



New South Wales

Industrial Relations Amendment Act 2006 No 1

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New South Wales

Industrial Relations Amendment Act 2006 No 1

Act No 1, 2006

An Act to amend the *Industrial Relations Act 1996* to make further provision with respect to the functions of the Industrial Relations Commission and certain awards made by agreement of the parties; and for other purposes. [Assented to 13 March 2006]

See also *Public Sector Employment Legislation Amendment Act 2006*.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Industrial Relations Amendment Act 2006*.

2 Commencement

This Act commences on the date of assent to this Act.

3 Amendment of Industrial Relations Act 1996 No 17

The *Industrial Relations Act 1996* is amended as set out in Schedule 1.

Schedule 1 Amendments

(Section 3)

[1] **Sections 127A–127G**

Omit the sections.

[2] **Chapter 2, Part 11**

Insert after Part 10 of Chapter 2:

Part 11 Outworkers in clothing trades

Division 1 Preliminary

129A Definitions

In this Part:

constitutional corporation means a corporation to which paragraph 51 (xx) of the Commonwealth Constitution applies.

employer means a person described in clause 1 (f) of Schedule 1 as an employer and, in relation to Division 3, does not include a person whose sole business in connection with the clothing industry is sale of clothing by retail.

Note. A person described in clause 1 (f) of Schedule 1 as an employer is taken to be an employer for the purposes of this Act by section 5 (3).

modification includes addition, exception, omission or substitution.

outworker in the clothing trades means a person described in clause 1 (f) of Schedule 1 as an employee.

Note. A person described in clause 1 (f) of Schedule 1 as an employee is taken to be an employee for the purposes of this Act by section 5 (3).

relevant clothing trades award means the *Clothing Trades (State) Award* made by the Commission and published in the Industrial Gazette on 19 October 2001, as amended and in force from time to time.

remuneration means an amount payable, within the meaning of the definition of **amount payable** in section 364 (1), in connection with work done by an outworker and includes an amount payable to the outworker under the *Annual Holidays Act 1944* or the *Long Service Leave Act 1955*.

unpaid remuneration claim means a claim for unpaid remuneration under section 129D.

Division 2 Conditions of employment

129B Outworkers in clothing trades employed by constitutional corporations

- (1) On and from the commencement of this section:
 - (a) the relevant clothing trades award ceases to have effect as an award in relation to outworkers in clothing trades and employers (but only to the extent that such outworkers are employed by constitutional corporations), and
 - (b) the conditions of employment set out in that award (as in force from time to time) in relation to outworkers in clothing trades and employers are, by force of this section, the conditions of employment applicable to outworkers employed by constitutional corporations and employers.

Note. The expression ***conditions of employment*** is defined in the Dictionary to include any provisions about an industrial matter.

- (2) To avoid doubt, subsection (1) (b) extends to conditions relating to the giving out of work by employers.
- (3) Nothing in this section affects the continued operation of the relevant clothing trades award in its application to employees not employed by constitutional corporations and their employers.

129C Application of certain enforcement provisions

A reference in Part 1 (Breach of industrial instruments) or Part 2 (Recovery of remuneration and other amounts) of Chapter 7 to:

- (a) an industrial instrument includes a reference to provisions of the relevant clothing trades award applying under section 129B, and
- (b) an amount payable under an industrial instrument includes a reference to an amount payable to an outworker under any such provision.

Division 3 Remuneration

129D Claims by outworkers in clothing trades for unpaid remuneration

- (1) **When may an outworker make an unpaid remuneration claim under this section?**

An outworker in the clothing trades may make a claim under this section for any unpaid remuneration against the person the outworker believes is his or her employer (the ***apparent employer***) if the employer has not paid the outworker all or any

of the remuneration for work done by the outworker for the employer (the *unpaid remuneration*).

- (2) The claim must be made within 6 months after the work is completed.
- (3) **How is an unpaid remuneration claim made?**

The claim is to be made by serving a written notice on the apparent employer that:

 - (a) claims payment of the unpaid remuneration, and
 - (b) sets out the following particulars:
 - (i) the name of the outworker,
 - (ii) the address at which the outworker may be contacted,
 - (iii) a description of the work done,
 - (iv) the date on which the work was done,
 - (v) the amount of unpaid remuneration claimed in respect of the work.
- (4) The particulars set out in the unpaid remuneration claim must be verified by statutory declaration.
- (5) This section applies only in respect of remuneration for work carried out after the commencement of the section.
- (6) Clause 3 of Schedule 1 does not apply to an employer served with an unpaid remuneration claim under this section.

129E Liability of apparent employer for unpaid remuneration for which an unpaid remuneration claim has been made

- (1) Except as provided by subsection (4), an apparent employer served with an unpaid remuneration claim under section 129D is liable (subject to any proceedings as referred to in section 129G) for the amount of unpaid remuneration claimed.
- (2) An apparent employer may, within 14 days after being served with an unpaid remuneration claim, refer the claim in accordance with this section to another person the apparent employer knows or has reasonable grounds to believe is the person for whom the work was done (the *actual employer*).
- (3) An apparent employer refers an unpaid remuneration claim in accordance with this section by:
 - (a) advising the outworker concerned in writing of the name and address of the actual employer, and

- (b) serving a copy of the claim (a *referred claim*) on the actual employer.
- (4) The apparent employer is not liable for the whole or any part of an amount of unpaid remuneration claimed for which the actual employer served with a referred claim accepts liability in accordance with section 129F.

129F Liability of actual employer for unpaid remuneration for which an unpaid remuneration claim has been made

- (1) An actual employer served with a referred claim under section 129E may, within 14 days after the service, accept liability for the whole or any part of the amount of unpaid remuneration claimed by paying it to the outworker concerned.
- (2) An actual employer who accepts liability must serve notice in writing on the apparent employer of that acceptance and of the amount paid.
- (3) The apparent employer may, after the apparent employer has paid to the outworker concerned any part of the amount of unpaid remuneration claimed for which the actual employer served with the referred claim has not accepted liability, deduct or set-off the amount the apparent employer has paid to the outworker from any amount that the apparent employer owes to the actual employer (whether or not in respect of work the subject of the referred claim).

129G Recovery of amount of unpaid remuneration

- (1) Part 2 of Chapter 7 (Recovery of remuneration and other amounts) applies to recovery of an amount payable to an outworker in the clothing trades from an apparent employer who fails to make a payment in respect of an amount of unpaid remuneration for which the employer is liable under section 129E. For the purposes of this section, a reference in Part 2 of Chapter 7 to an industrial instrument is to be construed as a reference to the provisions of this section.
- (2) In proceedings referred to in subsection (1), an order for the apparent employer to pay the amount concerned must be made unless the apparent employer proves that the work was not done or that the amount claimed for the work in the unpaid remuneration claim is not the correct amount in respect of the work.

129H Offences relating to unpaid remuneration claims and referred claims

A person must not:

- (a) by intimidation or by any other act or omission, intentionally hinder, prevent or discourage a person from making an unpaid remuneration claim, or
- (b) make any statement that the person knows is false or misleading in a material particular in any notice given for the purposes of section 129E or 129F, or
- (c) serve a referred claim on a person under section 129E that the person does not know, or have reasonable grounds to believe, is an actual employer.

Maximum penalty: 100 penalty units.

Division 4 Miscellaneous

129I Effect of this Part

- (1) This Part does not (except as provided by section 129D (6)), limit or exclude any other rights of recovery of remuneration of an outworker in the clothing trades, or any liability of any person with respect to the remuneration of such an outworker, whether or not arising under this Act or any other law or an industrial instrument.

Note. An outworker may, for example, seek an order from an industrial court under section 365 instead of making an unpaid remuneration claim under section 129D.

- (2) Nothing in section 129F (3) limits or excludes any right of recovery arising under any other law with respect to any amount of money owed by the apparent employer to the actual employer.
- (3) Nothing in this Part limits the rights of entry and inspection of officers of industrial organisations for the purpose of investigating any breach of a provision of this Part or a condition of employment conferred by or under this Part.

129J Relationship of this Part to Industrial Relations (Ethical Clothing Trades) Act 2001

In the event of an inconsistency between the provisions of the mandatory code within the meaning of the *Industrial Relations (Ethical Clothing Trades) Act 2001* and the provisions of this Part (or a condition of employment having effect under this Part), the provisions of this Part and those conditions of employment prevail to the extent of the inconsistency.

[3] Section 146A

Insert after section 146:

146A Commission may exercise certain functions conferred on it by agreement

- (1) This section applies to any of the following kinds of dispute if the parties to the dispute have agreed in writing (the *referral agreement*) that the dispute (or disputes of a class to which the dispute belongs) be resolved by the Commission:
 - (a) a dispute about any conditions of employment or industrial matter between an industrial organisation of employees and one or more employers (or industrial organisations of employers),
 - (b) a dispute of the kind referred to in section 332 (2) or (3) or a dispute about a claim for compensation of the kind referred to in section 346 between:
 - (i) an industrial organisation of employees and one or more employers (or industrial organisations of employers), or
 - (ii) an association of contract carriers and one or more principal contractors (or associations of employing contractors), or
 - (iii) an association of contract drivers and one or more bailors (or associations of employing contractors).
- (2) A party to a dispute to which this section applies may apply to the Commission for the exercise by the Commission of such functions with respect to the resolution of the dispute as may be specified in the referral agreement.
- (3) On any such application, the Commission has and may exercise such functions with respect to the resolution of the dispute as may be specified in the referral agreement.

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- (4) Without limiting subsections (2) and (3), the functions of the Commission with respect to the resolution of a dispute to which this section applies that may be specified in a referral agreement include the following:
- (a) the conciliation of the dispute,
 - (b) the arbitration of the dispute,
 - (c) the granting of a remedy or other relief of the kind provided by Part 6, 7 or 9 of Chapter 2,
 - (d) the granting of a remedy or other relief of the kind provided by Part 7 of Chapter 6,
 - (e) the determination of any other issue or question arising in the dispute.
- (5) The regulations may make provision for or with respect to the application of the provisions of this Act (with such modifications, if any, as may be prescribed by the regulations) to the exercise of functions conferred on the Commission by referral agreements.
- (6) Subject to any regulations made for the purposes of subsection (5), the Commission is to be constituted by:
- (a) except as provided by paragraph (b)—a single member of the Commission, or
 - (b) if the function to be exercised is a function of the kind referred to in section 153 (1)—the Commission in Court Session.
- (7) Subject to this Act and any regulations made for the purposes of subsection (5) (and without limiting the generality of section 185), rules of the Commission may be made for or with respect to the practice and procedure of the Commission in the exercise of functions conferred on it by referral agreements.
- (8) Nothing in this section makes any order, determination or other decision of the Commission in respect of a dispute binding on the parties to the dispute unless the referral agreement operates (apart from this section) to make any such order, determination or decision binding on the parties.
- (9) Despite the provisions of Part 7 (Appeals and references to Commission) of Chapter 4, a party to a dispute in respect of which the Commission has made a decision in exercise of a function conferred by a referral agreement may not appeal against the decision under that Part unless the agreement provides that the party may appeal such a decision.

(10) The functions conferred on the Commission by or under this section are in addition to, and do not derogate from, any other function of the Commission.

(11) In this section:
association of contract carriers, association of contract drivers, association of employing contractors, bailor and principal contractor have the same meanings as they have for the purposes of Chapter 6.
modification includes addition, exception, omission or substitution.

[4] Section 156 Full Bench of Commission

Omit “and at least one Commissioner” from section 156 (2).

[5] Section 159 Arrangement of business

Insert after section 159 (1):

(1A) Without limiting subsection (1), a direction given under that subsection may be limited to particular proceedings (or particular classes of proceedings) specified in the direction.

[6] Schedule 4 Savings, transitional and other provisions

Insert at the end of clause 2 (1):

Industrial Relations Amendment Act 2006

[7] Schedule 4, Part 8A

Insert after Part 8:

Part 8A Provisions consequent on enactment of Industrial Relations Amendment Act 2006

44A Definitions

In this Part:

amending Act means the *Industrial Relations Amendment Act 2006*.

constitutional corporation means a corporation to which paragraph 51 (xx) of the Commonwealth Constitution applies.

relevant time means the beginning of the day that occurs immediately before the day on which Part 2 of Schedule 4 to the *Workplace Relations Amendment (Work Choices) Act 2005* of the Commonwealth commences.

44B Application of section 146A

Section 146A, as inserted by Schedule 1 [3] to the amending Act, extends to agreements of the kind referred to in section 146A (1) entered into before the commencement of that section.

44C Certain agreed awards to have effect as enterprise agreements

- (1) This clause applies to an award that was in force immediately before the relevant time:
 - (a) that applies to a group of employees that is constituted wholly or partly by employees of any constitutional corporation and in respect of which an enterprise agreement could have been made (as referred to in section 30), and
 - (b) the parties to which are limited to the kinds of persons or bodies that could have been parties to an enterprise agreement (as referred to in section 31) in respect of those employees, and
 - (c) that binds only the parties to the award and the employees for whom the award was made, and
 - (d) that was made by the Commission so as to give effect to an agreement of the parties to the award.
- (2) Without limiting subclause (1) (d), an award was made so as to give effect to an agreement of the parties if:
 - (a) the award was made with the consent of the parties, or
 - (b) the award substantially gives effect to conditions of employment agreed to, or jointly proposed to the Commission, by the parties.
- (3) On and from the relevant time:
 - (a) an award to which this clause applies ceases to have effect as an award, but only to the extent to which it applies to employees of a constitutional corporation (the *relevant award*), and
 - (b) an enterprise agreement (with the features referred to in subclause (4) (a)–(d)) has effect instead of the relevant award in respect of those employees even though the formalities under Part 2 of Chapter 2 for the making of an enterprise agreement may not have been complied with.
- (4) Part 2 of Chapter 2 applies to any enterprise agreement given effect to by subclause (3) (b) in the same way as that Part applies to any other enterprise agreement, subject to the following:

- (a) the agreement is taken to have been duly made and to have been duly approved by the Commission at the relevant time,
 - (b) the agreement binds the same employees of a constitutional corporation and parties as the relevant award,
 - (c) the conditions of employment for which the agreement provides are taken to be the same conditions of employment for which the relevant award provided,
 - (d) the agreement has a nominal term commencing at the relevant time and ending at the same time as the nominal term of the relevant award,
 - (e) the provisions of section 45 (Register and publication of enterprise agreements) apply to the agreement as if the agreement were approved at the relevant time,
 - (f) such modifications of that Part as may be prescribed by the regulations.
- (5) Nothing in this clause affects the continued operation of any award to the extent to which the award applies to employees that are employed by the Government in the service of the Crown.
- (6) In this clause:
modification includes addition, exception, omission or substitution.

44D Applications to Commission concerning effect of clause 44C

Subject to any rules of the Commission, any party to an award may apply to the Commission (whether before or after the relevant time) for an order determining any of the following issues:

- (a) whether or not the award is an award to which clause 44C applies,
- (b) the extent to which an enterprise agreement has effect instead of an award to which clause 44C applies.

[Second reading speech made in—
Legislative Assembly on 7 March 2006
Legislative Council on 8 March 2006]

BY AUTHORITY