CHAPTER-V

THE WORKPLACE RELATIONS ACT, 1996-A CRITICAL APPRECIATION
Chapter - V

THE WORKPLACE RELATIONS ACT, 1996- A CRITICAL APPRECIATION

Australia’s previously high levels of industrial disputes have been a cause of concern and a constraint on the economic and employment growth. The number of days lost to strikes and other forms of industrial action seriously affected the efficiency, quality and reliability of Australian industry. It was a major disincentive to investment and to improved export performance.

In the past reputation of Australia as a strike prone nation was often well justified: the average number of days lost to disputes in Australia was up to ten times higher than some of the major trading partners of Australia such as United States, and around 100 times higher than for Japan. In a country with a workforce of only around 8 million employees, Australia lost an
average of over 1050000 working days each year to industrial disputes between 1987 to 1995.¹

Changes to the Federal workplace relations system were introduced by the Workplace Relations Act 1996. The Act aims to ensure that "the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace." Agreement making is now the focus of the Australian workplace relations system. Agreement making is now the main way wages and working conditions are settled at the enterprise and workplace level. State Governments have also introduced changes aimed at decentralizing workplace relations. In the past, Australia had a highly centralized workplace relations system, which emphasized the settlement of disputes by independent workplace relations' tribunals. In arbitrating disputes, tribunals produced industrial awards setting out terms and conditions of employment. Overall the system in the past relied more on tribunals, unions and employers associations than on encouraging employers and employees to reach agreements based on the

circumstances of their particular enterprise or organisation.

The John Howard\textsuperscript{2} Government's Industrial Relations programme, enshrined in the Workplace Relations Act 1996, became operative in early 1997. The legislation sought to re-write the former Labour Government's \textit{Industrial Relations Reform Act 1993}, which the coalition parties regarded as "pro-union", and unsuccessful in delivering flexibility to Australian workplaces. According to the architect's, of the Workplace Relations Act, 1996 the Act, would address the perceived failings of the Industrial Relations Reform Act.\textsuperscript{3}

Some of the central features of the Workplace Relations Act, 1996 are as follows:

- It seeks to stress on agreement making as the primary mechanism for establishing terms and conditions of employment.
- It allows parties to choose the sort of agreement, which best suits, their needs (which may include using

\textsuperscript{2} Prime Minister of Australia
\textsuperscript{3} \textit{The Workplace Relations Act in Operation}, ed Richard Naughton, Centre for Employment and Labour Relations Law (1998) p vi
non-unionised certified agreements or individualized Australian Workplace Agreements).

- It downgrades the importance of awards, and limits the Commission's award-making jurisdiction to a range of designed "allowable award matters".

- It is strongly influenced by the principle of "freedom of association" - which emphasizes the right of individuals to choose whether or not be union members, and which union they wish to join.

- It includes new statutory penalties for any unlawful industrial action (i.e., strike and other forms of industrial action apart from "protected action" taken during a bargaining period).

Although the John Howard Government of Australia was forced to compromise about much of its policy programme in order to ensure passage of the legislation, the Workplace Relations Act, 1996 does mark a radical change of direction in Australian industrial regulation. Even though some of its policies were diluted during the Parliamentary passage of the Bill, the Government has succeeded in establishing a system that is primarily focused upon parties at workplace level, with a reduced
role for third parties (most obviously, unions and the Commission).

1. objectives of Australian Workplace Relations Act 1996:

The principal object of this Act is to provide a framework for cooperative workplace relations which, promotes the economic prosperity and welfare of the people of Australia by:

(a) Encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through high productivity and a flexible and fair labour market.

(b) Protecting the competitive position of young people in the labour market, promoting youth employment, youth skills and community standards and assisting in reducing youth unemployment; and

(c) 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; and

4 Supra n 3
(d) Enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by the Act.

(e) Providing the means for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level, upon a foundation of minimum standards.

(f) To ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment.

(g) Providing a framework of rights and responsibilities for employers and employees, and their organization, which support fair and effective agreement making and ensures that they abide by awards and agreements applying to them.

(h) Ensuring freedom of association, including the rights of employees and employers to join an organization or association of their choice, or not to join an organization or association.
(i) Ensuring that employee and employer organizations registered under this Act and representative of and accountable to their members, and are able to operate effectively.

(j) Enabling the Commission to prevent and settle industrial disputes as far as possible by conciliation and, where appropriate and within specified limits, by arbitration.

(k) Assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers.

(l) Respecting and valuing the diversity of the workforce by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

(m) Assisting in giving effect to Australia’s international obligations in relation to labour standards.
2. Definitions and meaning of various terms as mentioned in the Act

(a) Australian Workplace Agreement

Australian Workplace Agreement (AWA) is the centrepiece of the recent Workplace Relations Act 1996. An Australian Workplace Agreement is a formalized individual agreement made directly between an employer and employee, which will entirely displace any relevant award. Employers make Australian Workplace Agreements directly with individual employees. The role of third parties (e.g. a union) is limited to that of acting as a 'bargaining agent', where specifically appointed by one of the parties. This focus upon the individual, relationship is in tune with the Workplace Relations Act’s object of placing 'primary responsibility' on employers and employees for determining matters, which affect their relationship.

(b) Demarcation dispute

Demarcation dispute includes:

---

6 Supra n 5 Sec 4
7 Supra n 5 Sec 4
I. A dispute arising between 2 or more organisations, or within an organisation, as to the rights, status or functions of members of the organisations or organisation in relation to the employment of those members; or

II. A dispute arising between employers and employees, or between members of different organisations, as to the demarcation of functions of employees or classes of employees; or

III. A dispute about the representation under the Act of the industrial interests of employees by an organisation of employees.

(c) Employment Advocate

Office of the Employment Advocate (EA) under the Workplace Relations Act is a new agency established primarily to undertake approval of Australian Workplace Agreements. The office of the Employment Advocate was set up in March 1997. The Head of Office of the Office Employment Advocate is called the Employment Advocate and is appointed by the government. The functions of the office Employment Advocate include filling and

\[\text{Supra n 3}\]
approving Australian Workplace Agreements and ensuring that they meet all statutory requirements, providing assistance and advice to employers and employees on the Workplace Relations Act, 1996.

(d) Industrial Action

'Industrial action' is defined to include everything from a strike through the 'performance of work in a manner different from that in which it is customarily performed', to 'bans', limitations or restrictions on the performance of work.' It does not, however, include action by employees which is authorised or agreed to by their employer or which is based on reasonable concerns for their health or safety: nor does it include action by an employer which is 'authorised or agreed to by or on behalf of employees of the employer.'

(e) Industrial Dispute

Industrial dispute means

(a) Industrial dispute (including a threatened, impending or probable industrial dispute):

(i) Extending beyond the limits of any one State; and

---

9 Supra n 5 sec. 4
10 Supra n 5 sec. 4
(ii) That is about matters pertaining to the relationship between employers and employees; or

(b) A situation that is likely to give rise to an industrial dispute of the kind referred to in paragraph (a); and includes a demarcation dispute (whether or not, in the case of a demarcation dispute involving an organisation or the members of an organisation in that capacity, the dispute extends beyond the limits of any one State).

(f) Industrial Situation

Industrial situation means a situation that, if preventive action is not taken, may give rise to:

(a) An industrial dispute of the kind referred to in paragraph (a) of the definition of Industrial dispute; or

(b) A demarcation dispute of the kind referred to in that definition.

(g) Industry means and includes,

---

11 Supra n 10
12 Ibid sec. 4
(a) Any business, trade, manufacture, undertaking or calling of employees;
(b) Any calling, service, employment, handicraft, industrial occupation or vocation of employees; and
(c) A branch of an industry and a group of industries.

(h) Trade Union

Trade union means;

(a) An organisation of employees;
(b) An association of employees that is registered or recognized as a trade union (however described) under the law of a State or territory; or
(c) An association employees a principal purpose of which is the protection and promotion of the employees interests in matters concerning their employment.

3. The Australian Industrial Relations Commission

The focus of the Act is on the workplace and the parties directly involved in the employment relationship, rather

13 Supra n 12
14 Part II Div, Workplace Relations Act, 1996.
than on third party involvement, thus signifying a more limited role for the Commission. The Commission is more concerned with improving the efficiency and productivity of Australian workplaces. The Commission’s work is focused on the adjudication of termination of employment matters, the performance of functions in relation to the maintenance and simplification of awards and the negotiation and certification of agreements. Commission plays a considerably smaller role in dispute settlement. The Commission’s main role is to conciliate, and to arbitrate only when both parties agree, or when the public interest is threatened.

3.1 Establishment of the Commission

Part II Division 1 of the Act speaks about the establishment of the Commission. Section 8 establishes the Commission. The Commission consists of the following officers:

(a) A President and 2 Vice Presidents

(b) A number of Senior Deputy Presidents

(c) A number of Deputy Presidents

(d) A number of Commissioners.
The Governor-General makes the appointment of the above officers of the Commission and hold office as provided by the Act. Each Presidential Member has the same rank, status and precedence as a Judge of the Court. Qualifications for appointment of the above persons are prescribed under section 10 of the Act. A person, who is or has been a Judge of a court created by the Parliament; or has been a Judge of a court of a State or Territory; or has been enrolled as a legal practitioner of the High Court, or the Supreme Court of a State or Territory, for at least 5 years; and or in the opinion of the Governor-General, the person is, because of skills and experience the field of industrial relations, a suitable person to be appointed as President.

Tenure of the Commission Members is stated in section 16 of Workplace Relations Act, 1996. A member of the Commission holds office until the member resigns or is removed or attains the age of 65 years.

3.2 Representation of Parties

(1) Party to a proceeding before the Commission may appear in person or may be represented by counsel, solicitor or agent,

15 Part II Div 3, Sec. 42, Workplace Relations Act, 1996
(a) By leave of the commission and with the consent of all parties;

b) by leave of the commission, granted on application made by a party, if the commission is satisfied that, having regard to the subject-matter of the proceeding, there are special circumstances that make it desirable that the parties may be so represented; or

c) By leave of the commission, granted on application made by the party, if the commission is satisfied that counsel, solicitor or agent can only adequately represent the party.

(2) A party that is an organisation may be represented by:

a) A member, office or employee of the organisation; or

b) An officer or employee of a peak council to which the organisation is affiliated.

(3) An employing authority may be represented by a prescribed person.

(4) A party other than an organisation or employing authority may be represented by:
(a) An officer or employee of the party;

(b) A member, officer or employee of an organisation of which the party is a member;

(c) An officer or employee of a peak council to which an organisation or association of which the party is a member is affiliated.

(5) Where the minister is a party (other than in the capacity or employing authority), the minister may be represented by counsel or solicitor or by another person authorised for the purpose by the minister.

(6) Where the minister is a party (other than in the capacity of employing authority), another party (including an employing authority) may, the leave of the commission, be represented by counsel, solicitor or agent.

3.3 The Powers and Functions of the Commission with respect to dispute Prevention and Settlement

3.3.1 Powers of the Commission

Powers may be exercised of Commission's own motion or on application. Subject to the Act, the Commission may perform a function or exercise a power:
(a) Of its own motion; or

(b) On the application of:

(i) A party to an industrial dispute; or

(ii) An organization or person bound by an award or a certified agreement.

In order to inquire into and investigate the industrial dispute and all matters affecting the merits and right settlement of industrial dispute the Commission has the following powers:

1) Take evidence on oath or affirmation.

2) Make an award or order, including one by consent of the parties, in relation to all or any of the matters in dispute, including: a provisional award or order or an interim award or order.

3) In accordance with division 4 of part VI B, certify an agreement.

4) Give a direction in the course of, or for the purposes of the hearing or determination of the industrial dispute.

5) Make an award or order including, or vary an award or order to include, a provision to the effect that engaging in conduct in breach of a specified terms
of the award or order shall be taken to constitute the commission of a separate breach of the terms on each day on which the conduct continues.

6) Set aside, revise or vary an award, order, direction, determination or other division of the commission.

7) If it appears to the Commission that any industrial dispute is too trivial or is already dealt with or part of it has been dealt by any State industrial authority or if it finds that any party has breached the award or certified agreement or it is desirable that in public interest the matter be not heard that, the Commission may dismiss the matter or part of it or restrain from further hearing.\textsuperscript{16}

8) To hear and determine the industrial dispute in the absence of a party who has been surrounded or served with notice to appear, and at any place and conduct its proceedings, or any part of its proceedings, in private. The commission can adjourn to any time and place, and also refer any matter to an expert and accept are to be joined or strikeout, allow the amendment, on such terms as it considers appropriate, of any application or other document relating to any proceeding. To correct, amend

\textsuperscript{16} Part VI, Div 3, Sec. 111AAA, Workplace Relations Act, 1996
or waive any error, defect or irregularity, whether in substance or form. The Commission can extend any prescribed time and also some one before it the parties to the industrial dispute, the witnesses, and any other persons whose presence the commission considers would help in the hearing or determination of the industrial dispute and compel the production before it of documents and other things for the purpose of reference to such entries or matters only as relate to the industrial disputes generally give all such directions and do all such things. As are necessary or expedient for the speedy and just hearing and determination of the industrial dispute. The commission must decide as quickly as it can whether to make an interim award if the commission consider that such an award may be necessary to protect, for an interim period. The wages and conditions of employment of the employees whom the power to authorize a person (including a member of the commission) to take evidence on its behalf, in writing, with such limitations (if any) as the commission directs, in relation to an industrial dispute, and the person has all the powers of the commission to secure the attendance of witnesses, the production of documents.
and things of and the taking of evidence on oath or affirmation.\textsuperscript{17}

9) The commission has power to set aside an award or any of the terms of an award. And if the commission considers it desirable for the purpose of removing ambiguity or uncertainty, vary an award.\textsuperscript{18}

10) As far as the Commission considers appropriate, an award must establish a process for agreements to be negotiated. At the enterprise or workplace level, about how the award (as it applies to the enterprise or workplace concerned) should be varied so as to make the enterprise or workplace operate more efficiently according to its particular needs.\textsuperscript{19}

11) The fact that an award or order has been made for the settlement of an industrial dispute, or that an award or order made for the settlement of an industrial dispute is in force does not prevent a further award or order being made for the settlement of the industrial dispute of an award or order being made for the settlement of a further industrial dispute between all or any of the parties to the earlier award or order and whether or not the subject matter of the further

\textsuperscript{17} Supra n 16 sec. 111
\textsuperscript{18} Supra n 16 sec. 113
\textsuperscript{19} Supra n 18 sec. 113 A
industrial dispute is the same (in whole or part) as the subject matter of the earlier industrial dispute.\textsuperscript{20}

12) The Commission may, where it considers it proper to do so, make an award or order that is not, or in its opinion may not be consistent with a relevant law of the commonwealth or of an internal territory this is in relation to an industrial dispute involving public sector employment.\textsuperscript{21}

13) Where the Commission by an award, prescribes a minimum rate of wages, the commission may also provide for the payment of wages at a lower rate to employees who are unable to earn a wage at the minimum rate and that the lower rate shall not be paid to an employee. Unless a particular person or authority has certified that the employee is unable to earn a wage at the minimum rate.\textsuperscript{22}

14) The Commission can order by giving directions that the industrial action stop or not occur when it appears that the industrial action is happening.\textsuperscript{23}

3.3.2 Functions of the Commission

\textsuperscript{20} Ibid sec.\textsuperscript{114}
\textsuperscript{21} Supra n 16 sec 121
\textsuperscript{22} Ibid sec.\textsuperscript{123}
\textsuperscript{23} Ibid sec.\textsuperscript{127}
The functions of the commission under the Workplace Relations Act, 1996 are enumerated under Section 88B. A general duty is cast on the Commission to perform its functions in manner that it furthers the objects of the Act. Some of the important functions of the Commission are as follows:

(1) To ensure that a safety net of fair minimum wages and conditions of employment is established and maintained, having regard to the following:

(a) The need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community;
(b) Economic factors, including levels of productivity and inflation, and the desirability of attaining a high level of employment;
(c) When adjusting the safety net, the needs of the low paid.

(2) In performing its functions under the Act, the commission must have regard to the following:

(a) The need for any alterations to wage relativities between awards to be based on skill,

24 Part VI, Div 1, Workplace Relations Act, 1996.
responsibility and the conditions under which work is performed;

b) The need to support training arrangements through appropriate trainee wage provisions;

ba) the need, using a case-by-case approach, to protect the competitive position youth employment, youth skills and community standards and to assist in reducing youth unemployment, through appropriate wage provisions, including where appropriate junior wage provisions;

c) The need to provide a supported wage system for people with disabilities;

d) The need to apply the principle of equal pay for work of equal value without discrimination based on sex;

e) The need to prevent and eliminate discrimination because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

The general functions of the Commission are, to prevent and settle industrial disputes:
(i) So far as possible, by conciliation; and

(ii) As a last resort and within the limits specified in the Act, by arbitration.

3.3.3 Conciliation of Industrial disputes by the Commission

Under section 99 of the Act, as soon as an organisation or an employer becomes aware of the existence of an alleged industrial dispute affecting the organisation or its members or affecting the employer, as the case may be, the organisation shall notify the relevant Presidential Member or a Registrar. A similar duty is cast on a Minister and the Registrar to inform the Presidential member of the Commission.

Once the Presidential member is informed or notified about alleged industrial dispute or otherwise becomes aware of industrial dispute, he has to refer it for settlement through conciliation either by himself or by any other member of the Commission. If in case the Presidential member does not refer the industrial
dispute for conciliation he must publish reasons for it and further deal the matter by arbitration. 25

Once the industrial dispute has been referred for conciliation the member of the Commission is duty bound to assist the parties in preventing or settling the industrial dispute. In this regard the Commission may arrange for conference between the parties either in its presence or in their absence. 26

Once the parties have reached an agreement either for the whole matter or for any part of the industrial dispute, the conciliation proceedings are deemed to have been completed. Even if there is no agreement reached for settlement and the parties have agreed that the matter is not likely to be settled or the member of the Commission feels that there is no likelihood of settlement being reached with in a reasonable period, the conciliation proceedings are to have been completed. 27

25 Supra n 16 sec 100
26 Ibid sec 102
27 Ibid sec 103
3.3.4 Arbitration of Industrial Dispute by the Australian Industrial Relations Commission

When a conciliation proceeding before a member of the Commission in relation to an industrial dispute is completed but the industrial dispute has not been fully settled, the commission shall proceed to deal with the industrial dispute, or the matter remaining in dispute, by arbitration. The member shall not disclose any thing said or done in the conciliation proceeding in relation to matters in dispute that remains unsettled. In an arbitration proceeding unless all the parties agree, evidence shall not be given or statement made, that would disclose any thing said; or done in an conciliation proceeding under the Act (whether before the member of the commission or at conference arranged by a member of the commission) in relation to matters in dispute that remain unsettled. Where a member of the commission has exercised conciliation powers in relation to an industrial dispute, the member shall not exercise or take part in the exercise of arbitration powers in relation to the industrial dispute if a party to the arbitration proceeding objects. In determining for the purposes of the arbitration, whether a determination was

28 Supra n 27 sect 104
harsh, unjust or unreasonable, the commission must have regard to:

(a) Whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements of the employers undertaking establishment or service and

(b) Whether the employee was notified of that reason: and

(c) Whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee and

(d) If the termination relates to unsatisfactory performance by the employee whether the employee had been warned about that unsatisfactory performance before its termination: and

(da) the degree to which the size of the employees undertaking establishment or service would be likely to impact on the procedure followed in effecting the termination: and

(db) the degree to which the absence of dedicated human resource management specialists or experts in the undertaking establishment or service would be likely
to impact on the procedure followed in effecting the termination: and

(e) Any other matters that the commission considers relevant. The commission on completion of the arbitration make an order that provides for a remedy of a kind, if it has determined that the termination was harsh, unjust or unreasonable. If the commission considers it appropriate, the commission may make an order requiring the employer to reinstate the employee by reappointing the employee to the position in which the employee was employed immediately before the termination or appointing the employee to another position on terms and conditions no less favourable than those on which the employee was employed immediately before the termination.

If the commission thinks that the reinstatement of the employee is inappropriate, the commission may if it considers appropriate in all the circumstances of the case, make an order requiring the employer to pay the employee an amount ordered by the commission in lieu of reinstatement. The commission must have regard to the following circumstances: -
(a) the effect of the order on the viability of the employers undertaking establishment or service.

(b) The length of the employees service with the employer.

(c) The remuneration that the employee would have received or would have been likely to receive, if the employee’s employment had not been terminated.

(d) The efforts of the employee (if any) to mitigate the loss suffered by the employee as a result of the termination.

(e) Any other matter that the commission consider relevant.

The commission must not fix an amount that exceeds the following amounts for an employee who was employed under award conditions immediately before the termination:

(a) The total amount of remuneration received by the employee or to which the employee was entitled. (Which ever is higher) for any period of employment with the employer during the period of 6 months immediately before the termination (other than any period of leave without full pay) and

(b) If the employee was on leave without pay or without full pay while so employed during any part of
that period— the amount of remuneration taken to have been received by the employee for the period to leave in accordance with the regulations.

3.3.5 Awards of the Commission 29

The functions of the Commission is to prevent and settle industrial dispute in so far as possible by conciliation and as a last resort and within the limits specified in the Act by arbitration and such other functions as are conferred on the commission. The industrial dispute normally is limited to allowable award matters. Awards and variations to awards are required to meet certain criteria to ensure that they operate more flexibly and allow greater choice about how work is organized at the workplace level for e.g.:

1) Matters of details or process are to be removed.

2) They are not to prescribe work practices or procedure that restrict or hinder the efficient performance of work or productivity.

3) Facilitative provisional are to be included that allow agreement at the workplace or enterprise level

29 Supra n 16 sec 143
between employers and employees including individual employees and how the award provisions are to apply.

The 20 allowable award matters are:

1) Clarifications of employees and skill based career paths.

2) Ordinary time hours of work and the times within which they are performed rest breaks notice periods and variations to working hours.

3) Rates if pay (such as hourly rates and annual salaries). Rates of pay for juniors, trainees or apprentices, and rates of pay for employees under the supported wage systems.

4) Piece rates, tallies and bonuses.

5) Annual leave and leaves loading.

6) Long service leave.

7) Personal careers leave, including sick leave, family leave, bereavement leave, compassionate leave, cultural leave, and other like forms of leave.

8) Parental leave, including maternity and adoption leave.

9) Public holidays.

10) Allowances.
11) Loadings for working overtime or for casual or shift work.
12) Penalty rates.
13) Redundancy pay.
14) Notice of termination.
15) Stand down provisions.
16) Dispute settling procedures
17) Jury, service,
18) Type of employment, such as full-time employment, casual employment, regular part time employment and shift work.
19) Super annuation
20) Pay and conditions for out workers, but only when compared with those specified in a relevant award or awards for employees who perform relevant award or awards for employees who perform The Commission may include in an award provisions that are incidental to the allowable matters and necessary for the effective operation of the award (for example date and period of operation of the award and facilitative provisions).

The commission shall, where it appears practicable and appropriate, encourage the parties to agree on procedures for preventing and settling by discussion and agreement further disputes between the parties or any of
them, with view to the agreed procedure being included in an award.

3.3.5 Forms of award

An award shall be framed so as best to express the decision of the commission and to avoid unnecessary technicalities. The date of an award is the day when the award was signed under subsection. While coming to the terms of award, an award shall specify the period for which the award is to continue in force, in determining the period the commission shall have to regard:

1) The wishes of the parties to the industrial dispute concerned as to the period for which the award should continue in force; &

2) The desirability of stability in industrial relations.

An award dealing with particular matters continues in force until a new award is made dealing with the same matters. An award made by the commission for the settlement of a further industrial dispute between the parties may be expressed to operate from a day not

---

30 Supra n 29 sec 143(1)
31 Supra n 30 sec. 147
earlier than the day on which the industrial dispute arose.\textsuperscript{32}

The persons bound by awards are as follows: -

1) All the parties to the industrial disputes who appeared or were represented before the commission.

2) All parties to the industrial dispute that were summoned or notified (either personally or as prescribed) to appear as parties to the industrial dispute (whether or not they appeared).

3) All parties who, having been notified (either personally or as prescribed) of the industrial dispute and of the fact that they were alleged to be parties to the industrial dispute, did not, with in the time prescribed, satisfy the commission that they were not parties to the industrial dispute, did not, within the time prescribed, satisfy the commission that they were not parties to the industrial dispute.

4) Any successor, assignee or transmittee (whether immediate or not) to or of the business or part of the business of an employer who was a party to the industrial dispute, including a corporation that has
acquired or taken over the business or part of the business of the employer.

5) All organisations and persons on whom the award is binding as a common rule; &

6) All members of organisations bound by the award. 33

The awards made by the commission are final, subject to the Act, an award (including an award made on appeal) is final and conclusive, shall not be challenged in question in any court; & is not subject to prohibition, mandarins or injunction in any court on any account.

An award is not invalid because it was made by the commission constituted otherwise than as provided by their Act. 34

Where a Registrar is of the opinion that an award that is in force might not have any continuing operation, or any substantial continuing operation. The registrar shall draw the award to the attention of the parties to the award and a member of the panel to which the industry concerned has been assigned or, if the industry concerned has not been assigned to a panel, the president. Where an award is drawn to the attention of a

33 Supra n 32 sec 149
34 Supra n 33 sec 150
member of the commission, the member shall invite the parties to the award to take part in discussion about the award with a view to cancelling the award, and if necessary, varying another appropriate award to include any operative provisions of the cancelled award in the other award.

The Industrial Registrar ensures that each award in force is examined by a registrar for the purpose of this section not later than 5 years after the award was made or was last examined by a registrar for those purposes.

4. The Employment advocate

Office of the Employment Advocate under the Workplace Relations Act is a new agency, established primarily to undertake approval of Australian workplace agreements. The Office of the Employment Advocate was set up in March 1997 with its main office in Sydney. The head of the Office of Employment Advocate is called the Employment Advocate and is appointed by the government. The functions of the Employment Advocate include: filling and approving Australian workplace agreement and ensuring that they meet all statutory requirements; providing assistance and advice to employers and

employees on the Workplace Relations Act, Australian workplace agreements, the non-disadvantage test, and the freedom of association provisions, handling alleged breaches of Australian workplace agreements and assisting parties in prosecuting alleged breaches of Australian workplace agreements, where appropriate. The establishment of the Office of the Employment Advocate is significant in that more than one body, further fragmenting the system, now handles approval of federal agreements negotiated between employers and employees.

4.1 Functions and powers of the Employment Advocate

Section 83BA of the Act establishes the Employment Advocate and Section 83BB describes the functions of the Employment Advocate they are as follows:

(1) The Employment Advocate has the following functions:

(a) Providing assistance and advice to employees about their rights and obligations under this Act;

(b) Providing assistance and advice to employers (especially employers in small business) about their rights and obligations under the Act.
(c) Providing advice to employers and employees, in connection with Australian workplace agreements, about the relevant award and statutory entitlements and about the relevant provisions of this Act;

(d) Performing functions relating to the filing and approval of Australian workplace agreements and ancillary documents;

(e) Investigating alleged breaches of Australian workplace agreements,

(f) Providing free legal representation to a party in a proceeding

(g) Providing aggregated statistical information to the Minister;

(h) Any other functions given to the Employment Advocate by the Act

(2) In performing his or her functions, the Employment Advocate must have particular regard to:

(a) The needs of workers in a disadvantaged bargaining position (for example: women, people from a non-English speaking background, young people, apprentices, trainees and outworkers); and
(b) Assisting workers to balance work and family responsibilities; and

(c) Promoting better work and management practices through Australian workplace agreements.

Sec. 83BC describes about Minister's directions to Employment Advocate.

(1) The Minister may, by notice published in the Gazette, give directions specifying the manner in which the Employment Advocate must exercise or perform the powers or functions of Employment Advocate (other than powers or functions relating to the approval of Australian workplace agreements and ancillary documents).

(2) The Employment Advocate must comply with the directions. The Governor-General appoints the Employment Advocate for a term of up to 5 years and the Employment Advocate holds office on a full-time basis.
4.2 The role of Employment Advocate under the Workplace Relations Act 1996

The role of the Employment Advocate (EA) and the making of Australian Workplace Agreements (AWA) under Part VID of the Act are interrelated since the approval and enforcement of AWA is the principle function of the EA. There are three main issues involving the EA which needs to be evaluated. They are:

a. The secrecy provisions in section 83BS of the Act

b. Whether the 'no disadvantage' test in Part VIE of the Act is able to protect workers, particularly the most vulnerable of employees; and

c. Whether the Employment Advocate is able to enforce the provisions of an AWA, or will enforcement be left to aggrieved individuals.

There has been a significant amount of criticism about the secrecy and apparent lack of scrutiny throughout the AWA approval process. Section 83BS of the Act imposes a general prohibition on the disclosure of information that will enable persons to be identified as parties to an AWA. Section 83BT specifically allows the EA to 'publish, or make available copies of, or extracts from,
AWAs or ancillary documents. It is unclear why there is an emphasis on secrecy surrounding AWAs, as section 170VG(2) indicates that an AWA must not include provisions, which prohibit or restrict disclosure of details of the AWA by either party to another person. It has been suggested that this secrecy may be a way to prevent unions gaining access to a list of employers and employees who could be covered by federal awards, with the consequence that unions may target workplaces for union membership.36

The insistence on secrecy may also be mistaken by employees who have entered into AWAs as a bar upon discussions they may wish to have with any other person or organization to determine if they are disadvantaged by an AWA.

While this may well be a method by which the government can 'shut out' the unions from the AWA process assuming they have not been appointed as bargaining agents, publication of parties to AWAs already made could presumably be an advantage to unions once an AWA is terminated, or a fresh one is to be negotiated. Even in situations where union members have signed AWAs, the

relevant union may only be entitled to access the wages records of the employer to check compliance with an award or a certified agreement, not an AWA. 37

One can only conclude that the secrecy provisions have no legitimate basis and serve only to restrict the scrutiny of the public, unions and - more importantly - make it almost impossible for any analysis to be made of the Australia Workplace Agreement process. The EA is subject to directions from the Minister 'specifying the manner in which the EA must exercise or perform the powers or functions of the EA. The Ministerial direction does not extend to matters relating to the approval of AWAs and ancillary documents, but there is considerable room for Ministerial control. For example, it extends to issue such as whether the EA provides legal assistance to employees. While section 83BC remains in force the EA cannot be seen to be independent.

The Workplace Relations Act, section 170XA(1) states that an AWA passes the 'no-disadvantage test if it does not disadvantage employees in relation to their terms and conditions of employment'. This provision is

37 Supra n 36 p 10
qualified by s 170XA(2)(a), which indicates that the test must be measured against overall terms and conditions of employment 'under relevant awards or designed awards'. The test does not include a measurement against any over-award pay or conditions existing at the time an AWA are negotiated. While much has been made of the protection afforded by the 'no-disadvantage' test it is not particularly effective. It is not a reason for the EA to reject an AWA, which meets all other requirements of the Act. If the EA has concerns about whether an AWA passes the test, an employer may provide a written undertaking that the AWA does not disadvantage the employees as compared to the relevant award.

Agreements for new employees cannot be included in the same documents as an AWA for an existing employee, and it is possible that an employer can justify not offering a new AWA on the same conditions as other employees on the basis that it would be unfair or unreasonable to do so where the skills and experience of new employees do not match those existing employees who are experienced in their work performance. Provided the 'no-disadvantage test' is satisfied, new employees may have

\textsuperscript{8} Supra n 36 p 13
to agree to pay rates and conditions which give the employer benefit of up to three years (or more) of paying the employee less than the standard rate given to other employees. In sum, the no-disadvantage test offers little protection to the vulnerable currently in employment, and virtually none to new employees.39

There is no power bestowed on the office of the EA for the enforcement of AWAs. Under section 83BB(e) of the Act the EA may investigate alleged breaches of AWAs, alleged contraventions of Part VID, and any other complaints relating to AWAs.

Under s 83BB(g) the EA may provide free legal representation to a party in a proceeding under Part VID (AWAs) or Part XA (Freedom of Association) if the EA considers this would promote the enforcement of the provisions of those Parts. Section 83BB(g) does not specify which party can be provided with free legal representation. Section 83BB(e) of the Act provides that the EA can investigate alleged breaches of Australia Workplace Agreements, alleged contraventions of Part VID and any other complaints relating to Australia Workplace Agreements. The EA has admitted that there is not power

39 Supra n 36 p 16
in the office to prosecute breaches, simply the ability to 'do the investigative groundwork and give it to the employer and employees'.\textsuperscript{40} It is therefore up to an aggrieved employee to take the matter to a court of competent jurisdiction. It is highly unlikely, given the disparities in bargaining power between employer and employee that current employees will complain of breaches of an AWA or, indeed of duress applied during the bargaining process.\textsuperscript{41}

The limitations on the power of the EA to enforce AWAs, its dual role of advising employers and employees, and the secrecy surrounding the AWA approval process make for complicated and uncertain system.

5. Australian Industrial Registry

Functions of the Industrial Registry which is stated in Division 1 of Workplace Relations Act are as follows:\textsuperscript{42}

(1) The functions of the Industrial Registry are:

(a) To keep a register of organisations.

\textsuperscript{40} Supra n 36 p 17
\textsuperscript{41} Supra n 40
\textsuperscript{42} Part IV Div 1 A, sec 63, Workplace Relations Act, 1996
(b) To act as the registry for the Commission and to provide administrative support to the Commission.

(c) To provide advice and assistance to organizations in relation to their rights and obligations under the Act.

(d) Such other functions as are conferred on the Industrial Registry by the Act.

5.1 Industrial Registrar

The Governor-General appoints a person to be the Industrial Registrar. The Industrial Registrar has the powers and functions conferred on the Industrial Registrar, or on a Registrar, by or under the Act or an award; and shall perform the functions conferred on the Industrial Registry by the Act, and has such powers as are necessary for the performance of those functions.

5.2 Reference by Registrar to Commission

A registrar may refer a matter, or a question (other than a question of law) arising in a matter, before the Registrar to the President for decision by the Commission. The Commission may:

44 Supra n 43 sec. 79
(a) Hear and determine the matter or question; or
(b) Refer the matter or question back to the Registrar, with such directions or suggestions as the Commission considers appropriate.

6. **Certified Agreements**

The certified agreement (CA) is a recent innovation in the Australian federal industrial relations system. The CA was introduced in the Industrial Relations Act, 1988 and has been given even larger and more complex form in the Workplace Relations act, 1996. The Act allows CA to be made between:

- An employer that is a constitutional corporation, or an employer in Victoria or a Territory, or an employer in a prescribed area of interstate or overseas trade and commerce, or the Commonwealth, and a federally registered union(s), to cover a single business or part of a single business\(^45\) (Division 2 agreements)
- Such employers directly with employees, or with employees and their unions, to cover single business or part of a single business;\(^46\) and

\(^45\) *Super n 43 sec. 170 LJ*
\(^46\) *Ibid sec. 170 LK*
An employer that is carrying on a single business and unions, in settlement or part settlement of an industrial dispute, to prevent further industrial disputes, or to prevent an industrial situation from giving rise to an industrial dispute. 47

Single business means a business, project or undertaking that is carried on by the Commonwealth a State or a territory or a body association office or other entity established for a public purpose by or under a law of the Commonwealth, and a state or a territory has a controlling interest. If two or more employers carry on a business project or understanding as a joint venture or common enterprise, the employees are taken to be one employer and if 2 or more corporations that are related to each other carry on a single business, the corporations may be treated as one employer and the single business may be treated as one single business.

An application made to the Commission for certification must meet a range of criteria before it can be certified by the Commission including that:

• The agreement passes the no-disadvantage test, that is its certification would not result on balance, in a
reduction in the overall terms and conditions of employment of employees covered by the agreement when compared with the relevant award, or designated award, and laws the Commission considers relevant⁴⁸; 

- The agreement has the genuine approval of a majority of employees who would be covered by it; 
- The employer explained the terms of the agreement to employees in a manner appropriate to the employees' particular circumstances and needs - for example, if the employees included women, people from a non-English speaking background or young people; 
- The agreement is not contrary to the public interest⁴⁹; 
- The agreement contains procedures for preventing and settling disputes between the employer and the employees whose employment will be subject to the agreement⁵⁰; 
- If the agreement was made directly with employees, the employer did not coerce, or attempt to coerce, any employee not to request a union to represent him/her, or to withdraw a request for union representation;

⁴⁸ Supra n 47 sec. 170 LJ (2)  
⁴⁹ Supra n 48 sec. 170 (3) (b)  
⁵⁰ Supra n 49 sec. 170 LT (8)
The agreement specifies a nominal expiry date, which cannot be more than 3 years after the date on which the agreement comes into operation.\textsuperscript{51}

The Commission, must refuse to certify the agreements unless it is satisfied that the agreement will settle or further settle all or and of the matter that are the subject of the industrial dispute, the settlement may be made by an award or by a certified agreement, prevent further industrial disputes between the persons concerned or prevent the industrial situation from giving rise to an industrial dispute involving the persons concerned.\textsuperscript{52}

The Commission has the power to refuse to certify an agreement if the Commission thinks that a provision of the agreement is inconsistent with an order by the Commission under that division or an injunction granted or any other order made by the court under the division.\textsuperscript{53}

Along with these the commission may refuse to certify an agreement if it thinks that a provision of the agreement discriminates against an employee, whose employment will

\textsuperscript{51} \textit{Ibid} sec. 170 LT (10)
\textsuperscript{52} \textit{Ibid} sec. 170 LU (1)
\textsuperscript{53} \textit{Supra} n 52 sec. 170 LU (2)
be subject to the agreement because of or for reasons including race, colour, sex, sexual preference, age, physical or mental pregnancy, religion, political opinion, national extraction or social origin.\textsuperscript{54}

An employee cannot be discriminated only on the basis it provides for a junior rate of pay or it provides for a rate or pay worked out by applying the wage criteria set out in the award providing for the national training wage or wage criteria of that kind or for different rates of pay for adult and non-adult employees participating in an apprenticeship, cadetship or other similar work based training arrangement or it discriminates in respect of particular employment on the basis of the inherent requirements of that employment and also in respect of employment as a member of the staff of an institution that is conducted in accordance with the readings of beliefs of a particular religion or creel on the basis of those teachings or beliefs and in good faith.

The Commission is empowered to settle disputes over the application of the agreement and also appoint a board of

\textsuperscript{54} \textit{Ibid} sec 170 LU (5)
reference as described in section 131 for the purpose of settling such disputes.\textsuperscript{55}

A certified agreement comes into operation when it is certified and ceases when its nominal expiry date has passed and it is replaced by another certified agreement.

The certified agreement binds the employer and all the persons whose employment is, at anytime when the agreement is in operation, subject to the agreement. If there are more than one organisation of employees who have made the agreement with the employer, then the agreement also binds the one or more organisation.\textsuperscript{56}

If the organisation satisfies the Commission that it has at least one member whose employment will be subject to the agreement and whose industrial interests the organisation is entitled to represent in relation to work that will be subject to the agreement and who requested the organisation to give the notification, then the Commission must, by order, determine that the agreement binds the organisation.\textsuperscript{57}

\textsuperscript{55} Supra n 53 sec 170 LW  
\textsuperscript{56} Ibid sec 170 M  
\textsuperscript{57} Supra n 56
If an employer is bound by a certified agreement and at a later time a new employer becomes the successor, transitivee or assignee (whether immediate or not) of the whole or a part of the business concerned then, from the later time, the new employer is bound by the certified agreement to the extent that it relates to the whole or the part of the business, the previous employer ceases to be bound by the certified agreement to the extent that it relates to the whole or the part of the business. 58

If the Commission is satisfied that the valid majority of the employees whose employment is subject to the agreement at the time have applied in writing for extension of the nominal expiry date of the agreement, the Commission must genuinely approve the extension. The to extend date must not be more than 3 years after the date on which agreement came into operation. 59

The Commission has the power to order to vary a certified agreement for the purpose of removing ambiguity or uncertainty or for the purpose of including

58 Ibid sec. 170 MB
59 Ibid sec. 170 MC
or omitting or varying terms that authorises employer to stand-down an employee.\textsuperscript{60}

The termination of a certified agreement must be in writing. The termination has no effect unless the Commission approves it. The Commission must, by order, approve the termination of the agreement if, and must not approve the termination unless, it is satisfied that a valid majority of the employees whose employment is subject to the agreement at the time genuinely approve its termination.\textsuperscript{61}

In brief the following is the process of Certified Agreements:

- A constitutional (trading or financial) corporation can make an agreement with one or more unions (which must have at least one member employed) or directly with employees. Parties to a dispute (employer and unions) can also make agreements.
- Agreements must have the approval of a majority of employees. Employees must have access to the agreement in writing at least 14 days before they approve it and its terms must be explained.

\textsuperscript{60} Supra n 53 sec. 170 MD
\textsuperscript{61} Ibid sec. 170 MG
A union member can request the union to represent him or her in meeting and conferring with the employer about the agreement. A union can intervene in Commission proceedings about the agreement it has received such a request.

The agreement must pass the no-disadvantage test, comparing the agreement overall with the relevant award.

An agreement can provide lower than the award rate for some traineeships and apprenticeships where an "approved authority" has determined that a lower percentage should apply due to a reduction in productive time due to time in training.

If there is no award, the Commission can nominate an appropriate award for the comparison.

A union can agree to become bound by an agreement, which is made directly with employees if it has at least one member who has requested that the union be bound.

An agreement can be varied during its term if the parties agree.

After its expiry date, an agreement can be terminated by consent, or one party can apply for termination to the Commission, which will agree if not contrary to the public interest to do so.
7. Bargaining Periods and Protected Action

The Workplace Relations Act, 1996 allows either party to engage in 'protected' industrial action during the bargaining period.62 Some of the features of a bargaining period and protected action are as follows:

- A union or an individual employee can initiate a bargaining period.
- Industrial action is prohibited during the term of an agreement or an award made consequent upon termination of a bargaining period.
- Industrial action must be preceded by 3 working days notice, but can be without notice if in response to action by other party.
- A bargaining period can be terminated or suspended where:

  i) A party is taking industrial action and did not genuinely try to reach agreement before taking the action or is not genuinely trying to reach agreement or has filed to comply with directions or recommendations of the Commission;

---

62 Sec. 170 ML- 170 MW, Workplace Relations Act, 1996
ii) Industrial action is endangering life, safety, health or welfare or causing significant damage to the economy;

iii) Action is being taken in support of claims for employees who are not members or eligible to join the union;

iv) Industrial action related to a significant extent to a demarcation dispute;\(^{63}\)

v) Union not complying with Commission award, orders etc in relation to another part of the single business; or

vi) Where a paid rates award has covered employees and there is no reasonable prospect of reaching an agreement.

8. Australian Workplace Agreements (AWA)

An AWA is a formalized individual agreement made directly between an employer and employee, which will entirely displace any relevant award.

Under the Workplace Relations Act 1996, many employers are now able to negotiate an agreement with individual employees known as Australian Workplace Agreement (AWA). This option is available to majority of private sector employers. AWAs operate to displace federal awards and

\(^{63}\) Supra n6
agreements. They must contain various clauses and be approved by the new Employment Advocate prior to their operation. This approval process involves the satisfaction of the 'no disadvantage' test discussed below. Both the negotiations and their outcome are private, although it is, theoretically, possible for both parties to appoint a bargaining agent. The Act itself provides no assistance as to the process of negotiations towards an AWA.

One positive protection for employees' rights is the retention of the 'no disadvantage' test, a threshold that must be passed by certified agreements and AWAs. In order to be acceptable to the Australian Industrial Relations Commission (AIRC), the agreements must not 'result, on balance, in a reduction in the overall terms and conditions of employment' of employees under awards or Commonwealth or state laws. The AIRC, or Employment Advocate in the case of AWAs, measures the proposed agreement against the current industry award or a designated award. It must be remembered, however, that certified agreements may still pass the 'no disadvantage' test with a reduction in overall conditions if it is not contrary to the public interest. The specific example given of such a situation is a
short-term crisis in a single business. Therefore, the 'no disadvantage' test has a very important qualification to its application as a protective mechanism for employees' rights.

The AWA represents the first appearances of individualized statutory agreements at the Federal level. They have the potential to have a significant impact on workplaces across Australia. It is for this reason that AWAs have been both celebrated and heavily criticized. In light of this conflict it is interesting to review the concept and process of AWA.

8.1 The Negotiation Process

Employers make AWAs directly with individual employees. The role of third parties (e.g., a union) is limited to that of acting as a 'bargaining agent', where specifically appointed by one of the parties. This focus upon the individual, relationship is in tune with the Act's object of placing 'primary responsibility' on employers and employees for determining matters, which affect their relationship. Arguably AWAs are also a mechanism enabling the development of mutually

beneficial 'work practices' and enhancing the flexibility, productivity and international competitiveness of Australian businesses.

On the other hand, a system of individualized bargaining and minimal union involvement has been criticized as skewing the system in favour of employers. It is argued that the natural inequality in the relationship between employer and employee will mean that individualized negotiations will disadvantage employees and erode hard-fought award wages and conditions. Certain groups of employees with limited bargaining power, such as women, part-time and casual workers, and workers from non-English speaking backgrounds are said to be particularly at risk. The disparity of bargaining power between employer and employee is an obvious issue in the negotiation of AWAs.65

8.2 The Filing Requirements

Every AWA must contain a set of prescribed provisions relating to discrimination and a dispute resolution procedure, and must not contain provisions restricting disclosure of AWA details by either party to other

65 Supra n 64
The AWA must be signed and dated by the parties and the signatures must be witnessed. The AWA must be accompanied by a declaration by the employer to the effect that it contains the required anti-discrimination provisions, that the employee was given a copy of the Employment Advocate's information statement, and that the AWA has been offered to all comparable employees. Further, the Employment Advocate must be satisfied that the employee received a copy of the AWA within a specified time, that the employer explained the effect of the AWA to the employee between the time of the employee receiving and signing the AWA, and that the employee's consent was genuine. There have been criticisms of these requirements. These filing requirements are problematic from an employee's perspective as well as employers.

To ensure that an employee receives the information statement, has had the agreement explained, and 'genuinely consents' to it, the Employment Advocate relies on the details supplied by the employer, and the declaration made in Part 1 of the Filing Application. While section 170VP of the Act requires that the

66 Sec. 170 VG, Workplace Relations Act, 1996
67 Supra n 66 sec. 170 VO
68 Sec. 170 VPA, Workplace Relations Act, 1996
69 Supra n 64 p 4
declaration be accurate, some employers may not exercise sufficient care and attention in meting these requirements.

In brief the following are the procedure for making an AWA:

- A constitutional corporation and the Commonwealth Government can make an agreement with an employee.
- An employee can authorise a bargaining agent, including a union, as his or her representative.
- The main requirements for approval of an AWA by the Employment Advocate are:

  i) The employee was given an information statement about requirements under the Act, occupational health and safety, services offered by the EA and the role of bargaining agents.
  ii) The agreements contain required discrimination provisions;
  iii) The employee received the AWA 14 days before signing (% for a new employee)
  iv) The employer explained the effect of the AWA to the employee;
  v) The employee genuinely consented;
vi) An AWA in the same terms was offered to all comparable employees;

vii) The AWA passes the no-disadvantage test (the same as that applying to certified agreements).

• If the EA has any concerns as to whether or not the AWA passes the no-disadvantage test, the AWA must be referred to the Commission. The Commission President, with the concurrence of the EA, must prepare a protocol guiding the EA in referring AWA's.

• A union can intervene in Commission proceedings only if the employee as bargaining agent has appointed it.

• An AWA wholly displaces a federal or State award or State agreement, except for State legislation in relation to workers' compensation, health and safety, apprenticeship and other matters prescribed in the Regulations.

• Industrial action in relation to the employment to which the AWA relates is prohibited the term of an AWA.

The Australian Workplace Agreements totally displace any otherwise applicable award. This provision it is felt enhances workplace flexibility and productivity by removing both the straitjacket of awards and the delay

70 Sec. 170 VQ subject to some minor exceptions with regard to paid rates, essential services and exceptional matters as set out in sec 170 VQ(2)
and expense of potential litigation with unions. Escaping awards is likely to be a major motivation for employers choosing the AWA option. The ability of AWAs to displace award is heavily criticised as it fundamentally undermines the centralised system, which has evolved to protect employees. It has been argued, that with out the protection of awards, wages and conditions are likely to be eroded.\textsuperscript{71}

AWAs provides for making agreements, which are tailored, made to suit the needs of individual employee and employer. However the total reliance on the employers with respect to ensuring that the employees are adequately informed and genuinely consent and the problems involved with the 'no - disadvantage' may make it easier for AWAs to advantage employers and disadvantage employees. The Current Status of AWAs as at 01 April 2004 are as follows:\textsuperscript{115}

1. AWAs Approved in March 2004 including those approved by the AIRC: 12,990

2. Number of AWAs Approved by OEA & AIRC since March 1997: 458,224

\textsuperscript{71} Supra n 64 p 5
3. Number of Employers with Approved AWAs: 7,728

9. Industrial Action

'Industrial action' is defined in section 4 (1) to include everything from a strike through the 'performance of work in a manner different from that in which it is customarily performed' to 'bans, limitations or restrictions on the performance of work.' It does not, however, include action by employees which is authorised or agreed by their employer or which is based on reasonable concerns for their health or safety: nor does it include action by an employer which is 'authorised or agreed to by or on behalf pf employees of the employer.'

The Workplace Relations Act 1996 allows workers to take industrial action in certain circumstances. They must have initiated a bargaining period with respect to the negotiation of a certified agreement and notified employers of their intention to take action (it is also possible to undertake protected action while negotiating an Australian workplace agreement).\textsuperscript{72} The employees may be prevented from going on strike in other situations. Section 127 provides that if industrial action is

\textsuperscript{72} Sec. 170 ML – 170 MT, Workplace Relations Act, 1996
happening, or is threatened impending or probable. The Australian industrial relations commission may make an order that the action 'stop or not occur'. Industrial action other than for genuine bargaining for agreement is not compatible with the norms of the systems and is not protected. Section 127 invests the Commission with a broad discretion to make orders to prevent or stop industrial action. As such, it has the potential to play a significant role in enforcing the norms of the Federal system.

The Workplace Relations Act, 1996 states that the primary responsibility for resolving matters affecting the employment relationship should occur at the workplace or enterprise level. 73 This principle is reflected in the statutory provisions concerning industrial action. The section 4 definition of 'industrial action, focuses on the conduct of individual employees rather that the behaviour of trade unions. Hence, the freedom to take lawful strike action is seen as an individual right of the worker, not a collective right.

73 Sec. 3 (c), Workplace Relations Act, 1996
10. The Role of Unions

Part XA of the Workplace Relations Act, 1996 deals with Freedom of Association. The objects of Part XA as set out in the Act are:

1. To ensure that employers, employees and independent contractors are free to join industrial associations of their choice or not to join industrial associations; and

2. To ensure that employers, employees and independent contractors are not discriminated against or victimised because they are, or are not, members or officers of industrial associations.

These objects emphasise the right of individuals to choose whether or not to belong to industrial associations. One of the first things to note about the provisions is that their reach extends well beyond the Federal industrial relations jurisdictions. Industrial associations need not be federally registered organisations. The focus of the provisions is on the conduct of the employer. Under section 298K employers are not - for a prohibited reason - able to

1. Dismiss an employee;

2. Injure an employee in his employment;
3. Alter the position of an employee to the employee’s prejudice;
4. Refuse to employ someone; or
5. Discriminate against someone in the terms and conditions on which the employer offers to employ them.

The Act does not limit the significant involvement of unions in the dispute settling and award making process. However, a number of means have been devised to restrict the role played by unions and the protection of union member at the workplace and in the process of making agreements. Freedom of association is now the theoretical underpinning of Australia’s industrial relations system, a freedom that expressly includes the right of an employee not to belong to an industrial organization. Under the ‘allowable award matters’ provisions, matters categorized as union security clauses are to be excluded from awards, such as certain rights of entry and clauses giving preference to unionists. The Act establishes a statutory scheme, which enables unions to gain right of entry to workplaces, and expressly prohibits any preference provisions. The ‘conveniently belong’ provisions have been modified in a way which places limits upon the opposition that existing unions may have to new
organizations seeking federal registration. In general terms, the Workplace Relations Act makes the role of Australian unions, the traditional representatives of employees' interests, more difficult to fulfil effectively.

11. Termination of employment

Termination of employment means termination of employment at the initiative of the employer. The object of section 170CA is:

(a) To establish procedures for conciliation in relation to certain matters relating to the termination or proposed termination of an employee's employment in certain circumstances; and

(b) To provide if the conciliation process is unsuccessful for the recourse to arbitration or to a court depending on the grounds on which the conciliation was sought; and

(c) To provide for remedies appropriate to a case where, on arbitration, a termination is found to be harsh, unjust or unreasonable; and

74 Part VI A Div.3 Sec.170 CA, Workplace Relations Act, 1996
(d) To provide for sanctions where on resource to a court a termination or proposed termination is found to be unlawful; and

(e) By those procedures, remedied and sanctions, and by orders made in the circumstances, to assist in giving effect to the termination of employment connection.

The provisions apply only to Commonwealth employees; federal award employees who are employed by a constitutional corporation and employees in states, which have referred their powers, top the Commonwealth or legislated the same provisions. Applications can be made where a termination is harsh, unjust or unreasonable or where it is alleged that the termination was unlawful because it was for prohibited reasons such as discrimination. All applications go to the Commission, which must attempt to conciliate. If conciliation is unsuccessful the commission must issue a certificate and indicate its assessment of the merits of the respective cases. The Commission may recommend that one or more grounds not be pursued or make any other recommendation. If conciliation is unsuccessful, harsh, the Commission on the basis of "a fair go all round" may arbitrate unjust or unreasonable terminations. Unlawful
terminations are determined in the Court. Both options cannot be pursued in relation to the same termination.

When the Commission arbitrates it must take into account whether there was a valid reason, whether the employee was notified of the reason and given an opportunity to respond, whether a warning was given about unsatisfactory performance and any other matters. The Commission can reinstate the employee or award compensation which is not, or that was received in the 6 months prior to the termination. For non-award employees this must not exceed $32,000. Matters to be taken into account in awarding a remedy include:

(a) Effect on the employer's business;
(b) Length of the employee's service;
(c) Remuneration the employee would have received;
(d) Mitigation efforts by the employee.

Costs can be awarded against a party if:

(a) The application was vexatious or without reasonable cause;
(b) The party acted unreasonably in failing to discontinue or agree to settlement;
The party elected to proceed to arbitration and then withdrew.

12. Parental leave

Not only the mother but also the father is necessary at the birth of the child; therefore, this parental leave is both maternity and paternity leave have been inserted in the provisions. The main object of section 170 KA is to give effect to the Family Responsibilities Convention and the Workers with Family Responsibility Recommendation 1981, which the General Conference of the International Labour Organisation adopted on 23 June 1981 and is known as Recommendation No. 165.

They provide for a system of unpaid parental leave, and a system of unpaid adoption leave, that will help men and women workers who have responsibilities in relation to their dependant children and to prepare for enter, participate in or advance in economic activity and to reconcile their employment and family responsibilities.

The child's mother is entitled to maternity leave and her spouse is entitled to paternity leave, totalling up to 52 weeks following the birth of the child. Except for
a period of one week at the time of birth maternity leave and paternity leave cannot overlap, since their main purpose is to enable the parent who is on leave to be the child's primary care giver. The purpose of the one-week overlapping period of leave is to enable both parents to care for the child, and to enable the mother's spouse to give care and support to the mother, during the period immediately following the birth.

13. A summing up

It is exactly hundred years since the uniquely Australian system of conciliation and arbitration was proposed to the Federal Parliament sitting in Melbourne. White Australia, tariff protection and conciliation and arbitration were the three pillars of Australian social policy for most of the first century of federation. White Australia is now dead; tariff protection is on its legs. The High Court and the Arbitration Court exercised powers of conciliation and arbitration of industrial disputes. There was an overlapping of the functions exercised by the two bodies. In 1956 the High Court declared the Arbitration Court an unconstitutional

75 Conciliation and Arbitration Act 1904 (Cth)
mixture of judicial and non-judicial functions. This led to the divided Commonwealth Industrial Court and the Arbitration Commission. These now have emerged as the Federal Court and the Australian Industrial Relations Commission. Some observers have suggested that the network of industrial relations law, that once ruled the Australian economy from Melbourne, is dead and the Commission that was its vehicle is now sidelined as a "bit player" in today's system. There is some evidence to support this assessment. The Australian arbitration system worked through unions and employer organisation. The proportion of Australian employees who are members of unions has been steadily falling. In 1996 it was 31%. In 2000 it was only 25% and still dropping. In part, this change has been reinforced by the moves of successive Federal governments to alter the focus of industrial law from industry-wide awards to workplace agreements.

76 The Queen v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254
76 Justice Michael Kirby, Industrial Relations Law - Call Off The Funeral Speeches, www.anu.edu.com