

Employment Protection Act 1982 No 122

[1982-122]



New South Wales

Status Information

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Provisions in force

The provisions displayed in this version of the legislation have all commenced.

Notes—

- **Does not include amendments by**
Industrial Relations Further Amendment Act 2006 No 97 (not commenced — to commence on 2.2.2007)

Authorisation

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Employment Protection Act 1982 No 122



New South Wales

An Act to require the giving of notice in relation to the termination or proposed termination of employment in certain cases; to confer jurisdiction on the Industrial Commission of New South Wales in relation to any such termination or proposed termination; and for other purposes.

Part 1 Preliminary

1 Name of Act

This Act may be cited as the *Employment Protection Act 1982*.

2 Commencement

- (1) Sections 1 and 2 shall commence on the date of assent to this Act.
- (2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.
- (3) Sections 7 and 8 do not apply in relation to any termination or proposed termination of employment if:
 - (a) where notice of the termination is or was given to the employee—the notice is or was given before the end of the period of 7 days commencing on and including the day appointed and notified under subsection (2), or
 - (b) where notice of the termination is not or was not given to the employee—the termination occurs or occurred before the end of that period.

3 (Repealed)

4 Definitions

- (1) In this Act, except in so far as the context or subject-matter otherwise indicates or requires:

agreement means an agreement within the meaning of the Principal Act.

apprentice means an apprentice within the meaning of the Principal Act.

award means an award within the meaning of the Principal Act.

Commission means the Industrial Commission of New South Wales established under the Principal Act.

conciliation commissioner means a conciliation commissioner appointed under the Principal Act.

employee means a person employed by an employer, and includes an apprentice, but does not include an employee of the Crown within the meaning of the Principal Act.

employer means a person, firm, company or corporation employing persons working in any industry within the meaning of the Principal Act, whether on behalf of himself, herself or itself or any other persons, and includes a person employing an apprentice, but does not include the Crown or a public authority within the meaning of the Principal Act.

group means a group referred to in section 5.

member means a judicial member of the Commission or a non-judicial member of the Commission.

President means the President of the Commission or the member on whom the powers of the President devolve under section 14 (9) of the Principal Act.

Principal Act means the [Industrial Arbitration Act 1940](#).

Registrar means the industrial registrar appointed under the Principal Act.

regulations means regulations under this Act.

superannuation scheme means a scheme, fund or arrangement under which any superannuation or retirement benefits are provided.

union means an industrial union registered as such under the Principal Act.

- (2) A reference in this Act to an employee or employer includes a reference to a person who was an employee or employer before the employment concerned was terminated.

5 Grouping provisions

- (1) For the purposes of this Act, an employer is a member of a group if:
- (a) the employer is, or

(b) the employer would, but for section 16H of the *Pay-roll Tax Act 1971*, be, a member of the group for the purposes of that Act.

- (2) The regulations may make provision for or with respect to the exclusion of an employer from a group for the purposes of this Act.
- (3) In determining, for the purposes of this Act, the number of employees employed by an employer who is a member of a group, the employer shall be deemed to be the employer of all the employees of the members of the group.

6 Principal Act

- (1) Nothing in this Act affects or impliedly repeals any of the provisions of the Principal Act, or limits or affects in any way the jurisdiction of a person or body under the Principal Act in relation to any matter to which this Act applies or may apply.
- (2) Except where the contrary intention appears, the Principal Act shall have effect, and be construed, as if this Act formed part of the Principal Act.

6A Industrial Relations Act 1996

- (1) After the repeal of the Principal Act, this Act continues to have effect and is to be construed subject to the *Industrial Relations Act 1996*.
- (2) In particular:
 - (a) references in this Act are to be construed in accordance with clause 40 of Schedule 4 to the *Industrial Relations Act 1996*, and
 - (b) references to agreements are to be construed as references to enterprise agreements within the meaning of that Act, except in section 14 (2) (b) and (3) of this Act where the references are to be construed as references to former industrial agreements.

Part 2 Obligations of employers

7 Notice of intention to terminate employment to be given to Registrar

- (1) Subject to section 9, an employer shall not terminate the employment of any employee unless the employer has, at least 7 days:
 - (a) before notice of the termination is given to the employee, or
 - (b) where notice of the termination is not given to the employee—before the termination of the employment,served on the Registrar a notice of intention to terminate the employment.

Maximum penalty: 50 penalty units.

- (2) A notice shall be deemed not to have been served for the purposes of subsection (1) unless it contains particulars of:
- (a) the name and address of the employee concerned,
 - (b) the position occupied by the employee or the duties required to be performed by the employee,
 - (c) the name of any relevant award or agreement applicable to the employee,
 - (d) the name of any relevant union to which the employee belongs, if known to the employer,
 - (e) any payments to be made to the employee in consequence of the termination of his or her employment,
 - (f) the date on which the employee entered the employment of the employer or, if the employee has entered that employment on more than one occasion, the date on which the employee last entered that employment,
 - (g) the date on or after which the termination of the employee's employment is to take effect, and
 - (h) such other matters as may be prescribed.
- (2A) A notice under this section may also contain particulars of the financial and other resources of the employer concerned to which the employer would desire the Commission to have regard before making an order under this Act.
- (3) For the purposes of this section:
- (a) an award or agreement is not a relevant award or agreement, or
 - (b) a union is not a relevant union,
- unless the award or agreement, or membership of the union, is relevant to the position occupied by the employee concerned or to his or her duties as an employee.
- (4) A notice under this section may relate to one or more employees whose employment is proposed to be terminated.
- (5) This section does not apply:
- (a) in relation to:
 - (i) the termination of an employee's employment if the termination is made in consequence of misconduct on the part of the employee, or
 - (ii) the termination of casual employment, or

(b) in such cases or classes of cases as are prescribed.

(6) For the purposes of subsection (5), employment is casual employment if and only if:

(a) it is, in accordance with the regulations, to be so treated, or

(b) any award or agreement applicable to the employee concerned treats or classifies the employment as being casual employment.

8 Notice of reasons for termination of employment to be given to Registrar in certain cases

(1) Subject to section 9, where:

(a) an employee:

(i) is given notice of termination of his or her employment, or

(ii) his or her employment is terminated without notice, and

(b) a notice of intention to terminate the employment has not been served on the Registrar under section 7,

the employer shall, not later than 7 days after the employee is given notice (as referred to in paragraph (a) (i)) or the employment is terminated without notice (as referred to in paragraph (a) (ii)), serve on the Registrar a written notice giving particulars of the reasons for the termination.

Maximum penalty: 50 penalty units.

(2) If the regulations so provide, a notice shall be deemed not to have been served for the purposes of subsection (1) unless it contains such particulars as may be prescribed.

(3) This section does not apply:

(a) in relation to the termination or proposed termination of employment of an employee unless, at the time of termination of the employment the employee has been, or will have been, continuously employed by the employer for at least 12 months ending at that time, or

(b) in such cases or classes of cases as are prescribed.

9 Non-application of sections 7 and 8 to employers of fewer than 15 employees

Neither section 7 nor section 8 requires a notice to be served on the Registrar in relation to the termination or proposed termination of an employee's employment if, immediately before the termination or proposed termination of employment, the employer employed fewer than 15 employees.

10 Unions to be notified by Registrar

It is the duty of the Registrar, as soon as practicable after receiving a notice under section 7, to furnish such union or unions as the Registrar considers appropriate with a copy of the notice.

Part 3 Jurisdiction of Commission

11 President to be notified by Registrar

- (1) It is the duty of the Registrar, as soon as practicable after receiving a notice under section 7, to furnish the President with a report containing a copy of the notice and such other matters as the Registrar thinks appropriate.
- (2) Subject to any directions of the President, subsection (1) does not apply if the Registrar is of the opinion that the Commission would make no orders in consequence of the notice.
- (3) The Registrar may, of his or her own motion, furnish the President with a report where the Registrar is of the opinion that an employer has or may have contravened or failed to comply with this Act in any respect or that a notice under section 8 contains or may contain inadequate, false or misleading particulars.

12 Report to be considered by Commission

- (1) The Commission has jurisdiction to consider and inquire into a report referred to the President under section 11 and, in consequence thereof, to make such orders under this Act as appear to be just and proper.
- (1A) Where, in relation to a report referred to in subsection (1), the Commission receives a request in or to the effect of the prescribed form from a union or from an employer to whom the report relates for the Commission to exercise its jurisdiction under this Act, the Commission shall forthwith proceed to exercise its jurisdiction under this Act in relation to that report.
- (1B) Where, in relation to a report referred to in subsection (1), no such request is made to the Commission by:
 - (a) an industrial union of employers or an employer to whom the report relates—within the period of 21 days after the date on which the Registrar received the relevant notice under this Act, or
 - (b) an industrial union of employees—within the period of 21 days after the date on which the Registrar first sent such a union a copy of the notice for the purposes of section 10,the Commission shall forthwith proceed to exercise its jurisdiction under this Act in relation to that report.

- (1C) The regulations may, in any case or class of cases, vary any period referred to in subsection (1A) or (1B), and those subsections shall, in any such case or class of cases, have effect subject to and in accordance with any such variation.
- (2) Notwithstanding anything in section 30B of the Principal Act, but subject to section 15 of this Act, the jurisdiction of the Commission under this Act may be exercised by:
- (a) a member, or
 - (b) a conciliation commissioner,
- to whom consideration of the report is for the time being allocated by the President.
- (3) The Commission may exercise its jurisdiction under this Act in relation to a termination or proposed termination of employment notwithstanding that the employer has contravened or failed to comply with this Act or the regulations in any respect, and may do so as if that contravention or failure had not occurred.

13 Conferences and conciliation

The Commission:

- (a) is empowered to endeavour, by all means which it deems proper and necessary, to settle by means of conciliation any matter to which a report under section 11 relates, and
- (b) shall take all reasonable steps to effect an amicable settlement in relation to any such matter and for this purpose is empowered to adjourn any proceedings at any stage to enable the persons concerned to negotiate with a view to a settlement by amicable arrangements.

14 Orders of Commission

- (1) The Commission may, after consideration of a report under section 11 and such inquiry as it thinks proper, make orders as to any or all of the following matters:
- (a) requiring the payment of severance payments to the employee concerned,
 - (b) requiring the payment of a gratuity to the employee,
 - (c) specifying the amount of, or the method of calculating the amount of, any such severance payments or gratuities,
 - (d) requiring the payment of benefits from a superannuation scheme of which the employee is a member, as if the benefits ordered to be paid were provided for by the scheme,
 - (e) requiring the payment of an amount to the employee to compensate for any loss of accrued benefits under a superannuation scheme of which the employee is a

member,

- (f) requiring the employer concerned to give preference to the employee for employment in a position for which the employee is or may become qualified, in the event that the employer requires additional staff within a specified period,
 - (g) requiring, in special cases, the retraining of the employee, and requiring the payment by the employer of any costs of any such retraining,
 - (h) requiring the payment of an amount to the employee by way of re-imbursment of salary or wages lost by the employee, in so far as the loss is, in the opinion of the Commission, attributable to a failure on the part of the employer to serve a notice on the Registrar in accordance with the requirements of section 7,
 - (i) requiring the payment of any other sums, or the doing of any other act, matter or thing, in consequence of the termination of the employment of the employee, as appears to the Commission to be just and proper,
 - (j) any ancillary matters relating to the matters referred to in any of the foregoing paragraphs of this subsection.
- (2) An order may be made under this Act in consequence of a report under section 11 so as:
- (a) to apply to and in relation to:
 - (i) all or any of the employees to whom the report relates, and
 - (ii) such other employees of the employer concerned as may thereafter have their employment terminated by the employer and as are specified or described in the order, or
 - (b) to rescind, cancel or vary any relevant award or industrial agreement or any relevant order under this Act.
- (3) A copy of any order under this Act that rescinds, cancels or varies an award or industrial agreement shall be published in the New South Wales Industrial Gazette, but otherwise an order under this Act need not be published in that Gazette.
- (4) An order under this Act takes effect from the date it is made or such later date as the Commission specifies in the order, whether or not it is required to be or has been published in the New South Wales Industrial Gazette.
- (5) Before making an order under this Act, the Commission shall have regard to such financial and other resources of the employer concerned as the employer desires the Commission to take into consideration and discloses (whether in the notice in consequence of which such an order may be made or otherwise) and as the Commission thinks relevant, and the probable effect the order, if made, will have in

relation to the employer.

- (6) The Commission shall not make an order under this Act unless it is satisfied that the employee concerned will not, if the order is made, be in a less favourable position than if the order had not been made.
- (7) The Commission shall not make an order under this Act in respect of the matters referred to in subsection (1) (d) or (e) unless it is satisfied that the amount of the payment to be made is not disproportionate to the relevant period of service that the employee concerned has had with the employer or to the amount of contributions made by the employee to the superannuation scheme concerned.
- (8) Nothing in subsection (1) (i) or (j) enables the making of an order under this Act requiring the appointment or re-instatement of the employee concerned to any position, except in a case where the employer concerned is required to give preference to the employee for employment in that position, as referred to in subsection (1) (f).
- (9) An order under this Act has effect notwithstanding that the number of employees employed by the employer concerned falls below 15.

15 Appeals

- (1) An appeal lies from an order of a member or conciliation commissioner exercising jurisdiction under this Act to the Commission in court session.
- (2) Without limiting section 6 (2) of this Act, the provisions of section 14 (8) of the Principal Act, and of the regulations under that Act, apply to and in respect of an appeal under this Act in the same way as they apply to and in respect of an appeal under that Act, and so apply as if a reference in those provisions to a member of the Commission included a reference to a conciliation commissioner.
- (3) Where an appeal has been instituted under this Act the Commission in court session may, on such terms and conditions as it thinks fit, make an order that the operation of the whole or a part of the decision be stayed pending the determination of the appeal or until further order of the Commission in court session.

16 Conduct of proceedings

- (1) Without limiting section 6 (2) of this Act but subject to section 15 of this Act, except in so far as a regulation made as referred to in subsection (2) so provides, the provisions of the Principal Act, and the regulations made under that Act, relating to proceedings before a member, a conciliation commissioner or the Commission and to appeals from an order of a member or a conciliation commissioner apply to and in respect of proceedings under this Act in the same way as they apply to and in respect of proceedings under that Act.

- (2) The regulations may make provision for or with respect to the institution and conduct of any proceedings under this Act and any ancillary matters.
- (3) Without limiting any other provision of this Act or section 78 (2) of the Principal Act, Unions NSW may, subject to establishing a sufficient interest in any proceedings under this Act, intervene in those proceedings and make such representations as it thinks necessary to safeguard the interests of any or all of the trade unions affiliated to it.

17 Enforcement of orders etc

- (1) Without limiting section 6 (2) of this Act, the provisions of sections 119 and 123 of the Principal Act apply to and in respect of orders and proceedings under this Act in the same way as they apply to and in respect of orders and proceedings under the Principal Act.
- (2) A person shall not contravene or fail to comply with an order under this Act.
Maximum penalty: 50 penalty units.
- (3) Nothing in subsection (2) affects the recovery as a debt of any amount ordered to be paid under an order under this Act.

Part 4 Miscellaneous

18 Service of documents

Service of documents (including service of documents on unions and service by way of substituted service) may be effected:

- (a) in the same manner as documents may be served under or for the purposes of the Principal Act,
- (b) in accordance with the regulations, or
- (c) in any other manner in which service may be effected apart from this section.

19 Summary procedure for offences

- (1) Proceedings for an offence against this Act or the regulations shall be disposed of summarily:
 - (a) before a Local Court, or
 - (b) before an industrial magistrate.
- (2) The provisions of the Principal Act, and the regulations made under that Act, relating to proceedings before an industrial magistrate and to appeals from an industrial magistrate to the Commission apply to proceedings before an industrial magistrate for offences against this Act or the regulations as if the proceedings under this Act were

proceedings under that Act.

- (3) In proceedings for an offence against this Act or the regulations, the prosecution case may be conducted:
 - (a) by the informant, or
 - (b) on behalf of the informant by an Australian legal practitioner or public servant, or
 - (c) on behalf of the informant by an agent authorised in writing by the informant.
- (4) In relation to a contravention or failure to comply with both sections 7 and 8 in connection with the termination or proposed termination of employment of a particular employee, the employer is, if punished in respect of one of those offences, not liable to be punished in respect of the other.

20 Authority to prosecute

- (1) Proceedings for an offence against this Act or the regulations may be instituted:
 - (a) by an inspector appointed under the Principal Act, or
 - (b) by a person acting with the written consent of the Minister.
- (2) In proceedings for an offence against this Act or the regulations, a consent to institute the proceedings, purporting to have been signed by the Minister, shall be evidence of that consent without proof of the signature of the Minister.

21 Time for instituting proceedings for offences

Notwithstanding anything in any other Act, proceedings for an offence against this Act or the regulations may be instituted within the period of 2 years after the act or omission alleged to constitute the offence.

22 Offences by corporations

- (1) Where a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each director of the corporation, and each person concerned in the management of the corporation, shall be deemed to have contravened the same provision unless he or she satisfies the court that:
 - (a) the corporation contravened the provision without his or her knowledge,
 - (b) he or she was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or
 - (c) he or she, being in such a position, used all due diligence to prevent the contravention by the corporation.
- (2) A person may be proceeded against and convicted under a provision pursuant to

subsection (1) whether or not the corporation has been proceeded against or been convicted under that provision.

- (3) Nothing in subsection (1) prejudices or affects any liability imposed by a provision of this Act or the regulations on any corporation by which an offence against the provision is actually committed.

23 Protection from liability

- (1) A person has qualified privilege in proceedings for defamation in respect of the furnishing of any notice to the Registrar under section 7 or 8, but this subsection does not limit or affect any right, privilege or immunity that a person has, apart from this subsection, as defendant in proceedings for defamation.
- (2) No matter or thing done by the Registrar shall, if the matter or thing was done in good faith for the purpose of executing this Act, subject the Registrar or any other person personally to any action, liability, claim or demand.

24 Regulations

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) A provision of a regulation may:
 - (a) apply generally or be limited in its application by reference to specified exceptions or factors,
 - (b) apply differently according to different factors of a specified kind, or
 - (c) authorise any matter or thing to be from time to time determined, applied or regulated by any specified person or body,or may do any combination of those things.
- (3) A regulation may impose a penalty not exceeding 20 penalty units for an offence against the regulation.