

**INDUSTRIAL RELATIONS (CONTRACTS OF CARRIAGE)
AMENDMENT ACT 1994 No. 40**

NEW SOUTH WALES



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**INDUSTRIAL RELATIONS (CONTRACTS OF CARRIAGE)
AMENDMENT ACT 1994 No. 40**

NEW SOUTH WALES



Act No. 40, 1994

An Act to amend the Industrial Relations Act 1991 to make provision for the payment of compensation in respect of the termination of certain contracts of carriage arrangements; and for other purposes. [Assented to 2 June 1994]

Industrial Relations (Contracts of Carriage) Amendment Act 1994 No. 40

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Industrial Relations (Contracts of Carriage) Amendment Act 1994.

Commencement

2. This Act commences on a day or days to be appointed by proclamation.

Amendment of Industrial Relations Act 1991 No. 34

3. The Industrial Relations Act 1991 is amended as set out in Schedule 1.

SCHEDULE 1—AMENDMENTS

(Sec. 3)

(1) Chapter 6, Part 5A:

After section 697, insert:

**PART 5A—COMPENSATION FOR TERMINATION
OF CERTAIN CONTRACTS OF CARRIAGE**

Definitions

697A. In this Part:

“**carrier**” means a person, partnership or body corporate who or which supplies services;

“**contract of carriage**” has the meaning given by section 663;

“**head contract of carriage**” means an agreement, arrangement or practice under which a principal contractor and carrier agree that the carrier is to provide services exclusively and on an agreed regular basis for the principal contractor;

“**President**” means the President of the Industrial Relations Commission;

“**previous carrier**” means a previous carrier as referred to in section 697B (1) (a);

SCHEDULE 1—AMENDMENTS—*continued*

“previous principal Contractor”, in relation to a previous carrier, means the principal contractor immediately preceding the principal contractor referred to in section 697B (1) (a) to whom the previous carrier provided services under the relevant head contract of carriage;

“principal contractor” has the meaning given by section 660;

“services” means services performed under a contract of carriage;

“termination” has its ordinary common law meaning, and includes conduct by a principal contractor, being conduct resulting from factors within the control of the principal contractor, the effect of which is to alter the head contract of carriage in a manner which imposes serious financial disadvantage on the carrier;

“Tribunal” means the Contract of Carriage Tribunal established by this Part.

Claim for compensation

697B. (1) A carrier whose head contract of carriage is terminated by a principal contractor may claim compensation from the principal contractor if:

- (a) the carrier entered into the head contract of carriage by arrangement with a previous carrier whose provision of services to the principal contractor was replaced by the carrier; and
- (b) under the terms of the arrangement between the previous carrier and the carrier, a sum of money was paid by the carrier to the previous carrier as a premium or fee in connection with the entry into the head contract of carriage by the carrier; and
- (c) it is a custom and practice in the relevant section of the industry or business of the principal contractor that such a premium or fee be paid; and
- (d) the principal contractor knew or ought reasonably to have known that such a premium or fee had been paid to the previous carrier; and

SCHEDULE 1—AMENDMENTS—*continued*

(e) the principal contractor failed to take reasonable steps to advise the carrier that it was not a requirement of the principal contractor that such a payment be made or requested.

(2) Where a carrier, working exclusively for a principal contractor, performs minor and or incidental work for another person, the carrier shall not be prohibited from making a claim under this section.

Tribunal

697C. (1) There is established by this Part a Contract of Carriage Tribunal.

(2) Except as provided by subsection (3), the Tribunal is constituted by a Presidential Member sitting alone.

(3) In the case of arbitration proceedings under this Part, the Tribunal is, for the purposes of the proceedings, constituted by a Presidential Member and two part-time members nominated by the Presidential Member, one from each of the arbitration panels.

(4) There are to be 2 arbitration panels, one consisting of persons appointed by the Minister to represent principal contractors and the other appointed by the Minister to represent carriers.

(5) The members of the panels are to be persons who, in the opinion of the Minister, are qualified to represent the interests of principal contractors and carriers respectively.

(6) The Minister may invite any person or body to nominate persons for appointment to an arbitration panel.

(7) The Minister may specify the period within which, and the manner in which, such a nomination may be made.

(8) A person is not to be nominated to the Tribunal until:

- (a) each party to the arbitration proceedings concerned has been notified of the proposed nomination and of the period in which the party may veto the nomination; and
- (b) either the period has ended without the nomination being vetoed or each party has notified the Presidential Member that the party has decided not to veto the proposed nomination.

SCHEDULE 1—AMENDMENTS—*continued*

(9) A part-time member is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine with respect to the part-time member.

Compulsory conference with respect to claims

697D. (1) When a head contract of carriage is terminated, the carrier may notify the Industrial Registrar of any claim for compensation in respect of the termination.

(2) Notification may be given by any person who might take proceedings instead of a carrier under section 691 (2).

(3) Notification must be made within 28 days or such further period of up to 3 months as the President may allow by special leave.

(4) On notification, the Registrar must notify the President.

(5) The President is to deal with the matter personally or assign the matter to another Presidential Member.

(6) A claim for compensation is to proceed by conciliation in the first instance.

(7) The Tribunal, when attempting conciliation, is to do everything that to it seems proper to assist the parties to settle the claim. If a settlement is not achieved but further discussions are, in the opinion of the Tribunal, likely to produce a settlement, the Tribunal may manage conferences of the parties or their representatives (whether or not presided over by the Tribunal).

(8) If the parties reach an agreement, the Tribunal may make a determination in accordance with the agreement, which is to be in full settlement of the claim.

(9) The Tribunal may summon a person to a compulsory conference:

- (a) to confer; or
- (b) to produce documents,

in an endeavour to bring the parties to a settlement which will determine the matter concerned.

(10) The Tribunal may direct that any person (including, but not limited to, a previous principal contractor) who or

SCHEDULE 1—AMENDMENTS—*continued*

which is not a party to the notification referred to in subsection (3) is to be a party to a compulsory conference held under this section.

(11) If conciliation does not settle the claim, the Tribunal is to deal with it by arbitration in accordance with section 697E (subject to subsection (12)).

(12) A Presidential Member who has exercised conciliation powers in respect of a claim under this section is not to arbitrate the claim if a party to the arbitration proceedings objects.

(13) The Tribunal is not taken to have exercised conciliation powers in relation to a claim merely because:

- (a) the Tribunal attempted conciliation after having begun to exercise arbitration powers; or
- (b) the Tribunal arranged for a conference of the parties involved in the claim, or their representatives, to be presided over by the Tribunal but the conference did not take place or was not presided over by the Tribunal; or
- (c) the Tribunal arranged for the parties or their representatives to confer among themselves at a conference at which the Tribunal was not present.

(14) If a party objects to a Presidential Member arbitrating a claim under subsection (12), the matter is to be referred to the President who is to assign it to another Presidential Member. That Member is to constitute the Tribunal and proceed to arbitrate the claim.

Arbitration of claim

697E. (1) The Tribunal may determine that compensation is payable in relation to a claim only if it is satisfied that the termination of the head contract of carriage concerned was unfair, harsh or unconscionable.

(2) The Tribunal may direct that any person (including, but not limited to, a previous principal contractor) who or which is not a party to a claim notified to the Industrial Registrar under section 697D (1), is to be a party to the arbitration proceedings.

SCHEDULE 1—AMENDMENTS—*continued*

(3) Subject to subsection (4), the Tribunal may order that a carrier, previous carrier, principal contractor or previous principal contractor joined as such a party is liable to pay solely, or jointly with another party or parties, compensation under this Part.

(4) In determining whether or not compensation is payable and, if so, the amount of compensation, the Tribunal is to have regard to the following matters:

- (a) the amount of the premium or fee paid by the carrier as referred to in section 697B;
- (b) any amount paid to the carrier by the principal contractor (including but not limited to redundancy payments) in respect of the termination of the head contract of carriage, whether or not such payment was made expressly on account of the payment of that premium or fee;
- (c) the duration of the head contract of carriage;
- (d) the likelihood of the carrier being able to use the motor vehicle required by the head contract of carriage for other types of work, and the availability of any such work;
- (e) the resale value of the motor vehicle;
- (f) the preparedness of the principal contractor to guarantee a flow of work to the carrier for a specified period in the future.

(5) If the Tribunal determines that compensation is payable by more than one party, the Tribunal is to determine the respective proportions of the total sum to be paid by each.

(6) Quantification of any compensation is to be approached as though in a claim for damages for breach of contract and compensation is payable only in respect of pecuniary loss resulting from termination of the head contract of carriage. Without limiting the amount of compensation that may be determined to be payable, compensation may include the whole or a part of the amount of premium or fee paid by the carrier.

SCHEDULE 1—AMENDMENTS—*continued*

(7) A claim for compensation may not be dealt with by the Tribunal if the claim (however described) is the subject of an application before, or has been determined by, any court or other tribunal.

(8) The Tribunal must not make a determination under this Part if the determination has the effect of altering or varying an agreement registered under Part 3, or a determination made under Part 4, of this Chapter.

Appeal from Tribunal

697F. There is a right of appeal from a determination of the Tribunal and for that purpose the provisions of Divisions 1 and 2 of Part 4 (Appeals etc.) of Chapter 4 apply to a decision, order or direction of a Tribunal under this Part in the same way as the provisions apply to a decision, order or direction of the Commission.

Reference to Industrial Court by Tribunal on question of law

697G. (1) The Tribunal may, on its own initiative but not on the application of a party, refer a question of law arising in a matter before the Tribunal for the opinion of the Full Industrial Court.

(2) Unless the question referred to the Full Industrial Court is whether the Tribunal may exercise powers in relation to the matter, the Tribunal may, despite the reference, make a decision, order or direction in relation to the matter.

(3) On the determination of the question by the Full Industrial Court, the Tribunal:

- (a) may, if it has not made a decision, order or direction in relation to the matter, make a decision, order or direction not inconsistent with the determination of the Full Industrial Court; or
- (b) must, if it has made a decision, order or direction in relation to the matter, vary the decision, order or direction to make it consistent with the determination of the Full Industrial Court.

(4) If a decision, order or direction is varied under subsection (3), an appeal does not lie on the question of law with which it has been made consistent.

SCHEDULE 1—AMENDMENTS—*continued*

(5) The Full Industrial Court may, on application, prohibit any proceedings pending before the Tribunal that the Tribunal does not have jurisdiction to entertain.

Costs

697H. The Tribunal may make an order for the payment of costs only if the Tribunal dismisses a claim on the ground that it is frivolous or vexatious, or was commenced without reasonable cause, or the Tribunal considers a party to have unreasonably refused to accept an offer of settlement of the Claim.

Representation of parties

697I. (1) A party to proceedings before the Tribunal may appear personally or be represented by a legal practitioner or by an agent who is not a legal practitioner, by an employee or officer of an association of employing contractors, or by an employee or officer of an association of contract carriers.

(2) However, a party is not entitled to be represented in conciliation proceedings by a person who is a legal practitioner without the leave of the Tribunal.

(3) The leave of the Tribunal is not required if the legal practitioner represents a member of an association of employing contractors or an association of contract carriers and is an officer or employee of such an association.

(4) The Tribunal may allow any party appearing before it the services of an interpreter.

(5) In this section:

“**legal practitioner**” means a practising barrister or practising solicitor.

Finality of decision

697J. Subject to the exercise of a right of appeal under this Part, and to section 697G, a determination of the Tribunal:

- (a) is final; and
- (b) may not be vitiated merely because of an informality or want of form; and

SCHEDULE 1—AMENDMENTS—*continued*

- (c) may not be appealed against and may not be reviewed, quashed or called in question whether by a writ or order in nature of certiorari or prohibition or otherwise, by any court or tribunal.

Contracting out prohibited in certain circumstances

697K. (1) The provisions of this Part have effect despite any stipulation to the contrary.

(2) No contract or agreement made or entered into before or after the commencement of this Part operates to annul, vary or exclude any of the provisions of this Part.,

Application of Part

697L. This Part applies despite any other provisions of this Act.

General procedure of Tribunal

697M. (1) The Tribunal:

- (a) may, subject to this Part, determine its own procedure; and
 - (b) is to act as quickly as is practicable; and
 - (c) is not bound to act in a formal manner; and
 - (d) is not bound by the rules of evidence and may inform itself on any matter in any way that it considers to be just; and
 - (e) is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms; and
 - (f) may, subject to section 697P, conduct its proceedings publicly or privately.
- (2) Each part-time member of a Tribunal has one vote.
- (3) If the part-time members both vote for or against a motion, the decision is the decision of the Tribunal.
- (4) If the part-time members do not both vote for or against a motion, the Presidential Member is to decide the question and the decision of the Presidential Member is the decision of the Tribunal.

SCHEDULE 1—AMENDMENTS—*continued*

(5) Section 362 applies to an arbitration under this Part.

(6) Rules may be made relating to the practice and procedure of (and other matters relating to) the Tribunal.

Adjournment of proceedings

697N. (1) The Tribunal may adjourn proceedings to any time and place.

(2) The Tribunal may, at any stage, adjourn a matter before it to enable the parties to negotiate an amicable settlement of the matter.

(3) If proceedings are not able to proceed because of the absence of a member of the Tribunal, the Industrial Registrar is to adjourn the proceedings to a time that the Industrial Registrar considers to be convenient.

Parties to negotiate in good faith

697O. (1) Persons who engage in negotiations with respect to claims for compensation under this Part are required to act in good faith.

(2) The Tribunal is to take into account the extent to which the requirement to act in good faith has been observed by the persons concerned when the Tribunal decides:

- (a) whether or not to exercise any of its functions; or
- (b) which of any alternative functions the Tribunal will exercise in that regard; or
- (c) how any such function should be exercised.

(3) This section is not intended to create an offence or to render any award, order or other decision void or voidable.

Trade secrets etc. tendered as evidence

697P. (1) In arbitration proceedings before the Tribunal:

- (a) the person entitled to a trade secret may object that information tendered as evidence relates to the trade secret; or
- (b) a witness or party may object that information tendered as evidence relates to the profits or financial position of the witness or party.

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(2) If an objection is made under subsection (1) to information tendered as evidence, the information may be given as evidence only under a direction of the Tribunal.

(3) If information is given as evidence under subsection (2), it must not be published in any newspaper, or otherwise.

(4) If the Tribunal directs that information relating to a trade secret or to the profits or financial position of a witness or party is to be given in evidence, the evidence must be taken in private if the person entitled to the trade secret, or the witness or party, so requests.

(5) The Tribunal may direct that evidence given in a proceeding before it, or the contents of a document produced for inspection, not be published.

(6) A person who contravenes this section or a direction under this section is guilty of an offence.

Maximum penalty: 100 penalty units.

Enforcement

697Q. Any compensation payable under this Part may be recovered by the carrier concerned as a debt in any court of competent jurisdiction.

(2) Schedule 2 (Savings, transitional and other provisions):

(a) Omit clause 2 (1) and (2), insert:

2. (1) The regulations may make provision of a savings or transitional nature consequent on the enactment of the following Acts:

this Act

the Industrial Relations (Contracts of Carriage) Amendment Act 1994

(2) A provision referred to in subclause (1) may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.

SCHEDULE 1—AMENDMENTS—*continued*

(b) After Part 3, insert:

**PART 4—PROVISIONS CONSEQUENTIAL ON
ENACTMENT OF INDUSTRIAL RELATIONS
(CONTRACTS OF CARRIAGE) AMENDMENT ACT
1994**

Transitional provision

19. An amendment to this Act made by the Industrial Relations (Contracts of Carriage) Amendment Act 1994 applies to the termination of a head contract of carriage that occurs on or after the commencement of that amendment, and so applies whether the head contract of carriage was entered into before or after that commencement.

*[Member's second reading speech made in—
Legislative Assembly on 14 April 1994*

*Minister's second reading speech made in—
Legislative Council on 12 May 1994]*