



Australian Government

**Department of Employment and
Workplace Relations**

Industrial Law Reform (Fair Work) Bill 2004 South Australia

**Submission by the Commonwealth Department of
Employment and Workplace Relations**

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DEWR Submission to the South Australian Government on the *Industrial Law Reform (Fair Work) Bill 2004*

Introduction

The Department of Employment and Workplace Relations (DEWR) is pleased to have the opportunity to provide comments on the South Australian draft Bill titled *Industrial Law Reform (Fair Work) Bill 2004* (the Bill). Judicious reform of Australia's workplace relations systems is paramount if we as a nation are to maintain, or improve, our competitive position within the globalised economy.

2. In the federal jurisdiction the previous Labor Government's *Industrial Relations Reform Act 1993* increased the prominence of enterprise agreement making and placed a greater onus on the parties to take responsibility for their own outcomes. Whilst this represented a shift away from Australia's traditional top-down centralist approach to regulating workplaces it failed to break the nexus between arbitrated awards and the agreement making stream. As a result, both the rate of agreement making and its spread across industries were disappointing.
3. The introduction of the *Workplace Relations Act 1996* (WR Act) overcame these limitations by providing an enabling framework in which legally enforceable workplace agreements can be negotiated either collectively or individually and in businesses which are non-unionised or unionised. Employers and employees are now free, provided a simplified system of minimum standards is observed, to adapt and change their workplace arrangements to best meet their circumstances. Access to a full range of employment arrangements that provide workplace flexibility is essential if companies are to remain viable and meet the demands of international competition.
4. The *Industrial Law Reform (Fair Work) Bill 2004* contains some amendments which will improve the operation of the South Australian system, such as extending the duration of agreements and simplifying the approval process. However, DEWR is concerned that the overall tenor of the Bill represents a return to the system more closely associated with the *Industrial Relations Reform Act 1993* than with the more modern approach offered by the WR Act. Not only is this a retrogressive step for South Australian employees and employers but it also undermines moves toward a more unified system of workplace relations for Australia.
5. Due to the tight deadline set for the consultative process this submission will focus on the proposed amendments of most interest to DEWR and to the Australian Government.

Objects of the Act

6. Although DEWR has no comment to make on the majority of the proposed objects of the *Industrial and Employee Relations Act* (the I&ER Act) there are three proposed objects about which we have some reservations.

7. The wording of object 3(1)(g) “to promote and facilitate security and permanency in employment” ignores the flexibility and convenience for both employers and workers provided by non-standard forms of employment. These alternative forms of employment, such as casual work, are often perceived in a negative way because they are temporary and therefore not as secure as regular employment. However, many workers prefer this form of employment precisely because of the flexibility it provides. The Australian Government’s policy is not to constrain the freedom of workers to choose alternative forms of employment if this suits them. Accordingly, we do not support this object.

8. There is also concern about inclusion of unfair contracts in object 3(1)(m), “to provide an avenue to address work-related grievances, including provisions for a right to review harsh, unjust or unreasonable dismissals or unfair contracts.” DEWR’s view on unfair contracts provisions is discussed below.

9. With regard to object 3(1)(r), “to ensure equal remuneration for men and women doing work of equal or comparable value” a preferred wording of this object would more accurately reflect the meaning of equal remuneration provided in the ILO Equal Remuneration Convention. The Convention refers to “equal remuneration for men and women workers for work of equal value”, and defines this as meaning rates of remuneration established “without discrimination based on sex”. The Convention does not use the word “comparable”.

International Labour Standards

10. Clause 5 of the Bill proposes the inclusion of the following International Labour Organisation (ILO) Conventions as schedules to the Act:

- Convention No. 156, *Workers with Family Responsibilities, 1981* (C156);
- Convention No. 182, *Worst Forms of Child Labour, 1999* (C182); and
- Convention No. 135, *Workers' Representatives, 1971* (C135)

The Court and the South Australian Industrial Relations Commission (the SA IRC) will be obliged to have regard to these Conventions in exercising their functions.

11. In the broader sense there are also reservations about the inclusion of ILO Conventions in the legislation itself and, given that SA already complies with the Conventions, this may place undue reliance on ILO Conventions for effective regulation of workplace relations practices.

Contract of Employment

12. The characterisation of a contract of employment in proposed section 5 refers to six types of contracts:

- contracts recognised at common law as contracts of employment – proposed section 5(1)(a);
- contracts for the driving of vehicles to provide a public passenger service – proposed section 5(1)(b);

- contracts for the cleaning of premises – proposed section 5(1)(c);
- contracts for outworkers – proposed section 5(1)(d);
- contracts deemed by the SA IRC to be contracts of employment on the grounds that the practical reality of the relationship between the service provider and the person for whom the services are provided is an employment relationship – proposed sections 5(1)(e) and 5(2)(a); and
- contracts deemed by the SA IRC to be contracts of employment on the grounds that the service providers are more appropriately regarded as employees than as independent contractors – proposed sections 5(1)(e) and 5(2)(b)

A strong argument can be made that only the first of these should be retained.

13. Australian commercial and business policies reflect the principle that people and organisations are entitled to enter contracts for their mutual benefit. Such contracts should be regulated by the common law.

14. The retention of paragraphs 5(1)(b), (c) and (d), which currently appear in the definition of ‘contract of employment’ in s.4, will undermine these mutual arrangements. These provisions deem to be a contract of employment a contract under which a service provider is engaged to: (b) drive a vehicle, other than a taxi, to provide a public passenger service; (c) carry out personally the work of cleaning premises; or (d) carry out work as an outworker.

15. The provisions illustrate the arbitrary distinctions made inevitable by deeming particular categories of workers to be employees. Driving a bus makes one an employee but driving a taxi does not. Cleaning premises makes one an employee but cleaning cars does not. Working from home makes one an employee but doing identical work at a business’s premises does not. Such an approach makes it almost impossible to maintain a principled distinction between employees and contract workers. The ultimate outcome of such an ad hoc approach is illustrated by Schedule 1 to the *Industrial Relations Act 1996* (NSW), which deems to be employees 13 disparate categories of workers including milk deliverers, carpenters, plasterers, blind installers, bread deliverers, swimming pool supervisors and the drivers of ready-mixed concrete trucks.

16. There is concern about the proposed discretion for the SA IRC to deem classes of workers to be employees. This concern is based on the belief that the case for broadening the coverage of the term ‘employee’, for the purposes of labour market regulation, beyond that determined by the common law, is yet to be made.

17. The relevant section of the Stevens’ report quotes with approval statements by Professor Andrew Stewart that ‘any competent lawyer can take almost any form of employment relationship and reconstruct it as something that the common law would treat as a relationship between principal and contractor.’ This is, at best, debatable. Courts and tribunals themselves have for the most part looked at the practical substance of the relationship between the business and the purported contractor. It is not clear that the Commission needs the power to deem entire classes of workers to be employees on the basis of what is essentially the same set of indicia as the courts are already using. The SA Government needs to reconsider these changes.

18. The discretion given to the SA IRC by clause 5(2) is very wide. The Full Commission may issue ‘a determination declaring a class of persons who provide services for another in an industry under a contract to be employees if (a) ...; or (b) the Full Commission is satisfied that the persons in question would be more appropriately regarded as employees than as independent

contractors.’ Again, in the interest of individual choice, the SA Government should reconsider these changes.

19. While the factors set out in clause 5(4) go some way to limiting the Commission’s discretion they do so in a problematic way. The first factor is the bargaining power of the persons relative to the bargaining power of the persons for whom they provide services. The second is whether the persons may be considered economically disadvantaged relative to the general community. The effect would be that workers on higher incomes could choose between employment and contract work but that workers on lower incomes would be denied this choice by dictate of the Commission, whether or not those workers want the purported protection being extended to them.

20. The third factor is whether the persons are subject to any ethnic, cultural, linguistic or other disadvantage. This is unjustifiably paternalistic. Consider a situation where the majority, but by no means all, of a class of workers are recent migrants with limited English skills. The draft legislation leaves it open to the Commission to deem the entire class to be employees, whether or not the workers want to work as employees, on the grounds of perceived ethnic or linguistic disadvantage. This scenario depends for any appeal it may have on the assumption that people with limited English skills are unable to assess their own economic circumstances or seek out the working arrangements that best suit them. The economic dynamism of Australia’s migrant communities, evident throughout the country’s history, strongly suggests that this is untrue. In addition, the minority of non-migrants in the class of workers would also find themselves classified as employees, whatever their situation and preferences.

21. The fourth factor, set out in clause 5(4)(d), is whether there is evidence of exploitation or an attempt to avoid the application of industrial conditions that would generally apply to employees.

- The notion of ‘exploitation’ is ambiguous and unexplained. It is also entirely subjective. What appears to one person to be exploitation may appear to another to be no more than a mutually beneficial agreement. In our estimation ‘evidence of exploitation’ is so nebulous a concept as to be unworkable as a basis for decisions by the Commission.
- It is difficult to see how ‘an attempt to avoid ...’ would work in practice. In a trivial sense, any resort to arrangements based on a contract for services constitutes ‘an attempt to avoid the application of industrial conditions that would generally apply to employees’ but that hardly justifies deeming the affected workers to be employees. Adopting this approach implies that the objective of the proposed legislation is to deny all workers choice in their working arrangements.

22. It has also been noted that the approach embodied in proposed sections 5(2)(b) and 5(4) is entirely absent from the Stevens’ Report and from Professor Andrew Stewart’s submission, on which the report draws extensively in this area. Finally, the explanatory information accompanying the draft bill provides no argument in support of this approach.

23. In summary, there has been broad community support for a workplace relations framework that maximises choice for workers and businesses and minimises regulatory constraints and interference by third parties. The flexibility afforded by such a framework plays a crucial role in the creation of high productivity and high pay workplaces.

24. The proposed amendments would give the Commission the capacity to deem contractors to be employees even if both the contractors and those to whom they provide services do not wish to enter an employment relationship. The amendments prepare the way for gratuitous interference in the affairs of contract workers and the businesses that engage them. The SA Government is strongly encouraged to reconsider these proposals.

25. Although both limbs of proposed section 5(2) are undesirable and should be reconsidered there is particular concern that proposed section 5(2)(b) (and the supplementary material at proposed section 5(4)) are so vague in their wording as to be unworkable, unwarranted in their intrusiveness, and unsupported either by the Stevens' Report or by other argument. The SA Government is strongly urged to abandon provisions along those lines.

Labour Hire Agencies

26. Australian businesses operate in an environment of rapid technological change and increasing global competition. For businesses to survive and prosper in this environment, it is essential that the workplace relations framework facilitates efficient, flexible and competitive business operations.

27. Labour hire employment provides an important source of flexibility in the Australian labour market. For many employers and employees, labour hire employment increases the competitiveness and efficiency of businesses and allows a better balance of work and family responsibilities. It does this by, for example, allowing employers to manage peaks and troughs in demand, to deal with employee absences, and to manage the risk of taking on permanent employees. In addition, it provides employees with a way into the labour market, allows employees more control over when and where they will work, and develops skills through exposure to different work environments.

28. The draft legislation proposes a range of measures that would substantially and inappropriately increase the regulatory burden on the labour hire industry. These measures would place at risk the substantial economic and social benefits that are provided through the flexibility and responsiveness available through labour hire employment.

29. Proposed section 5A would define the employer of a labour hire employee to be the labour hire agency, even in situations where the labour hire employee was employed by 'an associate' of the labour hire agency. Such a legislative definition is unnecessary, potentially confusing and, in some circumstances, could place unreasonable obligations on a party who, at common law, would not be classed as the employer.

30. In the majority of cases the employer of a labour hire employee will be the labour hire agency. However, there have been cases in which workplace relations tribunals and the courts have, after looking behind the labour hire arrangements, determined that under the appropriate common law tests the host employer is in fact the employer of the labour hire employee.

31. The complex range of relationships under which a person or business would be considered to be an associate of a labour hire agency, established by proposed section 5B, would increase the opportunity for the inappropriate or unreasonable deeming of a party to be an employer. In addition, the complexity of the definition of 'associates' would add to any confusion over who is the employer, for example, in a situation where two labour hire agencies are defined to be 'associates' because of common directorships.

32. It is appropriate that in those infrequent circumstances where the employer of the labour hire employee is in doubt, the employer of the labour hire employee should be established by examining the characteristics of the particular employment relationship, not by an arbitrary and complex 'one size fits' all rule.

Wages & Conditions

33. Clause 74 would provide that labour hire employees must be employed under terms and conditions of employment at least as favourable as those that would apply to employees of the host business undertaking similar work. This provision should be opposed as, in many situations, it would limit the flexibility that labour hire can provide. Many businesses are

burdened by excessively restrictive and prescriptive awards or agreements. These businesses can achieve substantial improvements in labour flexibility by utilising the services of labour hire agencies. Without access to a flexible labour force, such businesses would find it difficult to compete with businesses that operate under more modern and flexible arrangements.

34. It is also relevant that many employees prefer the labour hire mode of employment. This can be for a range of reasons including independence, flexibility to choose working arrangements and times. Employees understand they will be remunerated differently to a client's regular employees. Regulation based on the clause 74 approach increases the risk of denying employees access to this type of employment.

35. In addition, if a labour hire agency can procure employees to work in a host business more cheaply than the host business could procure its own workers and if, in doing so, the labour hire agency meets all its legal and financial obligations, then the labour hire agency should not be prohibited from doing so. Setting remuneration artificially high imposes a deadening hand on the economy as a whole.

Co-employers

36. Proposed section 5D would provide that a host business using labour hire employees would be deemed to be a co-employer of the labour hire employees if the employees had worked at the host business for six months or more over a nine month period. This proposal should not be supported as providing for co-employment could create confusion over the obligations of the co-employers and the entitlements of the labour hire employees.

37. In addition, some host businesses utilise the services of labour hire agencies because of concerns over the risks involved in taking on employees. Research has shown that many businesses will not put on additional employees because they believe unfair dismissal laws make it difficult and expensive to replace unsuitable staff. Utilising labour hire employment allows a business to pay the labour hire agency to assume risks and obligations that it is ill-equipped to take on itself. Forcing host businesses into an employment relationship would discourage some businesses from utilising labour hire agencies. This would have negative employment and economic consequences.

38. As previously recommended, it is appropriate that in those infrequent circumstances where the employer of the labour hire employee is in doubt, the employer of the labour hire employee should be established by examining the characteristics of the particular employment relationship, not by an arbitrary and complex 'one size fits all' rule.

Enterprise Agreements

Who May Make

39. The Bill provides the capacity to make multi-employer agreements.

40. In the federal jurisdiction the WR Act provides agreement-making options for both individual and collective agreements. However, the emphasis of the federal system is on bargaining at the workplace level. In this context, the WR Act requires more stringent tests for the certification of multiple business agreements. Multiple employer agreements cannot be certified unless the Commission is satisfied that such agreements are in the public interest. This is because multiple-employer agreements should not be used where it is possible for the parties to reach agreement at the individual workplace level.

41. Industry level agreements which ignore the needs of employers and employees at the workplace level should be opposed. Such agreements can result in pattern bargaining which undermines the core values of the WR Act, particularly freedom of association, flexibility and choice in agreement-making. The proposed approach represents an outdated one-sized fits all approach to workplace relations. It works against the goal of an inclusive and cooperative workplace relations system that sustains and enhances our living standards, our jobs, our productivity and our international competitiveness.

Best Endeavours Bargaining (and Enterprise Orders)

42. The Bill proposes the insertion of new provisions within Chapter 3, Part 2 of the I&ER Act to create a ‘best endeavours’ (i.e. ‘good faith’) bargaining regime.

43. The provisions would introduce a range of prescriptive requirements governing the conduct of negotiations for enterprise agreements. For example, the Bill would require negotiating parties to: ‘state and explain their position on the questions at issue to all other parties to the negotiations’ (proposed s.76A(2)(b)) and to ‘adhere to agreed outcomes and commitments’ (proposed s.76A(2)(g)). DEWR believes the restrictions contained in the Bill governing the conduct of negotiations could prevent parties from adopting innovative and flexible approaches to bargaining.

44. In addition, the provisions also encourage extensive scrutiny of, and intervention in, the bargaining process by the SA IRC. On application of one of the parties, the SA IRC could bring negotiations to an end if satisfied ‘that there is no reasonable prospect of the parties reaching agreement’ (proposed s.76A(5)(a)); or ‘that a party to the negotiations has unreasonably failed to adhere to any agreed outcome or commitment made during, or as a result of, negotiations’ (proposed s.76A(5)(b)). Further, the SA IRC could then, on the application of one of the parties, proceed to arbitrate an enterprise order (proposed s.76A(6)(b)).

45. Employers and employees consider bargaining and agreement regulation presently operating to be too complex. It can act as a deterrent to agreement making. To impose further regulation will exacerbate this problem.

46. In this regard, the provisions of the Bill go beyond what was recommended by the Stevens’ Review. The Review recommended that the SA IRC be able to arbitrate, once all other avenues have been exhausted, only on application of *all* parties, or on application of one of the parties *where it is in the public interest to do so*.

47. An evaluation of the proposed ‘best endeavours’ provisions suggest they will facilitate the proliferation of centrally arbitrated wage and conditions outcomes, and discourage agreement making. The provisions would create a restrictive regulatory web, resulting in situations where a party is unable to bargain freely without being forced into binding commitments. Where a negotiating party is unable to comply with the specified procedural requirements, another party could pursue resolution of the matters at issue via enterprise order. Alternately, a party seeking an arbitrated outcome may be encouraged to employ tactics designed to ensure that the SA IRC concludes there is ‘no reasonable prospect of the parties reaching agreement’.

48. Clearly, the ‘best endeavours’ provisions are inconsistent with the proposed revised objects of the Act ‘to provide for enterprise agreements that are relevant, flexible and appropriate’ (proposed s.3(1)(h)); and ‘to facilitate industrial efficiency and flexibility, and improve the productiveness of South Australian industry’ (proposed s.3(1)(c)).

49. The WR Act encourages individual and collective enterprise level bargaining, free from unwanted or inappropriate intervention from third parties or institutions. In so doing, it provides

opportunities for the development of productivity-enhancing, flexible working arrangements tailored to the particular needs of employers and employees. Under the WR Act, access to arbitration in the resolution of disputes is available in only a limited range of circumstances, consistent with the object of the WR Act of ensuring that the primary responsibility for determining workplace relations matters rests with the employers and employees at the workplace level. Bargaining provisions consistent with this approach would be preferred.

Approval

50. It is noted that the Bill provides the capacity for the Commission to waive strict formalities in the certification of enterprise agreements.

51. The Australian Government is committed to simplifying of the procedural aspects of agreement making. In this context, the Government's proposed Workplace Relations Amendment (Simplifying Agreement-Making) Bill 2002 allows for the approval, variation, extension and termination of certified agreements without a formal hearing, thereby preventing unwarranted intervention by third parties in agreement making. The SA Government is encouraged to consider adopting the provisions contained in the federal Bill.

Transmission of Business

52. The *Industrial and Employee Relations Act* (I&ER Act) has not previously had transmission of business provisions. The Stevens' Review correctly identified general uncertainty among employers and employees about the operation of awards and agreements when a business changes hands. Consequently the Review recommended that:

- a definition of 'transmission of business' be included in the I&ER Act which includes the transfer of assets, plant, equipment, goodwill and employee entitlements
- a provision similar to s149(1)(d) of the WR Act with regard to awards, and s170MB of the WR Act with regard to enterprise agreements, be included in the I&ER Act; and
- the Industrial Commission be empowered to hear applications to vary or avoid the application of an agreement to a transmittee, on proper grounds.

53. The Bill now proposes amendments to make an award or enterprise agreement apply following a transmission of business. The proposed amendments are drafted differently to the provisions in the WR Act. These amendments may operate more broadly than the provisions in the WR Act. This is due to the reference to a specific award or agreement applying to the employees or a particular class of employees engaged in a particular business or undertaking. By contrast, the WR Act operates with reference to whether or not the 'old employer' is bound by an award or agreement.

54. The drafting adopted for this Bill suggests that the amendments may operate where there is a substantial identity of activities performed by employees for consecutive employers engaged in the same business or undertaking.

55. Focussing attention on the activities of employees resembles a test that was used by the Federal Court for identifying a transmission of business in the public sector (*North Western Health Care Network v Health Services Union*). This test has since been rejected by the High Court of Australia (*PP Consultants v Finance Sector Union*) where a transmission of business occurs in the private sector. The High Court decided that the appropriate test was to compare

and contrast the character of the business in the hands of the old employer and the new employer respectively. If the character of the business is the same, there is a transmission of business. The activities of the employees are not relevant.

56. Furthermore DEWR presumes that the definition of ‘employees’ included in proposed clauses 29 and 90A will incorporate other proposals in the Fair Work Bill that allow the SA IRC to deem classes of workers to be ‘employees’.

57. If this is the case, the transmission of business provisions in the Fair Work Bill would operate on a much broader range of business transactions than those which are subject to the WR Act.

58. The difference in drafting may be explained by way of an example. Assume that Stainless Steel, a kitchen sink manufacturer, has decided to contract out its polishing activities to Shiners, a specialist polishing firm. If the Fair Work Bill was drafted in the same way as the WR Act transmission of business provisions, then the question of transmission would be addressed according to the approach laid down by the High Court of Australia in *PP Consultants v Finance Sector Union*:

- (a) characterise the business (or the relevant part of the business) of the first employer; and
- (b) characterise the transferred business activities in the hands of the new employer; then
- (c) compare the two businesses. If they bear substantially the same character, then the new employer has succeeded to the business of the previous employer.

59. If we apply the High Court’s approach to ‘business characterisation’ to our example there is no transmission of business:

Characterise the business of the first employer:

60. Stainless Steels is in the business of making kitchen sinks.

Characterise the transferred business activities in the hands of the new employer.

61. Stainless Steels has transferred its polishing activities to Shiners. Shiners is in the business of polishing.

Compare the two. If the two businesses bear substantially the same character, then the new employer has succeeded to the business of the previous employer.

62. While ceasing to polishing activities, Stainless Steels retains its core character of being in the kitchen sink making business. Likewise Shiners remains a polishing business. Shiner’s acquisition of Stainless’ polishing activities does not make Shiners a kitchen sink making business.

63. In other words, a transmission of business cannot occur where the new employer is engaged in a different business from the former employer. The mere fact that the new employer engages in some activities previously engaged in by the former employer, and in substantially the same way, is not enough to constitute a transmission of a business or part of a business.

64. However, the Department is of the view that the Fair Work Bill would not operate in a similar way. The draft Bill asks:

- (a) whether the specific award or agreement applies to the employees or a particular class of employees engaged in a particular business or undertaking; and
- (b) whether a new employer is the successor, transmittee or assignee of the whole or part of the business or undertaking.

65. It is conceivable that since Stainless Steel enterprise agreement (or specific award) previously applied to those employees who polished the kitchen sinks, then any company which takes over the polishing functions for Stainless Steel's kitchen sink business (say, Shiners) would become bound by the Stainless Steel award or agreement. This could result in that company being bound by multiple enterprise agreements (or specific awards) with potentially different wage rates and conditions of employment. The complications and inefficiencies created in this scenario represent a backward step for the SA workplace relations system.

66. The Fair Work Bill does not take up the Stevens' Review recommendations to allow the Commission to make orders changing the application of a transmitted agreement.

67. Our understanding of South Australian industrial law is that the Commission may unilaterally vary an agreement (section 84). However, there is no capacity for any person bound by the agreement to apply for orders seeking to vary the application of the agreement.

68. There should be some capacity for people bound by a transmitted award or agreement to seek orders from the Commission about the application of the instrument.

Commission's Jurisdiction to Intervene

69. The proposed changes to the SA IRC's jurisdiction to intervene in industrial disputes between persons bound by enterprise agreements should not be supported.

70. Currently, before the SA IRC intervenes in such a dispute, it should ensure that dispute resolution procedures contained in the agreement have been exhausted. It further requires that a determination made by the SA IRC in settlement of such a dispute must not be made in relation to a condition of employment that is a subject matter of the agreement, unless to correct an ambiguity or uncertainty in the agreement and must be consistent with the agreement (s.82 (2)).

71. The amendments to s.82 proposed by the Bill would allow a party to an agreement, or a registered association with at least one member who is bound by the agreement, to apply to the SA IRC to assist in the resolution of a dispute relating to the agreement, regardless of whether the dispute resolution procedures contained in the agreement have been exhausted. Furthermore, the SA IRC could proceed to vary the agreement, not only to correct an ambiguity or uncertainty but also to give effect to an agreed resolution of the dispute, or to provide an appropriate settlement to the dispute.

72. These amendments have potentially adverse consequences for workplace culture and productivity in South Australia. Rather than encouraging employers and employees to attempt to initially resolve issues arising for themselves in a co-operative manner using internal processes, the measures would encourage the escalation of such matters into formal adversarial processes. Considered alongside the proposed changes to the SA IRC's powers to vary agreements beyond providing clarity or removing ambiguity, these provisions could act to undermine the essential certainty provided by enterprise agreements. Clarity regarding the terms and conditions of employment provided by formal agreements of set duration is vital to harmonious, stable and productive workplaces. The proposed provisions would reduce confidence and certainty in agreement-covered workplaces by facilitating increased formal disputation, potentially involving damaging industrial action, during the life of enterprise agreements.

73. A principal object of the WR Act is ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level. Consistent with this, the WR Act requires that certified agreements must contain dispute resolution procedures to deal with disputes arising during the life of the agreement. While those dispute resolution procedures may provide for the

AIRC to settle disputes over the application of the agreement (s.170LW), they need not necessarily do so. The WR Act does not contain provisions which actively encourage the parties to seek intervention by the AIRC in matters arising over the interpretation of agreements.

74. The WR Act provides certainty for businesses and workers by ensuring that any substantive variation to a certified agreement requires the approval of the employer and a valid majority of employees covered by the agreement (s.170MD). Furthermore, industrial action cannot be taken in support of claims against an employer during the life of a current certified agreement. Industrial action that breaches this rule is directly prohibited (s.170MN) and can be the subject of Federal Court injunctions and financial penalties.

Duration of Agreement

75. The Bill seeks to extend the duration of an agreement from 2 to 3 years. DEWR notes that this is consistent with the current provisions of the WR Act and welcomes this alignment of the two Acts.

Awards

76. Given the broad support for simplifying Australian workplace relations it would be preferable for any changes in State jurisdictions to move closer to the federal model. Many workplaces have complicated industrial coverage that can include a mix of State and federal awards and agreements. Within a workplace, minimum standards for conditions of employment and/or processes for establishing conditions of employment can differ creating confusion and inconsistency for both employers and employees. Further, as was demonstrated in the federal workplace relations jurisdiction, a move to a simplified award system provides the proper incentive for employers and employees to achieve workplace flexibility through agreement making. This Bill, in dealing with the State award and agreement making framework, has missed an opportunity to reduce inconsistency with the federal framework.

Awards of General Application and Minimum Standards

77. The Bill introduces a new type of order – allowing for an ‘award by General Application’ under which minimum standards and wages set by the Commission will immediately flow through into all awards. Awards will no longer need to be individually brought before the Commission to incorporate test case standards and/or minimum terms and conditions of employment. While wages and terms and conditions of employment are maintained at minimum standard levels this provision is not overtly problematic. However it does raise the potential for significant changes to be made to minimum standards without further legislation.

Retrospectivity

78. Providing for the retrospective application of awards is inconsistent with the federal approach to award making and with long standing practice in most jurisdictions. Retrospective awards can increase the administrative costs of employers and remove certainty in employment costs.

Settlement of Disputes

79. For award covered employees, the Bill introduces a new right for individual employees to bring proceedings by application to the Industrial Commission. While the legislation already states an ‘employee’ may make an application the Bill introduces the specific right of an ‘individual’ to make an application.

80. It is generally agreed that the award system should operate as a safety net of minimum terms and conditions with general and collective application. The longstanding conventional understanding of industrial disputes under the award framework is that they are collective in nature.

81. The provision in the Bill was drafted in response to the South Australian Review finding that the Full Court has ruled against individual applications to the Commission. The Full Court ruled (*Public Service Association of South Australia v Commissioner for Public Employment (2002 SAIRC 25)*) that an individual cannot bring proceedings before the Industrial Commission based primarily on an interpretation that an ‘industrial matter’ must be collective in nature. Access will not be available to individuals where there are alternative independent grievance settling procedures.

82. In making its determination the South Australian Commission was following the conventional view that an industrial dispute is collective in nature. The Federal legislation is consistent with this longstanding convention as is the legislation of other States. In *Whittaker v Department of Finance and Administration AIRC (Eames C) (S6355) 24/5/00*, a similar finding was made by the AIRC. The Commissioner was satisfied from the applicant’s claim that the issues involved only concerned a single person, and so it was held to be an individual dispute. The matters were found to involve a personal disagreement between the applicant and respondent as to the applicant's entitlements - which did not fall within the definition of industrial dispute as defined in the WR Act. Accordingly the Commission had no jurisdiction and the application was dismissed.

83. Similar cases in the Federal jurisdiction have cited the longstanding principle articulated in *George Hudson Limited v The Australian Timber Workers Union (1923) 32 CLR 413*, where Isaacs J at page 441 illustrated the nature of an industrial dispute.

“The very nature of an 'industrial dispute', as distinguished from an individual dispute, is to obtain new industrial conditions, not merely for the specific individuals then working from the specific individuals then employing them, and not for the moment only, but for the class of employees from the class of employers limited by the ambit of disturbance or dislocation of public services which has arisen, or which might arise if the demand were not acceded to and observed for a period really indefinite. The concept looks entirely beyond the individuals who are actually fighting the battle. It is a battle by the claimants, not for themselves alone and not as against the respondents alone, but by the claimants so far as they represent their class, against the respondents so far as they represent their class.”

84. The proposed Bill overturns the understood meaning of ‘industrial dispute’ and may lead to confusion and uncertainty over jurisdictional issues for individual claims. Further encouragement for employers and employees to develop individual grievance procedures would be a more viable alternative. Where legislation is prescriptive about the steps to be taken in

dispute settling, there is little incentive for workplaces to develop alternatives. This Bill may limit the spread of alternative dispute settling procedures.

Pay Equity

85. Currently, s.69(2) of the Industrial and Employee Relations Act provides:

A rate of remuneration fixed by a contract of employment, or an award or enterprise agreement, must be consistent with the Equal Remuneration Convention.

86. The ILO's Equal Remuneration Convention (C100) 1951 is reproduced in Schedule 6 to the Act and provides at Article 2.1:

Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.

87. Article 1(b) of the convention provides:

For the purpose of this Convention -- ... (b) the term *equal remuneration for men and women workers for work of equal value* refers to rates of remuneration established without discrimination based on sex.

88. Proposed clause 94 reads:

In making an award regulating remuneration, the Commission must take all reasonable steps to ensure that the principle of equal remuneration for men and women doing work of equal or comparable value is applied (insofar as may be relevant).

89. Comparable statutes in New South Wales and Queensland contain similar provisions:

Industrial Relations Act 1996 (NSW) s.23: 'Whenever the Commission makes an award, it must ensure that the award provides equal remuneration and other conditions of employment for men and women doing work of equal or comparable value.'

Industrial Relations Act 1999 (Qld), s.60(1): 'The commission may make any order it considers appropriate to ensure employees covered by the order receive equal remuneration for work of equal or comparable value.'

90. By contrast, the federal and Western Australian statutes contain provisions that refer just to 'work of equal value' rather than 'work of equal or comparable value':

Workplace Relations Act 1996 (Cwlth), s.88B(3): 'In performing its functions under this Part [Part VI—Dispute prevention and settlement], the Commission must have regard to the following: ... (d) the need to apply the principle of equal pay for work of equal value without discrimination based on sex; ...'

Section 6(ac) of the *Industrial Relations Act 1979* (WA) merely includes in the objects promotion of 'equal remuneration for men and women for work of equal value.'

91. For the sake of consistency with the WR Act, DEWR would suggest the current provision be retained. The existing provision is consistent with the WR Act in that it is based on the ILO Equal Remuneration Convention which (a) does not refer to work of 'comparable value'; and (b) includes reference to equal pay for work of equal value 'without discrimination based on sex'.

92. It would preferable if the meaning of equal remuneration for work of equal value was based on the ILO Equal Remuneration Convention.

Contract Workers

Safe and Fair Rates for Contract Workers

93. Proposed section 96 would grant the SA IRC the power to make awards governing conditions of work for contract workers. This type of open-ended provision, which would effectively allow the SA IRC to bring contract workers under award coverage willy-nilly if the contractors are willing to work for lower pay than employees under awards or enterprise agreements should not be supported.

94. Difficulties with the draft provision include:

- It is important that individuals be able to choose whether to work as employees or independent contractors. Independent contracting generally involves the individual assuming more risk than he or she would in an employment relationship, but also holds out the prospect of more independence and greater rewards. Many people strongly prefer to work as independent contractors. This provision would allow the Commission unilaterally to deny people the right to work as an independent contractor.
- Flexibility in working arrangements not only maximises individual choice, which is desirable in itself, but increases the economic efficiency of the labour market. While quantification is difficult, there is no doubt that labour market reforms since 1996 have helped to boost employment by making more readily available flexible working arrangements such as labour hire employment, casual employment and independent contracting. This proposal will directly reduce labour market flexibility.
- Proposed section 96(1) would allow the SA IRC to make an award for contractors in an industry ‘if the Commission is satisfied that the award is reasonably necessary in order to avoid proscribed standards of remuneration.’ Proscribed rates of remuneration are rates ‘significantly less than the rates that apply for employees under awards or enterprise agreements under this Act, taking into account differences in work and financial arrangements arising from the fact that the work is being performed by independent contractors, and general community standards about fair return for work (as assessed by the Commission).’
 - This penalises independent contractors for being efficient. If an independent contractor can meet his or her legal and financial obligations and still do the work more cheaply than an employee under an award or enterprise agreement, he or she should be encouraged to do so, not prohibited from doing so. Setting remuneration artificially high will only succeed in redistributing income from businesses to workers while imposing a deadweight loss on the economy as a whole.
 - The expression ‘general community standards about fair return for work (as assessed by the Commission)’ is disturbingly vague. Labour market regulation should focus on setting appropriate and effective minimum standards of pay and conditions for genuine employees. Instead, this provision would empower the Commission to set remuneration of non-employees by reference to what ‘general community standards’ – assuming there are such things – hold to be fair. It is difficult to see how the Commission’s assessment

of ‘general community standards about fair return for work’ can amount to anything more than guesswork.

95. The restrictions that proposed section 96(3) would impose on the scope of awards that the SA Commission could make under proposed section 96(1) would go only a little way to mitigating the undesirable effects of these provisions. Awards under proposed section 96(1) would be limited to the regulation of working hours and pay, together with the recording of these matters. Proposed section 96(3)(d) allows awards under proposed section 96(1) to ‘provide for other matters that, in the opinion of the Commission, are reasonably necessary in order to avoid proscribed rates of remuneration.’ It is quite unclear what these ‘other matters’ may be. Since proposed section 96(3)(e) allows awards to ‘provide for incidental or ancillary matters’, 96(3)(d) appears superfluous.

Unfair Contracts

96. Clause 35 would establish an unfair contract jurisdiction in SA by inserting into the Act a new Part 3B.

97. The incorporation of unfair contract provisions in workplace relations legislation should not be supported. If a business and a service provider, of whatever legal form, choose to enter into a contract for services rather than a contract of service, that arrangement should be regulated, along with other contracts for services, by the common law of contract and related statute law, in particular, the *Trade Practices Act 1974* (Cwlth). In adopting this position, DEWR is conscious that the WR Act contains provisions (ss.127A-127C) which allows the Australian Industrial Relations Commission to review harsh or unfair contracts. We, however, believe that such provisions should not form part of workplace relations legislation. This is consistent with the approach taken in the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 which sought to repeal those provisions.

98. Proposed section 97(1) provides that ‘unfair contract’ means ‘a contract:

- (a) that is harsh, unconscionable or unfair; or
- (b) that is against the public interest; or
- (c) that provides a total remuneration that is less than a person performing the work as an employee would receive; or
- (d) that avoids, or is designed to avoid, the provisions of an industrial instrument.’

All four paragraphs of this proposed section raise difficulties.

99. Proposed section 97(1)(a) is superfluous. Part IVA of the Trade Practices Act already contains adequate provisions to guard against unconscionable conduct by the parties to contracts for services. As argued above, such contracts should not be regulated by workplace relations law.

100. In relation to proposed section 97(1)(b), it is inappropriate for the SA Commission to have the power to decide what work contracts are against the public interest. If a class of work contract emerges which may be against the public interest and which is not sufficiently controlled by existing legislation, it is more properly a matter for the legislature to delimit the class of contract and decide on the appropriate controls. For an industrial tribunal to make such judgements on a case by case basis goes beyond the proper function of workplace relations law.

101. Proposed section 97(1)(c) prohibits contract workers from working more efficiently than employees and dividing the efficiency dividend with the business for which the work is

performed. As with proposed section 96(1) the effect will be to redistribute income from businesses to workers while imposing a deadweight loss on the economy as a whole.

102. Finally, proposed section 97(1)(d) suffers from the same weakness as proposed section 5(4)(d). It is quite unclear how the Commission could sensibly distinguish between a contract that avoids the provisions of an industrial instrument – and is therefore unfair – and a contract that does not. Almost all contracts for services will omit some provisions of the most nearly comparable industrial instrument but it would be unreasonable to deem all such contracts unfair for that reason.

103. In summary, the incorporation of unfair contract provisions in workplace relations legislation should not be supported and proposed Part 3B should be omitted from the Bill.

Unfair Dismissal

104. It is widely recognised that the existence of differing state and federal unfair dismissal schemes is inefficient and excessively complex, and creates confusion and uncertainty for employees and employers alike. A single unfair dismissal system, or even increased consistency between the State and federal unfair dismissal systems, would lead to less complexity, lower costs and more certainty, and would have flow-on benefits for employment and the economy in general.

105. On this basis, those proposals that would bring the South Australian unfair dismissal system into alignment with the federal system should not be opposed. There are elements of the proposed legislation, however, that are inconsistent with the federal system, and, by unreasonably increasing the regulatory burden on businesses, would have adverse impacts for South Australia.

Re-employment

106. Proposed section 46 provides that re-employment is to be regarded as the preferred remedy for unfair dismissal. The Commission may only award another remedy if it has cogent reasons to believe that re-employment would not be appropriate in the circumstances. This approach is consistent with s.170CH(6) of the WR Act which provides that the AIRC may only order an amount in lieu of reinstatement *if it thinks that reinstatement is inappropriate*. DEWR has no objections to the insertion of proposed section 46.

Structure – Valid Reason for Dismissal and Improved Clarity

107. Subclause 41(2) identifies a range of factors to be taken into account by the Commission when considering whether a dismissal was unfair. Subclause 41(3) identifies reasons that are not valid reasons for termination. These factors and reasons are ostensibly based on provisions of the WR Act. Differences between the wording used in the proposed South Australian and the federal legislation, however, provide scope for differing interpretations of the meanings of the provisions. This potential for differing interpretations is undesirable as it would add to the confusion and complexity arising from the differing schemes. The Bill would be improved if the wording used in ss170CG(3) and 170CK(2) of the WR Act was imported unamended into the South Australian legislation.

108. Subclause 41(4) would provide that if a redundancy payment is provided in accordance with a relevant industrial instrument, the dismissal cannot be regarded as unfair solely on the ground that the payment was inadequate. This amendment is not opposed.

109. Subclause 41(1)(a) would amend the *Industrial and Employee Relations Act 1994* to exclude casual employees from access to unfair dismissal provisions unless they have been engaged by an employer on a regular and systematic basis over a period of at least 6 months and have a reasonable expectation that the pattern of re-engagement would continue. It is noted that while the *Industrial and Employee Relations Act 1994* currently provides for a nine month exclusion period, the prevailing provisions of the *Industrial and Employee Relations (General) Regulations 1994* provide for a six month period.

110. The WR Act provides that casual employees are eligible to lodge unfair dismissal applications after 12 months if they have been employed on a regular and systematic basis with a reasonable expectation of continuing employment.

111. Twelve months is a more appropriate duration for the exclusion period than six months. The shorter period would be onerous for many businesses, particularly small business, making it difficult for them to plan and manage their employment practices. It would create uncertainty regarding the obligations and liabilities of businesses, and leave businesses open to unfair dismissal claims for a larger number of casual employees. The effect of this would further discourage businesses from taking on employees. In particular, businesses that operate in environments where the strength or duration of demand is uncertain would be disadvantaged by the shorter exclusion period. Such environments are not uncommon in, for example, the tourism industry.

112. In addition, with regard to the exclusion of casual employees, it is noted that aside from the duration of the casual employee exclusions, the wording used in the South Australian regulations and the WR Act are consistent. The proposed amendment would introduce the concept of “a reasonable expectation that the pattern of re-engagement would continue”. The regulations currently refer to “a reasonable expectation of continuing employment by the employer”. Introduction of the concept of “the pattern of re-engagement” would potentially increase the complexity and confusion of unfair dismissal regulation. There may be doubt over how the new concept would be interpreted by the courts or the Commission, and there would be increased disparity between the South Australian and Australian Government unfair dismissal schemes.

Protection for Injured Workers

113. Subclause 41(5) would provide that a dismissal cannot be taken to be valid if an employer has failed to comply with the provisions of the *Workers Rehabilitation and Compensation Act 1986*. DEWR does not support this proposal. There are alternate and adequate remedies available to ensure compliance with OHS legislation. Increasing the complexity of unfair dismissal provisions and the regulatory burden on businesses in this manner is unnecessary and destructive of employment.

Workers Engaged for Specific Tasks or Periods

114. Subclause 41(1)(b) would provide that the exemption from unfair dismissal regulation for employees who are engaged for a specific task or specific period would not apply if there was a reasonable expectation that the pattern of employment would continue. This proposal would reduce the certainty of the operation of the unfair dismissal provisions and would create further

complexity and confusion for employers and employees. The proposed amendment is unnecessary and should not be supported.

Child Employment

115. See comments under International Labour Standards section above.

Right of Entry

116. Presently, the I&ER Act bases union right of entry to the workplace upon authorisation from award or agreement provisions (s.140). The Bill proposes that s.140 be amended to provide for a 'standard' statutory right of entry regime.

117. The proposed provisions would allow a union official, after giving reasonable notice to the employer of their intention to do so, to enter any workplace at which one or more members, or potential members, of their association work. Upon entry, a union official would have the right to:

- inspect time books and wage records at the workplace;
- inspect the work carried out at the workplace and note the conditions under which the work is carried out; and
- if specific complaints about non-compliance with the I&ER Act, an award or an enterprise agreement have been made, interview any person who works at the workplace about the complaints.

118. The statutory right of entry provisions proposed by the Bill should not be supported.

119. Because the proposed provisions differ significantly from those contained in the WR Act, confusion about rights and responsibilities over union right of entry could arise in workplaces where both Federal and State laws apply. The Cole Royal Commission into the Building and Construction Industry recognised that concurrent differing regulation of union right of entry to the workplace by Federal and State laws can make it difficult for industry participants to know their rights and obligations and can lead to laws being disregarded or flouted. To address such problems, the Royal Commission recommended that entry and inspection provisions in building-specific federal legislation be implemented to the full extent of the Commonwealth's Constitutional power. This is reflected in the right of entry provisions contained in the Australian Government's Building and Construction Industry Improvement Bill 2003. The Australian Government will continue to consider and explore approaches designed to ensure greater national unification in workplace relations matters, wherever possible.

120. The right of entry provisions contained in the Bill on specific grounds should also be opposed.

121. If 'standard' union right of entry provisions are to be included within the I&ER Act, the provisions should ensure an appropriate balance between the rights of unions to represent the interests of their members, and the right of businesses to conduct their affairs free from undue interference. It is also important that the rights of non-union members, the vast majority of employees in SA, be afforded due recognition. The Bill would not ensure such a balance.

122. The Bill would allow a union official to enter a workplace without having evidence that they have reasonable grounds to suspect a breach of an award, agreement or the I&ER Act. DEWR is concerned that this could facilitate 'fishing expeditions' by unions, resulting in unnecessary and costly disruption to business.

123. The Stevens Review recommended that the amended I&ER Act provide for access to the workplace by authorised officials only in non-working time, or at an alternate time agreed to by the employer. However, the Bill provides that the proposed powers of inspection may be exercised at a time when work is being carried out at the workplace (proposed s.140(1a)). The potential for damaging disruption to business operations of this provision is quite evident.

124. While the Bill contains a provision which specifies that in exercising entry powers an official must not unreasonably interrupt the performance of work at the workplace (proposed s.140(2a)), the interaction of this provision with the harassment and hindering civil penalty offences at s.140(3) is not clear. This creates the potential for costly legal uncertainty affecting both unions and business.

125. The fact that the Bill would provide access to the time and wage records of non-members is also a concern. The policy of the Australian Government is that unions should operate as membership-based service organisations. In this context, it views union access to non-members' records as inappropriate as the industrial rights of non-members are already appropriately protected via existing industrial inspectorate arrangements.

Protection for Outworkers

126. Proposed clause 93 allows the Minister to establish codes of practice, which may be mandatory, in relation to the employment of outworkers. This is similar to codes of practice recently adopted by the New South Wales and Victorian governments in their outworker legislation. The South Australian government indicates that it will consult with stakeholders regarding further provisions relating to recovery of wages by outworkers before finalising the amendments. It is assumed that the amendments will be along similar lines to the *Outworkers (Improved Protection) Act 2003* (Vic) and the *Industrial Relations (Ethical Clothing Trades) Act 2001* (NSW).

127. While DEWR does not have a view concerning the proposed power for the Minister to establish codes of practice, it is fundamentally opposed to the deeming of contract outworkers to be employees, as set out in proposed section 5(d). The Australian Government considers that it is important not to constrain flexible working arrangements and the ability for employers and workers to choose alternative forms of employment. Workers should be free to enter into either contractual or employment relationships. Deeming provisions tend to inhibit this flexibility. This issue is further discussed above under the heading *Contract of Employment*.

Conclusion

128. As stated in the introduction to this submission, DEWR recognises that some of the proposals contained in the Bill will improve the operation of the South Australian workplace relations system. These positive aspects include some changes that simplify the agreement making process, the extension of the duration of agreements and some aspects of the unfair dismissal provisions.

129. However this submission has argued that the overall policy direction underpinning this Bill is retrogressive and represents a return to the less than successful approach adopted by the federal *Industrial Relations Reform Act 1993*. This is particularly reflected in those provisions which promote a more centrally controlled system where institutions and third parties have increased powers over workplace relations at the expense of employers and employees.

130. The main retrograde matters discussed in this submission include the proposed amendments concerning:

- the contract of employment, in particular the deeming provisions;
- the increased complexity and reduced flexibility created by the extended regulations covering the labour hire industry;
- changes to enterprise agreement provisions which encourage multi-employer agreements and increase procedural red tape through the ‘best endeavour’ (i.e. good faith bargaining) approach;
- changes to dispute resolution processes which ‘re-institutionalise’ workplace relations by allowing the intervention of the SA IRC prior to the workplace level dispute resolution procedures contained in an agreement being exhausted;
- the rejection of the conventional view that an industrial dispute is collective in nature by the introduction of a new right for individual award covered employees to bring proceedings before the SA IRC;
- the constraint on contractual arrangements which reduce choice for individual workers, reduce labour market flexibility and penalise improved efficiency; and
- the right of entry for union officials which would result in unnecessary and costly disruption to business and raises privacy issues with regard to union access to non-member employment records.

131. On a broader, more progressive level DEWR believes that the Bill in its current form represents a missed opportunity to advance the harmonisation of State and Commonwealth workplace relation systems. In particular, the SA Government should consider:

- adopting the provisions contained in the *Workplace Relations Amendment (Transmission of Business) Bill 2002* to regulate the manner in which existing enterprise agreements are dealt with when a business changes ownership;
- harmonising the SA award system with the Commonwealth award system; and
- fully aligning the regulation of unfair dismissals with the Commonwealth system rather than the current approach of selective alignment.

132. In closing, DEWR anticipates that the SA Government will give serious consideration to the arguments raised in this submission and amend the provisions of the *Industrial Law Reform (Fair Work) Bill 2004* to better reflect the interests of South Australian employers and employees and to promote an internationally competitive economy.