrent to industrial action after an award had been negotiated and made.¹⁴

¹³ Niland, J, op cit note 2, Volume 1, p 149.

Although, see McGarry G, 'The Right to Take Industrial Action', *A New Province for Legalism: Legal Issues and the Deregulation of Industrial Relations*, ACIRRT, Monograph No 9, University of Sydney, 1993, 27 at 46.

¹⁴ See the Second Reading Speech to the Industrial Relations Bill 1991, *NSWPD*, 28/8/91, p716.

The 'industrial calendar' was further described in the Niland Report (p 25) as follows:

'In a broad sense, two contemporary models for processing industrial disputes can be identified. The first, the Australian model, entails the establishment of an agreement or an award, usually with close involvement from an industrial tribunal, which sets the duration of the award's operation at two to three years. While some distinction may be seen between the two phases of award/agreement setting and award/agreement operation, in reality the designated time frame has little meaning. Awards or agreements are frequently "reopened" in the sense that claims emerge during the second phase to bring terms and conditions settled in the first phase into line with the subsequent movement in what are seen to be comparable areas. If the flow-on is not smooth, which itself can create problems for containment of unit labour costs, strikes and other industrial action emerge. ...

A second approach, which is evident in virtually all other OECD type countries, is the Bargaining Model. Here a clear distinction is drawn between the process of setting the agreement or contract in the first phase of the industrial calendar and the operation of that agreement or contract in the second phase.

Key provisions of the *IR Act 1991* in relation to industrial disputes and actions concerning **settled rights** under awards and agreements include the following:

- section 184 - an award relating to conditions of employment is not to be made and an enterprise agreement is not to be registered unless they contain or adopt procedures for dealing with grievances of individuals and disputes between employers and employees;
- sections 188-191 - the Commission may settle disputes (and determine by order such dispute etc if agreement is not reached) in respect of awards and agreements;
- section 194 - if industrial action (to which Division 3 of Part 1 of Chapter 3) is taking place, or is threatened, the Industrial Court may grant an injunction in order to prevent the industrial action or to bring the industrial action to an end;
- section 195 - the Industrial Court may take certain action in relation to a breach of an injunction, including the imposition of a penalty or the suspension for a specified time entitlements under an award or agreement, or cancel an agreement; and
- Division 4 (of Part 1 of Chapter 3) - the role of the Industrial Court in the interpretation of awards and agreements.

Part 2 of Chapter 3 of the *IR Act 1991* deals with the conciliation and arbitration by the Commission on disputes **not concerning settled rights**, that is questions, disputes or difficulties concerning an industrial matter which arises at a time when the rights of the parties concerned are not settled by a current award or agreement. Under this Part, the Commission may order a person to cease or refrain from industrial action (a dispute order under section 210) and the Industrial Court may deal with a contravention of a dispute order (see section 212).

Part 3 of Chapter 3 of the *IR Act 1991* specifies that specific industrial action is unlawful as follows:

- (a) in any case, if it is based on a demarcation dispute in respect of which the Commission may make an order under Part 4 [Demarcation Disputes]; or
- (b) where the person engaging in the industrial action is an industrial organisation, if its purpose is to support another industrial organisation involved in an industrial action; or
- (c) in any case, if it is based on a claim for wages or benefits, or both, in respect of time spent in engaging in that or any other industrial action unless payment of the wages or provision of the benefit is authorised by the Commission under this Part.

In contrast, Chapter 3 of the Exposure Draft makes no distinction between disputes concerning settled rights or otherwise. All industrial disputes may be dealt with by the proposed IRC according to the standard conciliation and arbitration model (see proposed sections 114-121). Proposed sections 122-124 deal with the power of the proposed IRC to make dispute orders of the following kinds:

- (a) an order to a person to cease or refrain from taking industrial action;
- (b) an order to an employer to reinstate or re-employ any one or more employees who were dismissed in the course of the industrial dispute or whose dismissal resulted in the industrial dispute; and
- (c) an order to a person to cease a secondary boycott imposed in connection with the industrial dispute.

The proposed IRC in Judicial Session has jurisdiction (see proposed section 124) to take certain action against the relevant parties in relation to the contravention of a dispute order, such as the imposition of substantial penalties (a maximum penalty of \$10,000 for the first day the contravention occurs and an additional \$5,000 for each subsequent day).

There is no provision in the Exposure Draft that specifically makes particular types of industrial action unlawful. Although, the *Essential Services Act 1988* (NSW) would seem to continue to apply in relation to industrial action in certain industries.

In addition, apart from certain actions (such as damage to property and defamation), proposed section 126 of the Exposure Draft makes it clear that a person may *not* bring or continue an action in tort while the industrial dispute to which the action relates is subject to conciliation by the proposed IRC.¹⁵

Further Reading:

- Creighton, B and Stewart, A, *Labour Law* (Second Edition), The Federation Press, 1994, Chapter 11 (Strikes and Industrial Action)
- *Industrial Law, New South Wales* (Looseleaf Service), Butterworths, 1992, paras [s 184.0.1] - [s 219.1]
- McCarry, G, 'The Right to Take Industrial Action', *A New Province for Legalism: Legal Issues and the Deregulation of Industrial Relations*, Ronfeldt, P and McCallum, R (Eds), ACIRRT, Monograph No 9, University of Sydney, 1993, p 27.
- Rowe, A, 'The Right to Take Industrial Action: A New South Wales Perspective', *A New Province for Legalism: Legal Issues and the Deregulation of Industrial*

¹⁵ For a general discussion of tort liability in an industrial relations context, see Creighton, B and Stewart, A, *op cit* note 6, pp 267-284. The federal provisions, which afford some protection against common law liability are discussed at pp 275-276.

Relations, Ronfeldt, P and McCallum, R (Eds), ACIRRT, Monograph No 9, University of Sydney, 1993, p 49.

(e) Unfair Dismissals

For a discussion of the current law under the *IR Act 1991*, and the relevant proposed provisions of the Exposure Draft, please see the Parliamentary Library's *Briefing Paper*, 'Unfair Dismissal: International Obligations and Jurisdictional Issues', by Vicki Mullen (No 35/95).

Further reading:

- Murphy, D, 'Mr Slash and Spurn', *The Bulletin*, November 14, 1995, p 25 (this article discusses problems with the federal unfair dismissal laws)

(f) Unfair Contracts

The Summary of the Main Provisions of the Exposure Draft states:

The present legislation contains provisions which enable the Industrial Court to set aside or vary contracts, under which a person performs work, which are found to be unfair, harsh or unconscionable, against the public interest, provide remuneration less than a person performing the work would have received as an employee, or were designed to avoid the provisions of an award. It is proposed to continue these provisions while making it clear (in order to resolve a discrepancy in differing lines of judicial interpretation about the provisions) that unfairness can arise in the course of the operation of a contract and is not to be assessed merely in terms of the original contractual provisions.

Consistent with the Government's intention to promote an enhanced role for conciliation of disputes, a mandatory conciliation role for the Commission in respect of all unfair contracts will be introduced [see proposed section 106].

Sections 275-286 of the *IR Act 1991* currently govern void contracts and regulated contracts.

Further Reading:

- Holmes, M, 'An Historical Analysis of the Jurisdiction Conferred on the Industrial Court by s 275 of the Industrial Relations Act 1991 (NSW)', (1995) 69(1) *The Australian Law Journal* 49.

(g) Anti - discrimination matters

The importance of ensuring that discrimination and gender equity issues are addressed in the industrial relations arena is highlighted from the outset in the Exposure Draft by the inclusion of a specific provision in the 'Objects' section - proposed section 3(f). This states that one of the objects is to 'prevent and eliminate discrimination in the workplace and in particular to ensure equal remuneration for men and women doing work of equal or comparable worth'. Moreover under the Exposure Draft it is clear that discrimination and gender equity issues are recognized as being industrial issues. This is seen in proposed section 6(2)(f) which states that 'discrimination in employment in any industry (including in remuneration or other conditions of employment) whether on the ground of sex, age, race or otherwise' comes within the ambit of an 'industrial matter'.

The significance of these statements is that they make an unambiguous link between discrimination and gender equity issues as mainstream industrial relations matters. In the current *IR Act 1991* these issues are referred to in more general terms in the 'Objects' section of the Act, which says that one of its objects is 'to promote the conduct of industrial relations in a non-discriminatory manner and to provide for equality of opportunity in employment matters' - section 3. The fact that complaints of discrimination in an employment context are, by and large (except perhaps cases of unfair dismissal) dealt with as breaches of the *Anti-Discrimination Act 1977* rather than breaches of industrial relations legislation explains in part why issues of discrimination are sometimes seen as other than mainstream industrial relations issues.

To ensure that attention is paid to the issues of discrimination and gender equity the Exposure Draft proposes the following:

Awards

- the proposed IRC will be able to vary an award on its own initiative; or on the application of any party to the award; or on the application of the President of the Anti-Discrimination Board (ADB), in order to remove any unlawful discrimination arising from the award - proposed section 16(5). The variation can only be made, however, if the Equal Opportunity Tribunal (EOT) has made a finding of such unlawful discrimination under the *Anti-Discrimination Act 1977* (ADA).

This power would give the proposed IRC a much more active role than that exercised by either the current Industrial Court (section 300) or the current IRC (section 351) under the *IR Act 1991*. Both these sections are in identical terms except for the reference to 'Industrial Court' or 'Commission' and provide that 'the Commission (or Industrial Court) is to take into account the principles contained in the ADA relating to discrimination with respect to employment'. They are not, however, obliged to apply them in every situation. Proposed section 155 of the Exposure Draft maintains the other provisions of these sections, which state that matters currently before the EOT cannot be brought before the Commission (or Industrial Court) except with leave of the Commission (or Industrial Court), and that the Commission (or Industrial Court) has a discretion to admit evidence given before, or findings made by, the EOT.

At present if a person approaches the ADB with an employment related discrimination complaint, an investigation of the complaint will be conducted, and if there is a genuine complaint, an attempt to conciliate the matter will be made. If no such conciliation can be achieved the matter is referred to the EOT for hearing. When the EOT hands down a finding of unlawful discrimination it is only of immediate benefit to the individual bringing the particular case (although it may be of some precedent value in the future, each case is determined on its merits). However, if the proposed IRC has the power to look to a finding of unlawful discrimination made by the EOT when it is assessing whether an award should be varied, there is the potential to rectify the more general problem at its source.

Other powers of the proposed IRC in relation to awards are:

- The IRC is required to review each award at least once in every 3 years and when conducting this review it is to have to regard to, amongst other matters, 'any issue of discrimination under the award, including pay equity - proposed section 18(3)(d). Under proposed section 18(3)(5) it is empowered to 'make such changes to awards as it considers necessary'.
- Proposed section 20(1)(b) states that the Commission must on application make an award setting equal remuneration and other conditions for men and women doing work of equal or comparable value - the issue of equal remuneration and other conditions is further specified in proposed section 22.

Enterprise agreements

- The proposed IRC will also be given the power to review and rectify enterprise agreements coming before it for approval, to ensure that there is compliance with all relevant statutory requirements including those in the ADA - proposed section 34(1)(a). The reference to compliance with the ADA requirements is of significance as the ADA itself does not require strict compliance with its own provisions. The reason for this is historical but section 54 of the ADA permits certain discriminatory conduct authorised under another piece of legislation, to override the provisions of the ADA. A common example is conduct, which is in breach of the ADA, is said to be justified by the requirements of the *Occupational Health and Safety Act 1983*. This seeming anomaly may be partly addressed by the proposed section 34(1)(a) and is consistent with an amendment to the ADA made in 1994 which requires all new industrial awards and enterprise agreements, made after 8 August 1994, to comply with anti-discrimination legislation and all existing awards and agreements had until 8 August 1995 to remove any discriminatory provisions.
- The President of the ADB may also appear or be represented at proceedings before the Commission relating to any application for approval of an enterprise agreement (but only with the leave of the Commission) - proposed section 33(2)(d).
- Proposed section 42(3) provides for an enterprise agreement to be varied at any time by: the Commission on its own initiative; on application by any party to the

agreement; or by the President of the ADB on the same basis as that relating to awards discussed above.

President of the ADB

- In addition to the rights of the President of ADB to intervene, by right or by leave, in those proceedings already mentioned, the President of the ADB is given a more general power to intervene in any proceedings of the Commission if the President establishes that the proceedings concern unlawful discrimination under the ADA (proposed section 153).
- the President is also given the power to appeal to a Full Bench of the proposed IRC against a decision of the IRC constituted by a single member if the President considers that the decision is inconsistent with the ADA.

Further Reading:

- Creighton, B and Stewart, A, *Labour Law* (Second Edition), The Federation Press, 1994, Chapter 12 - Discrimination and Equal Opportunity.

(h) Parental leave

In relation to parental leave, the Summary of Major Provisions of the Exposure Draft states that 'the new arrangements will equalise entitlements for men and women and ensure that all employees have a right to return to their former position'.

In the *IR Act 1991* although Division 3 is given the generic heading 'parental leave', there are three distinct categories of leave entitlements contained within it, namely maternity leave (sections 28 to 41); paternity leave (sections 42 to 53) and adoption leave (sections 54 to 66), and each category has, to a greater or lesser extent, its own conditions, entitlements and requirements. While there is a degree of uniformity between them, certain distinctions are drawn depending on the particular category of leave. In some instances, the differences appear to be based either on artificial distinctions or on distinctions which could arguably be seen to be discriminatory. (This issue is more fully explained on pages 23 to 25). In Part 4 of the Exposure Draft, which deals with the minimum entitlements of employees to parental leave, a greater degree of uniformity exists between the categories, consistent with its stated object 'to prevent and eliminate discrimination in the workplace' - proposed section 3(f).

Main Provisions

In the Exposure Draft maternity leave, paternity leave and adoption leave are all covered by the umbrella term 'parental leave' - proposed section 52(1). However, where distinctions need to be drawn, references to maternity, paternity and adoption leave are maintained.

The proposed parental leave provisions would apply to all employees (defined generally

in proposed section 5 as 'persons employed in any industry, whether on salary or wages or piece-work rates') including part-time employees, but excluding casual or seasonal employees - proposed section 50. As with the current legislation, a total of 52 weeks unpaid parental leave would be available in connection with the birth or adoption of a child - proposed section 51. 'Child' is no longer defined in relation to maternity or paternity leave (which in the *IR Act 1991* means a child under the age of one year), although the current definition for adoption leave,¹⁶ is retained - proposed section 52(4).

As under the *IR Act 1991*, maternity leave would continue to be taken in a block while paternity leave and adoption leave can still be taken in two phases: at the time of the birth a male employee can take an unbroken period of up to one week - 'short paternity leave' - proposed section 52(3)(a) and a further unbroken period in order to be the primary care giver of the child¹⁷ - 'extended paternity leave' - section 52(3)(b) can also be taken, provided certain criteria are met. Up to 51 weeks is available as 'extended paternity leave'. Although the Exposure Draft does not state this specifically (unlike section 44(1)(b) of the *IR Act 1991*) this figure is the balance after the one week 'short paternity leave' has been taken from the maximum 52 weeks which are available to be taken as 'parental leave'. Similarly in regards to adoption an unbroken period of up to 3 weeks can be taken at the time of the placement - 'short adoption leave' - proposed section 52(4)(a) with a further unbroken period available in order to be the primary care giver of the child - extended adoption leave - proposed section 52(4)(b). Once again this period is up to 51 weeks although not specifically stated.

While the *IR Act 1991* provides for a maximum 52 weeks unpaid parental leave, it is not uniformly available as of right. 'Extended paternity leave' is **only** available if the employer consents - section 44(2), as is 'extended adoption leave' for a **male** employee - section 56(2). This distinction is removed in the Exposure Draft, where the fundamental criteria are: (i) being an employee and (ii) having had at least 12 months continuous service with the employer. Once these criteria are met and certain procedural requirements complied with, then up to 52 weeks parental leave is available to **any** employee. The particular format of the leave taken will be determined according to whether it is maternity leave, paternity leave or adoption leave. This is a major departure from the *IR Act 1991*.

When applying for parental leave, a number of notices and documents need to be supplied to the employer, and these vary according to the category of leave being applied for - proposed section 55. While there are certain similar requirements as under the *IR Act 1991*, the provisions in the Exposure Draft appear more flexible.

¹⁶ In the *IR Act 1991* 'child' means 'a person under the age of 5 years who has not previously lived continuously with the employee concerned for a period of 6 months or who is not a child or step-child of the employee or of the spouse of the employee and is placed with the employee for the purpose of adoption' - section 55.

¹⁷ Although reference is made to 'the primary care giver' in relation to both 'extended paternity leave' and 'extended adoption leave', no definition is given in the Exposure Draft, unlike the *IR Act 1991* which defines it as 'a person who assumes the principal role of providing care and attention to a child' - section 43 and section 55.

Maternity leave

In the case of maternity leave there are four requirements. The first is to give the employer at least 10 weeks' notice of the intention to take leave - proposed section 55(1)(a). This differs from the corresponding section in the current legislation in two respects: (i) notice can be giving either in writing or verbally and (ii) the 10 weeks' notification is no longer of the 'expected date of confinement' but more generally of the intention to take leave. The remaining three requirements, which must be complied with prior to the employee proceeding on leave, are the same as those in the *IR Act 1991*: at least 4 weeks' notice must be given of the actual dates of the leave period; a doctor's certificate must be provided confirming the pregnancy and stating the expected date of birth and a statutory declaration must be provided stating any period of paternity leave sought or taken by the spouse. One additional maternity leave requirement in the *IR Act 1991* not replicated in the Exposure Draft is section 32(3) which gives an employer the power, in certain circumstances, to require an employee to commence leave within the 6 weeks immediately before the expected date of birth.

If the pregnancy of an employee who is not off on maternity leave terminates before the expected date of birth or she suffers illness related to her pregnancy, under the Exposure Draft the employee is entitled to **either** such period of unpaid leave as specified by a doctor - 'special maternity leave' - **or** to such paid sick leave (either instead of, or in addition to, special maternity leave) as she is then entitled to, as specified by a doctor - proposed section 68. This provision differs from the corresponding section in the *IR Act 1991* where the choices appear less flexible. Only **unpaid leave** is available in the case of a termination - section 36(1)(a) but this section will not apply if the termination occurs outside 28 weeks of the expected date of birth. An illness suffered by an employee not off on maternity leave is treated in two different ways. If it is an illness **not** related to the 'normal consequences of confinement', which occurs when a termination has occurred within 28 weeks of the expected date of birth, then the employee is entitled (either instead of, or in addition to, special maternity leave) to such **paid sick leave** as specified by a doctor - section 36(1)(b). If it is an illness **related** to the pregnancy, the employee may take such **paid sick leave** as she is then entitled to **and** such further **unpaid leave** as specified by a doctor - section 36(2).

Paternity leave

There are also four main notice and document requirements to be met when applying for paternity leave. Some only apply in an application for extended paternity leave: (i) an employee must give at least 10 weeks' notice of the intention to take this form of leave; and (ii) the employee must submit a statutory declaration, which states any period of maternity leave sought or taken by the spouse and that he is seeking the period of extended paternity leave to become the primary care giver of a child - proposed sections 55(2)(a) and (d). Common to both the short and the extended paternity leave is (iii) the need to give at least 4 weeks' notice of the actual dates of the leave period and (iv) to provide a doctor's certificate confirming that the employee's spouse is pregnant and the expected date of birth - proposed sections 55(2)(b) and (c). It is interesting to note that for a male employee to take time off to look after a child he must produce a statutory declaration stating that he

will be fulfilling the role of primary care giver. No such requirement is made of a female employee. Yet if there are instances where men are applying for extended paternity leave then it follows that women are not necessarily always the primary care giver although this still seems to be the assumption from the differing requirements under the Exposure Draft.

Adoption leave

The adoption leave structure is in similar terms to that for paternity leave. In an application for 'extended adoption leave' an employee must (i) give notice of any approval or other decision to adopt a child, at least 10 weeks before the expected date of placement and (ii) the employee must submit a statutory declaration, which states any period of adoption leave sought or taken by his or her spouse and that the employee is seeking the period of extended paternity leave to become the primary care giver of a child - proposed sections 55(3)(a) and (d). Common to both the short and the extended adoption leave is the need (i) to give at least 14 days' notice of the actual dates of the leave period (not 4 weeks as is the case for maternity and paternity leave) as soon as practicable after being notified of the expected date of placement of the child and (ii) prior to going on leave the employee must provide a statement from an adoption agency or another appropriate body of the expected date of placement of the child - proposed section 55(3)(b) and (d).

Special leave of up to 2 days is also available in relation to adoption, if an employee needs to attend compulsory interviews or examinations as part of the adoption procedure - proposed section 69. While this provision also appears in the *IR Act 1991*, that Act further states that 'where paid leave is available to the employee, the employer may request the employee to take such leave instead of special leave' - section 61.

More general provisions

- Proposed section 55(4) says that an employee will not be in breach of the notice and document requirements if the child is born (or the pregnancy otherwise terminated) before the expected date of birth; or is placed for adoption before the expected date of placement or other compelling circumstances. In the case of the birth of a living child, notice needs to be given within 2 weeks of the birth, and in the case of adoption, within 2 weeks after the placement of the child. This proposed section differs somewhat from the corresponding *IR Act 1991* provisions. In the current legislation an employee will not be in breach of the 4 weeks' notice requirement if the failure to give notice is due to the premature birth of a living child as long as notice is given within 2 weeks of the birth - section 32(4). In the adoption context section 58(5) says that the notice requirements will not be breached if it is due to the adoption agency requiring the employee to accept earlier or later placement of the child, the death of the spouse or other compelling circumstances.
- Except for 'short paternity leave' or 'short adoption leave' an employee is not entitled to parental leave at the same time as his or her spouse - proposed section 57.

- Parental leave arrangements are not immutable but can be varied by being shortened, extended or even cancelled. While these options are available under the *IR Act 1991*, they appear to be more flexible under the Exposure Draft. In it, leave will be automatically cancelled **prior to commencement**, if an employee withdraws in writing his or her application or if the pregnancy terminates other than by birth of a living child or the placement of the child - proposed section 58(1). Proposed section 58(2) outlines the circumstances where leave will be automatically **cancelled after** it has been started.

The proposals in the Exposure Draft differ from the existing provisions in two major ways: (i) they apply uniformly to all three categories of leave and (ii) they give a female employee the right to resume work sooner than provided for in the *IR Act 1991*. Currently when the pregnancy of an employee on maternity leave terminates other than by the birth of a living child, if the employee has a medical certificate to this effect she can resume work at a time nominated by the employer, but not until after 4 weeks from the date of notification. Without a medical certificate, she cannot commence until 6 weeks from the date of notification - section 35. The proposed date of resumption in the Exposure Draft is within 2 weeks of notification. Although parental leave is generally to be taken in a block, it is possible for an employee and employer to agree for this period to be broken and for the employee to return to work on a full-time, part-time or casual basis - proposed section 60.

- Proposed section 63, which deals with the return to work after parental leave (it also applies to a female employee returning from special maternity leave) reflects the current position under the *IR Act 1991*. Its aim is to ensure that all employees have a right to return to their former position or the one they would have held but for the pregnancy (for instance, if a female employee moved to a part-time job simply because of the pregnancy or was transferred due to health and safety risks, that position would not be counted). If the position no longer exists, the employee should be put into an available comparable position for which the employee is capable and suitably qualified. An employer who does not make available to an employee a position to which the employee is entitled will be guilty of an offence and may face a maximum penalty of 100 penalty units.
- Employers are required to keep, for at least 6 years, a record of parental leave granted to employees and all notices and documents given by the employer or the employee. Provision is made for a maximum penalty of 20 penalty units for an employer failing to comply with this requirement - proposed section 64(2).
- Proposed section 65 clarifies the existing provision for termination of employment because of pregnancy etc and increases the penalty from 20 penalty units to 100.
- Proposed section 66 clarifies the existing provision dealing with replacement employees and increases the penalty from 20 penalty units to 50.

- In the *IR Act 1991* although section 33 deals with the situation of transferring a pregnant female employee from a particular job, if on a doctor's assessment there are risks or hazards associated with it to a safer job, the obligations imposed on the employer are less stringent than those under proposed section 67.

Under the current legislation, where a medical practitioner is of the opinion that an employee should be transferred, the employee must, if the employer deems it practicable, be transferred to a safer job at the rate and on the conditions of that safer job until the employee goes on maternity leave - section 33(1). If such a transfer is not practicable, the employee has an option of taking leave (which will be treated as maternity leave) for such period as is certified necessary by a doctor. It is also possible in this situation for the employer to require the employee to take such leave. Provision for non-compliance by the employer is a maximum penalty of 20 penalty units.

Under proposed 67(2) there is a mandatory requirement on the employer to temporarily adjust the employee's working conditions or hours of work in her usual job to avoid exposure to risk. If it is not feasible, or cannot reasonably be required, to make these adjustments to her usual job, then the employer is to transfer the employee to other work where she will not be exposed to risk - proposed 67(3). If transferring the employee is not feasible or cannot be reasonably be required, then the employer is to grant the employee maternity leave (or any available paid sick leave) for as long as is necessary to avoid exposure to risk as specified by a doctor - proposed 67(4). Failure by an employer to comply with this proposed section will be an offence and a maximum of 50 penalty units is provided - proposed 67(5).

The proposed section covers a pregnant woman or one who is breast feeding and applies to situations where there is a risk to the health and safety of either the mother or depending on the case, the unborn or new born child. While the risk assessment is to be based on the medical certificate supplied by the employee together with the employer's obligations under the *Occupational Health and Safety Act 1983*, it is not clear exactly who makes this assessment.

- In the Exposure Draft 'spouse' is defined to include a de facto spouse and a former spouse - proposed section 52(5). Under the *IR Act 1991* in relation to maternity and paternity leave - 'spouse' is defined only to include de facto spouse whereas in relation to adoption leave it includes both a de facto spouse and a former spouse. It would appear from the way the Exposure Draft is framed that 'parental leave' entitlements would not extend to homosexual couples, who in other contexts have recently been extended certain 'family' leave entitlements.¹⁸

¹⁸

In May 1995 the New South Wales Industrial Relations Commission conferred family status on same-sex couples in its decision in the State family leave case, which granted leave to workers for the purpose of caring for sick family members.

(i) Principles of Association

Freedom of association (which extends to the right of employers and workers to form and join organisations of their choice and the right of those organisations, once established, to autonomy) is recognised by democratic societies as a fundamental right and is accordingly enshrined in various conventions¹⁹ and Acts of Parliament, as evidenced by section 3 in the *IR Act 1991*, which cites as two of that Act's objects:

- the recognition and facilitation of the organisation of representative bodies of employers and employees, and the encouragement of their democratic control and efficient management; and
- ensuring that employees are free to choose whether or not to join unions by prohibiting preference in employment for union members and by preventing victimisation of persons on the ground that they are or are not union members.

In the Exposure Draft, freedom of association is referred to explicitly in proposed section 195:

A person cannot be compelled to become, or remain, a member of an industrial organisation. A person cannot be prevented from becoming, or remaining, a member of an industrial organisation except by the organisation itself acting under its rules ...

Preference clauses

Section 480 of the *IR Act 1991* makes it clear that an award or agreement cannot confer a right of employment preference in favour of a union member over a non-union member. This position is altered somewhat in the Exposure Draft in that limited preference to union members will be allowed in awards and agreements in certain circumstances but **only** where employers and unions agree to such arrangements in an enterprise agreement or a consent award - proposed section 197. These preference clauses would **only** operate in relation to recruitment of prospective employees where that employee is of equal to, or greater merit than, another prospective employee who is a non-union member.

Provision is made for people who hold a conscientious objection to union membership to obtain a 'certificate of conscientious objection' from the Industrial Registrar - proposed section 198(1). Where an employee holds such a certificate, he or she will be taken to be a member of a union for the purposes of any preference clauses which may apply - proposed section 198(3). To ensure parity with union members who are required to pay regular union dues, a holder of a certificate must make a comparable periodic payment to the Industrial Registrar. Failure to do so may result in the Industrial Registrar refusing to issue or cancelling a certificate of conscientious objection - proposed section 198(2).

¹⁹ Article 22 of the International Covenant on Civil and Political Rights says that everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. Australia is a signatory to this Covenant.

Victimisation

Under the *IR Act 1991*, victimisation, on various grounds including membership or non-membership of a union, is an offence, and carries a maximum penalty of 100 penalty units - section 481. The principle of freedom from victimisation is retained in the Exposure Draft - proposed section 196 and remedies enforceable by the proposed IRC are provided for employees who are victimised.

A more complete discussion of the issues associated with compulsory unionism and preference clauses is contained in the Parliamentary Library's *Briefing Paper*, 'Compulsion, Preference or Voluntarism: Options for Trade Union Law in New South Wales', by Gareth Griffith, (No 37/95).

(j) Registration of Industrial Organisations

In the Summary of Main Provisions to the Exposure Draft it is stated that:

The present provisions dealing with the registration of organisations are widely regarded as being cumbersome, overly technical and fraught with legal pitfalls. The new legislation will provide a streamlined, workable and efficient system of registration which meets the goals of promoting accountability, democratic control and effective administration. The registration status of all existing organisations will be confirmed.

For ease of comparison a description of the present system is given first, followed by comments on how the proposed system differs.

*IR Act 1991*²⁰

Organisations intended to be participants in the State industrial system are identified in section 405. They are:

- industrial organisations of employees or employers registered and incorporated under the Act;
- existing 'and other' industrial organisations that are 'recognised' as industrial organisations of employees or employers (that is, 'registered unions' under the 1940 legislation); and
- organisations of employees or employers registered under the Act as 'non-industrial organisations' - these being registered as an alternative to incorporation under the *Corporations Law* or any other Act.

²⁰ Information on the current system of registration is taken from the CCH Looseleaf Service, *Australian Labour Law Reporter*, pp7591- 7621.

Sections 408 - 422 deal with the process of registration and incorporation of organisations under the Act. It should be pointed out that these provisions apply only to associations seeking fresh registration under the Act. All existing industrial unions of employers and employees registered under the *Industrial Arbitration Act 1940* obtained automatic 'recognition'. New 'organisations' can be registered under the Act as either 'an industrial organisation of employees or employers' or a 'non-industrial organisation' but an organisation can not be registered in both categories - section 408. The next three sections spell out the eligibility criteria for registration, and depending on the status of the particular organisation, these differ (section 409 deals with registration of employee organisations; section 410 deals with registration of employer organisations and section 411 deals with registration of non-industrial organisations).

Section 412 specifies the criteria for registration and gives the Industrial Registrar the discretion to grant an application for registration made by an association if satisfied that all the Act's requirements are met. Section 413 specifies that applications for registration are made in the manner and form approved by the Industrial Registrar, who may require information to be verified by statutory declaration, and section 414 gives the Industrial Registrar the additional power to require such proof as he or she considers necessary to establish the authority of the persons making the application for registration.

How applications for registration are to be processed is dealt with in sections 415 and 416 and include notifying interested organisations upon receipt of an application, procedures for the lodging of objections, and provisions in relation to the hearing and disposition of any objections. At the end of this process the Industrial Registrar has the power to grant registration - Section 420. If registration is granted, a number of details need to be entered in the register kept for the purpose and an association is taken to be registered from the date when the Industrial Registrar records this information. An appeal from a decision of the Industrial Registrar in relation to the application for registration can be lodged with the Industrial Court - sections 417 and 418.

Section 421 provides that an association registered under the *IR Act 1991* as an organisation has full corporate status, with power to purchase and deal with any real or personal property and to be sued or sue in its registered name. The effect of incorporation means that the registered association has a separate legal identity to its members.

Suspension and cancellation of registration is provided for in sections 581-597.

Proposed system of registration

The substance of the registration provisions contained in the *IR Act 1991* appear to have been continued to a large extent in the Exposure Draft, but in a re-formulated and more comprehensible fashion. Three categories of organisations will be capable of applying to the Industrial Registrar for registration under proposed section 203:

- an organisation of employees or employers that is formed for the purpose of incorporation under this Act (a 'State organisation');

- an organisation of employees or employers that is a federally registered organisation (without branches) or a branch of such an organisation (a 'federal organisation');
- an organisation of employers that is incorporated under the *Corporations Law, Associations Incorporation Act 1984* or any other Act, other than a federally registered organisation (a 'separate organisation').

The criteria for registration are substantially the same as those in the current legislation with the only obvious additions being:

- in the case of a branch of a federal organisation - the rules of the parent organisation must confer on the branch applying for registration a reasonable degree of autonomy in the administration and control of New South Wales assets and in the determination of questions affecting solely or principally members resident in New South Wales - proposed section 204(1)(g);²¹ and
- in the case of an organisation consisting of the members of a branch of an organisation - the branch must be of sufficient importance to be registered separately - proposed section 204(1)(h).

The Industrial Registrar continues to have the power to grant the application and can only do so if the criteria for registration are met. The procedure for dealing with applications from receipt to notification, to lodgement of objections, to hearing and disposition of any such objections is provided for in proposed sections 205 and 206. This procedure is essentially the same as that under the *IR Act 1991* although a number of details (such as how notification should be given and the time frame for lodging objections and so on) often contained in regulations are elaborated in the Exposure Draft itself. Once an application for registration has been granted, the Industrial Register still needs to record various pieces of information as specified in proposed section 207 in the register kept for this purpose, and an organisation continues to be taken to be registered from the time this information is entered in the register and the Industrial Registrar must issue a certificate of registration to each organisation. Incorporation will still flow from registration.

An appeal from a decision of the Industrial Registrar in relation to the application for registration can be lodged with the Industrial Court - proposed sections 417 and 418 and cancellation of registration is provided for in proposed sections 211 - 218.

Further Reading:

- Creighton, B and Stewart, A, *Labour Law* (Second Edition), The Federation Press,

²¹ For background on the interaction of Federal and State laws please see the Library's *Background Paper*, 'Industrial Relations in New South Wales, 1901-1989', by CP Mills, (No 4/89), September 1989, pp 14-16; B Creighton and A Stewart, *Labour Law*, (2nd edition) Federation Press, 1994, pp221-227; and C Fox, W Howard and M Pittard, *Industrial Relations in Australia: Development, Law and Operation*, Longman, 1995, pp 422-426.

1994, Chapter 10 (for specific commentary on regulation of trade unions, see pages 220 - 231 which deal with registration).

(k) Right of entry to workplaces by union officials

Under the current *IR Act 1991* the right of entry of a union official is contained in section 733. This section provides, in essence, for a union official authorised by the Industrial Registrar to:

- enter any premises where there are members of that union engaged during working hours, to talk with or interview workers during lunch time or non-working time.
- enter any premises of an employer where there are members of that union engaged during working hours, to investigate any suspected breach of the *IR Act 1991* or of any award or agreement in force in relation to the industry or enterprise in which those members are engaged.
- require the employer to produce for inspection, during the usual office hours at the employer's premises, records related to a suspected breach which is being investigated.
- make copies of the records produced.

However, before a union official can exercise any of these powers, he or she must give the employer at least 7 days' notice and the authority to enter premises does not extend to those used for residential purposes unless the permission of the occupier is given.

A number of offences are provided for under this section, all of which carry a maximum penalty of 20 penalty units: (i) a union official wilfully hindering or obstructing employees during their working time; (ii) a person who refuses entry to, or hinders or obstructs a union official in the exercise of his or her powers and (iii) not returning the permit to the Industrial Registrar for cancellation within 14 days of its expiry or revocation.

In the Exposure Draft, entry and inspection by union officials is dealt with in proposed sections 282 - 288. While many of the current features remain, a number of differences are also apparent. It will now be possible for a union official authorised by the Industrial Registrar to:

- enter any premises during working hours, where 'relevant employees' are engaged, for the purpose of holding discussions during lunch time or non-working time. A 'relevant employee' is defined in proposed section 282 as 'an employee who is a member of the organisation or who is eligible to become a member of the organisation'. This would enable union officials to visit a wider range of premises as they would no longer be restricted to only those where there were currently members of the union official's particular industrial organisation already present.
- enter any premises during working hours, where there are relevant employees

engaged, for the purpose of investigating any suspected breach of the industrial relations legislation or of any award or enterprise agreement that applies to such employees.

- require the employer to produce for inspection, during the usual office hours at the employer's premises or at any mutually convenient time and place, records related to a suspected breach which is being investigated.
- make copies of the records produced.

Under proposed section 284 a union official will be able to exercise these powers once the employer concerned has been given at least 24 hours' notice. The Summary of Main Provisions in the Exposure Draft states that this time frame is generally equivalent to those in most other States and Federally.

- An authorised union official will now be required to produce the authority issued by the Industrial Registrar, if requested to do so, either by the occupier of the premises or by any person whom the officer requires to produce anything or to answer any question - proposed section 285.
- Some of the current offences are retained with the maximum penalty being increased in most cases to 100 penalty units: where a union official wilfully hinders or obstructs employees during their working time and where a person hinders or obstructs a union official in the exercise of his or her powers (although this offence now requires this behaviour to be wilful). Two new offences, which also carry a maximum penalty of 100 penalty units, have been included - (i) failing to comply with a requirement of an authorised industrial officer, without having a lawful excuse and (ii) purporting to exercise the powers of an authorised union official without having a current authority issued by the Industrial Registrar - proposed section 287. Not returning the permit to the Industrial Registrar for cancellation within 14 days of its expiry or revocation still carries a maximum penalty of 20 penalty units - proposed section 285(6).

4. CONCLUSION

Overall, the proposed effects of the Bill could be summarised as follows: an increase in the powers and functions of the key industrial regulatory body (to be a newly constituted Industrial Relations Commission of NSW), particularly in relation to the review of awards and the approval of enterprise agreements; the placing of a greater emphasis on awards (in particular as a 'safety net' in relation to enterprise agreements); the prevention and elimination of discrimination in the workplace; the allowance of limited preference to union members through awards and agreements; and an extended right of entry to workplaces by union officials. The Government's main aims in these reforms have been stated as workplace reform and productivity improvement with fairness for employees.²² How the balance which the Exposure Draft attempts to strike between employer and employee interests will be received, particularly in today's commercially competitive environment, remains to be seen.

²² Ibid, as quoted from the Hon Jeff Shaw QC, MLC (as Shadow Minister for Industrial Relations before the March 1995 election).

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