

# Industrial Relations Act 1996 No 17

[1996-17]



New South Wales

## Status Information

### Currency of version

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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**
  - [Mine Health and Safety Act 2004 No 74](#) (not commenced — to commence on 1.9.2008)
  - [Parliamentary Electorates and Elections Amendment Act 2006 No 68](#) (not commenced)
  - [Miscellaneous Acts \(Local Court\) Amendment Act 2007 No 94](#) (not commenced)
  - [Miscellaneous Acts Amendment \(Same Sex Relationships\) Act 2008 No 23](#) (not commenced)
- **See also**
  - [Dangerous Goods \(Road and Rail Transport\) Bill 2008](#)

### Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the [Interpretation Act 1987](#).

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# Industrial Relations Act 1996 No 17



New South Wales

An Act to reform the law concerning industrial relations, and to repeal the *Industrial Relations Act 1991*.

## Chapter 1 Preliminary

### 1 Name of Act

This Act is the *Industrial Relations Act 1996*.

### 2 Commencement

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

### 3 Objects

The objects of this Act are as follows:

- (a) to provide a framework for the conduct of industrial relations that is fair and just,
- (b) to promote efficiency and productivity in the economy of the State,
- (c) to promote participation in industrial relations by employees and employers at an enterprise or workplace level,
- (d) to encourage participation in industrial relations by representative bodies of employees and employers and to encourage the responsible management and democratic control of those bodies,
- (e) to facilitate appropriate regulation of employment through awards, enterprise agreements and other industrial instruments,
- (f) to prevent and eliminate discrimination in the workplace and in particular to ensure equal remuneration for men and women doing work of equal or comparable value,
- (g) to provide for the resolution of industrial disputes by conciliation and, if necessary, by arbitration in a prompt and fair manner and with a minimum of legal technicality,
- (h) to encourage and facilitate co-operative workplace reform and equitable, innovative and productive workplace relations.

#### 4 Dictionary

- (1) Expressions used in this Act (or in a particular provision of this Act) that are defined in the Dictionary at the end of this Act have the meanings given to them in the Dictionary.
- (2) Key expressions used in this Act are defined in the following provisions of this Chapter.

**Note—**

Some expressions used in this Act are defined in the [Interpretation Act 1987](#), and have the meanings given to them in that Act.

#### 5 Definition of employee

- (1) **General definition** In this Act, **employee** means:
  - (a) a person employed in any industry, whether on salary or wages or piece-work rates, or
  - (b) any person taken to be an employee by subsection (3).
- (2) A person is not prevented from being an employee only because:
  - (a) the person is working under a contract for labour only, or substantially for labour only, or
  - (b) the person works part-time or on a casual basis, or
  - (c) the person is the lessee of any tools or other implements of production, or
  - (d) the person is an outworker, or
  - (e) the person is paid wholly or partly by commission (such as a person working in the capacity of salesperson, commercial traveller or insurance agent).
- (3) **Deemed employees** The persons described in Schedule 1 are taken to be employees for the purposes of this Act. Any person described in that Schedule as the employer of such an employee is taken to be the employer.
- (4) **Exclusion** A person employed or engaged by his or her spouse or parent is not an employee for the purposes of this Act.

#### 6 Definition of industrial matters

- (1) **General definition** In this Act, **industrial matters** means matters or things affecting or relating to work done or to be done in any industry, or the privileges, rights, duties or obligations of employers or employees in any industry.
- (2) **Examples** Examples of industrial matters are as follows:

- (a) the employment of persons in any industry (including the employment of minors, trainees, apprentices and other classes of employees),
- (b) the remuneration (including rates of pay, rates for piece-work and allowances) for employees in any industry,
- (c) the conditions of employment in any industry (including hours of employment, qualifications of employees, manner of work and quantity of work to be done),
- (d) part-time or casual employment (including part-time work agreements),
- (e) the termination of employment of (or the refusal to employ) any person or class of persons in any industry,
- (f) discrimination in employment in any industry (including in remuneration or other conditions of employment) on a ground to which the *Anti-Discrimination Act 1977* applies,
- (g) procedures for the resolution of industrial disputes,
- (h) the established customs in any industry,
- (i) the authorised remittance by employers of membership fees of industrial organisations of employees,
- (j) the surveillance of employees in the workplace,
- (k) the mode, terms and conditions under which work is given out, whether directly or indirectly, to be performed by outworkers in the clothing trades.

**Note—**

The *Apprenticeship and Traineeship Act 2001* deals with apprenticeships and traineeships. Section 80 of that Act provides that that Act (and regulations, orders and directions under that Act) prevail over this Act (and regulations, orders, awards and agreements under this Act) to the extent of any inconsistency.

## **7 Definition of industry**

In this Act, **industry** includes:

- (a) any trade, manufacture, business, project or occupation in which persons work, or
- (b) a part of an industry or a number of industries.

## **8 Definition of industrial instrument**

In this Act, **industrial instrument** means an award, an enterprise agreement, a public sector industrial agreement, a former industrial agreement, a contract determination or a contract agreement.

## **9 Notes in text**

Notes in the text of this Act do not form part of this Act.

## **Chapter 2 Employment**

### **Part 1 Awards**

#### **Division 1 Awards generally**

##### **10 Commission may make awards**

The Commission may make an award in accordance with this Act setting fair and reasonable conditions of employment for employees.

##### **11 When award may be made**

- (1) An award may be made:
  - (a) on application to the Commission or on the Commission's own initiative, or
  - (b) in the course of an arbitration by the Commission under Chapter 3 to resolve an industrial dispute.
- (2) An application for an award may be made only by:
  - (a) an employer, or
  - (b) an industrial organisation of employers or employees, or
  - (c) a State peak council.
- (3) Anyone who can apply for an award may become a party to any proceedings for making an award.
- (4) An applicant for an award, or to become a party to the making of an award, is required to satisfy the Commission that it or any one or more of its members has a sufficient interest in the proposed award.

##### **12 Persons bound by award**

- (1) An award is binding on all employees and employers to which it relates, whether or not they were a party to the making of the award.
- (2) An award that applies to a particular industry is, subject to its terms, taken to bind all employees and employers engaged in the industry.
- (3) An award is, subject to its terms, binding on all industrial organisations that were a party to the making of the award.



### **13 Formal matters relating to making of award**

- (1) An award is required to be in writing, expressed to be an award and signed by at least one member of the Commission.
- (2) An award is to be published by the Industrial Registrar on the NSW industrial relations website.
- (3) An award is to comply with such other requirements as to form and procedure for its making as may be made by the regulations or (subject to any such regulations) by the rules of the Commission.
- (4) The Commission may give directions as to the standard format for awards.

### **14 Mandatory dispute resolution procedures in awards**

- (1) An award is not to be made unless it contains procedures for the resolution of industrial disputes under the award (***dispute resolution procedures***).
- (2) However, an award need not contain dispute resolution procedures if the Commission is satisfied that another specified award already does so.
- (3) Dispute resolution procedures are to include procedures for:
  - (a) consultation at the workplace, and
  - (b) the involvement of relevant industrial organisations.
- (4) Dispute resolution procedures in awards do not apply to employers who employ fewer than 20 employees, unless the award specifically applies those procedures to such an employer.

### **15 Commencement of award**

- (1) An award comes into force on the date specified by the Commission.
- (2) However, legal proceedings relating to the enforcement of the award cannot be commenced until the expiration of 7 days after the day on which it is published on the NSW industrial relations website.
- (3) An award may be expressed to apply retrospectively, but not earlier than the date on which:
  - (a) application for the award was lodged with the Industrial Registrar, or
  - (b) the Commission itself initiated proceedings for the award, or
  - (c) the industrial dispute giving rise to the award was notified to the Commission.
- (4) Despite subsection (3), the following awards may, with the consent of the parties to

the making of the award, apply retrospectively from a date, specified in the award, that is earlier than any date referred to in that subsection:

- (a) an award that sets conditions of employment in connection with a project,
- (b) an award that sets conditions of employment for employees of a single employer or for employees of two or more associated employers.

**Note—**

Section 190 enables the Full Bench or a Presidential Member to stay the operation of the whole or any part of an award for the purposes of appeal pending determination of the appeal or further order of the Commission.

**16 Term of award**

- (1) An award applies for the period specified in it as its nominal term and, after that period, until rescinded by the Commission.
- (2) The nominal term of an award must not be less than 12 months nor more than 3 years.
- (3) However, an award that sets conditions of employment in connection with a project may have a specified nominal term that does not exceed the expected duration of the project.
- (4) An award may in special circumstances be made on an interim basis. Any such award is to be expressed to be an interim award and applies only for the period (not exceeding 12 months) specified in it.

**17 Variation or rescission of award**

- (1) The Commission may vary or rescind an award.
- (2) Sections 11, 13 and 15 apply to any such variation or rescission. The other provisions of this Division continue to apply to the award as varied.
- (3) An award may be varied or rescinded in any of the following circumstances only:
  - (a) at any time with the mutual consent of all the parties to the making of the original award,
  - (b) at any time to give effect to a decision of the Full Bench of the Commission under section 50 or 51 (National and State decisions),
  - (c) during its nominal term if the Commission considers that it is not contrary to the public interest to do so and that there is a substantial reason to do so,
  - (d) after its nominal term if the Commission considers that it is not contrary to the public interest to do so.

- (4) This section extends to a variation or rescission of an award in the course of an arbitration by the Commission under Chapter 3 to resolve an industrial dispute.

**Note—**

Section 169 also enables an award to be varied at any time to remove unlawful discrimination.

**18 Exemptions from awards**

- (1) The Commission may, on application, grant an exemption from the whole or any part of an award if it is satisfied that it is not contrary to the public interest and that:
- (a) it is in the best interests of the employees and employers concerned, or
  - (b) the operation of the award (or part of the award) would result in significant unemployment or other serious consequences for the employees and employers concerned.
- (2) An exemption may be granted for a period not exceeding 3 years at any one time.
- (3) The Commission may, on application or on its own initiative, review any exemption, and may confirm, vary or revoke the exemption.

**19 Review of awards**

- (1) The Commission is required to review each award before September 2001 and subsequently at least once in every 3 years.
- (2) The purpose of a review is to modernise awards, to consolidate awards relating to the same industry and to rescind obsolete awards.
- (3) The Commission must take account of the following matters in the review of awards:
- (a) any decision of the Commission under Part 3 or any other test case decision of the Commission,
  - (b) rates of remuneration and other minimum conditions of employment,
  - (c) part-time work, casual work and job-sharing arrangements,
  - (d) dispute resolution procedures,
  - (e) any issue of discrimination under the awards, including pay equity,
  - (f) any obsolete provisions or unnecessary technicalities in the awards and the ease of understanding of the awards,
  - (g) any other matter relating to the objects of the Act that the Commission determines.
- (4) The Commission must also take account of the effect of the awards on productivity

and efficiency in the industry concerned.

- (5) During a review of awards, relevant industrial organisations and any other parties to the awards may make submissions on any of the matters being reviewed.
- (6) The Commission is to make such changes to awards as it considers necessary as a result of a review.

**Note—**

In addition to submissions of relevant industrial organisations, the Minister, the President of the Anti-Discrimination Board and State peak councils may make submissions in pursuance of their general right of intervention in Commission proceedings under section 167.

**20 Consolidation of awards**

- (1) The Commission may make an award consolidating, with or without amendments, related awards.
- (2) The Commission may rescind an obsolete award or an obsolete part of an award, whether or not in connection with the consolidation of awards.
- (3) The Industrial Registrar may, in accordance with the rules of the Commission, exercise the functions of the Commission under this section.

**Division 2 Particular conditions of employment in awards**

**21 Conditions to be provided in awards on application**

- (1) The Commission must, on application, make an award setting any of the following conditions of employment:
  - (a) ordinary hours of employment,
  - (b) equal remuneration and other conditions for men and women doing work of equal or comparable value,
  - (c) employment protection provisions,
  - (d) provisions relevant to technological change,
  - (e) sick leave,
  - (f) part-time work,
  - (g) casual work.
- (2) Those conditions are to be set:
  - (a) in accordance with any relevant requirement of this Division and any other provision of this Act, and

(b) with due regard to any established principles of the Commission or other matters considered relevant.

(3) Those conditions may be set in a new award or by the variation of an existing award.

(4) This section applies even though there is an existing award dealing with the matter.

## **22 Maximum ordinary hours of employment**

(1) The number of ordinary working hours of an employee when set by an award must not exceed 40 hours per week, averaged over a 12 week period.

(2) However, those ordinary hours may be averaged over a period not exceeding 52 weeks in the case of seasonal employment.

(3) The ordinary working hours of an employee cannot be reduced by an award unless the reduction is made by a Full Bench of the Commission.

## **23 Equal remuneration and other conditions**

Whenever the Commission makes an award, it must ensure that the award provides equal remuneration and other conditions of employment for men and women doing work of equal or comparable value.

## **24 Employment protection provisions**

Employment protection provisions in an award are to be provisions relating to the obligations and rights of an employer and an employee on the termination or proposed termination of employment of the employee.

## **25 Provisions relevant to technological change**

Provisions relevant to technological change may include provisions as to:

(a) the obligations of an employer on the introduction of technological change in the industry concerned, and

(b) the giving of notice of termination of services to employees and relevant organisations on account of the introduction of technological change (including the minimum period of notice).

## **26 Minimum sick leave entitlements**

(1) Sick leave when set by an award must include provisions under which:

(a) each employee is entitled to not less than one week of sick leave on full pay for each year of service with an employer, and

(b) sick leave accumulates from year to year for at least 3 years, that is, sick leave not taken in each year of service will be available to the employee for a period of

at least 3 years from the end of each such year.

- (2) Nothing in this Division prevents the Commission from making or varying awards relating to the conditions under which sick leave may be taken or imposing limitations on the amount of sick leave that may be accumulated by an employee.

## **27 Prohibition on cashing-in of accumulated sick leave**

- (1) An award must not allow or require an employee to cash-in the employee's accumulated sick leave.
- (2) Accumulated sick leave is cashed-in if the leave is not taken and a payment is made by the employer to or on behalf of the employee of the amount of remuneration for the period of accumulated leave or of any other amount calculated by reference to that period.
- (3) It is immaterial when the accumulated sick leave is to be cashed-in, including on termination of employment (whether by resignation, retirement, death or otherwise) or during the period of employment.
- (4) A provision of an award, whether made before or after the commencement of this section, does not have any effect to the extent that the provision contravenes this section.
- (5) In this section, **award** includes:
  - (a) a former industrial agreement, and
  - (b) a public sector industrial agreement.

### **Note—**

The above section does not apply to the cashing-in of sick leave under an enterprise agreement. Clause 14 of Schedule 4 preserves the cashing-in under an existing award of accumulated sick leave accrued before 15 February 1993, the date of commencement of section 99A of the *Industrial Relations Act 1991* which was the predecessor of the above section.

## **28 Other provisions not affected**

Nothing in this Division affects:

- (a) the requirements of this Part for the making or varying of awards, or
- (b) the powers of the Commission and the Industrial Registrar under sections 18 and 125 (provisions relating to Commission granting exemptions from awards and Industrial Registrar issuing special wage permits).

## Part 2 Enterprise agreements

### Division 1 Preliminary

#### 28A Definitions

In this Part:

**Federal award** means an award within the meaning of the *Workplace Relations Act 1996* of the Commonwealth.

**State award** means:

- (a) an award made, or taken to be made, by the Commission under this Act, and
- (b) any order of the Commission under this Act that sets conditions of employment (but not including a dispute order, an order under Part 6 or a stand-down order under section 126), and
- (c) a determination under section 63 of the *Public Sector Management Act 1988*, or any similar determination relating to employment in the public sector (including employment with an area health service), and
- (d) a public sector industrial agreement, and
- (e) a former industrial agreement, and
- (f) any other instrument made under this Act, or made under any other Act, relating to conditions of employment that is declared by the regulations to be a State award for the purposes of this Part.

#### 29 Making of enterprise agreements

An enterprise agreement may be made in accordance with this Act setting conditions of employment for employees.

#### 30 Coverage of enterprise agreement

- (1) An enterprise agreement may (subject to this Part) be made for any relevant group of employees, including the following:
  - (a) employees of a single employer (whether all employees or a group or category of employees),
  - (b) employees of 2 or more associated employers (whether associated because they are related corporations, because they are engaged in a joint or common venture or because they undertake similar work),
  - (c) employees engaged in a project (including a proposed project),

(d) public sector employees (whether employees of all or of one or more authorities or whether all or some of the employees of an authority).

(2) An enterprise agreement cannot be made for a group of employees if that group is limited by the agreement only to members of an industrial organisation.

### **31 Parties to an enterprise agreement**

(1) An enterprise agreement may be made between:

- (a) the employer or employers of the employees for whom it is made, and
- (b) one or more industrial organisations representing any of those employees.

An industrial organisation may represent only employees who are, or are eligible to be, members of the organisation.

(2) An enterprise agreement may also be made between:

- (a) the employer or employers of the employees for whom it is made, and
- (b) the employees at the time the agreement is made.

#### **Note—**

Section 36 (4) provides that the agreement must be approved by at least 65% of the employees at a secret ballot. Section 36 (5A) provides that an industrial organisation can become a party to the agreement.

(3) A State peak council or an industrial organisation of employers may sign an enterprise agreement on behalf of industrial organisations or of employers and may apply for approval for the agreement. In that case, the industrial organisations or employers on whose behalf the agreement is signed are taken to be parties to the agreement and not the State peak council or the industrial organisation of employers.

(4) An industrial organisation of employers may so sign an enterprise agreement on behalf of any employers (whether or not named in the agreement) who may in future employ persons in the project, venture or other industry for which the agreement is made.

(5) In the case of an enterprise agreement made under subsection (2), the group of employees from time to time covered by the agreement is taken to be one of the parties to the agreement for the purposes of this Part.

## **Division 2 Approval of enterprise agreements**

### **32 Enterprise agreement required to be approved**

(1) An enterprise agreement does not have any effect unless it is approved by the Commission under this Part.



- (2) This section extends to an enterprise agreement that varies an earlier agreement.

### **33 Principles for approval of enterprise agreements**

- (1) A Full Bench of the Commission is required to set principles to be followed by the Commission in determining whether to approve enterprise agreements.
- (2) In determining those principles, the Full Bench is to have regard, in particular, to the following:
- (a) the objects of this Act and the public interest,
  - (b) the relevant criteria for approval imposed by this Part,
  - (c) the need for an appropriate process for approving agreements to be followed by the Commission,
  - (d) the need for an appropriate process for ensuring sufficient information about the effect of the agreement is provided to employees who are to be covered by the agreement,
  - (e) the need for an appropriate negotiating process for the agreement.
- (3) A Full Bench of the Commission is to review the principles for approval at least once every 3 years.
- (4) Principles for approval may be set or reviewed on the application of any party that can apply for approval of an enterprise agreement or on the Commission's own initiative.
- (5) Industrial organisations are entitled to be notified of any proceedings of a Full Bench under this section and to make submissions on the setting or review of the principles for approval.
- (6) The Industrial Registrar is to publish the principles for approval on the NSW industrial relations website.
- (7) Principles for approval are to be set and published under this section within 6 months after the commencement of this Act.

### **34 Application for approval of enterprise agreement**

- (1) Application for approval of an enterprise agreement may be made by lodging the agreement with the Industrial Registrar in accordance with this Part and the rules of the Commission.
- (2) At proceedings of the Commission relating to any such application for approval, the following may appear or be represented:
- (a) any party to the agreement,

- (b) an industrial organisation, if its members or persons eligible to become members are affected by the agreement,
  - (c) a State peak council (but only with leave of the Commission),
  - (d) the President of the Anti-Discrimination Board (but only with leave of the Commission).
- (3) The Commission is to deal with any such application for approval within 28 days, unless it requires additional time to do so because of the special circumstances of the case.

### **35 Approval of enterprise agreement by Commission**

- (1) The Commission is to approve each enterprise agreement lodged for approval, but only if the Commission is satisfied that:
- (a) the agreement complies with all relevant statutory requirements (including the requirements of this Part and of the *Anti-Discrimination Act 1977*), and
  - (b) in the case of an agreement that covers employees to whom State awards would otherwise apply—the agreement does not, on balance, provide a net detriment to the employees when compared with the aggregate package of conditions of employment under the State awards, and
  - (b1) in the case of an agreement that covers employees to whom Federal awards would otherwise apply—the employees are not disadvantaged in comparison to their entitlements under the Federal awards, and
  - (b2) in the case of an agreement that covers employees to whom no State or Federal award would otherwise apply—the agreement does not, on balance, provide a net detriment to the employees when compared with the aggregate package of conditions of employment under a State or Federal award that covers employees performing similar work to that performed by the employees covered by the agreement, and
  - (c) the parties understand the effect of the agreement, and
  - (d) the parties did not enter the agreement under duress.
- (2) This subsection applies to an enterprise agreement that applies to some but not all the employees of an employer, unless the employees to whom it applies comprise a distinct geographic, operational or organisational unit. The Commission is not to approve such an enterprise agreement if it is satisfied that:
- (a) the agreement fails to cover employees who would reasonably be expected to be covered, given the nature of the work performed under the agreement and the organisational and operational relationships between the employees covered by

the agreement and the remainder of the employees, and

(b) it is unfair not to cover the employees excluded from the agreement.

(3) The Commission is to follow the principles for approval set under section 33 when deciding whether to approve an enterprise agreement, unless satisfied that any departure from those principles would not prejudice the interests of any of the parties to the agreement.

(4) (Repealed)

**36 Special requirements relating to enterprise agreements to which employees are parties**

(1) An enterprise agreement under which employees are a party is not to be approved unless the requirements of this section have been complied with.

(2) Before or at the time the employer first undertakes formal negotiations with the employees for the purposes of an agreement, the employer is to advise the Industrial Registrar in writing of the following:

(a) that an enterprise agreement is proposed or under negotiation,

(b) the State or Federal awards or enterprise agreements that then apply to the employees.

(3) The Industrial Registrar is to advise such persons or bodies as are prescribed by the regulations of the proposed enterprise agreement.

(4) The enterprise agreement must be approved in a secret ballot by not less than 65% of the employees who are to be covered by the agreement at the time the ballot is conducted.

(5) The Industrial Registrar must, after the enterprise agreement is lodged for approval, prepare a report for the Commission comparing the conditions of employment under the agreement and the conditions of employment that would otherwise apply to the employees under relevant State or Federal awards. If there are no relevant State or Federal awards, the report is to outline any relevant employment conditions of the employees.

(5A) The Commission must, by its order, make an industrial organisation a party to the enterprise agreement if it is satisfied that:

(a) the industrial organisation represents any of the employees covered by the enterprise agreement, and

(b) the industrial organisation has notified the Commission of its intention to become a party to the agreement by lodging a notice to that effect with the Industrial

Registrar at any time before the Commission approves of the agreement under this Part, and

- (c) an employee covered by the agreement is a member of the industrial organisation and has requested the industrial organisation to become a party to the agreement.

The Commission may direct that the name of an employee who made that request is not to be disclosed to the employer or other person.

- (6) (Repealed)

### **36A Determination of comparable award for purposes of approval of agreement for employees without award coverage**

- (1) This section applies to an enterprise agreement that is in the process of being negotiated and that will cover employees to whom no State or Federal award would otherwise apply.
- (2) A party to any such enterprise agreement may, before making an application for approval of the enterprise agreement under this Part, make a written application to the Industrial Registrar for a determination of the relevant State or Federal award against which the enterprise agreement will be compared for the purposes of the application of the “no net detriment” test in section 35 (1) (b2).
- (3) The Industrial Registrar must:
  - (a) advise any person or body entitled to be advised of the proposed enterprise agreement under section 36 (3) of the application made under this section, and
  - (b) advise the applicant, any such person or body and the Commission of the relevant State or Federal award determined by the Industrial Registrar.
- (4) If a determination is made by the Industrial Registrar under this section, the determination applies for the purposes of the application of the “no net detriment” test in section 35 (1) (b2), subject to the result of any appeal under this Act to the Commission against the determination of the Industrial Registrar.
- (5) If a determination is not made by the Industrial Registrar under this section, the determination of the matter is to be made by the Commission at the time of the application of the “no net detriment” test under section 35 (1) (b2).

### **37 Secret ballots under this Part**

- (1) Except as provided by subsection (2), a secret ballot under this Part must be conducted by a person (other than the employer or a person selected by that employer) on behalf of the employees entitled to vote in the ballot, being a person who meets any other requirement that may be imposed by the regulations or the principles established by the Commission.

- (2) If, within 14 days next following the holding of such a ballot, the Industrial Registrar receives a written complaint from at least 20% of the persons entitled to vote in the ballot alleging specified irregularities in the conduct of the ballot and requesting that a further secret ballot be conducted by an independent person, the Industrial Registrar may (if of the opinion that such action is justified) arrange with the persons concerned:
  - (a) for the conduct of such a further secret ballot, and
  - (b) for evidence of the result of the further ballot to be supplied to the Industrial Registrar.
- (3) The Commission may adjourn proceedings for the approval of an enterprise agreement if a request is made for a further ballot.
- (4) The Industrial Registrar may, in any special case, extend the time for receiving a request for a further ballot.
- (5) The result of a further ballot is to be disregarded if the Industrial Registrar is not satisfied that it has been conducted in accordance with the Industrial Registrar's directions.

## **Division 3 General**

### **38 Form and content of enterprise agreement**

- (1) An enterprise agreement is required to be in writing and signed by or on behalf of the parties to it.
- (2) An enterprise agreement must:
  - (a) identify the parties to the agreement and describe the employees for whom it is made, and
  - (b) set all or some conditions of employment for those employees.
- (3) If an enterprise agreement does not specify the place or places of employment to which it applies, the agreement applies:
  - (a) to any place of employment at which those employees were employed at the time the agreement was made, and
  - (b) to any other place at which those employees could reasonably be expected to be employed during the currency of the agreement.

### **39 Mandatory dispute resolution procedures in enterprise agreements**

- (1) An enterprise agreement is not to be approved unless it contains procedures for the resolution of industrial disputes under the enterprise agreement (***dispute resolution***

**procedures).**

- (2) However, an enterprise agreement need not contain dispute resolution procedures if the Commission is satisfied that another relevant agreement or award already does so.
- (3) Dispute resolution procedures may (but need not) be included in an enterprise agreement if the employer employs fewer than 20 employees.

#### **40 Persons bound by enterprise agreement**

An enterprise agreement is binding on:

- (a) the parties to the agreement, and
- (b) each employee for whom the agreement is made (whether or not such an employee at the time the agreement was made).

#### **41 Enterprise agreements prevail over State awards**

- (1) The provisions of an enterprise agreement prevail over the provisions of any State award of the Commission that deal with the same matters in so far as the provisions of the State award apply to a person bound by the enterprise agreement. This subsection is subject to the terms of the enterprise agreement.
- (2) Nothing in this Part limits the application to an employee bound by an enterprise agreement of any conditions of employment that apply to employees generally under this Act or any other Act.
- (3) (Repealed)

**Note—**

Section 152 of the [Workplace Relations Act 1996](#) of the Commonwealth sets out the circumstances in which the provisions of an enterprise agreement made under this Act will prevail over the provisions of a Federal award that deal with the same matters.

#### **42 Term of enterprise agreement**

- (1) An enterprise agreement applies for the period specified in it as its nominal term and, after that period, until terminated in accordance with this Part.
- (2) The nominal term of an enterprise agreement must not be more than 3 years.
- (3) However, an enterprise agreement made for a project may have a specified nominal term not exceeding the expected duration of the project.
- (4) An enterprise agreement varying an earlier agreement applies for the residue of the term of the agreement it varies.

### **43 Variation of an enterprise agreement**

- (1) An enterprise agreement may be varied at any time by a further enterprise agreement made and approved in accordance with this Part.
- (2) The parties to the further agreement need not be the same as the parties to the earlier agreement.

**Note—**

Section 169 also enables an enterprise agreement to be varied at any time to remove unlawful discrimination.

### **44 Termination of enterprise agreement**

- (1) An enterprise agreement can be terminated only in accordance with this section.
- (2) An enterprise agreement can be terminated at any time with the approval of all the parties to it, whether during or after its nominal term.
- (3) An enterprise agreement can also be terminated at or after the end of its nominal term by any one of the parties giving at least 3 months' written notice of intention to terminate to each other party. The notice may be served before the end of the nominal term.
- (4) In the case of an enterprise agreement in which the employees are a party, the proposed termination of the agreement by the employees must be approved in a secret ballot by not less than 65% of the employees covered by the agreement at the time the ballot is conducted.
- (5) Termination of the enterprise agreement is not effective until the Industrial Registrar has been given written notice of the approval to terminate or of service of the notice of intention to terminate.

### **45 Register and publication of enterprise agreements**

- (1) The Industrial Registrar is to keep a register of all enterprise agreements that have been approved by the Commission, approvals or notices to terminate enterprise agreements, and such other particulars as the Industrial Registrar considers appropriate.
- (2) The Industrial Registrar is to publish the following details on the NSW industrial relations website of each enterprise agreement as soon as practicable after the agreement is approved:
  - (a) the identity of the parties to the agreement and the description of the employees covered by the agreement,
  - (b) the commencement and the nominal term of the agreement,

(c) a statement of whether the agreement is a new agreement or the variation of an earlier agreement.

- (3) The register of enterprise agreements is to be open for public inspection during ordinary office hours.
- (4) A person may make copies of any document kept in the register of enterprise agreements on payment of such fee, if any, as is prescribed by the regulations.

#### **46 Notification of enterprise agreements to new employees**

Before an employer bound by an enterprise agreement employs a person who will be bound by conditions of employment set by the agreement, the employer must give the person notice of the existence of the agreement and access to a copy or to a summary of the agreement, for perusal by the person, in a language the person understands.

Maximum penalty: 10 penalty units.

#### **47 Enterprise agreement conditions—flow-on**

When making awards or exercising its other arbitral functions under this Act, the Commission is not to regard conditions of employment set by enterprise agreements as standard conditions of employment for other employees.

### **Part 3 National and State decisions**

#### **48 What is a National decision?**

A **National decision** is a decision of a Full Bench of the Australian Industrial Relations Commission that generally affects, or is likely to generally affect, the conditions of employment of employees in New South Wales who are subject to its jurisdiction.

#### **49 What is a State decision?**

A **State decision** is a decision of a Full Bench of the Commission that generally affects, or is likely to generally affect, the conditions of employment of employees in New South Wales who are subject to its jurisdiction.

#### **50 Adoption of National decisions**

- (1) As soon as practicable after the making of a National decision, a Full Bench of the Commission must give consideration to the decision and, unless satisfied that it is not consistent with the objects of this Act or that there are other good reasons for not doing so, must adopt the principles or provisions of the National decision for the purposes of awards and other matters under this Act.
- (2) A Full Bench of the Commission is to give consideration to the National decision either on application or on its own initiative.



- (3) The principles or provisions of a National decision may be adopted:
  - (a) wholly or partly and with or without modification, and
  - (b) generally for all awards or other matters under this Act or only for particular awards or other matters under this Act.
- (4) The principles or provisions of a National decision so adopted may be varied by a Full Bench of the Commission, whether or not another National decision is made.

### **51 Making of State decisions**

- (1) A Full Bench of the Commission may, if satisfied that it is consistent with the objects of this Act and that there are good reasons for doing so, make a State decision setting principles or provisions for the purposes of awards and other matters under this Act.
- (2) A Full Bench of the Commission may make a State decision only on the application of a State peak council or on its own initiative.
- (3) A State decision may apply generally to all awards or other matters under this Act or only to particular awards or other matters under this Act.
- (4) The principles or provisions of a State decision may be varied by a Full Bench of the Commission.

### **52 Variation of awards and other orders on adoption of National decisions or making of State decisions**

A Full Bench of the Commission may, when adopting the principles or provisions of a National decision or making a State decision, make or vary awards, or make other orders, to the extent necessary to give effect to its decision.

**Note—**

The adoption of a National decision or the making of a State decision enables the variation of an award to give effect to the decision without the concurrence of the parties to the award (see section 17).

## **Part 4 Parental leave**

### **Division 1 Parental leave generally**

#### **53 Employees to whom Part applies**

- (1) This Part applies to all employees, including part-time employees or regular casual employees, but does not apply to other casual or seasonal employees.
- (2) For the purposes of this Part, a **regular casual employee** is a casual employee who works for an employer on a regular and systematic basis and who has a reasonable expectation of on-going employment on that basis.

#### 54 Entitlement to unpaid parental leave

- (1) An employee is entitled to a total of 52 weeks unpaid parental leave in connection with the birth or adoption of a child, as provided by this Part.
- (2) Parental leave is not to extend beyond 1 year after the child was born or adopted.

**Note—**

See also Part 5 relating to entitlements to part-time work agreements.

#### 55 What is parental leave?

- (1) For the purposes of this Part, **parental leave** is maternity leave, paternity leave or adoption leave.
- (2) **Maternity leave** is leave taken by a female employee in connection with the pregnancy or the birth of a child of the employee. Maternity leave consists of an unbroken period of leave.
- (3) **Paternity leave** is leave taken by a male employee in connection with the birth of a child of the employee or of the employee's spouse. Paternity leave consists of:
  - (a) an unbroken period of up to one week at the time of the birth of the child or other termination of the pregnancy (**short paternity leave**), and
  - (b) a further unbroken period in order to be the primary care-giver of the child (**extended paternity leave**).
- (4) **Adoption leave** is leave taken by a female or male employee in connection with the adoption by the employee of a child under the age of 18 years (other than a child who has previously lived continuously with the employee for a period of at least 6 months or who is a child or step-child of the employee or of the employee's spouse). Adoption leave consists of:
  - (a) an unbroken period of up to 3 weeks at the time of the placement of the child with the employee (**short adoption leave**), and
  - (b) a further unbroken period in order to be the primary care-giver of the child (**extended adoption leave**).
- (5) For the purposes of this Part, **spouse** includes a de facto spouse.

**Note—**

Employees are also entitled to special maternity leave for recovery from a termination of pregnancy or illness related to pregnancy (section 71) and to special adoption leave up to 2 days to attend interviews or examinations for the purposes of adoption (section 72). The requirement of unbroken periods of leave is subject to section 63 (Employee and employer may agree to interruption of parental leave by return to work).

## **56 This Part provides minimum entitlements**

- (1) This Part sets out the minimum entitlements of employees to parental leave.
- (2) The provisions of an industrial instrument, contract of employment or other agreement (whether made or entered into before or after the commencement of this Part) do not have effect to the extent that they provide an employee with a benefit that is less favourable to the employee than the benefit to which the employee is entitled under this Part.

## **57 Length of service for eligibility**

- (1) An employee is entitled to parental leave only if the employee has had at least 12 months of continuous service with the employer.
- (2) Continuous service is service under one or more unbroken contracts of employment, including:
  - (a) any period of authorised leave or absence, and
  - (b) any period of part-time work.
- (3) However, in the case of a casual employee:
  - (a) the employee is entitled to parental leave only if the employee has had at least 12 months of continuous service with the employer as a regular casual employee (or partly as a regular casual employee and partly as a full-time or part-time employee), and
  - (b) continuous service is work for an employer on an unbroken regular and systematic basis (including any period of authorised leave or absence).

### **Note—**

Under Part 8 of this Chapter a period of service in the business of a former employer counts as service with a new employer to whom the business concerned has been transferred.

## **58 Notices and documents required to be given to employer**

- (1) **Maternity leave** The notices and documents to be given to the employer for the purposes of taking maternity leave are as follows:
  - (a) The employee should give at least 10 weeks' written notice of the intention to take the leave.
  - (b) The employee must, at least 4 weeks' before proceeding on leave, give written notice of the dates on which she proposes to start and end the period of leave.
  - (c) The employee must, before the start of leave, provide a certificate from a medical practitioner confirming that she is pregnant and the expected date of birth.

(d) The employee must, before the start of leave, provide a statutory declaration by the employee stating, if applicable, the period of any paternity leave sought or taken by her spouse.

(2) **Paternity leave** The notices and documents to be given to the employer for the purposes of taking paternity leave are as follows:

(a) In the case of extended paternity leave, the employee should give at least 10 weeks' written notice of the intention to take the leave.

(b) The employee must, at least 4 weeks before proceeding on leave, give written notice of the dates on which he proposes to start and end the period of leave.

(c) The employee must, before the start of leave, provide a certificate from a medical practitioner confirming that his spouse is pregnant and the expected date of birth.

(d) In the case of extended paternity leave, the employee must, before the start of leave, provide a statutory declaration by the employee stating:

(i) if applicable, the period of any maternity leave sought or taken by his spouse, and

(ii) that he is seeking that period of extended paternity leave to become the primary care-giver of a child.

(3) **Adoption leave** The notices and documents to be given to the employer for the purposes of taking adoption leave are as follows:

(a) In the case of extended adoption leave, the employee should give written notice of any approval or other decision to adopt a child at least 10 weeks' before the expected date of placement.

(b) The employee must give written notice of the dates on which the employee proposes to start and end the period of leave, as soon as practicable after the employee is notified of the expected date of placement of the child but at least 14 days before proceeding on leave.

(c) The employee must, before the start of leave, provide a statement from an adoption agency or another appropriate body of the expected date of placement of the child with the employee for adoption purposes.

(d) In the case of extended adoption leave, the employee must, before the start of leave, provide a statutory declaration by the employee stating:

(i) if applicable, the period of any adoption leave sought or taken by his or her spouse, and

(ii) that the employee is seeking that period of extended adoption leave to

become the primary care-giver of a child.

- (4) An employee does not fail to comply with this section if the failure was caused by:
- (a) the child being born (or the pregnancy otherwise terminating) before the expected date of birth, or
  - (b) the child being placed for adoption before the expected date of placement,
- or if it was not otherwise reasonably practicable to comply in the circumstances.

In the case of the birth of a living child, notice of the period of leave is to be given within 2 weeks after the birth and the certificate of the medical practitioner is to state that the child was born and the date of birth. In the case of the adoption of a child, notice of the period of leave is to be given within 2 weeks after the placement of the child.

- (5) An employee must notify the employer of any change in the information provided under this section within 2 weeks after the change.
- (6) If required by the employer, an employee who applies for parental leave is to give the employer a statutory declaration, or enter into an agreement with the employer, that for the period of the leave the employee will not engage in any conduct inconsistent with the employee's contract of employment.

#### **59 Continuity of service**

- (1) Parental leave does not break an employee's continuity of service, but is not to be taken into account in calculating an employee's period of service for any purpose.
- (2) However, parental leave counts as service for any purpose authorised by law or by any industrial instrument or contract of employment.

#### **60 Parents not to take parental leave at the same time**

- (1) An employee is not entitled to parental leave at the same time as his or her spouse is on parental leave under this Part.
- (2) If this section is contravened the period of parental leave to which the employee is entitled under this Part is reduced by the period of leave taken by his or her spouse.
- (3) This section does not apply to short paternity leave or short adoption leave.

#### **61 Cancellation of parental leave**

- (1) **Before starting leave** Parental leave applied for but not commenced is automatically cancelled if:
  - (a) the employee withdraws the application for leave by written notice to the employer, or

(b) the pregnancy concerned terminates other than by the birth of a living child or the placement of the child concerned does not proceed.

(2) **After starting leave** If:

- (a) the pregnancy of an employee or an employee's spouse terminates other than by the birth of a living child while the employee or spouse is on parental leave, or
- (b) the child in respect of whom an employee is then on parental leave dies, or
- (c) the placement of a child for adoption purposes with an employee then on adoption leave does not proceed or continue,

the employee is entitled to resume work at a time nominated by his or her employer within 2 weeks after the date on which the employee gives his or her employer a notice in writing stating that the employee intends to resume work and the reason for the intended resumption.

- (3) **Special leave not affected** This section does not affect an employee's entitlement to special maternity leave under section 71.

## **62 Parental leave and other leave**

- (1) An employee may take any annual leave or long service leave (or any part of it) to which the employee is entitled instead of or in conjunction with parental leave.
- (2) However, the total period of leave cannot be so extended beyond the maximum period of parental leave authorised by this Part.
- (3) Any paid sick leave or other paid absence authorised by law or by an industrial instrument or contract of employment is not available to an employee on parental leave, except if the paid absence is annual leave or long service leave or with the agreement of the employer.

## **63 Employee and employer may agree to interruption of parental leave by return to work**

- (1) An employee on parental leave may, with the agreement of the employer, break the period of leave by returning to work for the employer, whether on a full-time, part-time or casual basis.
- (2) The period of leave cannot be extended by such a return to work beyond the maximum period of leave authorised by this Part.
- (3) Nothing in this section affects any other work undertaken by the employee during parental leave.

### **Note—**

Section 58 (6) requires the employee when taking parental leave to provide the employer with a statutory

declaration, or enter into an agreement with the employer, that the employee will not engage during leave in any conduct inconsistent with the employee's contract.

#### **64 Extension of period of parental leave**

- (1) An employee may extend the period of parental leave once only by giving the employer notice in writing of the extended period at least 14 days before the start of the extended period. The period of leave cannot be extended by such a notice beyond the maximum period of leave authorised by this Part.
- (2) An employee may extend the period of parental leave at any time with the agreement of the employer. The period of leave can be extended by such an agreement beyond the maximum period of leave authorised by this Part.
- (3) This section applies to an extension of leave while the employee is on leave or before the employee commences leave.

#### **65 Shortening of period of parental leave**

An employee may shorten the period of parental leave with the agreement of the employer and by giving the employer notice in writing of the shortened period at least 14 days before the leave is to come to an end.

#### **66 Return to work after parental leave**

- (1) An employee returning to work after a period of parental leave is entitled to be employed in:
  - (a) the position held by the employee immediately before proceeding on that leave, or
  - (b) if the employee worked part-time or on a less regular casual basis because of the pregnancy before proceeding on maternity leave—the position held immediately before commencing that part-time work or less regular casual work, or
  - (c) if the employee was transferred to a safe job under section 70 before proceeding on maternity leave—the position held immediately before the transfer.
- (2) If the position no longer exists but there are other positions available that the employee is qualified for and is capable of performing, the employee is entitled to be employed in a position as nearly as possible comparable in status and pay to that of the employee's former position.
- (3) This section extends to a female employee returning to work after a period of leave under section 71 (Special maternity leave and sick leave).
- (4) An employer who does not make available to an employee a position to which the employee is entitled under this section is guilty of an offence.

Maximum penalty: 100 penalty units.

- (5) In this section, a reference to employment in a position includes, in the case of a casual employee, a reference to work for an employer on a regular and systematic basis.

**Note—**

An employee returning to work after parental leave may also have an entitlement to work part-time under an industrial instrument or a part-time work agreement under Part 5.

## **Division 2 Miscellaneous provisions**

### **67 Employer's obligations**

- (1) **Information to employees** On becoming aware that an employee (or an employee's spouse) is pregnant, or that an employee is adopting a child, an employer must inform the employee of:
- (a) the employee's entitlements to parental leave under this Part, and
  - (b) the employee's obligations to notify the employer of any matter under this Part.

An employer cannot rely on an employee's failure to give a notice or other document required by this Part unless the employer establishes that this subsection has been complied with in relation to the employee.

- (2) **Records** An employer must keep, for at least 6 years, a record of parental leave granted under this Part to employees and all notices and documents given under this Part by employees or the employer.

Maximum penalty: 20 penalty units.

### **68 Termination of employment because of pregnancy or parental leave**

- (1) An employer must not terminate the employment of an employee because:
- (a) the employee or employee's spouse is pregnant or has applied to adopt a child, or
  - (b) the employee or employee's spouse has given birth to a child or has adopted a child, or
  - (c) the employee has applied for, or is absent on, parental leave,

but otherwise the rights of an employer in relation to termination of employment are not affected by this Part.

Maximum penalty: 100 penalty units.

- (2) For the purposes of establishing such a termination of employment, it is sufficient if it



is established that the alleged reason for termination was one of two or more reasons for termination.

- (3) This section does not affect any other rights of a dismissed employee under this or any other Act or under any industrial instrument or contract of employment, or the rights of an industrial organisation representing such an employee.

**Note—**

A dismissed employee may also make a claim under Part 6 (Unfair dismissals).

## **69 Replacement employees**

- (1) A replacement employee is a person who is specifically employed as a result of an employee proceeding on parental leave (including as a replacement for an employee who has been temporarily promoted or transferred in order to replace the employee proceeding on parental leave).
- (2) Before a replacement employee is employed, the employer must inform the person of the temporary nature of the employment and of the rights of the employee on parental leave to return to work.

Maximum penalty: 50 penalty units.

- (3) A reference in this section to an employee proceeding on parental leave includes a reference to a pregnant employee exercising a right under section 70 to be transferred to a safe job.

## **70 Transfer to a safe job**

- (1) This section applies whenever the present work of a female employee is, because of her pregnancy or breastfeeding, a risk to the health or safety of the employee or of her unborn or new born child. The assessment of such a risk is to be made on the basis of a medical certificate supplied by the employee and of the obligations of the employer under the *Occupational Health and Safety Act 2000*.
- (2) The employer is to temporarily adjust the employee's working conditions or hours of work to avoid exposure to that risk.
- (3) If such an adjustment is not feasible or cannot reasonably be required to be made, the employer is to transfer the employee to other appropriate work that:
- (a) will not expose her to that risk, and
  - (b) is as nearly as possible comparable in status and pay to that of her present work.
- (4) If such a transfer is not feasible or cannot reasonably be required to be made, the employer is to grant the employee maternity leave under this Part (or any available paid sick leave) for as long as is necessary to avoid exposure to that risk, as certified by a medical practitioner.

- (5) An employer who does not comply with any obligation imposed on the employer by this section is guilty of an offence.

Maximum penalty (subsection (5)): 50 penalty units.

### **71 Special maternity leave and sick leave**

If the pregnancy of an employee terminates before the expected date of birth (other than by the birth of a living child), or she suffers illness related to her pregnancy, and she is not then on maternity leave:

- (a) the employee is entitled to such period of unpaid leave (to be known as **special maternity leave**) as a medical practitioner certifies to be necessary before her return to work, or
- (b) the employee is entitled to such paid sick leave (either instead of or in addition to special maternity leave) as she is then entitled to and as a medical practitioner certifies to be necessary for her return to work.

### **72 Special adoption leave**

An employee who is seeking to adopt a child is entitled to up to 2 days unpaid leave if the employee requires that leave to attend compulsory interviews or examinations as part of the adoption procedure.

## **Part 4B Leave for victims of crime**

### **72AA Employees to whom Part applies**

This Part applies to all employees, including part-time employees and casual employees.

### **72AB Definitions**

- (1) In this Part:

**court proceedings** means proceedings before a court against a person charged with a violent crime, including:

- (a) committal proceedings, and
- (b) sentencing proceedings, and
- (c) proceedings on appeal, and
- (d) proceedings on a back up offence or related offence (as defined in section 35 of the [Criminal Procedure Act 1986](#)) in relation to the alleged violent crime, and
- (e) any other proceedings prescribed by the regulations.

**harm** means actual physical bodily harm, mental illness or nervous shock.

**victim of crime** means a person:

- (a) who suffers harm as a direct result of an act committed, or apparently committed, by another person in the course of an alleged violent crime, or
- (b) who is the parent, grandparent or guardian of a child who suffers such harm (but only if the child is under the age of 18 years at the time victims leave is taken), or
- (c) who is a member of the immediate family of a person who dies as a direct result of an act committed, or apparently committed, by another person in the course of an alleged violent crime.

**victims leave** means leave under this Part.

**violent crime** means a serious indictable offence involving violence (including sexual or indecent assault).

**Note—**

The [Interpretation Act 1987](#) defines a serious indictable offence as an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more.

(2) A **member of the immediate family** of a person is:

- (a) the person's spouse, or
- (b) a person who is in a de facto relationship (within the meaning of the [Property \(Relationships\) Act 1984](#)) with the person, or
- (c) a parent or guardian, or step-parent, of the person, or
- (d) a grandparent or step-grandparent of the person (a step-grandparent being a step-parent of a parent of the person), or
- (e) a child or step-child of the person or some other child of whom the person is the guardian, or
- (f) a grandchild or step-grandchild of the person (a step-grandchild being a step-child of a child of the person), or
- (g) a brother, sister, step-brother or step-sister of the person.

**72AC Entitlement to unpaid victims leave**

- (1) An employee who is a victim of crime is entitled to unpaid victims leave in connection with court proceedings relating to the violent crime, as provided by this Part.
- (2) This Part does not affect any other entitlement to paid or unpaid leave of the employee.

**72AD Purposes for which victims leave may be taken**

- (1) Victims leave may be taken:
  - (a) for the purpose of attending court proceedings scheduled in relation to the violent crime (whether or not as a witness), and
  - (b) for the purpose of travelling to attend those court proceedings if the victim usually resides more than 100 kilometres from the place where the proceedings are scheduled to be held.
- (2) Victims leave may be taken for a full working day for the purpose of attending court proceedings even if the proceedings are only scheduled for a part of the day or, without prior notice to the employee, the proceedings do not proceed on the day on which they were scheduled.
- (3) Victims leave for the purpose of travel to attend court proceedings is not to exceed one working day for the duration of any stage of the court proceedings.

**72AE Notices and documents required to be given to employer**

- (1) The notices and documents to be given to the employer for the purpose of taking victims leave are as follows:
  - (a) the employee is to give at least one week's notice of the intention to take the leave,
  - (b) if requested by the employer, the employee is to provide to the employer a certificate from a police officer, prosecutor or other relevant official confirming that the employee is a victim of crime (within the meaning of this Part) and the date or dates on which the court proceedings will be held.
- (2) An employee is not required to comply with this section if the employee is not notified of the court proceedings in sufficient time to give the required period of notice or if it was not otherwise reasonably practicable to comply in the circumstances.

**72AF Return to work after victims leave**

- (1) An employee returning to work after a period of victims leave is entitled to be employed in the position held by the employee immediately before proceeding on leave.
- (2) If the position no longer exists but there are other positions available that the employee is qualified for and is capable of performing, the employee is entitled to be employed in a position as nearly as possible comparable in status and pay to that of the employee's former position.

**Note—**

See Part 6 of this Chapter and Part 1 of Chapter 5 for remedies available to an employee who is dismissed or otherwise victimised for claiming the benefit of victims leave.

## **72AG Miscellaneous provisions relating to victims leave**

- (1) Victims leave does not break an employee's continuity of service, but any period of leave that exceeds 3 months is not to be taken into account in calculating the employee's period of service for any purpose.
- (2) An employee may take any annual, long service or other leave to which the employee is entitled instead of or in conjunction with victims leave.
- (3) This Part sets out the minimum entitlements of employees to victims leave. The provisions of an industrial instrument, contract of employment or other agreement (whether made or entered into before or after the commencement of this Part) do not have effect to the extent that they provide an employee with a benefit that is less favourable to the employee than the benefit to which the employee is entitled under this Part.
- (4) This Part extends to persons employed on or after the commencement of this Part and to violent crimes committed before or after that commencement.

## **Part 5 Part-time work**

### **73 Employees to whom Part applies**

This Part applies to employees for whom any conditions of employment are set by an industrial instrument.

### **74 What is part-time work?**

For the purposes of this Part, **part-time work** is work of a lesser number of hours than constitutes full-time work under the relevant industrial instrument, other than casual work.

### **75 This Part not to affect other entitlements to work part-time**

Nothing in this Part affects any entitlement that an employee has to part-time work under any industrial instrument.

### **76 Entitlement to work part-time with agreement of employer**

- (1) An employee may work part-time in accordance with this Part with the agreement of the employer (a **part-time work agreement**).
- (2) A part-time work agreement must be in writing and signed by the employer and employee.
- (3) A part-time work agreement must provide for agreement on the following:

- (a) the entitlement of the employee to work part-time,
  - (b) the number of hours to be worked by the employee, the days on which they will be worked and commencing and finishing times for the work,
  - (c) the classification applying to the work to be performed,
  - (d) the entitlement (if any) of the employee to return to full-time employment.
- (4) The agreement may be limited to a specified period or periods of part-time employment, but need not be so limited.
- (5) The agreement may be made prior to the employee commencing employment with the employer.

#### **77 Variation of part-time work agreements**

A part-time work agreement may be varied by a further agreement in writing between the employee and employer.

#### **78 Obligations of employer under part-time work agreements**

- (1) A part-time work agreement must be retained by the employer during the period of part-time work.
- (2) The employer must give a copy of the agreement to the employee immediately after it is made.
- (3) The employer must send a copy of the agreement to the Industrial Registrar not later than 1 month after it is made.
- (4) The copy of the agreement is to be made available by the Industrial Registrar for public inspection during ordinary office hours. A person may make copies of it on payment of such fee, if any, as is prescribed by the regulations.
- (5) This section extends to any variation of the agreement.

Maximum penalty: 20 penalty units.

#### **79 Application of industrial instruments**

- (1) **Application generally** Part-time work under this Part is to be in accordance with the provisions of the industrial instrument applicable to the work concerned, except where the provisions do not have effect or are modified because of this section.
- (2) **Application pro rata** To the extent that any such provision of the industrial instrument is based on an employee engaged on a full-time basis, the provision is to apply pro rata to part-time work under this Part.

- (3) **Commission to make State decision on part-time work** A Full Bench of the Commission is required to make a State decision under Part 3 relating to part-time work by employees covered by industrial instruments and to set, by that decision, minimum conditions of employment to which part-time work agreements under this Part are to be subject. The minimum conditions must include minimum and maximum hours of work and other relevant conditions of employment.
- (4) **Inconsistent provisions** Any of the following provisions of an industrial instrument has, except to the extent that it is identified as a minimum condition by any such State decision, no effect if it would prevent an employee working part-time under this Part:
- (a) a provision limiting the number of employees who may work part-time,
  - (b) a provision establishing quotas as to the ratio of part-time to full-time employees,
  - (c) a provision prescribing a minimum or maximum number of hours a part-time employee may work.

#### **80 Additional hours of work**

An employer may request, but not require, an employee working part-time under this Part to work for longer than the hours agreed to under the part-time work agreement.

#### **81 Leave**

- (1) The leave entitlements of an employee working part-time under this Part (including entitlements previously accrued) are to be converted into hours. The conversion is to be based on a day's leave being equivalent to the number of ordinary hours of work for a day of full-time employment.
- (2) Leave entitlements based on full-time work are to accrue pro rata during the part-time work.
- (3) Leave taken during part-time work is to be taken on an hourly basis for each ordinary hour of part-time work during which the employee is absent from work.
- (4) Any accrued leave entitlements on return to full-time employment are to be re-converted into days.
- (5) By agreement between the employer and the employee, the period over which leave is taken during part-time work may be shortened to the extent necessary for the employee to receive pay at the employee's current full-time rate.
- (6) This section is subject to any provision of a relevant industrial instrument that provides for leave during part-time work.

#### **82 Replacement employees**

- (1) A replacement employee is a person who is specifically employed as a result of an

employee working part-time under this Part and whose employment may be terminated on the return of that employee to full-time employment.

- (2) Before a replacement employee is employed, the employer must inform the person of the temporary nature of the employment and of the rights of the employee working part-time to return to full-time employment.

Maximum penalty: 50 penalty units.

## **Part 6 Unfair dismissals**

### **83 Application of Part**

- (1) This Part applies to the dismissal of:

- (a) any public sector employee, or
- (b) any other employee, except an employee for whom conditions of employment are not set by an industrial instrument and whose annual remuneration is greater than \$62,200 (or such greater amount as is prescribed by the regulations).

- (1A) This Part applies to the dismissal of an employee even if the person was employed in this State under a Federal award. However, this Part does not apply to the dismissal of any such employee if:

- (a) the person is entitled to make an application to the Australian Industrial Relations Commission with respect to the dismissal on the ground that it was harsh, unjust or unreasonable, or
- (b) the person would have been entitled to make such an application but for the exclusion of the person from the relevant provisions of the *Workplace Relations Act 1996* of the Commonwealth (being an exclusion of a kind referred to in subsection (2)).

- (2) This Part does not apply to an employee who is exempted from this Part by the regulations. Any such regulation may only exempt specified classes of employees included in any of the following classes:

- (a) employees engaged under a contract of employment for a specified period of time or a specific task,
- (b) employees serving a period of probation or qualifying period,
- (c) employees engaged on a casual basis for a short period,
- (d) employees whose terms and conditions of employment are governed by special arrangements providing particular protection in respect of termination of employment either generally or in particular circumstances,



- (e) employees in relation to whom the operation of the provisions of this Part causes or would cause substantial problems because of:
  - (i) their particular conditions of employment, or
  - (ii) the size or nature of the undertakings in which they are employed.
- (3) This Part does not apply to the dismissal of any such employee who is an apprentice or trainee (other than an existing worker trainee) within the meaning of the [Apprenticeship and Traineeship Act 2001](#) or any such employee who is an executive officer to whom Part 2A of the [Public Sector Management Act 1988](#) or Part 5 of the [Police Service Act 1990](#) applies.
- (4) This Part applies to the dismissal of an employee even though it occurred in the course of an industrial dispute and the Commission is otherwise authorised under this Act to order the reinstatement of the employee.
- (5) In this Part:
  - dismissal** includes:
    - (a) the threat of dismissal, and
    - (b) in the case of a public sector employee—dispensing with the services of the employee, dismissing the employee as a consequence of disciplinary proceedings against, or the commission of an offence by, the employee or annulling the appointment of the employee.

**Federal award** means an award within the meaning of the [Workplace Relations Act 1996](#) of the Commonwealth.

**industrial instrument** includes a Federal award or other Federal industrial instrument.

#### **84 Application for remedy by dismissed employee**

- (1) If an employer dismisses an employee and the employee claims that the dismissal is harsh, unreasonable or unjust, the employee may apply to the Commission for the claim to be dealt with under this Part.
- (2) An application may be made on behalf of the employee by an industrial organisation of employees.
- (3) An industrial organisation may make one application on behalf of a number of employees who were dismissed at the same time or for related reasons. However, this subsection does not prevent the Commission from hearing a number of applications under this Part together or individually.
- (4) An application may be made under this Part even though the applicant does not

specify the nature of the remedy sought or requests compensation only. However, this subsection does not affect the requirement under this Part that compensation is available only if the Commission considers that reinstatement or re-employment would be impracticable.

### **85 Time for making applications**

- (1) An application under this Part must be made not later than 21 days after the dismissal of the employee.
- (2) The Commission is required to accept an application that is made out of time if the applicant has previously made a similar application under Commonwealth law relating to the same dismissal and:
  - (a) the similar application was made within the time required by that Commonwealth law, and
  - (b) the similar application has not been settled or determined, and
  - (c) the application under this Part is made not later than 21 days after the similar application is withdrawn, or is declined because of the existence of an alternative remedy under this Part.
- (3) The Commission may accept an application that is made out of time if the Commission considers there is a sufficient reason to do so, having regard in particular to:
  - (a) the reason for, and the length of, the delay in making the application, and
  - (b) any hardship that may be caused to the applicant or the employer if the application is or is not rejected, and
  - (c) the conduct of the employer relating to the dismissal.

### **86 Conciliation of applications**

The Commission must endeavour, by all means it considers proper and necessary, to settle the applicant's claim by conciliation.

### **87 Arbitration where conciliation unsuccessful**

- (1) When, in the opinion of the Commission, all reasonable attempts to settle the applicant's claim by conciliation have been made but have been unsuccessful, the Commission is to determine the claim by making an order under section 89, dismissing the application or making any other order it is authorised to make under this Act.
- (2) Nothing in this section prevents further conciliation from being attempted at any time before the Commission makes such an order.

## **88 Matters to be considered in determining a claim**

In determining the applicant's claim, the Commission may, if appropriate, take into account:

- (a) whether a reason for the dismissal was given to the applicant and, if the applicant sought but was refused reinstatement or re-employment with the employer, whether a reason was given for the refusal to reinstate or re-employ, and
- (b) if any such reason was given—its nature, whether it had a basis in fact, and whether the applicant was given an opportunity to make out a defence or give an explanation for his or her behaviour or to justify his or her reinstatement or re-employment, and
- (c) whether a warning of unsatisfactory performance was given before the dismissal, and
- (d) the nature of the duties of the applicant immediately before the dismissal and, if the applicant sought but was refused reinstatement or re-employment, the likely nature of those duties if the applicant were to be reinstated or re-employed, and
- (e) whether or not the applicant requested reinstatement or re-employment with the employer, and
- (f) such other matters as the Commission considers relevant.

## **89 Orders for reinstatement, re-employment, remuneration, compensation**

- (1) **Reinstatement** The Commission may order the employer to reinstate the applicant in his or her former position on terms not less favourable to the applicant than those that would have been applicable if the applicant had not been dismissed.
- (2) **Re-employment** If the Commission considers that it would be impracticable to reinstate the applicant, the Commission may order the employer to re-employ the applicant in another position that the employer has available and that, in the Commission's opinion, is suitable.
- (3) **Remuneration** If the Commission orders reinstatement or re-employment, it may order the employer to pay to the applicant an amount stated in the order that does not exceed the remuneration the applicant would, but for being dismissed, have received before being reinstated or re-employed in accordance with the order.
- (4) **Continuity** If the Commission orders reinstatement or re-employment, it may order that the period of employment of the applicant with the employer is taken not to have been broken by the dismissal.
- (5) **Compensation** If the Commission considers that it would be impracticable to make an order for reinstatement or re-employment, the Commission may order the employer to pay to the applicant an amount of compensation not exceeding the amount of remuneration of the applicant during the period of 6 months immediately before being

dismissed. If the applicant was on leave without full pay during any part of that period, the maximum amount of compensation is to be determined as if the applicant had received full pay while on leave.

- (6) When assessing any compensation payable, the Commission is to take into account whether the applicant made a reasonable attempt to find alternative employment and the remuneration received in alternative employment, or that would have been payable if the applicant had succeeded in obtaining alternative employment.
- (7) **Threat of dismissal** In determining a claim relating to a threat of dismissal, the Commission may order the employer not to dismiss the employee in accordance with that threat.
- (8) An order under this section may be made on such terms and conditions as the Commission determines.

#### **90 Effect of availability of other remedies**

The Commission must not determine an applicant's claim by making an order under section 89 if:

- (a) another Act or a statutory instrument provides for redress to the person in relation to the dismissal, and
- (b) the person has commenced proceedings under the other Act or instrument or has not lodged a written undertaking not to proceed under the other Act or instrument.

#### **90A Industrial agent must not represent an applicant or employer in proceedings unless there are reasonable prospects of success**

- (1) In this section:

**compensation order** means an order for compensation under section 89 (5).

**compensation proceedings** means proceedings under this Part in which a compensation order is sought (whether or not any other order is sought in addition to or as an alternative to the compensation order).

- (2) An industrial agent must not represent an applicant in compensation proceedings unless the industrial agent has filed a certificate with the Industrial Registrar certifying that the industrial agent has reasonable grounds for believing, on the basis of provable facts, that the applicant's claim in the proceedings has reasonable prospects of success.
- (3) An industrial agent must not represent an employer in compensation proceedings unless the industrial agent has filed a certificate with the Industrial Registrar certifying that the industrial agent has reasonable grounds for believing, on the basis of provable facts, that the employer's response to the claim in the proceedings has

reasonable prospects of success.

- (4) A fact is provable only if the industrial agent reasonably believes that the material then available to him or her provides a proper basis for alleging that fact.
- (5) A claim has reasonable prospects of success if there are reasonable prospects of the Commission making the compensation order or, if the compensation order is sought in addition to or as an alternative to another order, any of the other orders sought.
- (6) A response has reasonable prospects of success if there are reasonable prospects of the Commission refusing to make the compensation order or, if the compensation order is sought in addition to or as an alternative to another order, any of the other orders sought.
- (7) This section does not apply to any service provided as a preliminary matter for the purpose of a proper and reasonable consideration of whether a claim or response has reasonable prospects of success.
- (8) If the Commission hearing proceedings under this Part finds that the facts established by the evidence before the Commission do not form a basis for a reasonable belief that the claim or the response had reasonable prospects of success, there is a presumption for the purposes of this section that industrial agent services provided on the claim or the response (as appropriate) were provided without reasonable prospects of success.
- (9) A presumption arising under this section is rebuttable and an industrial agent who seeks to rebut it bears the onus of establishing that at the time industrial agent services were provided there were provable facts (as provided by subsection (2) and (3)) that provided a basis for a reasonable belief that the claim or the response on which they were provided had reasonable prospects of success.
- (10) An industrial agent may, for the purpose of establishing that at the time industrial agent services were provided there were provable facts (as provided by subsection (2) and (3)) that provided a basis for a reasonable belief that the claim or the response on which they were provided had reasonable prospects of success, produce information or a document despite any duty of confidentiality in respect of a communication between the industrial agent and a client, but only if:
  - (a) the client is the client to whom the industrial agent services were provided or consents to its disclosure, or
  - (b) the Commission is satisfied that it is necessary for the industrial agent to do so in order to rebut a presumption arising under this section.

## **90B Extinguishment of rights and liabilities**

A payment made after the commencement of this section in compliance with an order

under this Part or any other agreement between the applicant and employer in relation to proceedings under this Part does not extinguish any right given, or liability imposed, on an applicant or employer by the order or agreement unless the payment is made:

- (a) directly to the applicant or employer, or
- (b) to an industrial organisation on behalf of the applicant or employer, or
- (c) to an Australian legal practitioner on behalf of the applicant or employer, or
- (d) to another person in accordance with the directions of the Commission.

**Note—**

Section 181 provides that the Commission may order costs to be paid in proceedings under this Part in the circumstances set out in that section. Section 380 enables the Commission in the course of proceedings under this Part to make an order for a small claim under Part 2 of Chapter 7 (Recovery of remuneration and other amounts) connected with the unfair dismissal.

## **Part 7**

### **91-100 (Repealed)**

## **Part 8 Protection of entitlements on transfer of business**

### **101 Definitions**

- (1) In this Part:

**transfer of business** means the transfer, transmission, conveyance, assignment or succession, whether by agreement or by operation of law, of the whole or any part of a business, undertaking or establishment.

**transferred employee** means a person who becomes an employee of an employer (**the new employer**) as a result of the transfer of business to that employer from another employer (**the former employer**).

- (2) A person is to be regarded as a transferred employee even if the person's employment with the former employer is terminated before the transfer of business, so long as:
- (a) the person is employed by the new employer after the transfer of business, and
  - (b) the circumstances of that termination and employment indicate an intention to avoid the operation of this Part.

In that case, the termination of employment of such a transferred employee is to be disregarded for the purposes of this Part.

### **102 Continuity of service for determining entitlements**

- (1) This section applies for the purpose of determining a transferred employee's

entitlements as an employee of the new employer under an industrial instrument or the industrial relations legislation.

- (2) For the purpose of determining those entitlements:
  - (a) the continuity of the employee's contract of employment is taken not to have been broken by the transfer of business, and
  - (b) a period of service with the former employer (including service before the commencement of this section) is taken to be a period of service with the new employer.
- (3) Service with the former employer includes service that because of this section or a former Act is taken to be service with that employer as a result of a previous transfer of the business.

### **103 Entitlements when industrial instrument or legislation contravened**

- (1) This section applies only to an entitlement (***the avoided entitlement***) that a former employer has failed to provide to a transferred employee in contravention of an industrial instrument or the industrial relations legislation.
- (2) If the avoided entitlement relates to the payment of remuneration, this Part does not operate:
  - (a) to create an entitlement to payment by the new employer, or
  - (b) to relieve the former employer from liability for the payment.
- (3) If the avoided entitlement relates to anything else and the new employer is required because of this Part to provide the entitlement, the new employer is entitled to be indemnified by the former employer for the reasonable cost of providing it.

### **104 Prevention of double entitlement**

This Part does not entitle a transferred employee to claim a benefit from more than one employer in respect of the same period of service.

## **Part 9 Unfair contracts**

### **Division 1 Definitions**

#### **105 Definitions**

In this Part:

***contract*** means any contract or arrangement, or any related condition or collateral arrangement, but does not include an industrial instrument.

***unfair contract*** means a contract:

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

**Note—**

The jurisdiction of the Commission under this Part is exercisable only by the Commission in Court Session.

## **Division 2 Unfair contracts may be declared void or varied**

### **106 Power of Commission to declare contracts void or varied**

- (1) The Commission may make an order declaring wholly or partly void, or varying, any contract whereby a person performs work in any industry if the Commission finds that the contract is an unfair contract.
- (2) The Commission may find that it was an unfair contract at the time it was entered into or that it subsequently became an unfair contract because of any conduct of the parties, any variation of the contract or any other reason.
- (2A) A contract that is a related condition or collateral arrangement may be declared void or varied even though it does not relate to the performance by a person of work in an industry, so long as:
  - (a) the contract to which it is related or collateral is a contract whereby the person performs work in an industry, and
  - (b) the performance of work is a significant purpose of the contractual arrangements made by the person.
- (3) A contract may be declared wholly or partly void, or varied, either from the commencement of the contract or from some other time.
- (4) In considering whether a contract is unfair because it is against the public interest, the matters to which the Commission is to have regard must include the effect that the contract, or a series of such contracts, has had, or may have, on any system of apprenticeship and other methods of providing a sufficient and trained labour force.
- (5) In making an order under this section, the Commission may make such order as to the payment of money in connection with any contract declared wholly or partly void, or varied, as the Commission considers just in the circumstances of the case.
- (6) In making an order under this section, the Commission must take into account whether or not the applicant (or person on behalf of whom the application is made)



took any action to mitigate loss.

### **107 Orders to prevent further unfair contracts**

(1) The Commission, when making an order under section 106 or at a later time, may make such further order as the Commission considers appropriate for the purpose of prohibiting (either absolutely or otherwise than in accordance with specified conditions):

(a) any party to the contract, or

(b) any other person who is (in any way considered relevant by the Commission) associated with any such party,

from:

(c) entering into any specified kind of contract whereby a person performs work in an industry, or

(d) doing any act (whether by way of advertising or otherwise) which may reasonably be construed as being intended to induce other persons to enter into any such contract.

(2) An order under this section must identify the person or persons bound by the order and takes effect in respect of each such person:

(a) on service on the person of a copy of the order, or

(b) on publication of the order in a daily newspaper circulating generally throughout New South Wales,

whichever first occurs.

### **108 Who may apply for order**

An order may be made under this Division on the application of:

(a) any party to the contract, or

(b) any person who, but for the making of such an order, would be a party to the contract, or

(c) an industrial organisation of employers whose members employ persons working in the industry to which the contract relates, or

(d) an industrial organisation of employees whose members are employed in the industry to which the contract relates, or

(e) an association registered under Chapter 6 of which a party to the contract is a member,

and not otherwise.

**108A Employment contracts in respect of which applications cannot be made**

- (1) An application cannot be made for an order under this Division if the application relates to a contract of employment under which:
  - (a) a remuneration package that exceeds the remuneration cap is paid or received (or is payable or receivable) during the period of 12 months immediately before the application is made (or, if the application concerned relates to a contract that has been terminated, immediately before the termination), or
  - (b) a remuneration package is paid or received (or is payable or receivable) during a period of less than 12 months immediately before the application is made (or, if the application concerned relates to a contract that has been terminated, immediately before the termination) that would, if the remuneration package had been paid or received (or been payable or receivable) for a period of 12 months, have exceeded the remuneration cap.
- (2) An application cannot be made for an order under this Division by a person who is a partner carrying on a business if:
  - (a) the application relates to a contract between that partner and the other persons carrying on that business in partnership, and
  - (b) the share of the net profits, or payments contingent on the net profits, of the business that are paid to or received by (or payable to or receivable by) the applicant during the period of 12 months immediately before the application is made (or, if the application relates to a contract that has been terminated, immediately before the termination) exceed:
    - (i) \$200,000, or
    - (ii) if an amount is prescribed for the purposes of paragraph (b) of the definition of “remuneration cap” in subsection (3)—that amount.
- (3) In this section:

**contract of employment** means any contract or arrangement under which work is done by a person in the capacity of an employee, and includes a related condition or collateral arrangement with respect to such a contract.

**employment benefit** means a benefit provided to an employee at the cost of his or her employer (being a benefit of a private nature) and, without limitation, includes:

- (a) contributions payable to a superannuation scheme by an employer in respect of the employee, including any liability of that employer to make any such contributions or to pay costs associated with that scheme, or

(b) the provision by an employer of a motor vehicle for private use by the employee, or

(c) any other benefit prescribed by the regulations for the purposes of this definition.

**monetary remuneration** includes any performance-related bonus or incentive payment.

**remuneration cap** means:

(a) \$200,000, except as provided by paragraph (b), or

(b) any greater amount prescribed by the regulations (being a regulation that increases the amount by reference to increases in the amount referred to in section 83 (1) (b)).

**remuneration package** means the total value of monetary remuneration and employment benefits payable or receivable under a contract of employment.

#### **108B Time for making application**

- (1) An application for an order under this Division in relation to a contract that has been terminated must be made not later than 12 months after the termination of the contract.
- (2) The Commission does not have jurisdiction to extend the time for making any such application or, subject to subsection (3), to accept an application made after the time prescribed by subsection (1).
- (3) The Commission may accept an application made within 3 months after the time prescribed by subsection (1) if the applicant satisfies the Commission that there are exceptional circumstances justifying the making of the late application.

#### **109 Conciliation of applications to be attempted first**

- (1) The Commission must endeavour, by all means it considers proper and necessary, to settle a matter under this Division by conciliation.
- (2) When, in the opinion of the Commission, all reasonable attempts to settle the matter by conciliation have been made but have been unsuccessful, the Commission is to determine the matter in accordance with this Act.
- (3) Nothing in this section prevents further conciliation from being attempted at any time before the Commission makes such an order.
- (4) Any member of the Commission (whether or not a judicial member) may undertake the conciliation of a matter under this Division.

**109A Exclusion of certain contracts in connection with unfair dismissals**

- (1) This Division does not apply to a contract of employment that is alleged to be an unfair contract for any reason for which:
  - (a) an application has been or could have been made by the employee under Part 6 (Unfair dismissals), or
  - (b) such an application could have been made but for the provisions of section 83 that exclude the employee from making an application under that Part.

- (2) In this section:

**contract of employment** means any contract or arrangement under which work is done by a person in the capacity of an employee, and includes a related condition or collateral arrangement with respect to such a contract.

**dismissal** has the same meaning that it has in Part 6.

**Division 3 Determination of remuneration of contractors under unfair building and certain other contracts**

**110 Application of Division**

- (1) This Division applies to a contract for the carrying out of:
  - (a) building work, or
  - (b) door-to-door handbill delivery work, or
  - (c) door-to-door sales work,except as provided by this Division.
- (2) This Division does not apply to any such contract:
  - (a) to the extent that it is a contract under which the work is done by a person in the capacity of an employee, or
  - (b) unless at least one of the parties to the contract (other than a person who actually does the work) is a person who carries on a business of doing, or arranging for the doing, of that kind of work.
- (3) The regulations may declare any specified work to be, or not to be, building work, door-to-door handbill delivery work or door-to-door sales work for the purposes of this Division.

**111 Division applies only if Commission declares contract unfair**

- (1) This Division does not apply to a contract unless the Commission has found (under

Division 2 or on application under this section) that the contract is an unfair contract.

- (2) An application for such a finding for the purposes of this Division may be made only by an industrial organisation of employees whose members are employed in the industry in connection with which work is done of the same kind as that done under the contract to which the application relates.

#### **112 Commission may determine remuneration under unfair contract**

The Commission may, by its order, prescribe the minimum rate at which a person is (otherwise than as an employee) to be remunerated under a contract to which this Division applies.

#### **113 Notice of possible order**

- (1) Before making an order under this Division, the Commission is to require the person in whose favour the order would be made to serve notice on such persons as the Commission considers have an interest in the matter that such an order might be made.
- (2) A person served with such a notice is entitled to appear and be heard in relation to the matter.

#### **114 Time at which order takes effect**

An order under this Division takes effect:

- (a) 28 days after its publication on the NSW industrial relations website, or
- (b) if the order so provides—on any later day specified in the order.

#### **115 Incorporation of order in contract and other contracts**

- (1) If an order is in force under this Division in relation to the doing of work under a contract:
  - (a) that contract, and
  - (b) any other contract that is a contract for the doing of the same kind of work and is a contract of a kind in respect of which the Commission may make a finding that it is an unfair contract,are taken to incorporate the order in so far as it relates to that kind of work.
- (2) If there is an inconsistency between a provision of an order in force under this Division and a contract in which it is incorporated by this section, the provision of the order prevails to the extent of the inconsistency.

### **116 Variation or revocation of order**

The Commission may vary or revoke an order in force under this Division on its own initiative or on application by the industrial organisation of employees whose members are employed in the industry concerned or by any other person affected by the order.

## **Part 10 Payment of remuneration**

### **117 Employees to be paid in money**

- (1) Remuneration payable to an employee must be paid in money and, if demanded, at least once each fortnight.
- (2) Payment is made in money only if it is made:
  - (a) in cash, or
  - (b) with appropriate authority, by cheque payable to the employee, or
  - (c) with appropriate authority, into an account in the name of the employee (whether or not jointly with another person) at a financial institution by electronic transfer of funds or other means.

**Appropriate authority** is authority conferred in writing by the employee or authority conferred by an industrial instrument.

- (3) Payment of remuneration is to be made in advance if the employee is entitled to payments in advance by agreement, custom or otherwise.
- (4) An employer must not pay remuneration to an employee contrary to this section.

Maximum penalty: 100 penalty units.

### **118 Employees to be paid in full**

- (1) Payment of remuneration to an employee is to be made in full without any deduction for goods, board or lodging or any other services supplied by the employer in payment (or part payment) of remuneration.
- (2) However, an employer can deduct and pay on behalf of an employee from any remuneration payable to the employee:
  - (a) any payments principally for the benefit of the employee that are authorised in writing by the employee to be deducted and paid, or
  - (b) any payments that are authorised by an industrial instrument to be deducted and paid.
- (3) An employer must not pay remuneration to an employee contrary to this section.

Maximum penalty: 100 penalty units.

**119 Employer not to stipulate how remuneration to be spent**

An employer must not, directly or indirectly, impose as a condition of the employment of an employee any terms as to the place where or the manner in which or the person with whom any remuneration paid to the employee is to be spent.

Maximum penalty: 100 penalty units.

**120 Recovery of remuneration—no set-off or action for goods or services supplied by employer**

- (1) In any proceedings by an employee against the employer to recover any amount due as remuneration, the employer is not entitled to any set-off or reduction of the claim in respect of:
  - (a) any goods or services supplied to the employee as, or as part of, remuneration, or
  - (b) any goods sold or supplied at any shop or other premises of the employer or in the profits of which the employer has any share or interest, or
  - (c) any goods supplied to the employee by any person under the direction of the employer or the employer's agent.
- (2) An employer is not entitled to maintain any action in any court or tribunal against an employee for or in respect of any goods sold or supplied to the employee by the employer while in the employer's employment as or as part of the employee's remuneration.

**121 Unauthorised payments—civil effect**

- (1) Payment of remuneration to an employee contrary to this Part is not to be considered to be payment or part payment of that remuneration, except to the extent (if any) permitted by the Commission.
- (2) A provision of a contract that provides for payment of remuneration to an employee in a manner that is contrary to this Part is void.

**122 Payment of unclaimed remuneration**

- (1) If:
  - (a) an employee has left the employment of an employer without being paid the full amount due to the employee in respect of the employment, and
  - (b) the employer has been unable, during a period of 30 days after the termination of the employment, to make the payment because the location of the employee is unknown to the employer, and cannot with reasonable diligence be found,

the employer must, immediately after the expiration of that period, pay the full amount to the Treasury.

Maximum penalty: 50 penalty units.

- (2) A receipt issued on behalf of the Treasury for money so paid is a sufficient discharge to an employer for the amount specified in the receipt.
- (3) The amount so paid is to be paid into the Consolidated Fund.
- (4) If the Treasurer is satisfied that a person is entitled to money that has been so paid into the Consolidated Fund, the Treasurer is to pay that amount of money to that person.

### **123 Particulars of remuneration to be supplied to employees**

- (1) An employer must, when paying remuneration to an employee, supply the employee with such written particulars regarding the payment as are prescribed by the regulations.

Maximum penalty: 20 penalty units.

- (2) The employer may, instead of supplying those written particulars, make other arrangements approved by the Industrial Registrar for supplying information about remuneration to all or any of the employees of the employer. Any such approval:
  - (a) must be granted to the employer in writing, and
  - (b) must not be granted unless the Industrial Registrar is satisfied that the arrangements are in the interests of the employees concerned and meet their reasonable requirements for information about remuneration, and
  - (c) may be revoked or varied by the Industrial Registrar by notice in writing to the employer.

### **124 Superannuation fund contributions**

- (1) If an industrial instrument requires an employer to pay contributions to a specified superannuation fund for the purpose of providing superannuation benefits to or in respect of an employee of the employer, the required contributions may, despite the industrial instrument, be paid to a complying superannuation fund nominated for the time being by the employee and approved by the employer.
- (2) However, subsection (1) applies only if:
  - (a) the nomination of the complying superannuation fund by the employee is in writing and signed by the employee, and
  - (b) the employer has given the employee a copy of the nomination and written notice



of the employer's approval of the nomination, and

(c) the employer retains a copy of the nomination.

(2A) An employee may, by notice in writing, revoke a nomination under this section.

(3) In this section:

**complying superannuation fund** means a superannuation fund that, for the relevant year of income, is a complying superannuation fund within the meaning of the *Superannuation Industry (Supervision) Act 1993* of the Commonwealth.

**superannuation fund** has the same meaning as it has in the *Superannuation Industry (Supervision) Act 1993* of the Commonwealth.

### **125 Permits—special wage payments**

- (1) Any employee may apply to the Industrial Registrar for a written permit authorising the employee to work for less than the rate of pay set for the employee by an industrial instrument if the employee considers himself or herself unable to earn the minimum rate of pay set by the industrial instrument because of any impairment of the employee.
- (2) An application may be made by post and may, with the approval of the Industrial Registrar, be made by a person on behalf of the employee.
- (3) The Industrial Registrar may grant a permit under this section (with or without conditions) or refuse to grant the permit. Any such permit has effect according to its tenor.
- (4) The Industrial Registrar may at any time cancel any such permit.
- (5) If the Industrial Registrar grants a permit, the Industrial Registrar must notify the industrial organisation of employees for the industry in which the applicant is employed or intends to be employed of the grant of the permit and its conditions.
- (6) The organisation may at any time after being given such notice apply to the Industrial Registrar for cancellation of the permit.

#### **Note—**

Under section 194 a person may appeal to the Commission against the granting of or the refusal or failure to grant or the cancellation of a permit.

### **126 Stand-down orders—suspension of payment of remuneration**

- (1) The Commission may, on the application of an employer or an industrial organisation of employers, order the stand down of employees of that employer or of members of that organisation if there is no useful work for the employees because of:

(a) industrial action, or

(b) breakdown of machinery, or

(c) any other act or omission,

for which the employer or employers concerned are not responsible.

- (2) The Commission is to give high priority to the hearing and determination of any such application.
- (3) An employee who is stood down by the Commission is not entitled to any remuneration (including allowances) while stood down. However, this subsection does not apply to any allowance that the Commission considers should be paid despite the stand-down order.
- (4) The period during which an employee is stood down is to be regarded as a period of employment with the employer for all other purposes, including the accrual of leave and the calculation of superannuation and other entitlements.
- (5) A stand-down order does not apply to an employee who is an apprentice or trainee (other than an existing worker trainee) within the meaning of the [Apprenticeship and Traineeship Act 2001](#).

### **127 Liability of principal contractor for remuneration payable to employees of subcontractor**

(1) **Application** This section applies where:

- (a) a person (***the principal contractor***) has entered into a contract for the carrying out of work by another person (***the subcontractor***), and
- (b) employees of that subcontractor are engaged in carrying out the work (***the relevant employees***), and
- (c) the work is carried out in connection with a business undertaking of the principal contractor.

(2) **Liability of principal contractor** The principal contractor is liable for the payment of any remuneration of the relevant employees that has not been paid for work done in connection with the contract during any period of the contract unless the principal contractor has a written statement given by the subcontractor under this section for that period of the contract.

(3) **Content and form of statement** The written statement is a statement by the subcontractor that all remuneration payable to relevant employees for work under the contract done during that period has been paid. The regulations may make provision for or with respect to the form of the written statement.

- (4) **Retention of copies of statements** The subcontractor must keep a copy of any written statement under this section for at least 6 years after it was given.
- (5) **Payments under contract** The principal contractor may withhold any payment due to the subcontractor under the contract until the subcontractor gives a written statement under this section for any period up to the date of the statement. Any penalty for late payment under the contract does not apply to any payment withheld under this subsection.
- (6) **Remuneration** For the purposes of this section, remuneration means remuneration or other amounts payable to relevant employees by legislation, or under an industrial instrument, in connection with work done by the employees.
- (7) **False statement not effective** The written statement is not effective to relieve the principal contractor of liability under this section if the principal contractor had, when given the statement, reason to believe it was false.
- (8) **False statement is offence** A person who gives the principal contractor a written statement knowing it to be false is guilty of an offence if:
- (a) the person is the subcontractor, or
  - (b) the person is authorised by the subcontractor to give the statement on behalf of the subcontractor, or
  - (c) the person holds out or represents that the person is authorised by the subcontractor to give the statement on behalf of the subcontractor.
- Maximum penalty: 100 penalty units.
- (9) **Recovery** The provisions of this Act relating to the recovery of amounts payable under industrial instruments apply to the recovery of remuneration payable by a principal contractor under this section.
- (10) **Exclusion** This section does not apply in relation to a contract if the subcontractor is in receivership or in the course of being wound up or, in the case of an individual, is bankrupt and if payments made under the contract are made to the receiver, liquidator or trustee in bankruptcy.
- (11) **Application** To avoid doubt, this section extends to a principal contractor who is the owner or occupier of a building for the carrying out of work in connection with the building so long as the building is owned or occupied by the principal contractor in connection with a business undertaking of the principal contractor.
- (12) Nothing in this section limits or excludes any liability with respect to payment of remuneration by a person who is a principal contractor arising under this Act or any other law or any industrial instrument.

## **127A-127G (Repealed)**

### **128 Minimum remuneration for musicians**

- (1) In any contract for the performance of any work involving the supply for reward of any musical entertainment, the consideration for the contract is not to be less than a sum sufficient to pay, to each person engaged in the performance of the work, the remuneration set by any award for a person performing the work as an employee.
- (2) Any person who offers, enters into or is in any way concerned with a contract that does not comply with this section or who knowingly performs work in pursuance of a contract that does not comply with this section is guilty of an offence.

Maximum penalty: 100 penalty units.

### **129 Records to be kept by employers concerning employees**

- (1) An employer must ensure that the following daily records are kept in relation to employees of the employer:
  - (a) records of remuneration paid and hours worked by the employees, and
  - (b) any other prescribed records relating to conditions of employment set by the industrial relations legislation or industrial instruments.
- (2) (Repealed)
- (3) The records are to be kept in the manner and form prescribed by the regulations or in accordance with different requirements approved in writing by the Industrial Registrar.
- (4) The employer must ensure that the records are kept for a period of at least 6 years.
- (5) The regulations may make provision for or with respect to the transfer of any such records, or copies of any such records, to the successor of an employer.
- (6) A person who contravenes this section or the regulations under this section is guilty of an offence.

Maximum penalty: 20 penalty units.

## **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.

**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, the conditions referred to in subsection (1) (b) include provisions of the award relating to:
  - (a) the giving out of work, and
  - (b) the making or keeping of records in connection with the giving out of work, and
  - (c) the disclosure of information about the giving out of work, and

(d) the registration of persons for the purpose of giving out work.

(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 or in section 406 (Awards and other industrial instruments provide minimum entitlements) 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.

## **Chapter 3 Industrial disputes**

### **Part 1 Conciliation and arbitration of industrial disputes**

#### **130 Notification of industrial dispute to Commission**

- (1) Any of the following may notify the Commission of an industrial dispute for the purpose of resolving the dispute:
  - (a) an industrial organisation of employees or employers,
  - (b) an employer who is or is likely to be affected by the dispute,
  - (c) a person who is or is likely to be the subject of a secondary boycott in connection with the dispute,
  - (d) a State peak council.
- (2) The Commission may act on its own initiative to resolve an industrial dispute.

#### **131 Mandatory dispute resolution procedures to be followed first**

The Commission may refuse to deal with an industrial dispute until it is satisfied that any relevant dispute resolution procedures in an industrial instrument have been followed as far as is reasonably practicable in the circumstances.

**Note—**

Sections 14 and 39 require the inclusion of dispute resolution procedures in awards and enterprise agreements.

#### **132 Compulsory conference**

- (1) For the purpose of resolving an industrial dispute, the Commission may convene a compulsory conference and require the attendance of any person whose presence the Commission considers would help in the resolution of the dispute.
- (2) A compulsory conference is to be presided over by a member of the Commission.
- (3) The Commission may confer with any person on any matter that may affect the resolution of an industrial dispute, without requiring the person to attend a compulsory conference.

**Note—**

Section 165 provides that the Industrial Registrar may issue a summons for the purpose of any compulsory conference. Section 380 enables the Commission in the course of a compulsory conference to make an order for a small claim under Part 2 of Chapter 7 (Recovery of remuneration and other amounts) arising out of the industrial dispute.

### **133 Conciliation before arbitration**

The Commission must first attempt to resolve an industrial dispute by conciliation.

### **134 Conciliation of dispute**

- (1) **Commission to assist parties** The Commission, when attempting the conciliation of an industrial dispute, is to do everything that seems to be proper to assist the parties to agree on terms for the resolution of the dispute.
- (2) **Recommendations or directions** During conciliation proceedings, the Commission may make a recommendation or give a direction to the parties to the industrial dispute. Failure to comply with any such recommendation or direction may not be penalised but may be taken into account by the Commission in exercising its functions under this Act.
- (3) **Conferences** The action that may be taken by the Commission to assist the parties includes making arrangements or giving directions for the convening and conduct of conferences of the parties or their representatives (whether or not compulsory conferences and whether or not presided over by a member of the Commission).
- (4) **Good faith bargaining** The Commission, when dealing with an industrial dispute, must consider whether the parties have bargained in good faith and, in particular, whether the parties have:
  - (a) attended meetings they have agreed to attend, and
  - (b) complied with agreed or reasonable negotiating procedures, and
  - (c) disclosed relevant information for the purposes of negotiation.

The Commission may make recommendations or give directions to the parties to bargain in good faith.

### **135 Arbitration after attempted conciliation**

- (1) The Commission is to deal with an industrial dispute by arbitration only if it is not resolved by conciliation.
- (2) Arbitration by the Commission is not to proceed until the Commission has issued a certificate that reasonable attempts have been made to resolve the industrial dispute by conciliation (***certificate of attempted conciliation***).
- (3) A certificate of attempted conciliation is to be provided to the President of the

Commission unless the Commission is constituted by the President.

- (4) When determining whether to issue a certificate of attempted conciliation, the Commission must consider the effect that any industrial action in connection with the industrial dispute is having on the parties and the public generally. In particular, the Commission must give urgent consideration to the effect of industrial action in connection with a demarcation dispute.
- (5) A certificate of attempted conciliation may be issued on the Commission's own initiative or on application by any person authorised to notify the Commission of the industrial dispute.
- (6) The Commission must, without delay, issue a certificate of attempted conciliation on the application of any such person if the person satisfies the Commission that there is no reasonable likelihood that the dispute will be resolved by conciliation.
- (7) The Commission must, without delay, issue a certificate of attempted conciliation if the Commission decides that industrial action or duress necessitates the exercise of its arbitral powers.
- (8) The parties to the proceedings are to be provided with a copy of any certificate of attempted conciliation.
- (9) Nothing in this Act prevents the exercise of conciliation powers merely because arbitration powers have been exercised under this Act.

### **136 Arbitration of dispute**

- (1) The Commission may, in arbitration proceedings, do any one or more of the following:
  - (a) make a recommendation or give a direction to the parties to the industrial dispute,
  - (b) make or vary an award under Part 1 of Chapter 2,
  - (c) make a dispute order under Part 2,
  - (d) make any other kind of order it is authorised to make (including an order made on an interim basis).
- (2) Any such action may be taken by the Commission on its own initiative or on application by any person authorised to notify the Commission of the industrial dispute.

#### **Note—**

Examples of other kinds of orders the Commission may make are orders for secret ballots (section 172), a demarcation order under Part 6 of Chapter 5 and stand-down orders (section 126).

## **Part 2 Dispute orders**

### **137 Kinds of dispute orders**

- (1) The Commission may make the following kinds of dispute orders when dealing with an industrial dispute in arbitration proceedings:
  - (a) The Commission may order a person to cease or refrain from taking industrial action.
  - (b) The Commission may order an employer to reinstate or re-employ any one or more employees who were dismissed in the course of the industrial dispute or whose dismissal resulted in the industrial dispute.
  - (c) The Commission may order an employer not to dismiss employees in the course of the industrial dispute if the employer has threatened to do so.
  - (d) The Commission may order a person to cease a secondary boycott imposed in connection with the industrial dispute.
- (2) If employees are taking industrial action in connection with the industrial dispute, the Commission may order the employees to cease taking that industrial action before it makes any other kind of dispute order against the employer.
- (3) A dispute order may not provide for the payment of compensation, lost remuneration or any other amount.

**Note—**

See also claim for remedy under Part 6 of Chapter 2 (Unfair dismissals).

### **138 Making of dispute orders**

- (1) A dispute order may be made only against:
  - (a) a party or likely party to the industrial dispute, or
  - (b) a member, officer or employee of an industrial organisation that is such a party or likely party, or
  - (c) a person engaged, or likely to be engaged, in a secondary boycott in connection with the industrial dispute.
- (2) A dispute order:
  - (a) must clearly identify the persons against whom the order is made and who are bound by the order, and
  - (b) must state a time within which the order is to be complied with or state a period during which it remains in force, and

(c) may be varied or revoked by the Commission at any time.

- (3) If an employee is reinstated or re-employed under this Part, the Commission may order that the period of employment of the employee with the employer is taken not to have been broken by the dismissal.

### **139 Contravention of dispute order**

- (1) The Commission, on application, must deal expeditiously with an alleged contravention of a dispute order. The application may be made by the person who applied for the order or any other person who was authorised to apply for the order.
- (2) Before dealing with an alleged contravention of the order, the Commission is required to summon the person alleged to have contravened the order to show cause why the Commission should not take action for the contravention.
- (3) The Commission may, after hearing any person who answered the summons to show cause and considering any other relevant matter, do any one or more of the following:
- (a) dismiss the matter if it finds that the dispute order was not contravened or if it finds that the circumstances were such that the Commission should take no action on the contravention,
  - (b) cancel the approval of an enterprise agreement,
  - (c) suspend or modify for any period all or any of the entitlements under an industrial instrument,
  - (d) cancel the registration of an industrial organisation or take any other action authorised by Division 2 of Part 3 of Chapter 5,
  - (e) impose a penalty on an industrial organisation or an employer as provided by subsection (4),
  - (f) make any other determination that the Commission considers would help in resolving the industrial dispute.
- (4) The maximum penalty that may be imposed on an industrial organisation or employer is:
- (a) except as provided by paragraph (b)—a penalty not exceeding in total \$10,000 for the first day the contravention occurs and an additional \$5,000 for each subsequent day on which the contravention continues, or
  - (b) if a penalty has previously been imposed on the industrial organisation or employer for a contravention of an earlier dispute order—a penalty not exceeding in total \$20,000 for the first day the contravention occurs and an additional \$10,000 for each subsequent day on which the contravention continues.

- (5) Any such penalty may be recovered in the same way as a penalty imposed by the Commission for an offence against this Act.

**Note—**

The jurisdiction of the Commission under this section is exercisable only by the Commission in Court Session.

### **Part 3 Common law actions during conciliation of industrial disputes**

#### **140 Actions in tort to which Part applies**

- (1) This Part applies to an action in tort for an act done or omitted to be done:
- (a) by an industrial organisation of employees, or
  - (b) by an official or member of any such organisation,
- in contemplation or furtherance of an industrial dispute in which the Commission has jurisdiction.
- (2) However, this Part does not apply to:
- (a) an action for the recovery of damages for death or personal injury, or
  - (b) an action for the recovery of damages in connection with the destruction of or damage to property, or
  - (c) an action for conversion or detinue, or
  - (d) an action for defamation, or
  - (e) an action in respect of the acts or omissions of an official or member of an industrial organisation when the person is not acting in the capacity of such an official or member, or
  - (f) any action prescribed by the regulations.

#### **141 Actions in tort while Commission attempting to conciliate dispute not actionable**

- (1) A person may not bring or continue an action in tort to which this Part applies while the industrial dispute to which the action relates is subject to conciliation by the Commission.
- (2) For the purposes of this section, an industrial dispute is subject to conciliation if:
- (a) the Commission has been notified under this Chapter of the dispute or has decided on its own initiative to resolve the dispute, and
  - (b) a certificate of attempted conciliation has not been issued by the Commission under this Chapter in respect of the dispute.

- (3) For the purposes of this section, an industrial dispute is not subject to conciliation if the Commission has decided to dismiss or otherwise discontinue the proceedings concerned.
- (4) A certificate issued by a member of the Commission as to whether a specified industrial dispute is subject to conciliation by the Commission is admissible in evidence in any proceedings in which this Part is in issue and is evidence of the matters stated in the certificate.

#### **142 Injunction not to be granted while industrial tort not actionable**

An injunction cannot be granted by any court to restrain a threatened or apprehended tort, or to restrain the continuation or repetition of a tort, if at that time the tort is not actionable under this Part.

### **Part 4 Miscellaneous provisions relating to industrial disputes**

#### **143 Strike pay prohibited**

- (1) An employer who pays any remuneration or provides any other financial benefit to an employee in respect of time spent by the employee in engaging in industrial action is guilty of an offence.

Maximum penalty: 100 penalty units.

- (2) The employer is not guilty of an offence if the payment of the remuneration or provision of the financial benefit was authorised or ordered by the Commission.
- (3) The Commission may, on the application of an industrial organisation of employees, authorise the payment of remuneration or the provision of financial benefits that would otherwise constitute an offence under this section. The Commission may, instead, order the employer to pay any such remuneration or provide any such benefit if it considers it appropriate in the circumstances.
- (4) The Commission may authorise or order an employer to do so:
  - (a) only if the applicant satisfies the Commission that the relevant industrial action was based on a reasonable concern for health or safety, and
  - (b) only to the particular employees whose health or safety caused that concern.
- (5) For the purposes of this section, industrial action is not based on a reasonable concern for health or safety if the employees whose health or safety is alleged to be involved have engaged in industrial action instead of complying with a direction by the employer:
  - (a) to move to a specified safe place in the work place or to another suitable workplace, and

(b) to do other appropriate and available work there if required.

(6) In this section, **employer** includes a person acting on behalf of the employer.

#### **144 Determination of demarcation questions concerning occupations**

(1) The Commission may, for the purpose of resolving an industrial dispute during arbitration proceedings, determine any question as to the right of employees in particular occupations to do particular work in an industry to the exclusion of employees in other occupations.

(2) Any such determination is to be made by an award of the Commission.

(3) This section does not limit the power of the Commission to make an award relating to the occupations of employees who may do specified work in an industry to the exclusion of other employees.

## **Chapter 4 Industrial Relations Commission**

### **Part 1 Establishment and functions of Commission**

#### **145 Establishment of Commission**

(1) There is established by this Act the Industrial Relations Commission of New South Wales.

(2) The Commission is to have a seal and the seal is to be judicially noticed.

#### **146 General functions of Commission**

(1) The Commission has the following functions:

(a) setting remuneration and other conditions of employment,

(b) resolving industrial disputes,

(c) hearing and determining other industrial matters,

(d) inquiring into, and reporting on, any industrial or other matter referred to it by the Minister,

(e) functions conferred on it by this or any other Act or law.

(2) The Commission must take into account the public interest in the exercise of its functions and, for that purpose, must have regard to:

(a) the objects of this Act, and

(b) the state of the economy of New South Wales and the likely effect of its decisions on that economy.



This subsection does not apply to proceedings before the Commission in Court Session that are criminal proceedings or that it determines are not appropriate.

**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.
- (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.

**146B Commission may exercise certain dispute resolution functions under federal workplace agreements**

- (1) A person may apply to the Commission to have a dispute resolution process conducted by the Commission in relation to a matter or matters in dispute if:
  - (a) the parties to the dispute are bound by a federal workplace agreement, and
  - (b) the Commission is authorised or permitted to conduct the dispute resolution

process:

- (i) under dispute settlement procedures (within the meaning of section 353 of the federal Act) set out in the agreement, or
- (ii) if no such dispute settlement procedures are set out in the agreement, under the federal model dispute resolution process.

**Note—**

Section 353 of the federal Act provides that a federal workplace agreement must include procedures for settling disputes about matters arising under the agreement between the employer and the employees whose employment will be subject to the agreement. The section also provides that if the workplace agreement does not include such procedures, then the agreement is taken to include the model dispute resolution process set out in Part 13 of that Act.

- (2) On any such application, the Commission has and may exercise such functions with respect to the resolution of the dispute as are conferred or imposed on it by or under:
  - (a) the federal workplace agreement concerned or federal model dispute resolution process (as the case may be), and
  - (b) the federal Act.
- (3) The Commission is to be constituted by a single member of the Commission unless the federal workplace agreement concerned, federal model dispute resolution process or federal Act (as the case may be) requires otherwise.
- (4) Subject to subsection (5), the exercise of a function conferred or imposed on the Commission as referred to in subsection (2) is, for the purposes of any other provision of this Act, taken not to have been exercised under this Act.
- (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 or imposed on the Commission as referred to in subsection (2).
- (6) The functions that the Commission is authorised or permitted to exercise as referred to in this section are in addition to, and do not derogate from, any other function of the Commission.
- (7) Nothing in this section:
  - (a) makes any order, determination or other decision of the Commission in respect of the dispute binding on the parties to the dispute unless the federal workplace agreement concerned, federal model dispute resolution process or federal Act (as the case may be) operate to make any such order, determination or decision binding on the parties, or

(b) limits the operation of section 146A.

(8) In this section:

**federal Act** means the *Workplace Relations Act 1996* of the Commonwealth.

**federal model dispute resolution process** means the model dispute resolution process within the meaning of the federal Act.

**federal workplace agreement** means a workplace agreement within the meaning of the federal Act.

**modification** includes addition, exception, omission or substitution.

## Part 2 Membership of Commission

### 147 Membership of Commission

(1) The Commission consists of the following members:

- (a) a President,
- (b) a Vice-President,
- (c) Deputy Presidents,
- (d) Commissioners.

(2) The President, the Vice-President and the Deputy Presidents of the Commission are referred to in this Act as Presidential Members.

### 148 Appointment of members of the Commission

The members of the Commission are to be appointed by the Governor by commission under the public seal of the State.

### 149 Judicial members

(1) The Governor may appoint a Presidential Member of the Commission as a Member of the Commission in Court Session. The appointment may be made by the commission appointing the person as a member of the Commission or by subsequent commission under the public seal of the State.

(2) A person is not eligible to be appointed as a member of the Commission in Court Session unless the person is:

- (a) a person who holds or has held a judicial office of this State or of the Commonwealth, another State or a Territory, or
- (b) an Australian lawyer of at least 7 years' standing.

- (3) A person appointed as a member of the Commission in Court Session is referred to in this Act as a judicial member of the Commission.

### **150 Provisions relating to members of Commission**

Schedule 2 has effect with respect to the members of the Commission (including judicial members).

**Note—**

Part 9 of the *Constitution Act 1902* and Parts 7 and 8 of the *Judicial Officers Act 1986* deal with the suspension, removal or retirement from office of members.

## **Part 3 The Commission in Court Session**

### **151 Judicial members to constitute Commission in Court Session**

- (1) The Commission in Court Session is the Commission constituted by a judicial member or members only for the purposes of exercising the functions that are conferred or imposed on the Commission in Court Session by or under this or any other Act or law.
- (2) This section does not prevent the Commission from being constituted by judicial members when not exercising those functions.

### **151A Name of Commission in Court Session to be the Industrial Court of New South Wales**

The name of the Commission in Court Session is to be the Industrial Court of New South Wales, and a reference in this Act (or any other Act, statutory instrument or document) to the Commission in Court Session (whether enacted or made before or after the commencement of this section) is taken to include a reference to the Industrial Court of New South Wales.

### **152 Commission in Court Session superior court of record**

- (1) The Commission in Court Session is established by this Act as a superior court of record.
- (2) For the purposes of Part 9 of the *Constitution Act 1902*, the Commission in Court Session is a court of equivalent status to the Supreme Court and the Land and Environment Court, and is of higher status than the courts referred to in section 52 (2) (b) and (c) of that Act.

**Note—**

Part 9 of the *Constitution Act 1902* is amended by Schedule 5 to this Act to extend that Part to members of the Commission in Court Session. That Part already applies to Judges of the Industrial Court. As a consequence of the abolition of the Industrial Court by this Act, that Part confers a right on the former Judges of that Court to be appointed to judicial office in a court of equivalent or higher status. The above provision ensures that the appointment of all Judges of the former Industrial Court as members of the Commission in Court Session (by Part 4 of Schedule 4 to this Act) satisfies the requirements of the *Constitution Act 1902*.

### **153 Jurisdiction of Commission in Court Session**

- (1) The following functions of the Commission are to be exercised only by the Commission in Court Session:
  - (a) proceedings for an offence taken before the Commission (including proceedings for contempt),
  - (b) proceedings for declarations of right under section 154,
  - (c) proceedings under Part 9 of Chapter 2 (Unfair contracts),
  - (d) proceedings under section 139 (Contravention of dispute order),
  - (e) proceedings under Parts 3, 4 and 5 of Chapter 5 (Registration and regulation of industrial organisations), other than Division 3 of Part 4 (Election of officers),
  - (f) proceedings under Part 1 of Chapter 7 (Breach of industrial instruments),
  - (g) proceedings for the recovery of money under Part 2 of Chapter 7 (other than small claims under section 380),
  - (h) proceedings on a superannuation appeal under section 40 or 88 of the *Superannuation Administration Act 1996*,
  - (i) proceedings on an appeal from a member of the Commission exercising the functions of the Commission in Court Session,
  - (j) proceedings on an appeal or case stated from an Industrial Magistrate or any other court,
  - (k) any other proceedings that are, by this Act or any other Act, required to be taken before the Commission in Court Session.
- (2) The functions referred to in subsection (1) (i) and (j) and functions relating to proceedings for the cancellation of the registration of industrial organisations, may be exercised only by a Full Bench of the Commission in Court Session.
- (3) Subject to subsection (4), the functions of the Commission relating to proceedings for contempt of the Commission may be exercised only by a Full Bench of the Commission in Court Session.
- (4) The functions of the Commission relating to the commencement of proceedings for contempt of the Commission may also be exercised by a judicial member.

### **154 Declaratory jurisdiction**

- (1) The Commission in Court Session may make binding declarations of right in relation to a matter in which the Commission (however constituted) has jurisdiction. The

Commission in Court Session may do so, whether or not any consequential relief is or could be claimed.

- (2) Proceedings before the Commission in Court Session are not open to objection on the ground that a declaration of right only is sought.

## **Part 4 Organisation of Commission**

### **155 Constitution of Commission for exercise of functions**

The Commission may be constituted by:

- (a) 1 member, or
- (b) a Full Bench of the Commission.

#### **Note—**

Section 199 authorises an Industrial Committee to exercise the functions of the Commission. The rules of the Commission under section 185 may also authorise the Industrial Registrar or other officer of the Commission to exercise the functions of the Commission.

### **156 Full Bench of Commission**

- (1) A Full Bench of the Commission consists of at least 3 members who are constituted as a Full Bench by the President for the purposes of a proceeding.
- (2) A Full Bench of the Commission (other than the Commission in Court Session) must include at least one Presidential member.
- (3) A Full Bench of the Commission in Court Session must include only judicial members.
- (4) A Full Bench of the Commission constituted to hear an appeal from a decision of the Commission must not include a member of the Commission who made the decision.
- (5) A Full Bench of the Commission may:
  - (a) refer a particular matter in relation to a proceeding before it to a member of the Commission for report to the Full Bench, or
  - (b) authorise a member of the Full Bench to make any order or give any direction in proceedings before it, other than an order or direction involving the determination of the proceeding or the grant of leave to appeal.

### **157 Regional matters**

- (1) The President of the Commission may designate particular members as regional members for different regions in the State.
- (2) The President of the Commission may allocate a matter before the Commission that the President considers to be of significance for a particular region for hearing and

determination by the appropriate regional member.

- (3) However, a regional member must be designated for, and a regional office of the Industrial Registry must be established in, any region of the State prescribed by the regulations.
- (4) This section does not limit the functions of a regional member or the functions of other members.

#### **158 Matters relating to general award review or discrimination in workplace**

- (1) The President of the Commission is to designate particular Deputy Presidents to deal with matters relating to general award reviews or discrimination in the workplace.
- (2) The President of the Commission may allocate such matters for hearing and determination by the appropriate designated Deputy President.
- (3) This section does not limit the functions of a designated Deputy President or the functions of other members.

#### **159 Arrangement of business**

- (1) The President of the Commission is (subject to this Act and the rules of the Commission) to direct the business of the Commission.
- (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.
- (2) Despite anything to the contrary in this Act, if the President of the Commission is not a judicial member, the function of allocating a matter for hearing and determination by a judicial member as the Commission in Court Session (including constituting a Full Bench of the Commission in Court Session) is to be exercised by the most senior judicial member.

#### **160 Delegation by President**

The President of the Commission may delegate to another Presidential Member any of the functions of the President, other than this power of delegation.

**Note—**

The Vice-President of the Commission may also exercise the functions of the President—see clause 1 of Schedule 2.

#### **161 Annual report**

The President of the Commission must provide to the Minister an annual report of the operations of the Commission for presentation to each House of Parliament.



## **Part 5 Procedure and powers of Commission**

### **162 Procedure generally**

- (1) The Commission may, subject to this Act, determine its own procedure.
- (2) The Commission:
  - (a) is to act as quickly as is practicable, and
  - (b) is to conduct its proceedings publicly or, if it considers it necessary, privately, and
  - (c) may require the presentation of the respective cases of the parties before it to be limited to the periods of time that it determines are reasonably necessary for the fair and adequate presentation of the cases, and
  - (d) may require evidence or argument to be presented in writing and decide on the matters on which it will hear oral evidence or argument, and
  - (e) may sit at any place, and
  - (f) may require a document to be served outside the State, and
  - (g) may adjourn proceedings to any time and place (including for the purpose of enabling the parties to negotiate a settlement), and
  - (h) may dismiss at any stage any proceedings before it if it considers the proceedings are frivolous or vexatious, and
  - (i) may exercise, on its own initiative, any function exercisable by it on application (except when it is in Court Session), and
  - (j) may, on its own initiative, inquire into any industrial matter.

### **162A Transfer of certain proceedings to Industrial Magistrates**

- (1) This section applies to the following proceedings:
  - (a) proceedings for a civil penalty under Part 1 of Chapter 7,
  - (b) proceedings for the recovery of money under Part 2 of Chapter 7.
- (2) If any proceedings to which this section applies have been instituted in or before the Commission in Court Session, but the hearing of the matter has not been commenced, the President of the Commission, or a judicial member of the Commission authorised by the President for the purposes of this section, may order the transfer of the proceedings to a Local Court to be dealt with by that court.
- (3) The President or judicial member is not to make an order under this section unless:

- (a) the President or judicial member is satisfied that the proceedings concerned should have been instituted in a Local Court because of the nature of the proceedings, and
  - (b) the Local Court has jurisdiction to deal with the proceedings.
- (4) Any proceedings to which this section applies that are transferred to a Local Court under this section are to continue before the Local Court as if they had been instituted there.
- (5) In this section:

**Local Court** means a Local Court constituted by an Industrial Magistrate sitting alone.

### **163 Rules of evidence and legal formality**

- (1) The Commission:
- (a) is not bound to act in a formal manner, and
  - (b) 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
  - (c) is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.
- (2) However, the rules of evidence and other formal procedures of a superior court of record apply to the Commission in Court Session.

### **164 Powers of Commission as to the production of evidence, perjury and contempt**

- (1) The Commission may exercise the functions of the Supreme Court in relation to:
- (a) compelling the attendance of witnesses and examining them on oath or affirmation, or by use of a statutory declaration, and
  - (b) compelling the production, discovery and inspection of records and other documents, and
  - (c) compelling witnesses to answer questions which the Commission considers to be relevant in any proceeding before it, and
  - (d) directing that a witness be prosecuted for perjury.
- (2) The Commission in Court Session may exercise the functions of the Supreme Court in relation to the apprehension, detention and punishment of persons guilty of contempt of the Commission (including disobedience of any order made by or process issuing out of the Commission).
- (3) Without limiting subsection (2), a judicial member may exercise the functions of the

Supreme Court in relation to the commencement of proceedings for contempt of the Commission.

**Note—**

Section 153 (4) provides that the functions of the Commission relating to the commencement of proceedings for contempt of the Commission may also be exercised by a judicial member.

**164A Powers of Commission as to the disclosure of matters before the Commission**

- (1) A **non-disclosure order** is any of the following orders:
  - (a) an order prohibiting or restricting:
    - (i) the disclosure of the name, address, picture or any other material that identifies, or may lead to the identification of, any person (whether or not a party to proceedings before the Commission or a witness summoned by, or appearing before, the Commission), or
    - (ii) the doing of any other thing that identifies, or may lead to the identification of, any such person,
  - (b) an order prohibiting or restricting the publication or broadcast of any report of proceedings before the Commission,
  - (c) an order prohibiting or restricting the publication of evidence given before the Commission, whether in public or in private, or of matters contained in documents lodged with the Commission or received in evidence by the Commission,
  - (d) an order prohibiting or restricting the disclosure to some or all of the parties to the proceedings of evidence given before the Commission, or of the contents of a document lodged with the Commission or received in evidence by the Commission, in relation to the proceedings.
- (2) The Commission in Court Session may make any non-disclosure order if it is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason.
- (3) The Commission (other than in Court Session) may make any non-disclosure order only if:
  - (a) in relation to proceedings under Subdivision 2 of Division 2 of Part 7 of the *Commission for Children and Young People Act 1998*—it is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, or
  - (b) in relation to any other proceedings—it is satisfied that it is necessary to do so in the interests of justice.
- (4) The Commission may from time to time vary or revoke an order it has made under

this section.

- (5) Nothing in this section operates to limit any power of the Commission in Court Session apart from this section to make a non-disclosure order or any other order prohibiting or restricting the disclosure or publication of matters before the Commission.

#### **165 Issue of summons**

- (1) A summons for the purposes of this Act is to be issued by the Industrial Registrar.
- (2) Any such summons must be signed by a member of the Commission or the Industrial Registrar or as otherwise provided by the rules of the Commission.
- (3) Any such summons may require a person to do any one or more of the following:
  - (a) attend and confer,
  - (b) attend and give evidence,
  - (c) attend and produce documents or other things.
- (4) A person who, without reasonable excuse, fails to comply with the requirements of a summons is guilty of an offence.

Maximum penalty: 100 penalty units.

- (5) A person does not comply with the requirements of a summons to confer if the person leaves the conference without the permission of the person presiding at the conference.
- (6) A summons may be served within or outside the State.

#### **166 Representation of parties**

- (1) A party to proceedings before the Commission may appear personally or be represented by an Australian legal practitioner or by an agent who is not such a practitioner.
- (2) However, a party is not entitled to be represented in conciliation proceedings by a person who is an Australian legal practitioner or an agent who is an industrial agent without the leave of the Commission.
- (3) The leave of the Commission is not required if the Australian legal practitioner represents an industrial organisation (or any of its members) and is an officer or employee of the organisation.
- (4) The leave of the Commission is also not required if the Australian legal practitioner represents a State peak council and is an officer or employee of the State peak council.

- (5) The Commission may allow any party appearing before it the services of an interpreter.

#### **167 Intervention by Minister, ADB and State peak council**

- (1) The Minister may intervene at any stage of proceedings before the Commission. The Minister may also initiate any proceedings before the Commission.
- (2) The President of the Anti-Discrimination Board may intervene in any proceedings of the Commission if the President of that Board establishes that the proceedings concern unlawful discrimination under the [Anti-Discrimination Act 1977](#).
- (3) A State peak council may intervene in any proceedings before the Commission if it establishes that it or any one or more of its members has a sufficient interest in the proceedings.
- (4) A party that intervenes or initiates proceedings under this section may do so personally or, subject to this Act, by an Australian legal practitioner or agent.
- (5) This section has effect despite any other provision of this Act limiting the persons who may intervene in or initiate the relevant proceedings before the Commission.

#### **168 Criminal procedure**

- (1) Proceedings for any offence in respect of which proceedings are taken before the Commission in Court Session are to be dealt with summarily by the Commission.
- (2) Part 5 of Chapter 4 of the [Criminal Procedure Act 1986](#) applies to proceedings for an offence taken before the Commission in Court Session.
- (3) Nothing in subsection (2) affects the operation of section 170.
- (4) The provisions applied by this section prevail over any other provisions of this Part for the purposes of proceedings for an offence.

**Note—**

See section 196 with respect to the procedure on appeal to the Full Bench in criminal proceedings.

#### **169 Anti-discrimination matters**

- (1) The Commission must, in the exercise of its functions, take into account the principles contained in the [Anti-Discrimination Act 1977](#).
- (2) An issue that is the subject of proceedings before the Administrative Decisions Tribunal in relation to a matter arising under the [Anti-Discrimination Act 1977](#) may not be the subject of proceedings before the Commission without the leave of the Commission.

- (3) The Commission may admit in proceedings before it evidence given before, or findings made by, the Tribunal in relation to a matter arising under the *Anti-Discrimination Act 1977*. This subsection does not prevent the admission of any other evidence in the proceedings that contradicts any such evidence or finding.
- (4) An industrial instrument may be varied at any time by the Commission in order to remove any unlawful discrimination arising from the instrument. An application for such a variation:
  - (a) may be made by a party to the instrument, and
  - (b) may be made by the President of the Anti-Discrimination Board with the leave of the Commission.
- (5) This section does not apply to criminal proceedings before the Commission in Court Session.

#### **170 Amendments and irregularities**

- (1) The Commission may, in any proceedings before it, make any amendments to the proceedings that the Commission considers to be necessary in the interests of justice.
- (2) Any such amendment may be made:
  - (a) at any stage of the proceedings, and
  - (b) on such terms as the Commission thinks fit (including, if it can award costs in the proceedings, terms as to costs).
- (3) If this Act, the regulations or a rule of the Commission is not complied with in relation to the institution or conduct of proceedings before the Commission, the failure to comply is to be treated as an irregularity and does not nullify the proceedings, any step taken in the proceedings, or any decision in the proceedings.
- (4) For the purposes of subsection (3), the Commission may wholly or partly set aside the proceedings, a step taken in the proceedings, or a decision in the proceedings.

#### **171 Power to impose conditions**

A power of the Commission to make an award, order or other decision includes a power to make the decision subject to such conditions (including exemptions) as the Commission specifies when making the decision.

#### **172 Power to order secret ballot**

- (1) The Commission may order that a secret ballot be taken of any group of employees in order to find out their opinion about an industrial matter.
- (2) The Commission may order a secret ballot for the purpose of the exercise of any of its

functions, for example, the resolution of industrial disputes, the approval of enterprise agreements and the registration of organisations.

- (3) The Commission is to have regard to the result of a secret ballot under this section when exercising a function relating to any matter on which persons expressed an opinion in the ballot.
- (4) A secret ballot may (but need not) be limited to some or all of the members of an industrial organisation of employees.
- (5) The Commission may order a secret ballot on the Commission's own initiative or on application by:
  - (a) any industrial organisation of employees, being an organisation with members who are affected by the industrial matter, or
  - (b) at least 5% of the members of an industrial organisation of employees or 250 members of that organisation (whichever is the lesser number), or
  - (c) an employer of the employees concerned or an industrial organisation of employers a member of which is such an employer.
- (6) When the Commission orders that a secret ballot be taken under this section, it must by its order:
  - (a) give directions about the manner in which the secret ballot is to be conducted (including the type of ballot, the question to be put and the persons eligible to vote), and
  - (b) give directions about the person who is to conduct the ballot (whether an industrial organisation of employees, the Industrial Registrar, the Electoral Commissioner or some other person), and
  - (c) give such other directions as the Commission considers necessary to ensure that the ballot is effectively conducted.
- (7) The expenses incurred in the conduct of a secret ballot under this section are to be borne by the State.
- (8) This section does not apply to criminal proceedings.

### **173 Members who may exercise arbitration powers after attempted conciliation**

- (1) The member of the Commission who attempted conciliation of an industrial dispute or other matter is not to exercise arbitration powers in relation to the dispute or matter if a party to the arbitration proceedings objects and requests that a different member of the Commission exercise arbitration powers.
- (2) A member of the Commission is not, for the purposes of this section, taken to have

attempted conciliation merely because:

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

#### **174 Powers when application settled by conciliation**

If a matter that is the subject of an application to the Commission under this Act is settled by conciliation, the Commission may:

- (a) dismiss the application, or
- (b) make an order on the agreed terms for settlement.

#### **175 Powers of interpretation**

The Commission may, for the purpose of exercising its functions in connection with a matter before it, determine any question concerning the interpretation, application or operation of any relevant law or instrument (including the industrial relations legislation and any industrial instrument).

#### **176 Reconstitution of Commission during hearing**

- (1) The President of the Commission may replace the member, or one of the members, constituting the Commission after the hearing of a matter has commenced if the member becomes unavailable for any reason, or ceases to be a member, before the matter is determined. This subsection does not apply to proceedings before the Commission in Court Session unless the parties consent.
- (2) The Commission as so reconstituted is to have regard to the evidence and decisions in relation to the matter that were given or made before the Commission was reconstituted.
- (3) If a matter arises in proceedings before the Commission (otherwise than in Court Session) that is within the jurisdiction of the Commission in Court Session, the Commission may continue to deal with that matter as the Commission in Court Session if:
  - (a) the Commission is duly constituted or reconstituted by a judicial member or members, and



- (b) any member who is not a judicial member does not take part in the proceedings on that matter, and
- (c) only such evidence given in the existing proceedings before the Commission as is admissible in evidence in proceedings before the Commission in Court Session is taken into account in determining that matter.

(4) This section does not apply to criminal proceedings.

#### **177 Commission may reserve decision**

- (1) The Commission may reserve its decision in any proceedings before it.
- (2) A reserved decision of a member or members of the Commission may be given:
  - (a) by the member or members at a subsequent sitting of the Commission, or
  - (b) if the decision of a member is set out in writing and signed by the member—by being delivered by a member of the Commission, or by the Industrial Registrar, at a time and place of which the parties have been given reasonable notice.

#### **178 Commission divided in opinion**

- (1) If the members sitting as the Full Bench of the Commission are divided in opinion, the opinion of the majority is taken to be the decision of the Commission.
- (2) If the members are equally divided in their opinion, the opinion that prevails is:
  - (a) the opinion of the President if the President is sitting, or
  - (b) if the President is not sitting but the Vice-President is sitting—the opinion of the Vice-President, or
  - (c) if the President and Vice-President are not sitting and only one Deputy President is sitting—the opinion of the Deputy President, or
  - (d) if the President and Vice-President are not sitting and more than one Deputy President is sitting—the opinion of the senior Deputy President.

#### **179 Finality of decisions**

- (1) A decision of the Commission (however constituted) is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal.
- (2) Proceedings of the Commission (however constituted) may not be prevented from being brought, prevented from being continued, terminated or called into question by any court or tribunal.
- (3) This section extends to proceedings brought in a court or tribunal in respect of a decision or proceedings of the Commission on an issue of fact or law.

- (4) This section extends to proceedings brought in a court or tribunal in respect of a purported decision of the Commission on an issue of the jurisdiction of the Commission, but does not extend to any such purported decision of:
  - (a) the Full Bench of the Commission in Court Session, or
  - (b) the Commission in Court Session if the Full Bench refuses to give leave to appeal the decision.
- (5) This section extends to proceedings brought in a court or tribunal for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise.
- (6) This section is subject to the exercise of a right of appeal to a Full Bench of the Commission conferred by this or any other Act or law.
- (7) In this section:

**decision** includes any award or order.

#### **180 Contempt of Commission—offence**

- (1) A person in contempt of the Commission is guilty of an offence.

Maximum penalty: 500 penalty units in the case of a corporation or, in any other case, 50 penalty units or imprisonment for 6 months, or both.
- (2) For the purposes of subsection (1), conduct is a contempt only if the same conduct in relation to the Supreme Court would be a contempt of the Supreme Court.
- (3) Proceedings for an offence against this section may be taken only before the Commission in Court Session.

#### **181 Costs**

- (1) Subject to the rules of the Commission and any other Act or law:
  - (a) the Commission may award costs, and
  - (b) costs are in the discretion of the Commission, and
  - (c) the Commission may determine by whom and to what extent costs are to be paid, and
  - (d) the Commission may order costs to be assessed on the basis set out in Division 11 of Part 3.2 of the [Legal Profession Act 2004](#) or on any other basis.
- (2) However, the Commission when it is not in Court Session may award costs only in the following cases:

- (a) the Commission may award costs against an applicant if it considers that the application to it was frivolous or vexatious, or
  - (b) the Commission may award costs against a party to proceedings who, in the opinion of the Commission, instituted proceedings without reasonable cause, or
  - (c) the Commission may award costs against a party to proceedings under Part 6 of Chapter 2 (Unfair dismissals) who, in the opinion of the Commission, unreasonably failed to agree to a settlement of the claim or whose application was frivolous or vexatious, or
  - (c1) the Commission may award costs against an industrial agent representing an applicant or employer in proceedings under Part 6 of Chapter 2 if:
    - (i) the industrial agent fails to file a certificate as required by section 90A, or
    - (ii) the Commission finds that the industrial agent has filed a certificate under that section certifying that the agent has reasonable grounds for believing, on the basis of provable facts, that the applicant's claim or employer's response to the claim had reasonable prospects of success when the agent did not have reasonable grounds for believing, on the basis of provable facts, that it had reasonable prospects of success, or
  - (d) the Commission may award costs in proceedings for a breach of an industrial instrument or the recovery of money under Chapter 7, as provided by sections 357 and 373.
- (3) The Commission in Court Session may not award costs in proceedings for a contravention of a dispute order or in proceedings under Division 2 of Part 4 of Chapter 5 (Rules of industrial organisations).
- (4) In this section, **costs** includes:
- (a) costs of or incidental to proceedings in the Commission, and
  - (b) in the case of an appeal to the Commission, the costs of or incidental to the proceedings giving rise to the appeal, as well as the costs of or incidental to the appeal.

**181A Obligation to disclose costs to clients and Commission**

- (1) An industrial agent who represents a client in proceedings before the Commission must disclose to the client and the Commission in accordance with this section the basis of the costs of any industrial agent services provided by him or her in the proceedings.
- (2) The following matters are to be disclosed to the client and the Commission:

- (a) the amount of the costs, if known,
  - (b) if the amount of the costs is not known, the basis of calculating the costs,
  - (c) the billing arrangements,
  - (d) any other matter required to be disclosed by the regulations.
- (3) A disclosure under the section is to be made at or before the commencement of the proceedings in which the industrial agent is representing the client.
- (4) A disclosure under this section must be made in writing and be expressed in clear plain language.
- (5) The disclosure may be made separately or in a costs agreement or in any other contract relating to the representation of the client in the proceedings.
- (6) A disclosure is not required to be made under this section when it would not be reasonable to require it.
- (7) The regulations may make provision for or with respect to:
- (a) the information to be disclosed under this section, and
  - (b) when it would not be reasonable to require a disclosure to be made under this section.
- (8) If an industrial agent fails to make a disclosure to a client in accordance with this section of the matters required to be disclosed by this section in relation to costs, the client need not pay the costs of the representation.
- (9) An industrial agent who fails to make a disclosure in accordance with this section of the matters required to be disclosed by this section in relation to costs may not maintain proceedings for the recovery of the costs.
- (10) In this section:

**costs agreement** means an agreement between a party to proceedings before the Commission (**the client**) and an industrial agent as to the costs of representing the party in the proceedings.

## **182 Recovery of amounts ordered to be paid (other than penalties)**

- (1) For the purposes of the recovery of any amount ordered to be paid by the Commission (including costs, but not including a criminal or civil penalty), the amount is to be certified by the Industrial Registrar.
- (2) A certificate given under this section must identify the person liable to pay the certified amount.

- (3) A certificate of the Industrial Registrar that:
  - (a) is given under this section, and
  - (b) is filed in the office of a court having jurisdiction to give judgment for a debt of the same amount as the amount stated in the certificate,operates as such a judgment.
- (4) To avoid doubt, an appeal lies to the Commission under Part 7 against any amount certified by the Industrial Registrar under this section.
- (5) To avoid doubt, an appeal lies to a Full Bench of the Commission under Part 7 against an order by the Commission for the payment of costs.

### **183 Regulations relating to fees**

The regulations may make provision for or with respect to the fees to be charged in respect of the business of the Commission (including an Industrial Committee) and the payment of the expenses of witnesses or persons receiving a summons under this Act.

### **184 Power of entry of members of Commission and other authorised officers**

- (1) A member of the Commission, the Industrial Registrar or a person authorised in writing by a member of the Commission may at any time during working hours enter any premises in or in respect of which he or she has reasonable grounds to suspect that:
  - (a) any industry is being carried on, or
  - (b) any matter or thing is taking or has taken place in relation to which any industrial action is pending, or
  - (c) any industrial instrument has been or is to be made,and may inspect and view any work, material, machinery, appliance, articles, book, document or other record there.
- (2) Any such person does not have authority to enter any part of premises used for residential purposes, except with the permission of the occupier.
- (3) A person who hinders or obstructs a member of the Commission, the Industrial Registrar or any authorised person in the exercise of any power conferred by this section is guilty of an offence.

Maximum penalty: 100 penalty units.

## **Part 6 Rules of Commission**

### **185 Rules of Commission**

- (1) Rules of the Commission may be made for or with respect to any matter that by this or any other Act is required or permitted to be prescribed by rules of the Commission or that is necessary or convenient to be prescribed in relation to the practice and procedure of the Commission under this or any other Act.
- (2) Without affecting the generality of subsection (1), rules of the Commission may be made for or with respect to:
  - (a) the initiation of proceedings in the Commission, or
  - (b) the practice and procedure to be followed in, or for the purposes of, proceedings before the Commission, or
  - (c) the means for, and the practice and procedure to be followed in, the enforcement and execution of decisions of the Commission, or
  - (d) the functions of the Industrial Registrar or other officers under this Act, including functions in relation to proceedings instituted before the Commission, or
  - (e) any matter that may be the subject of rules under the *Supreme Court Act 1970* or the *Civil Procedure Act 2005*.
- (3) This section extends to the making of rules relating to the practice and procedure of (and other matters relating to) an Industrial Committee.

### **186 Establishment and procedure of the Rule Committee of the Commission**

- (1) The rules of the Commission are to be made by a Rule Committee of the Commission comprising:
  - (a) the President of the Commission, and
  - (b) 2 other Presidential Members appointed by the President.
- (2) The President of the Commission may co-opt other persons to be members of the Committee, either generally or for limited purposes.
- (3) The procedure at a meeting of the Committee is to be as determined by the President of the Commission.
- (4) At a meeting of the Rule Committee of the Commission:
  - (a) the President of the Commission is to preside, or
  - (b) if the President is absent, a member nominated by the President is to preside.

## **Part 7 Appeals and references to Commission**

### **187 Appeal to Full Bench from decision of Commission**

The following may appeal to a Full Bench of the Commission against a decision of the Commission constituted by a single member:

- (a) a party to the proceedings in which the decision was made,
- (b) an industrial organisation, or an association registered under Chapter 6, affected by the decision,
- (c) the Minister if the Minister considers that the public interest is, or is likely to be, affected by the decision,
- (d) the President of the Anti-Discrimination Board if that President considers that the decision is inconsistent with the principles contained in the [Anti-Discrimination Act 1977](#).

#### **Note—**

An appeal lies against a decision of an Industrial Committee as if the decision were that of a member of the Commission (see section 199 (3)).

### **188 Appeals to Full Bench by leave only**

- (1) An appeal to a Full Bench of the Commission under this Part may be made only with the leave of the Full Bench.
- (2) The Full Bench is to grant leave to appeal if, in its opinion, the matter is of such importance that, in the public interest, leave should be granted.
- (3) The Full Bench may deal with an application for leave to appeal separately and without conducting a hearing into the merits of the appeal.
- (4) This section does not apply to an appeal made by the Minister.

### **189 Time and procedure for making appeals**

- (1) An appeal to a Full Bench of the Commission under this Part must be made within 21 days after the date of the decision appealed against or within such further time as the Full Bench or the Commission constituted by a Presidential Member allows.
- (2) Further time may be allowed, either before or after the end of that 21-day period.

### **190 Stay of decision appealed against**

If an appeal is made under this Part to a Full Bench of the Commission, the Full Bench or the Commission constituted by a Presidential Member may, on such terms as it considers appropriate, order that the decision concerned be wholly or partly stayed pending

determination of the appeal or until further order of the Full Bench or Commission.

**190A Interlocutory and other matters in proceedings on appeal**

- (1) If an appeal is made under this Part to a Full Bench of the Commission, the Commission constituted by the President (or by another member of the Commission nominated by the President) may do any one or more of the following for the purposes of, or in relation to, the appeal:
  - (a) make any consent order in relation to the appeal,
  - (b) grant leave to withdraw or discontinue the appeal,
  - (c) give any directions in relation to the hearing of the appeal,
  - (d) deal with any interlocutory application in the appeal.
- (2) If the appeal is made to a Full Bench of the Commission in Court Session:
  - (a) a non-judicial member may not constitute the Commission for the purposes of this section, and
  - (b) this section applies despite section 153 (2).
- (3) A member of the Commission who made a decision the subject of an appeal may not constitute the Commission for the purposes of this section.
- (4) This section does not authorise:
  - (a) the Commission constituted in accordance with this section to grant leave to appeal, or
  - (b) the granting of a stay against the decision appealed against otherwise than under section 190.

**191 Nature of appeal**

- (1) An appeal to a Full Bench of the Commission under this Part is not by way of a new hearing and is to be determined on the evidence and material adduced in relation to the decision appealed against.
- (2) However, the Full Bench may, by leave, receive further evidence if it considers that special grounds exist or if the evidence concerns matters occurring after the decision appealed against.
- (3) To avoid doubt, the Full Bench cannot merely substitute its decision on the matter, but must follow the principles applying to appeals from discretionary decisions, whether or not further evidence is received.

**Note—**



The above section generally follows the decision of the Full Industrial Relations Commission in *Big W Discount Stores v Donato* (1995) 58 IR 239 as to the nature of an appeal. The appeals in respect of which the section applies include appeals in connection with awards, unfair dismissals, approvals of enterprise agreements, unfair contracts or contraventions of dispute orders.

### **192 Powers on appeal**

- (1) On an appeal under this Part to a Full Bench of the Commission, the Full Bench may (in accordance with this Act):
  - (a) confirm, quash or vary the decision of the Commission concerned, or
  - (b) direct a member of the Commission to take further action under this Act to carry its decision on the appeal into effect, or
  - (c) refer the matter back to the member of the Commission, with such directions or recommendations as the Full Bench considers appropriate.

The Full Bench may determine a part of the matter and refer the remainder back to the member of the Commission.

- (2) The Full Bench may direct that its decision on an appeal under this Part take effect as from any specified date after the lodging of the original application relating to the decision.

### **193 References by members to Full Bench**

- (1) A member of the Commission may refer to the President, for decision by a Full Bench of the Commission:
  - (a) a matter (or part of a matter) before the member, or
  - (b) a question arising in a matter before the member.
- (2) The President is to determine whether or not a Full Bench should deal with the matter or question.
- (3) The Full Bench may:
  - (a) hear and determine the matter or question, or
  - (b) refer the matter or question back to the member, with such directions or recommendations as the Commission considers appropriate.

The Full Bench may hear and determine a part of the matter and refer the remainder back to the member.

- (4) This section extends to a reference by a member who is the Chairperson of an Industrial Committee of a matter before the Committee.

#### **194 Appeal from Industrial Registrar to Commission**

- (1) A person may appeal to the Commission against:
  - (a) a decision made by the Industrial Registrar in a matter (or any part of a matter) arising under this Act that directly affects the person, or
  - (b) a refusal by the Industrial Registrar to make such a decision.

However, an appeal does not lie if the decision or refusal relates to settling minutes of an award or other decision of the Commission.

- (2) An appeal against a decision relating to the refusal of an application for registration or an objection to any such application may only be made by the applicant or a party to the hearing of the matter by the Industrial Registrar. The regulations and, subject to the regulations, the rules of the Commission may make provision with respect to the persons who may appeal under this section.
- (3) If an appeal is instituted under this section, the Commission may, on such terms as it considers appropriate, order that the decision concerned be wholly or partly stayed pending determination of the appeal or until further order of the Commission.
- (4) For the purposes of an appeal under this section, the Commission may, by leave, receive further evidence.
- (5) On hearing an appeal under this section, the Commission may do any one or more of the following:
  - (a) confirm, quash or vary the decision concerned,
  - (b) make a decision dealing with the subject-matter of the decision concerned,
  - (c) direct the Industrial Registrar to take further action to deal with the subject-matter of the decision as directed by the Commission.

#### **195 Reference by, or removal from, Industrial Registrar to Commission**

- (1) The Industrial Registrar may refer to the President, for decision by the Commission:
  - (a) a matter (or part of a matter) before the Industrial Registrar, or
  - (b) a question arising in a matter before the Industrial Registrar.
- (2) The President is to determine whether or not the Commission should deal with the matter or question.
- (3) The Commission may:
  - (a) hear and determine the matter or question, or

- (b) refer the matter or question back to the Industrial Registrar, with such directions or recommendations as the Commission considers appropriate.

The Commission may hear and determine a part of the matter and refer the remainder back to the Industrial Registrar.

- (4) A matter before the Industrial Registrar is to be heard and determined by the Commission if the President refers the matter for hearing and determination by the Commission (whether constituted by a single member or by a Full Bench).

### **196 Appeals from and references by members of Commission in criminal proceedings**

- (1) This section applies (and the other provisions of this Part do not apply) to appeals and references to the Full Bench of the Commission in Court Session in respect of criminal proceedings taken before a judicial member of the Commission.
- (2) The *Criminal Appeal Act 1912* applies to any such appeal or reference in the same way as it applies to an appeal or reference to the Court of Criminal Appeal in respect of criminal proceedings taken before a Judge of the Supreme Court in its summary jurisdiction.
- (3) For the purposes of subsection (2), a reference (however expressed) in the *Criminal Appeal Act 1912*:
  - (a) to the Court of Criminal Appeal—is taken to be a reference to a Full Bench of the Commission in Court Session, and
  - (b) to the Supreme Court—is taken to be a reference to the Commission in Court Session, and
  - (c) to rules—is taken to be a reference to rules of the Commission, and
  - (d) to the Attorney General—is taken to include a reference to the Minister, and
  - (e) to the Director of Public Prosecutions—is taken to include a reference to the prosecutor in the proceedings before the Commission in Court Session, and
  - (f) to the registrar—is taken to be a reference to the Industrial Registrar.
- (4) Subsection (2) does not apply to any provision of the *Criminal Appeal Act 1912* relating to costs.

### **197 Appeals from Local Court**

- (1) An appeal lies to a Full Bench of the Commission in Court Session against:
  - (a) any order made under this Act by a Local Court for the payment of money or the dismissal by the Local Court of an application for such an order (including a dismissal on the ground that it does not have jurisdiction to deal with the

application), or

- (b) any conviction or penalty imposed by the Local Court for an offence against this Act or the regulations, or
- (c) a civil penalty imposed under this Act by a Local Court for a contravention of an industrial instrument or the dismissal by the Local Court of proceedings for such a civil penalty.

(2) The provisions of the *Crimes (Local Courts Appeal and Review) Act 2001* that relate to:

- (a) appeals from a Local Court to the District Court or Supreme Court, and
- (b) the decisions of the District Court or Supreme Court on any such appeal, and
- (c) the carrying out or enforcement of any such decision,

(including those provisions as applied by section 64 of the *Local Courts Act 1982*) apply, subject to the regulations under this Act, to any appeal referred to in subsection (1).

(3) (Repealed)

(4) The Full Bench of the Commission in Court Session may refer a matter the subject of an appeal back to the Local Court with such directions or recommendations as it considers appropriate.

(5) Section 179 (Finality of decisions):

- (a) applies to a decision or purported decision of a Local Court in proceedings to which this section applies in the same way as it applies to a decision or purported decision of the Commission, and
- (b) without limiting that section, applies to a decision or purported decision of the Commission in respect of proceedings to which this section applies.

**Note—**

The provisions of this section are extended to similar proceedings under other industrial relations legislation eg section 14 of the *Annual Holidays Act 1944*; section 14 of the *Long Service Leave Act 1955*.

**197A Appeals against acquittals in proceedings for offences against occupational health and safety legislation**

- (1) This section applies to the decision of a member of the Commission or of a Local Court constituted by an Industrial or other Magistrate to acquit a person of an offence against the occupational health and safety legislation.
- (2) This section applies to such a decision only if proceedings for the offence were

instituted by an inspector appointed under that legislation or with the consent of the Minister or other officer authorised by that legislation to give such a consent.

- (3) An appeal lies to the Full Bench of the Commission in Court Session against a decision to which this section applies. The appeal is not limited to a question of law.
- (4) The appeal may be made by the Attorney General, the Minister, the Director of Public Prosecutions or the prosecutor in the proceedings in which the decision appealed against was made.
- (5) An appeal may be made within 21 days after the date of the decision appealed against or within such further time (not exceeding 3 months after that date) as the Full Bench or the Commission constituted by a Presidential Member allows. Further time may be allowed, either before or after the end of that 21-day period.
- (6) Section 191 applies to an appeal under this section.
- (7) On an appeal under this section, the Full Bench may:
  - (a) dismiss the appeal, or
  - (b) set aside the decision appealed against and make a decision in the matter in accordance with law (including the conviction and sentence of the defendant for the offence charged).
- (8) If the Full Bench on appeal convicts the defendant of the offence, the maximum penalty that the Full Bench may impose for the offence is the maximum penalty that the court that acquitted the defendant could have imposed for the offence.
- (9) This section has effect despite anything to the contrary in section 196 or 197.
- (10) In this section, **occupational health and safety legislation** means:
  - (a) the *Occupational Health and Safety Act 1983* and the regulations made under that Act, and
  - (b) the *Occupational Health and Safety Act 2000* and the regulations made under that Act, and
  - (c) the *Coal Mines Regulation Act 1982* and the regulations made under that Act, and
  - (d) the *Coal Mine Health and Safety Act 2002* and the regulations made under that Act, and
  - (e) the associated occupational health and safety legislation, within the meaning of the *Occupational Health and Safety Act 2000*.
- (11) This section does not apply to a decision made before the commencement of this section.

## **Part 8 Industrial Committees**

### **198 Establishment of Industrial Committees**

- (1) The Commission constituted by a Presidential Member may, on application, establish an Industrial Committee to operate in relation to the whole or any part of a particular industry (including an occupation).
- (2) An Industrial Committee is to consist of the following:
  - (a) the member of the Commission to whom the matter to be dealt with by the Committee has been allocated, and
  - (b) equal numbers, determined by the Commission, of representatives of employers and representatives of employees.

The relevant member of the Commission is to be the Chairperson of the Committee when it deals with that matter.

- (3) The members of an Industrial Committee (other than the Chairperson) are to be appointed by the Industrial Registrar following nomination as prescribed by the regulations.
- (4) If the Industrial Registrar is satisfied that there has been a failure to nominate a person for appointment, the Industrial Registrar may appoint an appropriately qualified person to the Committee.

### **199 Functions of Industrial Committee**

- (1) The functions of the Commission under this Act with respect to a matter may be exercised in accordance with this Act by an Industrial Committee, but only in respect of the industry (or part of the industry) for which the Committee is established.
- (2) Any such function may be so exercised only if:
  - (a) the matter is allocated to the Committee by the President of the Commission, or
  - (b) application for the exercise of the function in respect of the matter is made to the Committee by:
    - (i) any employer in the industry (or part of the industry) for which the Committee is established or any industrial organisation of such employers, or
    - (ii) an industrial organisation of employees in the industry (or part of the industry) for which the Committee is established.
- (3) Any function so exercised is taken to have been exercised by the member of the Commission who is the Chairperson sitting alone.

(4) An Industrial Committee is not to exercise a function if the Commission has directed that proceedings before the Committee on the matter be discontinued.

(5) This section does not apply to a function that may only be exercised by the Commission in Court Session.

## **200 Duration and dissolution of Industrial Committees**

(1) An Industrial Committee continues in existence for 3 years after it is established, unless it is sooner dissolved.

(2) The Commission constituted by a Presidential Member may, on application or on its own initiative, dissolve an Industrial Committee.

(3) The Commission constituted by a Presidential Member may extend the duration of an Industrial Committee for a period not exceeding 3 years at a time. The duration of the Committee may be extended even though the current period of the Committee has expired.

(4) If the duration of an Industrial Committee is extended, the existing members of the Committee (or the members of the Committee on its expiration) continue in office without the need for their re-appointment.

(5) Nothing in this section prevents an Industrial Committee that has been dissolved or that has expired from being re-established and new members appointed.

(6) Any matter pending before an Industrial Committee on its dissolution is taken to be pending before the member of the Commission constituting the dissolved Committee in connection with the matter.

## **201 Provisions relating to members and procedure of Industrial Committees**

Schedule 3 has effect with respect to Industrial Committees.

## **Part 9 Co-operation between State and Federal tribunals**

### **202 Definitions**

In this Part:

**Federal Act** means the [Workplace Relations Act 1996](#) of the Commonwealth.

**Federal Commission** means the Australian Industrial Relations Commission.

**Federal President** means the President of the Federal Commission.

**State Commission** means the Industrial Relations Commission established by this Act.

**State President** means the President of the State Commission.

### **203 Referral of matter by Federal President to State Commission**

- (1) If the Federal President duly requests the State Commission to deal under the Federal Act with a matter with which the Federal Commission is empowered to deal, the matter may be allocated by the State President to a member of the State Commission.
- (2) The member of the State Commission must cease dealing with the matter if the request is duly revoked before the matter is determined.
- (3) The member of the State Commission has the functions conferred by the Federal Act for the purpose of dealing with the matter.
- (4) The determination of the matter is, for the purposes of this Act, taken not to have been made by a member of the State Commission under this Act.

### **204 Referral of matter by State President to Federal Commission**

- (1) The State President may request the Federal Commission to deal under this Act with a matter with which the State Commission is empowered to deal.
- (2) The State President may revoke that request at any time before the Federal Commission determines the matter.
- (3) The member of the Federal Commission to whom the matter is allocated has, for the purpose of dealing with the matter, the functions of the State Commission under this Act (other than a Full Bench of the Commission or the Commission in Court Session).
- (4) The determination of the matter is, for the purposes of this Act, taken to have been made by a member of the State Commission under this Act.
- (5) This section does not apply to a matter that may only be dealt with by the State Commission in Court Session.

### **205 Joint proceedings**

- (1) A member of the State Commission may exercise, in the presence of:
  - (a) a member of the Federal Commission, and
  - (b) the parties to any proceedings before the Federal Commission, and
  - (c) any witness summoned by the Federal Commission,any of the functions that are exercisable by the member of the State Commission in relation to a matter.
- (2) Evidence may be given, and submissions made, jointly for the purposes of the proceedings before the State Commission and the Federal Commission.



## 206 Dual Federal and State appointments of members

- (1) A member of the State Commission may hold office as a member of the Federal Commission.
- (2) A member of the Federal Commission may, if otherwise eligible, be appointed as a member of the State Commission unless the law of the Commonwealth otherwise provides.
- (3) A person who is a member of the State Commission and also a member of the Federal Commission may, in accordance with any agreement made between the State President and the head of the Federal Commission:
  - (a) exercise functions as a member of the Federal Commission, and
  - (b) in relation to a particular matter, exercise functions that the person has in relation to the matter both as a member of the State Commission and as a member of the Federal Commission.
- (4) The appointment, as a member of the State Commission, of a person who is a member of the Federal Commission may be for a fixed term and such a member holds office until:
  - (a) the expiration of the term, or
  - (b) he or she ceases to be a member of the Federal Commission, or
  - (c) he or she resigns, or is removed, from office as a member of the State Commission,whichever first occurs.
- (5) A member of the Federal Commission who is appointed as a member of the State Commission is not to be remunerated as a member of the State Commission, but may be paid such allowances as the Minister considers to be reasonable for expenses incurred in discharging the duties of a member of the State Commission.
- (6) In this section:

**Federal Commission** includes any industrial tribunal (in addition to the Federal Commission) constituted by a law of the Commonwealth that is prescribed by the regulations for the purposes of this section.

**member of the State Commission** includes a judicial member of the State Commission.

### Note—

Members of the State Commission may also hold dual appointments as members of other State tribunals, for example, as members of the Equal Opportunity Tribunal (section 69E of the [Anti-Discrimination Act 1977](#)) or of

the Government and Related Employees Appeal Tribunal (sections 7 and 10 of, and Schedule 1 to, the *Government and Related Employees Appeal Tribunal Act 1980*).

## **Part 9A Co-operation between State industrial tribunals**

### **206A Definitions**

In this Part:

**industrial law** of another State means:

- (a) a law of the State corresponding, or substantially corresponding, to this Act, or
- (b) a law of the State that is declared by the regulations to be a corresponding law (whether or not the law corresponds, or substantially corresponds, to this Act).

**industrial tribunal** of another State means:

- (a) a tribunal established under a law of the State that has functions corresponding, or substantially corresponding, to functions conferred or imposed on the NSW Commission by this Act, or
- (b) a tribunal established under a law of the State that is declared by the regulations to be the industrial tribunal of the State (whether or not the tribunal has functions corresponding, or substantially corresponding, to functions conferred or imposed on the NSW Commission by this Act).

**NSW Commission** means the Industrial Relations Commission established by this Act.

### **206B Joint proceedings**

- (1) A member of the NSW Commission may exercise, in the presence of:
  - (a) a member of an industrial tribunal of another State, and
  - (b) the parties to any proceedings before an industrial tribunal of another State, and
  - (c) any witness summoned by an industrial tribunal of another State,any of the functions that are exercisable by the member of the NSW Commission in relation to a matter.
- (2) Evidence may be given, and submissions made, jointly for the purposes of the proceedings before the NSW Commission and the industrial tribunal of another State.

### **206C NSW Commission may exercise functions conferred under industrial law of another State**

- (1) Subject to subsection (3), the NSW Commission has (and may exercise) such functions as may be conferred on it under the industrial law of another State.

- (2) However, the exercise of any such function by the NSW Commission is taken for the purposes of this Act not to be the exercise of a function under this Act.
- (3) Subsection (1) does not extend to any function (or class of functions) conferred under the industrial law of another State that is excluded by the regulations.

## **Part 10 Industrial Registrar**

### **207 Appointment of Industrial Registrar and staff**

An Industrial Registrar, Deputy Industrial Registrars and such other staff as may be necessary for the purposes of this Act are to be employed under Part 2 of the *Public Sector Management Act 1988*.

### **208 Functions of Industrial Registrar and Deputy Industrial Registrar**

- (1) The Industrial Registrar has the functions conferred or imposed on the Industrial Registrar by or under this or any other Act or law.
- (2) A Deputy Industrial Registrar may exercise the functions of the Industrial Registrar:
  - (a) as directed by the Industrial Registrar, and
  - (b) during the absence of, or a vacancy in the office of, the Industrial Registrar.
- (3) Anything done or omitted by a Deputy Industrial Registrar in exercising a function of the Industrial Registrar has effect as if it had been done or omitted by the Industrial Registrar.
- (4) The regulations may make provision for or with respect to the functions of the Industrial Registrar.

## **Part 11 NSW industrial relations website**

### **208A NSW industrial relations website**

For the purposes of this Act, the ***NSW industrial relations website*** is the Internet website used for the time being by the Industrial Registrar to provide public access to information relating to New South Wales industrial relations matters.

### **208B When matter is published on NSW industrial relations website**

- (1) A matter is published on the NSW industrial relations website:
  - (a) if it is made accessible in full on that website, or
  - (b) if notice of its making, issue or other production is made accessible on that website and it is made accessible separately in full on that website or in any other identified location.

- (2) The date on which a matter is published on the NSW industrial relations website is the date notified by the Industrial Registrar (whether as part of the matter or elsewhere) as the date of its publication, being a date that is not earlier than the date on which it was first made so accessible.
- (3) If a matter cannot for technical or other reasons be published on the NSW industrial relations website at a particular time, the matter may be published at that time in such other manner as the Industrial Registrar determines and published on that website as soon as practicable thereafter. In that case, it is taken to have been published on that website at that earlier time.

### **208C Evidence of publication**

- (1) The Industrial Registrar may issue a certificate that certifies either or both of the following matters:
  - (a) that a specified website is currently used (or was used during a specified period or on a specified date) by the Registrar to provide public access to information relating to New South Wales industrial relations matters,
  - (b) that a specified matter was published on the NSW industrial relations website on a specified date.
- (2) For the purposes of any proceedings before a court or tribunal, a certificate purportedly issued under subsection (1) is admissible as evidence of the particulars certified in and by the certificate.
- (3) The provisions of this section are in addition to, and do not derogate from, the provisions of section 390.

## **Chapter 5 Industrial organisations**

### **Part 1 Principles of association**

#### **209 Freedom of association**

- (1) A person is entitled to be a member of an industrial organisation, but can be prevented from becoming or remaining a member by the organisation acting under its rules and in accordance with section 260.
- (2) A person cannot be compelled to become, or remain, a member of an industrial organisation.

#### **210 Freedom from victimisation**

- (1) An employer or industrial organisation must not victimise an employee or prospective employee because the person:

- (a) is or was a member or an official of an industrial organisation of employees or otherwise an elected representative of employees, or
  - (b) does not belong to an industrial organisation of employees, or holds a certificate of conscientious objection to becoming a member of such an industrial organisation, or
  - (c) refuses to engage in industrial action, or
  - (d) exercises functions conferred under this Act, or
  - (e) claims a benefit to which the person is entitled under the industrial relations legislation or an industrial instrument, or
  - (f) informs any person of an alleged breach by an employer of the industrial relations legislation or of an industrial instrument, or
  - (g) participates, or proposes to participate, in proceedings relating to an industrial matter, or
  - (h) engages in, or proposes to engage in, any public or political activity (unless it interferes with the performance of the employee's duties), or
  - (i) informs any person of an alleged breach of the *Protection of the Environment Operations Act 1997* by an employer, or
  - (ia) informs any person or body of, or gives evidence in relation to, a notifiable occurrence within the meaning of the *Rail Safety Act 2002*, or
  - (ib) reports a matter relating to the safety or reliability of railway, bus or ferry operations to the Chief Investigator of the Independent Transport Safety and Reliability Regulator or an officer of the Ministry of Transport, or
  - (j) makes a complaint about a workplace matter that the person considers is not safe or a risk to health, or exercises functions (as a member of a committee or otherwise) with respect to workplace consultation conferred under Division 2 of Part 2 of the *Occupational Health and Safety Act 2000*, or
  - (k) assists the Independent Pricing and Regulatory Tribunal or Scheme Administrator in the exercise of its functions under the *Electricity Supply Act 1995*.
- (2) In any proceedings under section 213 to enforce the provisions of this section, it is presumed that an employee or prospective employee who suffers any detriment as a result of action by the employer or industrial organisation was victimised because of a matter referred to in subsection (1) that is alleged by the applicant to be the cause of the detrimental action. That presumption is rebutted if the employer or industrial organisation satisfies the Commission that the alleged matter was not a substantial and operative cause of the detrimental action.

**211 No preference to members of employee organisations over non-members**

- (1) An industrial instrument cannot confer a right of preference of employment in favour of a member of an industrial organisation of employees over a person who is not a member of such an organisation.
- (2) This section applies to industrial instruments in force on the commencement of this section.
- (3) For the purposes of this section, a member of an industrial organisation includes a person who has applied to become a member of the organisation.

**212 Conscientious objection to membership of organisation**

- (1) The Industrial Registrar may issue a certificate of conscientious objection to a person who satisfies the Industrial Registrar that he or she holds a genuine conscientious objection to becoming a member of an industrial organisation of employees.
- (2) The Industrial Registrar may refuse to issue or may cancel such a certificate if the person does not pay the Industrial Registrar fees (including periodic fees) of such amount as the Industrial Registrar determines would be payable for membership of a relevant industrial organisation of employees.
- (3) A certificate of conscientious objection may, without limiting this section, be issued to a person (whether or not an employee) who satisfies the Industrial Registrar that he or she is a practising member of a religious society or order (such as the Brethren) whose tenets or beliefs preclude membership of any organisation or body other than that society or order. In the case of a certificate issued to a person who is not an employee, a reference in this section to a relevant organisation of employees is taken to be a reference to a relevant organisation of employers.

**213 Enforcement**

- (1) The Commission may, by order, enforce the provisions of this Part on the application of an industrial organisation or by any person affected by a contravention of this Part.
- (2) The Commission may, in particular, for that purpose do any one or more of the following:
  - (a) order the reinstatement or re-employment of an employee,
  - (b) order the employer to promote or otherwise advance an employee in his or her employment,
  - (c) order the employer to pay an employee or prospective employee the whole or any part of the amount of remuneration or other financial benefits lost or foregone,
  - (d) order the employer to employ a prospective employee,

- (e) order the employer not to carry out a threat to victimise an employee or not to make any further such threat,
  - (f) order an industrial organisation (or its officials or employees) to take any particular action or to cease any particular activity,
  - (g) make consequential orders (including orders concerning continuity of service).
- (3) An application for an order under this section must be made within 21 days after the contravention concerned.
- (4) The Commission may accept an application that is made out of time if the Commission considers there is sufficient reason to do so, having regard in particular to:
- (a) the reason for, and the length of, the delay in making the application, and
  - (b) any hardship that may be caused to the applicant or other party if the application is or is not rejected, and
  - (c) the conduct in relation to which the order is sought.

#### **214 Application of Part**

This Part applies despite anything to the contrary in an industrial instrument.

### **Part 2 State peak councils**

#### **215 State peak council—employees**

For the purposes of this Act, Unions NSW is the **State peak council** for employees.

#### **216 State peak councils—employers**

- (1) For the purposes of this Act, an organisation approved for the time being by the Commission under this section is a **State peak council** for employers. More than one organisation may be so approved.
- (2) The Commission may approve as a State peak council for employers an organisation that is representative of a significant number of member associations or organisations of employers (being associations or organisations whose members operate primarily in New South Wales).
- (3) The Commission may at any time revoke any such approval for any reason it thinks fit.
- (4) The regulations may make provision for or with respect to approvals under this section and the application to an approved organisation of any requirements applicable to industrial organisations (with or without modifications).

## Part 3 Registration of organisations

### Notes—

- 1 Some defined terms in the Dictionary that are relevant to this Part include **office** in an organisation; **officer** of an organisation; **committee of management** of organisation.
- 2 The jurisdiction of the Commission under this Part is exercisable only by the Commission in Court Session.

## Division 1 Registration

### 217 Organisations capable of applying for registration

- (1) Any of the following organisations may apply to the Industrial Registrar to be registered under this Chapter:
  - (a) an organisation of employees or employers that is formed for the purpose of its incorporation under this Act, other than a federally registered organisation (or a branch of such an organisation) or another organisation which is already incorporated under the *Corporations Act 2001* of the Commonwealth, the *Associations Incorporation Act 1984* or any other Act (a **State organisation**),
  - (b) subject to subsection (2), an organisation of employees or employers that is a federally registered organisation (without branches) or a branch of such an organisation (a **federal organisation**),
  - (c) an organisation of employers that is incorporated under the *Corporations Act 2001* of the Commonwealth, *Associations Incorporation Act 1984* or any other Act, other than a federally registered organisation (a **separate organisation**).
- (2) A federal organisation of employees cannot apply for registration under this Chapter unless the application is made with the consent of each registered State organisation of employees whose constitutional coverage extends to all or any of the class of members proposed to be covered by the federal organisation.
- (3) The regulations may declare that any specified organisation or class of organisation is capable, or is taken, to be registered under this Chapter. The regulations may modify the application of this Chapter in respect of any such organisation.
- (4) In this section, **federally registered organisation** means an organisation registered under the *Workplace Relations Act 1996* of the Commonwealth.

### 218 Criteria for registration

- (1) The Industrial Registrar is to grant the application for registration if, and only if:
  - (a) the organisation is a genuine organisation of a kind that is capable of registration under this Chapter, and
  - (b) the organisation is an organisation for furthering or protecting the interests of its



members, and

- (c) the organisation is capable of representing its members in connection with industrial matters, and
- (d) in the case of an organisation of employees—the organisation has, at the time of registration, at least 50 members who are employees, and
- (e) in the case of an organisation of employers—the organisation has, at the time of registration, at least 2 members who are employers and those members employ between them at least 50 employees, and
- (f) the rules of the organisation make provision as required by this Chapter to be made by the rules of such an organisation, and
- (g) in the case of an organisation consisting of the members of a branch of an organisation—the branch is of sufficient importance to be registered separately, and
- (h) the organisation does not have the same name as that of an organisation registered under this Chapter and does not have a name that is so similar to such a name as to be likely to cause confusion, and
- (i) the name of the association is not, in the opinion of the Industrial Registrar, unsuitable to be the name of a registered organisation, and
- (j) in the case of a State organisation—a majority of the members present at a general meeting of the organisation or an absolute majority of the committee of management of the organisation has passed, under the rules of the organisation, a resolution in favour of registration of the organisation, and
- (k) in the case of a federal organisation—the rules of the organisation (including any parent body) confer on the organisation applying for registration a reasonable degree of autonomy in the administration and control of New South Wales assets and in the determination of questions affecting solely or principally members resident in New South Wales, and
- (l) in the case of a federal organisation of employees—the application for registration of the organisation is made with the consent of each registered State organisation whose constitutional coverage extends to all or any of the class of members proposed to be covered by the federal organisation, and
- (m) in the case of an organisation of employees—there is no other industrial organisation of employees to which the members of the organisation might conveniently belong.

(2) An organisation may be registered even if its members include:

- (a) officers of the organisation, or
- (b) in the case of an organisation of employers—persons other than employees who carry on business but who do not have any employees, or
- (c) in the case of an organisation of employers—persons admitted to membership who have ceased to be employers, or
- (d) in the case of an organisation of employees—independent contractors who would be eligible for membership if their work were done as an employee.

However, an organisation with any such members may be registered only if it is effectively representative of the members who are employees or employers, as the case requires.

### **219 Applications for registration**

- (1) An application for registration under this Chapter is to be made in the manner and form approved by the Industrial Registrar.
- (2) The Industrial Registrar may require information in the application to be verified by statutory declaration and may require proof of the authority of the applicants to act on behalf of the organisation concerned.
- (3) An applicant must, within 14 days after submitting an application, publish a notice of the application in a newspaper circulating throughout the State.
- (4) The Industrial Registrar must, within 14 days after receiving an application, notify any organisation registered under this Chapter that, in the opinion of the Industrial Registrar, may be affected by the application.
- (5) The Industrial Registrar may grant an applicant leave to amend the application (including for the purposes of a change in the name or rules of the organisation to meet an objection to registration).

### **220 Objections to registration**

- (1) Any person may lodge with the Industrial Registrar a notice of objection to an application for registration. The notice must be lodged within 28 days after publication by the applicant of the notice of the application in a newspaper or within 28 days after being notified by the Industrial Registrar of the application (whichever last occurs).
- (2) The notice of objection must set out with reasonable particularity the ground or grounds of the objection and the facts and circumstances relied on as establishing those grounds, and must be verified by statutory declaration.
- (3) A copy of the notice of objection must be served on the applicant for registration by the objector within 7 days after lodging the objection with the Industrial Registrar.

- (4) After conducting a hearing into any objections to an application for registration, the Industrial Registrar is to determine the application. The Industrial Registrar may determine the application without a hearing if there are no objections.
- (5) The procedure to be followed at any hearing in connection with objections to registration is, subject to the rules of the Commission, to be as directed by the Industrial Registrar.

**Note—**

Section 194 provides for an appeal to the Commission against a decision of the Industrial Registrar on the application for registration by the applicant or an objector.

## **221 Registration**

- (1) When the Industrial Registrar grants an application for registration, the Industrial Registrar must immediately record, in the register kept for the purpose:
  - (a) the name of the organisation, and
  - (b) whether the organisation is an organisation of employees or employers, and
  - (c) whether the organisation is a State, federal or separate organisation, and
  - (d) such other particulars of the organisation as are prescribed by the regulations or determined by the Industrial Registrar, and
  - (e) the date of the entry.
- (2) An organisation is taken to be registered under this Chapter as an industrial organisation of employees or an industrial organisation of employers when the Industrial Registrar records that information in the register.
- (3) The Industrial Registrar must issue to each organisation registered under this Chapter a certificate of registration. The regulations may make provision for or with respect to certificates of registration.

## **222 Incorporation of State organisations on registration**

A State organisation, when registered under this Chapter:

- (a) is a body corporate, and
- (b) has perpetual succession, and
- (c) has power to purchase, take on lease, hold, sell, lease, mortgage, exchange and otherwise own, possess and deal with any real or personal property, and
- (d) is required to have a seal, and
- (e) may sue or be sued in its registered name.

### **223 Continuation of registration of existing industrial organisations**

- (1) Any industrial organisation of employees or employers registered or recognised as such under Chapter 5 of the *Industrial Relations Act 1991* immediately before the repeal of that Act is taken to be an industrial organisation of employees or employers registered under this Chapter.
- (2) The Industrial Registrar is to record in the register kept under this Chapter whether such an organisation is a State, federal or separate organisation.
- (3) If the rules of such an organisation do not comply with the requirements of this Chapter, the organisation must ensure that the rules comply with those requirements within 2 years after the commencement of this section. The Industrial Registrar may notify such an organisation of the requirements with which the rules of the organisation do not comply.
- (4) If the rules of such an organisation have not been duly altered within that 2-year period:
  - (a) in the case of a State organisation, the Industrial Registrar may, by order, alter the rules of the organisation so that they comply with the relevant requirements, or
  - (b) in any other case, the failure to alter the rules is a ground for the cancellation of the registration of the organisation under Division 2.

### **224 Registered office of organisation**

- (1) An industrial organisation must have an office in New South Wales for the time being registered with the Industrial Registrar to which all communications and notices may be addressed.
- (2) An industrial organisation must give notice of the address of its registered office and of any change in that address to the Industrial Registrar.
- (3) Until the organisation has given that notice, it is taken not to have a registered office.
- (4) A contravention of this section is a sufficient ground for the cancellation of the registration of the organisation under Division 2 or for the imposition of any other penalty under that Division.

## **Division 2 Cancellation of registration**

### **225 Institution of proceedings for cancellation of registration**

- (1) An industrial organisation or, with the leave of the Commission, a person who has a sufficient interest in the matter may apply to the Commission for the cancellation of the registration of an industrial organisation.

- (2) The Commission may institute proceedings under this Division on its own initiative.
- (3) An industrial organisation may apply for the cancellation of its own registration.
- (4) An industrial organisation must be given an opportunity to be heard by the Commission in any proceedings against the organisation under this Division.

## **226 Grounds on which registration may be cancelled**

The registration of an industrial organisation may be cancelled on any one or more of the following grounds:

- (a) that the organisation, or a substantial number of its members, has or have contravened the industrial relations legislation, any industrial instrument, or any order of the Commission,
- (b) that the industrial organisation, or a substantial number of its members, has or have engaged in any industrial action that has had, is having or is likely to have, a substantial adverse effect on the safety, health or welfare of the community or a part of the community,
- (c) that the organisation or a substantial number of its members, has or have engaged in any industrial action that has had or is having a major and substantial adverse effect on the provision of any public service by the State or an authority of the State contrary to the public interest and without reasonable excuse,
- (d) that the industrial organisation was registered by mistake,
- (e) that the industrial organisation is no longer effectively representative of the members who are employees or employers, as the case requires,
- (f) that the organisation has applied for the cancellation of its own registration,
- (g) that the organisation is defunct,
- (h) in the case of a federal organisation—that the rules of the organisation (and any parent body) no longer confer on the organisation a reasonable degree of autonomy in the administration and control of New South Wales assets and in the determination of questions affecting solely or principally members resident in New South Wales.

## **227 Cancellation of registration of industrial organisation**

- (1) The Commission may cancel the registration of an industrial organisation if the Commission considers that a ground for cancellation has been established.
- (2) However, the Commission is not to cancel the registration of an industrial organisation on a ground referred to in section 226 (a)–(c) unless the Commission considers that it is appropriate to cancel the registration in the circumstances because of the gravity of the case.

## **228 Consequences of cancellation**

- (1) On cancellation of registration of an industrial organisation, the organisation ceases to be an industrial organisation for the purposes of this Act.
- (2) The cancellation of registration does not relieve the industrial organisation or any of its members from any penalty or liability incurred by the industrial organisation or its members before the cancellation.
- (3) The cancellation of registration of a State organisation also has the following consequences:
  - (a) the organisation ceases to be a body corporate under this Act, but does not thereby cease to be an unincorporated organisation,
  - (b) the Commission may, on application by a person interested, make such order as it considers appropriate in relation to the satisfaction of the debts and obligations of the organisation out of the property of the organisation,
  - (c) the property of the incorporated organisation is, subject to any such order, the property of the unincorporated organisation and is required to be held and applied for the purposes of the organisation under the rules of the organisation so far as they can still be carried out or observed.

## **229 Alteration of rules (instead of cancellation of registration) of organisation**

If:

- (a) the Commission finds that a ground of cancellation has been established, and
- (b) that finding is made, wholly or mainly, because of the conduct of a particular class or group of members of the industrial organisation,

the Commission may, if it considers it just to do so, instead of cancelling the registration of the industrial organisation, make a demarcation order under Part 6 so as to exclude from eligibility for membership of the industrial organisation persons belonging to the class or group.

## **230 Suspension or other orders where cancellation of registration deferred**

- (1) The Commission may, instead of making an order cancelling registration, or altering rules, of an industrial organisation, make one or more of the following orders:
  - (a) an order suspending, to the extent specified in the order, all or any of the rights, privileges or capacities of the industrial organisation, or of all or any of its members as such, under this or any other Act or under industrial instruments or orders made under this or any other Act,
  - (b) an order giving directions as to the exercise of any rights, privileges or capacities

that have been suspended,

(c) an order restricting the use of the funds or property of the industrial organisation, and for the control of the funds or property for the purpose of ensuring observance of the restrictions.

(2) Having made such an order, the Commission must defer the determination of the question whether to cancel the registration of the industrial organisation concerned until:

(a) any order made under this section ceases to be in force, or

(b) on application by a party to the proceeding, the Commission considers that it is just to determine the question, having regard to any evidence given relating to the observance or non-observance of any order and to any other relevant circumstance,

whichever happens first.

(3) An order made under this section has effect despite anything in the rules of the industrial organisation concerned.

(4) An order made under this section:

(a) may be revoked by the Commission, by order, on application by a party to the proceeding concerned, and

(b) unless sooner revoked, ceases to be in force:

(i) 6 months after it came into force, or

(ii) at the expiration of such longer period after it came into force as is ordered by the Commission on application by a party to the proceeding made while the order remains in force.

(5) A person who contravenes an order made under subsection (1) (b) or (c) is guilty of an offence.

Maximum penalty: 50 penalty units.

### **231 Commission may make necessary ancillary or consequential orders**

(1) The Commission may make such orders as are necessary to give effect to, or in consequence of, an order made under this Division.

(2) In particular, the Commission may, if it cancels the registration of an industrial organisation, direct that an application by that organisation to be registered as an industrial organisation is not to be dealt with under this Act before the end of a specified period.

### **232 Cancellation or other order to be recorded**

The Industrial Registrar must record a cancellation or other order made under this Division, and the date it takes effect, in the register kept under this Part.

## **Part 4 Regulation of State industrial organisations**

### **Division 1 Application**

#### **233 Application of Part to State organisations**

This Part applies to industrial organisations that are State organisations incorporated under this Act.

**Note—**

The jurisdiction of the Commission under this Part (except Division 3) may be exercised only by the Commission in Court Session.

### **Division 2 Rules**

#### **234 State organisations to have rules**

A State organisation must have rules that make provision as required by this Part.

#### **235 General requirements for rules of State organisations**

(1) The rules of a State organisation:

- (a) must not be contrary to, or fail to make provision as required by, this Act or an award or order of the Commission, or otherwise be contrary to law, and
- (b) must not be such as to prevent or hinder members of the organisation from observing any law or the provisions of any award or order of the Commission, and
- (c) must not impose on members of the organisation, or on applicants for membership of the organisation, any conditions, obligations or restrictions that, having regard to the objects of this Act and the purposes of registration under this Chapter, are oppressive, unreasonable or unjust.

(2) The rules must comply with any requirements of the regulations.

#### **236 Rules to specify name, purposes and conditions of eligibility for membership**

The rules of a State organisation must specify:

- (a) the name of the organisation, and
- (b) the purposes for which the organisation is formed, and
- (c) the conditions of eligibility for membership,



and may specify the industry in relation to which it is formed.

**237 Rules to provide for procedural and administrative matters**

- (1) The rules of a State organisation must provide for:
- (a) the entrance fees, subscription, affiliation and other amounts (if any) to be paid by members of the organisation, and
  - (b) the procedure (if any) for the disciplining of members and the mechanism (if any) for appeals by members in respect of disciplinary action taken against them, and
  - (c) the name, constitution, membership, powers and duties of the committees of, and the powers and duties of holders of offices in, the organisation and, in particular:
    - (i) the election or appointment of members of the committees, and
    - (ii) the terms of office of members of the committees, and
    - (iii) the grounds on which, or the reasons for which, the office of a member of a committee becomes vacant, and
    - (iv) the filling of casual vacancies occurring on the committees, and
    - (v) the quorum and procedure at meetings of the committees, and
  - (d) the manner of summoning meetings of members of the organisation and meetings of the committees of the organisation, and
  - (e) the quorum and procedure at general meetings of members of the organisation and whether members are entitled to vote by proxy at general meetings, and
  - (f) the intervals between general meetings of members of the organisation and the manner of calling general meetings, and
  - (g) the time within which, and the manner in which, notices of general meetings and notices of motion are to be given, published or circulated, and
  - (h) the removal of holders of offices in the organisation, and
  - (i) the control of committees of the organisation by the members of the organisation, and
  - (j) the sources from which the funds of the organisation are to be, or may be, derived, and
  - (k) the manner in which the funds of the organisation are to be managed and, in particular, the mode of drawing and signing cheques on behalf of the organisation, and

- (l) the manner in which documents may be executed by or on behalf of the organisation, and
  - (m) the manner in which the property of the organisation is to be controlled and its funds invested, and
  - (n) the conditions under which funds may be spent, and
  - (o) the custody of books, documents and securities of the organisation, and
  - (p) the inspection by members of the organisation of books and documents of the organisation, and
  - (q) the registered office of the organisation (which must be within New South Wales), and
  - (r) the annual or periodic auditing of the accounts of the organisation, including the appointment of an auditor and the grounds on which, or the reasons for which, the position of auditor becomes vacant, and
  - (s) the keeping of accounting records by the organisation, and
  - (t) the times when, and the terms on which, persons become or cease (otherwise than by resignation) to be members, and
  - (u) the resignation of members, and
  - (v) the keeping of a register of the members, arranged, if there are branches of the organisation, according to branches, and
  - (w) the manner in which the rules may be altered or rescinded, and
  - (x) any other matters that may be prescribed by the regulations.
- (2) The rules of a State organisation may provide for the removal from office of a person elected to an office in the organisation only if the person has been found guilty, under the rules of the organisation, of:
- (a) misappropriation of the funds of the organisation, or
  - (b) a substantial breach of the rules of the organisation, or
  - (c) gross misbehaviour or gross neglect of duty,
- or has ceased, under the rules of the organisation, to be eligible to hold office.
- (3) The rules of a State organisation must require the organisation to inform applicants for membership, in writing, of:
- (a) the financial obligations arising from membership, and

(b) the circumstances, and the manner, in which a member may resign from the organisation.

(4) The rules of an organisation may also provide for any other matter.

(5) In this section:

**committee**, in relation to a State organisation, means a collective body of the organisation that has powers of the kind mentioned in the definition of **office** in the Dictionary.

### **238 Rules to provide for elections for offices**

(1) The rules of a State organisation must provide for the election of the holder of each office in the organisation by:

(a) a particular direct voting system, or

(b) a particular collegiate electoral system that, in the case of a full-time office, is a one-tier collegiate electoral system.

(2) In this section:

**collegiate electoral system** means a method of election comprising a first stage, at which persons are elected to a number of offices by a direct voting system, and a subsequent stage or subsequent stages at which persons are elected by and from a body of persons consisting only of:

(a) persons elected at the last preceding stage, or

(b) persons elected at the last preceding stage and other persons (being in number not more than 15% of the number of persons comprising the body) holding offices in the organisation (including the office to which the election relates), not including any person holding such an office merely because of having filled a casual vacancy in the office within the last 12 months, or the last quarter, of the term of the office.

**direct voting system** means a method of election at which the following are eligible to vote subject to reasonable provisions in relation to enrolment:

(a) all financial members, or

(b) all financial members included in the division of the organisation that is appropriate having regard to the nature of the office.

**one-tier collegiate electoral system** means a collegiate electoral system comprising only one stage after the first stage.

### **239 Rules may provide for elections for offices in State branch of Federal organisation to**

**be elections for purposes of State organisation**

- (1) The rules of a State organisation registered under this Chapter may provide that persons elected to offices in a State branch of a Federal organisation are taken to be validly elected to the corresponding offices in the State organisation registered under this Chapter if the Industrial Registrar is satisfied that:
  - (a) the membership of the State branch of the Federal organisation and the State organisation registered under this Chapter is identical or substantially similar, and
  - (b) the rules of the State branch of the Federal organisation relating to the election of the holders of offices comply substantially with the requirements relating to election of the holders of offices under this Act.
- (2) The regulations may specify circumstances in which:
  - (a) the membership of organisations is or is not substantially similar for the purposes of subsection (1) (a), or
  - (b) the rules of an organisation comply or do not comply substantially with the relevant provisions for the purposes of subsection (1) (b).
- (3) In this section, **State branch of a Federal organisation** means a State branch of an organisation registered under the [Workplace Relations Act 1996](#) of the Commonwealth.

**240 Rules to provide for electoral system**

- (1) The rules of a State organisation must provide that, if a ballot is required for an election by a direct voting system, it must be a secret postal ballot.
- (2) A State organisation may lodge with the Industrial Registrar an application for an exemption from subsection (1), accompanied by particulars of proposed alterations of the rules of the organisation, to provide for the conduct of elections by a secret ballot other than a postal ballot.
- (3) If the Industrial Registrar is satisfied, on application, that:
  - (a) the proposed alterations of the rules:
    - (i) comply with and are not contrary to this Act and awards or orders of the Commission made under this Act, and
    - (ii) are not otherwise contrary to law, and
    - (iii) have been decided in accordance with the rules of the organisation, and
  - (b) the conduct of a ballot under the rules of the organisation as proposed to be altered:

(i) is likely to result in no less participation by members of the organisation in the ballot than would result from a postal ballot, and

(ii) will give the members entitled to vote an adequate opportunity of voting without intimidation,

the Industrial Registrar may grant to the organisation an exemption from subsection (1).

(4) Proposed alterations of the rules of a State organisation referred to in subsection (2) take effect if and when the Industrial Registrar grants to the organisation an exemption from subsection (1).

(5) An exemption under this section remains in force until revoked under subsection (6).

(6) The Industrial Registrar may revoke an exemption granted to a State organisation under this section:

(a) on application by the organisation, if the Industrial Registrar is satisfied that the rules of the organisation comply with subsection (1), or

(b) if the Industrial Registrar is no longer satisfied:

(i) that the rules of the organisation provide for the conduct of elections by a secret ballot other than a postal ballot, or

(ii) of a matter referred to in subsection (3) (b),

and the Industrial Registrar has given the organisation an opportunity, as prescribed by the regulations, to show cause why the exemption should not be revoked.

(7) If the Industrial Registrar revokes an exemption granted to a State organisation on a ground specified in subsection (6) (b), the Industrial Registrar may, by instrument in writing, after giving the organisation an opportunity, as prescribed by the regulations, to be heard, determine such alterations (if any) of the rules of the organisation as are, in the Industrial Registrar's opinion, necessary to bring them into conformity with subsection (1).

(8) An alteration of the rules of a State organisation determined under subsection (7) takes effect on the date of the instrument.

#### **241 Rules to provide for terms of office**

(1) The rules of a State organisation must, subject to this section, provide terms of office for officers in the organisation of no longer than 4 years without re-election.

(2) The rules of a State organisation may provide that a particular term of office is extended for a specified period, if the extension is for the purpose of synchronising elections for offices in the organisation.

- (3) Rules made under subsection (2) may apply in relation to a term of office that started before the commencement of this section.
- (4) The term of an office must not be extended under subsection (2) so that the term exceeds 5 years.

#### **242 Rules may provide for filling of casual vacancies**

- (1) The rules of a State organisation may provide for the filling of a casual vacancy in an office by an ordinary election or, subject to this section, in any other manner provided in the rules.
- (2) Any such rules must not permit a casual vacancy, or a further casual vacancy, occurring within the term of an office to be filled, otherwise than by an ordinary election, for so much of the unexpired part of the term as exceeds:
  - (a) 12 months, or
  - (b) three-quarters of the term of the office,whichever is the greater.
- (3) If, under the rules, a vacancy in an office in a State organisation is filled otherwise than by an ordinary election, the person filling the vacancy must be taken, for the purposes of the relevant provisions, to have been elected to the office under the relevant provisions.
- (4) In this section:

**ordinary election** means an election held under rules that comply with section 238 (Rules to provide for elections for offices).

**relevant provisions**, in relation to a State organisation, means:

- (a) the provisions of this Act (other than this section), and
- (b) the rules of the organisation (other than rules made under this section providing for the filling of a casual vacancy in an office otherwise than by an ordinary election).

**term**, in relation to an office, means the total period for which the last person elected to the office by an ordinary election (other than an ordinary election to fill a casual vacancy in the office) was entitled by virtue of that election (having regard to any rule made under section 241 (2)) to hold the office without being re-elected.

#### **243 Rules to provide conditions for loans, grants and donations by State organisations**

- (1) The rules of a State organisation must provide that a loan, grant or donation of an amount exceeding \$1,000 must not be made by the organisation unless the

committee of management of the organisation:

(a) has satisfied itself:

- (i) that the making of the loan, grant or donation would be in accordance with the other rules of the organisation, and
- (ii) in the case of a loan—that, in the circumstances, the security proposed to be given for the repayment of the loan is adequate and the proposed arrangements for the repayment of the loan are satisfactory, and

(b) has approved the making of the loan, grant or donation.

(2) The rules of an organisation may, however, provide for a person authorised by the rules to make a loan, grant or donation of an amount not exceeding \$3,000 to a member of the organisation, if the loan, grant or donation:

- (a) is for the purpose of relieving the member or any of the member's dependants from severe financial hardship, and
- (b) is subject to a condition to the effect that, if the committee of management, at the next meeting of the committee, does not approve the loan, grant or donation, it must be repaid as determined by the committee.

(3) In considering whether to approve a loan, grant or donation made under subsection (2), the committee of management must have regard to:

- (a) whether the loan, grant or donation was made under the rules of the organisation, and
- (b) in the case of a loan:
  - (i) whether the security (if any) given for the repayment of the loan is adequate, and
  - (ii) whether the arrangements for the repayment of the loan are satisfactory.

(4) Nothing in subsection (1) requires the rules of a State organisation to make provision of the kind referred to in that subsection in relation to payments made by the organisation by way of provision for, or reimbursement of, out-of-pocket expenses incurred by persons for the benefit of the organisation.

(5) Nothing in subsection (1) requires the rules of a State organisation to make provision of the kind referred to in that subsection in relation to the payment in advance of remuneration and other entitlements to an employee of the organisation.

#### **244 Industrial Registrar may determine alterations of rules**

(1) If the rules of a State organisation do not, in the Industrial Registrar's opinion, make

provision required by this Act, the Industrial Registrar may, by instrument in writing, after giving the organisation at least 14 days to be heard on the matter, determine such alterations of the rules as are, in the Industrial Registrar's opinion, necessary to bring them into conformity with this Act.

- (2) Alterations determined under this section take effect on the date of the instrument.

#### **245 Alteration of rules of State organisation**

- (1) An alteration of the rules of a State organisation does not take effect unless the Industrial Registrar consents to the alteration.
- (2) The Industrial Registrar may consent to an alteration of the rules in whole or part, but must not consent to an alteration unless satisfied that the alteration:
- (a) complies with, and is not contrary to, this Act and relevant awards or orders of the Commission made under this Act, and
  - (b) is not otherwise contrary to law, and
  - (c) has been made under the rules of the organisation.
- (3) The Industrial Registrar must not consent to an alteration of the rules of an industrial organisation of employees relating to eligibility for membership of the organisation if, in relation to persons who would be eligible for membership because of the alteration, there is, in the opinion of the Industrial Registrar, another industrial organisation of employees to which those persons might conveniently belong.
- (4) If particulars of an alteration of the rules of a State organisation have been lodged with or recorded by the Industrial Registrar, the Industrial Registrar may, with the consent of the organisation, amend the alteration for the purpose of correcting a typographical, clerical or formal error.
- (5) If the Industrial Registrar consents under this section to an alteration, the alteration takes effect on the recording of the change by the Industrial Registrar.
- (6) This section does not apply in relation to an alteration of the rules of a State organisation that is:
- (a) determined by the Industrial Registrar under section 244 or 247, or
  - (b) proposed to be made for the purpose of an amalgamation under this Part.

#### **246 Change of name of State organisation**

- (1) A change in the name of a State organisation does not take effect unless the Industrial Registrar consents to the change and records the change in the relevant register.



- (2) The Industrial Registrar must not consent to a change unless satisfied that the change has been made under the rules of the organisation.
- (3) The Industrial Registrar must not consent to a change in the name of a State organisation unless the name satisfies the relevant criteria of registration of an organisation with such a name.
- (4) The recording of a change of name in the register does not affect any rights and liabilities of the organisation existing immediately before the recording.
- (5) The Industrial Registrar is to provide the organisation with an amended certificate of registration as soon as practicable after the organisation produces its existing certificate of registration.

#### **247 Rules contravening the requirements for rules under this Part**

- (1) A member of a State organisation may apply to the Commission for an order under this section in relation to the organisation.
- (2) An order under this section may declare that the whole or a part of a rule of a State organisation contravenes section 235 (General requirements for rules) or that the rules of a State organisation contravene that section in a particular respect.
- (3) If an order under this section declares that the whole or a part of a rule contravenes section 235 or that the rules contravene that section in a particular respect, the rule or that part of the rule or the rules in that particular respect, as the case may be, is or are taken to be void from the date of the order.
- (4) If:
  - (a) the Commission makes an order as mentioned in subsection (2) in relation to the rules of a State organisation, and
  - (b) at the expiration of 3 months from the making of the order, the rules of the organisation have not been altered in a manner that, in the opinion of the Industrial Registrar, brings them into conformity with section 235 in relation to the matters that gave rise to the order,

the Industrial Registrar must, after giving the organisation at least 14 days to be heard on the matter, determine, by instrument in writing, such alterations of the rules as will, in the Industrial Registrar's opinion, bring them into conformity with that section in relation to those matters.

- (5) The Industrial Registrar may, on the application of the organisation made within the period of 3 months referred to in subsection (4) or within any extension of the period, extend, or further extend, the period.
- (6) Alterations determined under subsection (4) take effect on the date of the instrument.

- (7) At any time after a proceeding under this section has been instituted, the Commission may make such interim orders as it considers appropriate in relation to any matter raised in the proceedings.
- (8) An order under subsection (7) continues in force, unless expressed to operate for a shorter period or sooner discharged, until the completion of the proceeding concerned.

#### **248 Directions for performance of rules**

- (1) A member of a State organisation may apply to the Commission for an order giving directions for the performance or observance of any of the rules of an organisation by any person who is under an obligation to perform or observe those rules.
- (2) Before making an order under this section, the Commission must give any person against whom the order is sought an opportunity to be heard.
- (3) The Commission may refuse to deal with an application for an order under this section unless it is satisfied that the applicant has taken all reasonable steps to try to have the matter the subject of the application resolved within the organisation.
- (4) At any time after the making of an application for an order under this section, the Commission may make such interim orders as it considers appropriate and, in particular, orders intended to further the resolution within the organisation concerned of the matter the subject of the application.
- (5) An order under subsection (4) continues in force, unless expressed to operate for a shorter period or sooner discharged, until the completion of the proceeding concerned.
- (6) An order must not be made under this section that would have the effect of treating as invalid an election, or purported election, to an office in a State organisation or a step in relation to such an election.
- (7) The Commission, when considering an application under this section, may make an order under section 247.

### **Division 3 Election of officers**

#### **249 Regulations**

- (1) The regulations may make provision for or with respect to the election of officers of State organisations.
- (2) Any such regulations may deal with any of the matters dealt with in Division 4 of Part 9 of the *Workplace Relations Act 1996* of the Commonwealth in connection with the election of officers of organisations registered under that Act. The regulations may adopt the provisions of that Part, with or without modification.

## 250 Offences in relation to elections

- (1) A person must not, without lawful authority or excuse, in relation to an election for an office in a State organisation:
  - (a) personate another person to secure a ballot-paper to which the personator is not entitled, or personate another person for the purpose of voting, or
  - (b) destroy, deface, alter, take or otherwise interfere with a nomination paper, ballot-paper or envelope, or
  - (c) put or deliver a ballot-paper or other paper:
    - (i) into a ballot-box or other ballot receptacle, or
    - (ii) into the post, or
  - (d) deliver a ballot-paper or other paper to a person receiving ballot-papers for the purposes of the election or ballot, or
  - (e) record a vote that the person is not entitled to record, or
  - (f) record more than one vote, or
  - (g) forge a nomination paper, ballot-paper or envelope, or utter a nomination paper, ballot-paper or envelope that the person knows to be forged, or
  - (h) provide a ballot-paper, or
  - (i) obtain, or have possession, of a ballot-paper, or
  - (j) destroy, take, open or otherwise interfere with a ballot-box or other ballot receptacle.
- (2) A person must not, without lawful authority or excuse, in relation to an election for an office in a State organisation threaten, offer or suggest, or use, cause, inflict or procure, any violence, injury, punishment, damage, loss or disadvantage because of, or to induce:
  - (a) any candidature or withdrawal of candidature, or
  - (b) any vote or omission to vote, or
  - (c) any support or opposition to any candidate, or
  - (d) any promise of any vote, omission, support or opposition.
- (3) A person (in this subsection called ***the relevant person***) must not, without lawful authority or excuse, in relation to an election for an office in a State organisation:

- (a) request, require or induce another person to show a ballot-paper to the relevant person, or permit the relevant person to see a ballot-paper, in such a manner that the relevant person can see the vote, while the ballot-paper is being marked or after it has been marked, or
- (b) if the relevant person is a person performing duties for the purposes of the ballot, show to another person, or permit another person to have access to, a ballot-paper used in the ballot, otherwise than in the performance of those duties.

Maximum penalty: 100 penalty units.

### **251 Cost of elections**

- (1) The expenses of an election conducted by officers or employees of the State must be borne by the organisation concerned, including:
  - (a) the salary or other remuneration of any officer or employee of the State performing any duty in relation to the election, including any person appointed solely for the purposes of the election, and
  - (b) the cost of travel of such an officer or employee, including any travelling or similar allowance, incurred in connection with the performance of any such duty, and
  - (c) expenses in connection with the provision or use of premises provided by the State for the purposes of the election, including premises obtained solely for such purposes.
- (2) If the expenses of an election are not duly paid in accordance with this section and the regulations, the persons to whom they are payable may recover them as a debt in a court of competent jurisdiction.

### **252 Application for inquiry concerning irregularity in election**

- (1) A person who is, or within the preceding period of 12 months has been, a member of a State organisation and who claims that there has been an irregularity in relation to an election for an office in the organisation may make an application for an inquiry by the Commission into the matter.
- (2) An **irregularity** in relation to an election for an office includes a breach of the rules of a State organisation and any act, omission or other thing that prevents or hinders or attempts to prevent or hinder:
  - (a) the full and free recording of votes by all persons entitled to record votes and by no other persons, or
  - (b) a correct ascertainment or declaration of the results of the voting, or otherwise adversely and unfairly affects the result of the election.

- (3) An application under this section must:
- (a) be in a form approved by the Industrial Registrar, and
  - (b) be lodged with the Industrial Registrar before the completion of the election or within 6 months after the completion of the election, and
  - (c) specify the alleged irregularity and the facts relied on to support the allegation (verified by a statutory declaration of the applicant).

### **253 Action by Industrial Registrar**

- (1) On lodgment of an application for an inquiry, the Industrial Registrar must:
- (a) if the Industrial Registrar is satisfied:
    - (i) that there are reasonable grounds for an inquiry into the question of whether there has been an irregularity in relation to the election that may have affected or may affect the result of the election, and
    - (ii) that the circumstances of the matter justify an inquiry by the Commission, grant the application and refer the matter to the Commission, or
  - (b) if the Industrial Registrar is not so satisfied, refuse the application and inform the applicant accordingly.
- (2) The Industrial Registrar may exercise his or her powers under this section on the basis of the matters stated in the application but the Industrial Registrar may also take into account any relevant information coming to his or her knowledge.
- (3) Any act or decision of the Industrial Registrar under this section is not subject to appeal to the Commission.

### **254 Inquiry by Commission**

On receipt of a reference for an inquiry from the Industrial Registrar, the Commission must as soon as practicable proceed to inquire into the alleged irregularity.

### **255 Interim orders**

- (1) At any time after an inquiry in relation to an election has been instituted, the Commission may make one or more of the following orders:
- (a) an order that no further steps are to be taken in the conduct of the election or in carrying into effect the result of the election,
  - (b) an order that a person who has assumed an office, has continued to act in an office, or claims to occupy an office, to which the inquiry relates, must not act in that office,

- (c) an order that a person who holds, or last held before the election, an office to which the inquiry relates may act or continue to act in that office,
  - (d) if the Commission considers that an order under paragraph (c) would not be practicable, would be prejudicial to the efficient conduct of the affairs of the organisation or would be inappropriate having regard to the nature of the inquiry, an order that a member of the organisation or another person specified in the order may act in an office to which the inquiry relates,
  - (e) an order for the recounting of votes,
  - (f) an order incidental or supplementary to an order under this subsection.
- (2) If the Commission orders that a person may act, or continue to act, in an office, the person must, while the order remains in force, and despite anything contained in the rules of the organisation, be taken, for all purposes, to hold the office.
- (3) An order under this section is to continue in force, unless expressed to operate for a shorter period or unless sooner discharged, until the completion of proceedings before the Commission in relation to the election and of all matters ordered (otherwise than under this section) by the Commission in those proceedings.

#### **256 Procedure at inquiry**

- (1) The Commission is to allow to appear or be represented at an inquiry all persons who apply to the Commission for leave to appear or be represented, being persons who appear to the Commission to be justly entitled to be heard. The Commission may order any other person to appear or be represented.
- (2) For the purposes of an inquiry the Commission is not bound to act in a formal manner and is not bound by any rules of evidence, but may inform itself on any matter in such manner as it considers just.

#### **257 Functions and powers of Commission at inquiry**

- (1) At an inquiry, the Commission is to inquire into and determine the question of whether an irregularity has occurred in relation to the election and such further questions concerning the conduct and results of the election as the Commission thinks necessary.
- (2) In the course of conducting an inquiry, the Commission may make such orders (including an order for the recounting of votes) as the Commission considers necessary.
- (3) If the Commission finds that an irregularity has occurred, the Commission may make one or more of the following orders:
- (a) an order declaring the election, or any step taken in relation to the election, to be

void,

- (b) an order declaring a person purporting to have been elected not to have been elected, and declaring another person to have been elected,
- (c) an order directing the Industrial Registrar to make arrangements:
  - (i) in the case of an uncompleted election—for a step in relation to the election (including the calling for nominations) to be taken again and for the uncompleted steps in the election to be taken, or
  - (ii) in the case of a completed election—for a step in relation to the election (including the calling for nominations) to be taken again or a new election to be held,
- (d) an order directing, despite anything contained in the rules of the organisation, the taking of such safeguards as the Commission considers necessary against irregularities in relation to:
  - (i) any such new election, or
  - (ii) any such step so ordered to be taken again, or
  - (iii) any uncompleted steps in the election,and, for the purposes of any such order, an order appointing and authorising a person to act as a returning officer either alone or in conjunction with the returning officer acting under the rules of the organisation in relation to the election, and to exercise such powers as the Commission directs,
- (e) an order (including an order modifying the operation of the rules of the organisation to the extent necessary to enable a new election to be held, a step in relation to an election to be taken again or an uncompleted step in an election to be taken) incidental or supplementary to, or consequential on, any other order under this section.

- (4) The Commission is not to declare an election, or any step taken in relation to an election, to be void, or declare that a person was not elected, unless the Commission is of the opinion that, having regard to the irregularity found, and any circumstances giving rise to a likelihood that similar irregularities may have occurred or may occur, the result of the election may have been affected, or may be affected, by irregularities.

### **258 Validity of certain acts where election declared void**

- (1) If the Commission declares void the election of a person who has, since the election, purported to act in the office to which the person purports to have been elected, or declares such a person not to have been elected:

- (a) subject to a declaration under paragraph (b), all acts done by or in relation to the person that could validly have been done by or in relation to the person if the person had been duly elected are valid, and
  - (b) the Commission may declare an act referred to in paragraph (a) to have been void, and, if the Commission does so, the act is taken not to have been valid.
- (2) If an election is held, or a step in relation to an election is taken, under an order of the Commission, the election or step is not invalid merely because of a departure from the rules of the organisation concerned that was required by the order of the Commission.

### **259 Costs in relation to inquiries**

- (1) The Commission may make such order as to the costs (including expenses of witnesses) of proceedings before the Commission in relation to an inquiry under this Division as the Commission considers just, and the Commission may assess the amount of such costs.
- (2) If, on any such inquiry, the Commission finds that an irregularity has occurred, the Minister may, if the Minister considers the circumstances justify so doing, authorise the grant by the State to the person who applied for the inquiry of financial assistance in relation to the whole or a part of the costs (including expenses of witnesses) that the applicant has paid, has become liable to pay or may become liable to pay in relation to the inquiry.
- (3) If, on any such inquiry, the Commission does not find that any irregularity has occurred, but certifies that the person who applied for the inquiry acted reasonably in so applying, the Minister may authorise the grant by the State to that person of financial assistance in relation to the whole or a part of the costs of the applicant as specified in subsection (2).
- (4) If the Minister is satisfied that, having regard to the findings of the Commission on any such inquiry, it is not just that a person (not being the person who applied for the inquiry) should be required to bear, or to bear in full, any costs that the person has paid, has become liable to pay or may become liable to pay in relation to the inquiry (including expenses of witnesses), the Minister may authorise the grant by the State to that person of financial assistance in relation to the whole or a part of those costs.
- (5) If the Commission orders:
  - (a) a new election to be held, or
  - (b) any step in relation to an election to be taken again, or
  - (c) any other step (including modification of the rules of the organisation) incidental or supplementary to, or consequential on, any other order made in the inquiry, to be taken,



the Minister may, if the Minister is satisfied that the nature of the irregularity found by the Commission to have occurred is such that it would be unreasonable for the organisation to be required to bear, or to bear in full, the expenses involved in compliance with the order of the Commission, authorise payment by the State of the whole or a part of those expenses.

## **Division 4 Membership**

### **260 Entitlement to membership of State organisations**

- (1) An employee who is eligible to become a member of a State organisation of employees under the rules of the organisation that relate to the relevant industry in which members are to be employed is entitled:
  - (a) to be admitted as a member of the organisation, and
  - (b) to remain a member so long as the employee complies with the rules of the organisation and remains eligible to be a member under those rules.
- (2) An employer who is eligible to become a member of a State organisation of employers is entitled:
  - (a) to be admitted as a member of the organisation, and
  - (b) to remain a member so long as the employer complies with the rules of the organisation and remains eligible to be a member under those rules.
- (3) An entitlement under this section is subject to the payment of any amount properly payable in relation to membership.
- (4) A person who is qualified to be employed in a relevant industry is, for the purposes of this section, taken to be an employee in that industry if the person seeks to be employed in that industry, whether or not the person has ever been so employed.
- (5) In this section, **relevant industry** includes a relevant occupation or other relevant part of an industry.

### **261 Request by member for statement of membership**

A member of a State organisation is entitled to be given, within 28 days after a request to the organisation, a statement showing:

- (a) that the person is a member of the organisation, and
- (b) if there are categories of membership of the organisation—the category of the person's membership, and
- (c) if the person expressly requests—whether the person is a financial member of the organisation.

## **262 Request by member for copy of rules**

A member of a State organisation is entitled to be given, within 14 days after a request to the organisation and payment or tender of such fee (if any) fixed by its rules, a copy of the current rules of the organisation.

## **263 Copies of report and audited accounts to be provided to members and presented to meetings**

- (1) A State organisation must provide free of charge to its members:
  - (a) a copy of the report of the auditor in relation to the inspection and audit of the accounting records kept by the organisation in relation to a financial year, and
  - (b) a copy of the accounts and other statements to which the report relates.
- (2) If, under the rules of the organisation, the committee of management of the organisation resolves to provide to the members of the organisation a summary of the report, accounts and statements, the organisation may comply with subsection (1) by providing free of charge to its members a copy of the summary if:
  - (a) the organisation lodges a copy of the summary with the Industrial Registrar, and
  - (b) the auditor certifies that the summary is, in the auditor's opinion, a fair and accurate summary of the report, accounts and statements, and
  - (c) the summary contains a statement to the effect that the organisation will provide a copy of the report, accounts and statements free of charge to any member who requests it, and
  - (d) where particulars of a deficiency, failure or shortcoming in relation to a matter are set out in the report—the summary contains the particulars.
- (3) The copies referred to in subsection (1), or the summary referred to in subsection (2), must be provided within 56 days after the making by the organisation of the report concerned.
- (4) A State organisation that publishes a journal of the organisation that is available to the members of the organisation free of charge, may comply with subsection (1):
  - (a) by publishing in the journal the report, accounts and other statements referred to in that subsection, or
  - (b) by preparing a summary as described in subsection (2), complying with the requirements of that subsection in relation to the summary and publishing the summary in the journal,and by posting a copy of the journal to each member of the organisation.

- (5) In addition to other rights conferred on a member of a State organisation by this Division, a member is entitled to inspect the accounting records of the organisation at its registered office during business hours.
- (6) A State organisation must not fail to comply with this section.  
Maximum penalty: 50 penalty units.

#### **264 Resignation from membership**

- (1) A member of a State organisation may resign from membership by written notice delivered or sent to the registered address of the organisation.
- (2) A notice of resignation from membership of a State organisation takes effect:
  - (a) if the member ceases to be eligible to become a member of the organisation:
    - (i) on the day on which the notice is so delivered or otherwise received by the organisation, or
    - (ii) on the day specified in the notice, that is a day not earlier than the day when the member ceases to be eligible to become a member,whichever is later, or
  - (b) in any other case:
    - (i) at the end of 6 months, or such shorter period as is specified in the rules of the organisation, after the notice is so delivered or otherwise received by the organisation, or
    - (ii) on the day specified in the notice,whichever is later.
- (3) Any dues payable but not paid by a former member of a State organisation in relation to a period, not exceeding 6 months, before the member's resignation from the organisation took effect may be sued for and recovered in the name of the organisation, in a court of competent jurisdiction, as a debt due to the organisation.

#### **265 Mortality fund**

- (1) A member of a State organisation may, by written notice delivered at or sent to the registered office of the organisation, nominate any person to whom money due to the member by the organisation is to be paid at the member's death.
- (2) The notice must not nominate an officer or employee of the organisation unless the officer or employee is a member of the family of the nominator.
- (3) A member of a State organisation may from time to time revoke or vary a nomination

under subsection (1) by written notice delivered at or sent to the registered office of the organisation.

- (4) The organisation, on receiving satisfactory proof of the death of the nominator, must pay to the nominee the amount due to the deceased member.

## **266 Enforcement**

- (1) The Commission may, by order, enforce the provisions of this Division on the application of a member, former member or prospective member of an industrial organisation affected by a contravention of this Division.
- (2) The Commission may, in particular, for that purpose do any one or more of the following:
- (a) order the admission to membership of an applicant for membership of an industrial organisation (whether from the date of the order or an earlier date),
  - (b) declare that a member of an industrial organisation ceased to be a member on a particular date,
  - (c) order an industrial organisation to correct its register of members,
  - (d) order an industrial organisation (or its officials or employees) to take any particular action or to cease any particular activity,
  - (e) make consequential orders.

## **Division 5 Duties and liabilities of officers**

### **267 Acting dishonestly to deceive or defraud**

An officer of a State organisation must not, with intent to deceive or defraud the organisation or the members of the organisation or for any other fraudulent purpose, act dishonestly in the exercise of any of the powers or the discharge of any of the duties of his or her office.

Maximum penalty: 100 penalty units.

### **268 Use of position for profit**

An officer of a State organisation must not make improper use of the officer's position as such an officer to gain, directly or indirectly, an advantage for the officer or for any other person or to cause detriment, loss or damage to the organisation.

Maximum penalty: 100 penalty units.

### **269 Officer to disclose interest**

- (1) An officer of a State organisation who:

- (a) has an interest, whether directly or indirectly, in a contract or proposed contract with the organisation, or
- (b) has an interest, whether directly or indirectly, in any property, or
- (c) holds any other office,

that may conflict with his or her duties or interests as an officer of the organisation must, as soon as practicable after the relevant facts have come to his or her knowledge, declare the nature of the interest or office at a meeting of the governing body of the organisation.

Maximum penalty: 50 penalty units.

- (2) The secretary of a State organisation must record every declaration under this section in the minutes of the meeting at which it was made.

## **270 Compensation to State organisation**

- (1) If the Commission convicts a person of an offence under this Division, the Commission may, if satisfied that a State organisation has suffered loss or damage as a result of the act or omission that constituted the offence, in addition to imposing a penalty, order the convicted person to pay compensation to the organisation in the amount that the Commission specifies.
- (2) If an officer of a State organisation contravenes a provision of this Division in relation to an organisation, the organisation may, whether or not the person has been convicted of an offence under this Division in relation to that contravention, recover from the officer as a debt due to the organisation by action in the Commission:
  - (a) if that officer, or any other person made a profit as a result of the contravention or failure—an amount equal to that profit, and
  - (b) if the organisation has suffered loss or damage as a result of the contravention or failure—an amount equal to that loss or damage.
- (3) In determining the amount of compensation to award under this section, the Commission must have regard to any amount that has been paid to the organisation or that the organisation is entitled to be paid by way of damages awarded in civil proceedings.

## **271 Operation of Division**

- (1) This Division has effect in addition to, and not in derogation of, any rule of law relating to the duty or liability of an officer of a State organisation and does not prevent the institution of any civil proceedings in respect of a breach of such a duty or in respect of such a liability.

- (2) In this Division, **officer** of a State organisation, includes any person, by whatever name called and whether or not he or she holds an office in the organisation, who is concerned, or takes part, in the management of the organisation.

## **Division 6 Disqualification from office**

### **272 Interpretation**

- (1) In this Division, **serious offence** means:
- (a) an offence under a law of the Commonwealth, a State or Territory, or of another country, involving fraud or dishonesty and punishable on conviction by imprisonment for a period of 3 months or more, or
  - (b) an offence against section 250 or any of the provisions of Division 5, or
  - (c) any other offence in relation to the formation, registration or management of an organisation registered under this Chapter, or
  - (d) any other offence under a law of the Commonwealth, a State or Territory, or of another country, involving the intentional use of violence towards another person, the intentional causing of death or injury to another person or the intentional damaging or destruction of property.
- (2) A reference in this Division to a person having been convicted of a serious offence includes a reference to a person having been so convicted before the commencement of this section.
- (3) A reference in this Division to a person being convicted of a serious offence does not include a reference to a person being convicted, otherwise than on indictment, of an offence referred to in subsection (1) (c).
- (4) A reference in this Division to a person being convicted of a serious offence does not include a reference to a person being convicted of an offence referred to in subsection (1) (d) unless the person has served, or is serving, a term of imprisonment in relation to the offence.
- (5) A certificate purporting to be signed by the Industrial Registrar or other proper officer of a federal court, a court of a State or Territory, or a court of another country, stating that a person was convicted by the court of a specified offence on a specified day is, for the purpose of an application made under this Division, evidence that the person was convicted of the offence on that day.
- (6) A certificate purporting to be signed by the Industrial Registrar or other proper officer of a federal court, a court of a State or Territory, or a court of another country, stating that a person was acquitted by the court of a specified offence, or that a specified charge against the person was dismissed by the court, is, for the purpose of an

application made under this Division, evidence of the facts stated in the certificate.

- (7) A certificate purporting to be signed by the officer in charge of a prison stating that a person was released from the prison on a specified day is, for the purpose of an application made under this Division, evidence that the person was released from the prison on that day.

### **273 Certain persons disqualified from holding office in State organisations**

- (1) A person who has been convicted of a serious offence is not eligible to be a candidate for an election, or to be elected or appointed, to an office in a State organisation unless:
- (a) on an application made under section 274 (Application for leave to hold office in organisations by prospective candidate for office) or 275 (Application for leave to hold office in organisations by office holder) (in this section called **the specified sections**) in relation to the conviction of the person for the serious offence:
    - (i) the person was granted leave to hold office in organisations, or
    - (ii) the person was refused leave to hold office in organisations but, under section 274 (2) (b) or 275 (2) (b), the Commission specified a period for the purposes of this subsection, and the period has elapsed since the person was convicted of the serious offence or, if the person served a term of imprisonment in relation to the serious offence, since the person was released from prison, or
  - (b) in any other case—a period of 5 years has elapsed since the person was convicted of the serious offence or, if the person served a term of imprisonment in relation to the serious offence, since the person was released from prison.
- (2) If a person who holds an office in a State organisation is convicted of a serious offence, the person ceases to hold the office at the end of the period of 28 days after the conviction unless, within the period, the person makes an application to the Commission under either of the specified sections.
- (3) Where a person who holds an office in a State organisation makes an application to the Commission under either of the specified sections and the application is not determined:
- (a) except in a case to which paragraph (b) applies—within the period of 3 months after the date of the application, or
  - (b) if the Commission, on application by the person, has extended that period—within that period as extended,
- the person ceases to hold the office at the end of the period of 3 months or the period as extended, as the case may be.

- (4) The Commission must not, under subsection (3) (b), extend a period for the purposes of subsection (3) unless:
  - (a) the application for the extension is made before the end of the period of 3 months referred to in subsection (3) (a), or
  - (b) if the Commission has previously extended the period under subsection (3) (b)—the application for the further extension is made before the end of that period as extended.
- (5) A State organisation, a member of a State organisation or the Industrial Registrar may apply to the Commission for a declaration that, because of the operation of this section or either of the specified sections:
  - (a) a person is not, or was not, eligible to be a candidate for election, or to be elected or appointed, to an office in the organisation, or
  - (b) a person has ceased to hold an office in the organisation.
- (6) The granting to a person, on an application made under either of the specified sections in relation to a conviction of the person for a serious offence, of leave to hold offices in organisations does not affect the operation of this section or either of the specified sections in relation to another conviction of the person for a serious offence.

**274 Application for leave to hold office in organisations by prospective candidate for office**

- (1) A person who:
  - (a) wants to be a candidate for election to an office in a State organisation, and
  - (b) has been, within the immediately preceding period of 5 years, convicted of a serious offence or released from prison after serving a term of imprisonment in relation to a conviction for a serious offence,may, subject to subsection (4), apply to the Commission for leave to hold office in organisations.
- (2) If a person makes an application under this section, the Commission may:
  - (a) grant the person leave to hold office in organisations, or
  - (b) refuse the person leave to hold office in organisations and specify, for the purposes of section 273 (1), a period of less than 5 years, or
  - (c) refuse a person leave to hold office in organisations.
- (3) A person who:
  - (a) holds an office in a State organisation, and



(b) is convicted of a serious offence, and

(c) on an application made under this section in relation to the conviction for the serious offence, is, under subsection (2), refused leave to hold office in organisations,

ceases to hold the office in the organisation.

(4) A person is not entitled to make an application under this section in relation to the person's conviction for a serious offence if the person has previously made an application under this section or under section 275 in relation to the conviction.

### **275 Application for leave to hold office in organisations by office holder**

(1) If a person who holds an office in a State organisation is convicted of a serious offence, the person may, within 28 days after the conviction, apply to the Commission for leave to hold office in organisations.

(2) If a person makes an application under this section, the Commission may:

(a) grant the person leave to hold office in organisations, or

(b) refuse the person leave to hold office in organisations and specify, for the purposes of section 273 (1), a period of less than 5 years, or

(c) refuse the person leave to hold office in organisations.

(3) A person who, on an application made under this section, is, under subsection (2), refused leave to hold office in organisations ceases to hold the office concerned.

(4) A person is not entitled to make an application under this section in relation to the person's conviction for a serious offence if the person has previously made an application under this section or section 274 in relation to the conviction.

### **276 Commission to have regard to certain matters**

For the purposes of exercising the power under this Division to grant or refuse leave to a person who has been convicted of a serious offence to hold office in organisations, the Commission must have regard to:

(a) the nature of the serious offence, and

(b) the circumstances of, and the nature of the person's involvement in, the commission of the serious offence, and

(c) the general character of the person, and

(d) the fitness of the person to be involved in the management of organisations, having regard to the conviction for the serious offence, and

(e) any other matter that, in the opinion of the Commission, is relevant.

### **277 Action by Commission**

- (1) The Commission may, despite anything in the rules of any organisation concerned, make such order to give effect to a declaration referred to in section 273 (5) as it considers appropriate.
- (2) Where an application is made to the Commission under section 273 (5):
  - (a) the person whose eligibility, or whose holding of office, is in question must be given an opportunity to be heard by the Commission, and
  - (b) if the application is made otherwise than by the organisation concerned—the organisation must be given an opportunity to be heard by the Commission.
- (3) If an application is made to the Commission under section 274 or 275, the organisation concerned must be given an opportunity to be heard by the Commission.

## **Division 7 Records**

### **278 Records to be kept and lodged by organisations**

- (1) A State organisation must keep the following records:
  - (a) a register of its members, showing the name, postal address of each member and such other particulars as may be prescribed by the regulations,
  - (b) a list of the offices in the organisation,
  - (c) a list of the names, postal addresses and occupations of the persons holding the offices,
  - (d) such other records as are prescribed by the regulations.
- (2) A State organisation must:
  - (a) enter in the register the name and postal address of each person who becomes a member, within 28 days after the person becomes a member, and
  - (b) remove from the register the name and postal address of each person who ceases to be a member, within 28 days after the person ceases to be a member, and
  - (c) enter in the register any change in the particulars shown on the register, within 28 days after the matters necessitating the change become known to the organisation.
- (3) A State organisation must lodge with the Industrial Registrar once in each year, at such time as is prescribed by the regulations:

- (a) a statutory declaration by the secretary of the organisation certifying that the register of members has, during the immediately preceding calendar year, been kept and maintained as required by subsections (1) and (2), and
  - (b) a copy of the records required to be kept under subsection (1) (b), (c) and (d), certified by statutory declaration by the secretary of the organisation to be a correct statement of the information contained in those records.
- (4) A State organisation must, within 28 days, lodge with the Industrial Registrar notification of any change made to the records required to be kept under subsection (1) (b), (c) and (d), certified by statutory declaration by the secretary of the organisation to be a correct statement of the changes made.
- (5) The records kept by a State organisation under this section must be kept at the registered office of the organisation or other place approved by the Industrial Registrar.
- (6) A person authorised by the Industrial Registrar may inspect, and make copies of, or take extracts from, the register of members of a State organisation, or a part of the register, at such times as the Industrial Registrar specifies.
- (7) A State organisation must cause its register of members, or each part of the register, to be available, at all relevant times, for the purposes of subsection (6), at the office where the register is kept, to a person authorised by the Industrial Registrar under that subsection.
- (8) If:
  - (a) a member of a State organisation requests the Industrial Registrar to give a direction under this subsection, and
  - (b) the Industrial Registrar is satisfied:
    - (i) that the member has been refused access to the register of members, or a part of the register of members, of the organisation at the office where the register is kept, or
    - (ii) that there are other grounds for giving a direction under this subsection,the Industrial Registrar may direct the organisation to deliver to the Industrial Registrar, before a specified day, a copy of the register certified by statutory declaration by the secretary or other specified officer of the organisation to be, as at a day specified in the certificate that is not more than 28 days before the first-mentioned day, a correct statement of the information contained in the register, for the member to inspect at the office of the Industrial Registrar.
- (9) If default is made in complying with a provision of this section, the organisation is

guilty of an offence.

Maximum penalty (subsection (9)): 100 penalty units.

### **279 Directions by Industrial Registrar concerning maintenance of register of members**

- (1) The Industrial Registrar may give directions to a State organisation in relation to the maintenance of the register of its members if the Industrial Registrar is not satisfied that the organisation is maintaining the register in accordance with this Division.
- (2) Without affecting the generality of subsection (1), the Industrial Registrar may direct a State organisation to make:
  - (a) such rectifications of the register, or
  - (b) such changes in the form of or manner in which the register is being maintained, as are necessary to ensure that the register provides, for the purpose of the conduct of a ballot or election under this Act, in a convenient form, accurate and current particulars of the membership of the organisation.
- (3) A State organisation that fails to comply with a direction given by the Industrial Registrar under this section is guilty of an offence.

Maximum penalty (subsection (3)): 100 penalty units.

### **280 Organisations to notify particulars of loans, grants and donations**

- (1) A State organisation must, as soon as practicable after the end of each financial year, lodge with the Industrial Registrar a statement showing the relevant particulars in relation to each loan, grant or donation of an amount exceeding \$1,000.
- (2) The statement must be signed by an officer of the organisation.
- (3) The statement may be inspected at the office of the Industrial Registrar, during office hours, by a member of the organisation concerned.
- (4) The relevant particulars, in relation to a loan made by a State organisation, are:
  - (a) the amount of the loan, and
  - (b) the purpose for which the loan was required, and
  - (c) the security given in relation to the loan, and
  - (d) the name and address of the person to whom the loan was made and the arrangements made for the repayment of the loan.
- (5) The relevant particulars, in relation to a grant or donation made by a State organisation, are:

- (a) the amount of the grant or donation, and
  - (b) the purpose for which the grant or donation was made, and
  - (c) the name and address of the person to whom the grant or donation was made.
- (6) If default is made in complying with a provision of this section, the organisation is guilty of an offence.

Maximum penalty (subsection (6)): 100 penalty units.

### **281 Waiver of requirement to keep records**

The Industrial Registrar may, on application by a State organisation, exempt the organisation from any requirement under this Division that the organisation must keep a specific register, record or other document or lodge it with the Industrial Registrar if the Industrial Registrar is satisfied that the organisation is required to keep or lodge a register, record or document in compliance with a similar requirement of the *Workplace Relations Act 1996* of the Commonwealth.

## **Division 8 Accounts and audit**

### **282 Regulations**

- (1) The Regulations may make provision for or with respect to the accounts and audit of industrial organisations.
- (2) Any such regulations may deal with any of the matters dealt with in Division 11 of Part 9 of the *Workplace Relations Act 1996* of the Commonwealth in connection with the accounts and audit of organisations registered under that Act. The regulations may adopt the provisions of that Division, with or without modification.
- (3) Until any such regulations are made, the provisions of Subdivision 2 of Division 8 of Part 3 of Chapter 5 of the *Industrial Relations Act 1991* (and the regulations under those provisions) apply to a State organisation as regulations made under this Division.

## **Division 9 Amalgamation**

### **283 Regulations**

- (1) The Regulations may make provision for or with respect to the amalgamation of State organisations.
- (2) Any such regulations may deal with any of the matters dealt with in Division 7 of Part 9 of the *Workplace Relations Act 1996* of the Commonwealth in connection with the amalgamation of organisations registered under that Act. The regulations may adopt the provisions of that Division, with or without modification.

- (3) Until any such regulations are made, the provisions of Division 9 of Part 3 of Chapter 5 of the *Industrial Relations Act 1991* (and the regulations under those provisions) apply to a State organisation as regulations made under this Division.

## Division 10 Validating provisions

### 284 Definitions

In this Division:

**collective body** means, in relation to an organisation, the committee of management or a conference, council, committee, panel or other body of or within the organisation.

**invalidity** includes nullity and, without limiting the generality of the foregoing, includes any invalidity resulting from an omission, defect, error, irregularity or absence of a quorum or caused by the fact that:

- (a) a member, or each of 2 or more of the members, of a collective body of an organisation, or one of the persons, or each of 2 or more of the persons, purporting to act as the members of such a collective body, or a person, or each of 2 or more persons, holding or purporting to hold an office or position in an organisation:
- (i) has not been elected or appointed or duly elected or appointed, or
  - (ii) has purported to be elected or appointed by an election or appointment that was a nullity, or
  - (iii) was not entitled to be elected or appointed or to hold office, or
  - (iv) was not a member of the organisation, or
  - (v) was elected or appointed or purported to be elected or appointed, in a case where one or more of the persons who took part in the election or appointment or the purported election or appointment was or were not entitled to do so or was or were not members of the organisation, or
- (b) persons who were not entitled to do so, or were not members of the organisation, took part in the making or purported making or the alteration or purported alteration of the rules of an organisation, as officers or voters or otherwise.

### 285 Validation of certain acts done in good faith

- (1) Subject to this section and section 287, all acts done in good faith by a collective body of an organisation, or by persons purporting to act as such a collective body, are valid despite any invalidity that may later be discovered in:
- (a) the election or appointment of the collective body, any member of the collective body or the persons or any of the persons purporting to act as the collective body, or

- (b) the making, alteration or rescission of a rule of the organisation.
- (2) Subject to this section and section 287, all acts done in good faith by a person holding or purporting to hold an office or position in an organisation are valid despite any invalidity that may later be discovered in:
- (a) the election or appointment of the person, or
  - (b) the making, alteration or rescission of a rule of the organisation.
- (3) For the purposes of this section, a person is not to be treated as purporting to act as a member of a collective body of an organisation or as the holder of an office or position in an organisation unless the person has, in good faith, purported to be, and has been treated by officers or members of the organisation as being, such a member or the holder of the office or position.
- (4) For the purposes of this section:
- (a) an act is to be treated as done in good faith until the contrary is proved, and
  - (b) a person who has purported to be a member of a collective body of an organisation is to be treated as having done so in good faith until the contrary is proved, and
  - (c) knowledge of facts from which an invalidity arises is not of itself to be treated as knowledge that the invalidity exists, and
  - (d) an invalidity in any election or appointment or in the making or alteration of a rule to which this section applies is not to be treated as discovered before the earliest time proved to be a time when the existence of the invalidity was known to a majority of the members of the committee of management of the organisation or to a majority of the persons purporting to act as that committee of management.
- (5) This section applies:
- (a) to an act whenever done (including an act done before the commencement of this section), and
  - (b) to an act done in relation to an association before it became an organisation.
- (6) Nothing in this section validates the expulsion or suspension of, or the imposition of a fine or any other penalty on, a member of an organisation that would not have been valid if this section had not been enacted.
- (7) Nothing in this section affects the operation of the provisions of this Part relating to inquiries into elections.

### **286 Validation of certain acts after 4 years**

(1) Subject to this section and section 287, after the end of 4 years from:

(a) the doing of an act:

(i) by, or by persons purporting to act as, a collective body of an organisation and purporting to exercise power conferred by or under the rules of the organisation, or

(ii) by a person holding or purporting to hold an office or position in an organisation and purporting to exercise power conferred by or under the rules of the organisation, or

(b) the election or purported election, or the appointment or purported appointment, of a person, to an office or position in an organisation, or

(c) the making or purported making, or the alteration or purported alteration, of a rule of an organisation,

the act, election, purported election, appointment or purported appointment, or the making or purported making or alteration or purported alteration of the rule, is to be taken to have been done in compliance with the rules of the organisation.

(2) The operation of this section does not affect:

(a) any proceedings pending under this Act, or

(b) the validity or operation of an order, judgment, decree, declaration, direction, verdict, sentence, decision or similar judicial act of the Commission or any other court,

made before the end of the 4 years referred to in subsection (1).

(3) This section extends to an act, election, purported election, appointment or purported appointment, and to the making or purported making or alteration or purported alteration of a rule:

(a) done or occurring before the commencement of this section, or

(b) done or occurring in relation to an association before it became an organisation.

### **287 Order affecting application of section 285 or 286**

(1) If, on an application for an order under this section, the Commission is satisfied that the application of section 285 or 286 in relation to an act would do substantial injustice, having regard to the interests of:

(a) the organisation, or



- (b) members or creditors of the organisation, or
  - (c) persons having dealings with the organisation,
- the Commission must, by order, declare accordingly.
- (2) Where a declaration is made under subsection (1), section 285 or 286, as the case requires, does not apply, and is to be taken never to have applied, in relation to the act specified in the declaration.
  - (3) The Commission may make an order under subsection (1) on the application of the organisation, a member of the organisation or any other person having a sufficient interest in relation to the organisation.
  - (4) The Commission may determine:
    - (a) what notice, summons or rule to show cause is to be given to other persons of the intention to make an application or an order under this section, and
    - (b) whether and how the notice, summons or rule should be given or served and whether it should be advertised in any newspaper.
  - (5) A reference in this section to an act includes a reference to an election, purported election, appointment or purported appointment, and to the making or purported making or alteration or purported alteration of a rule.

**288 Commission may make orders in relation to consequences of invalidity**

- (1) An organisation, a member of an organisation or any other person having a sufficient interest in relation to an organisation may apply to the Commission for the determination of the question whether an invalidity has occurred in:
  - (a) the management or administration of the organisation, or
  - (b) an election or appointment in the organisation, or
  - (c) the making or alteration of the rules of the organisation.
- (2) On an application under subsection (1), the Commission may make such determination as it considers appropriate.
- (3) If, in a proceeding under subsection (1), the Commission determines that an invalidity of a kind referred to in that subsection has occurred, the Commission may make such order as it considers appropriate:
  - (a) to rectify the invalidity or cause it to be rectified, or
  - (b) to negative, modify or cause to be modified the consequences in law of the invalidity, or

- (c) to validate any act, matter or thing rendered invalid by or because of the invalidity.
- (4) Where an order is made under subsection (3), the Commission may give such ancillary or consequential directions as it considers appropriate.
- (5) The Commission must not make an order under subsection (3) without satisfying itself that such an order would not do substantial injustice to:
  - (a) the organisation, or
  - (b) any member or creditor of the organisation, or
  - (c) any person having dealings with the organisation.
- (6) The Commission may determine:
  - (a) what notice, summons or rule to show cause is to be given to other persons of the intention to make an application or an order under this section, and
  - (b) whether and how the notice, summons or rule should be given or served and whether it should be advertised in any newspaper.
- (7) This section applies:
  - (a) to an invalidity whenever occurring (including an invalidity occurring before the commencement of this section), and
  - (b) to an invalidity occurring in relation to an association before it became an organisation.

**289 Application for membership of organisation by person treated as having been a member**

- (1) If:
  - (a) a person who is eligible for membership of an organisation (other than a member of the organisation or a person who has been expelled from the organisation) applies to be admitted as a member of the organisation, and
  - (b) the person has, up to a time within one month before the application, acted in good faith as, and been treated by the organisation as, a member,the person is entitled to be admitted to membership and treated by the organisation and its members as though the person had been a member during the whole of the time when the person acted as, and was treated by the organisation as, a member and during the whole of the time from the person's application to the person's admission.
- (2) If a question arises as to the entitlement under this section of a person to be admitted

as a member and to be treated as though the person had been a member during the times referred to in subsection (1):

- (a) the person, or
- (b) a person who is or desires to become the employer of the person, or
- (c) the organisation,

may apply to the Commission to determine the entitlement of the person under this section.

- (3) Subject to subsection (5), the Commission may, despite anything in the rules of the organisation concerned, make such orders (including mandatory injunctions) to give effect to its determination as it considers appropriate.
- (4) The orders that the Commission may make under subsection (3) include an order requiring the organisation concerned to treat a person to whom subsection (1) applies as being a member of the organisation and as having been a member during the times referred to in subsection (1).
- (5) Where an application is made to the Commission under this section:
  - (a) if the application is made otherwise than by the person whose entitlement is in question—the person must be given an opportunity to be heard by the Commission, and
  - (b) if the application is made otherwise than by the organisation concerned—the organisation must be given an opportunity to be heard by the Commission.
- (6) A reference in this section to a person having acted as, or been treated by the organisation as, a member of an organisation includes a reference to a person having so acted or been so treated during a period before the commencement of this section.

## **290 No challenge to dual membership with Federal organisation**

No proceedings may be taken to challenge:

- (a) the existence of an organisation, or
- (b) the registration of an organisation, or
- (c) the election of officers of an organisation, or
- (d) any decision made by an organisation,

only because members of the organisation are also members of an organisation registered under the [Workplace Relations Act 1996](#) of the Commonwealth.

## 290A Amalgamations

(1) In this section:

**amalgamation** means the amalgamation of any State organisations under this Part or the amalgamation of any organisations (including recognised organisations) under Chapter 5 of the *Industrial Relations Act 1991*, including:

- (a) the registration of the amalgamated organisation under this Chapter or under Chapter 5 of that Act, and
- (b) the cancellation of the registration under this Chapter, or under Chapter 5 of that Act, of the organisations that are amalgamated.

**relevant date** means:

- (a) in the case of the amalgamation of any State organisations under this Part—the date that is 6 months after the registration under this Chapter of the amalgamated organisation, or
- (b) in the case of the amalgamation of organisations (including recognised organisations) under Chapter 5 of the *Industrial Relations Act 1991*—the date on which this section commences.

(2) On the relevant date:

- (a) an amalgamation (or purported amalgamation), and
- (b) anything done (or purporting to have been done) for the purposes of, or in connection with, an amalgamation or on which the validity of an amalgamation depends,

are, to the extent of any invalidity, validated and are taken always to have been valid.

(3) If:

- (a) any State organisations are amalgamated under this Act after the commencement of this Act, and
- (b) proceedings are taken under this Act before the date that is 6 months after the registration under this Chapter of the amalgamated organisation to challenge that amalgamation,

the operation of this section is subject to the determination of the Commission in those proceedings.

(4) This section applies to any proceedings under this or any other Act or law of any court or tribunal, whether taken before or after the commencement of this section or whether pending on that commencement, and has effect despite any determination in

those proceedings.

- (5) Anything validated by this section may not be reviewed, quashed or called into question by any court or tribunal (including by way of order in the nature of prohibition, certiorari or mandamus, or by injunction or declaration or otherwise).

## **Part 5 Regulation of industrial organisations (other than State organisations)**

### **291 Regulations applying Part 4**

The regulations may apply provisions of Part 4 (Regulation of State industrial organisations) to industrial organisations (other than State organisations) or make provision with respect to those organisations, being provisions that relate to the matters dealt with in that Part.

### **292 Documents to be lodged with Industrial Registrar**

An industrial organisation (other than a State organisation) is required to lodge the following documents with the Industrial Registrar, at the times specified:

- (a) the rules of the organisation—at the time of registration and immediately after any change to the documents,
- (b) the annual audited financial statements—at the time of registration and as soon as practicable after the end of each financial year of the organisation.

### **293 Cancellation of registration or other penalty for contravention of this Part**

- (1) A contravention of this Part, or the regulations made under this Part, by an industrial organisation constitutes a sufficient ground for the cancellation of its registration under Division 2 of Part 3 or for the imposition of any other penalty under that Division.
- (2) For that purpose, the Industrial Registrar may exercise the functions of the Commission under Division 2 of Part 3 (but without limiting the power of the Commission to exercise those functions).
- (3) Action may not be taken against an industrial organisation for a contravention of section 292 unless the organisation has been given at least 1 month's notice by the Industrial Registrar to rectify the contravention.

## **Part 6 Demarcation orders**

### **294 Determination of demarcation questions concerning interests of industrial organisations of employees**

- (1) The Commission may, by its order, determine any question as to the demarcation of

the industrial interests of industrial organisations of employees (**demarcation order**).

- (2) A demarcation order may be made on the Commission's own initiative or on application by an industrial organisation, an employer or a State peak council.

### **295 Demarcation orders—coverage of industrial organisations of employees**

- (1) The demarcation orders that the Commission may make include (but are not limited to) any one or more of the following orders:
- (a) an order that an industrial organisation of employees is to have the right, to the exclusion of another such organisation or other such organisations, to represent under this Act the industrial interests of a particular class or group of employees who are eligible for membership of the organisation,
  - (b) an order that an industrial organisation of employees that does not have the right to represent under this Act the industrial interests of a particular class or group of employees is to have that right,
  - (c) an order that an industrial organisation of employees is not to have the right to represent under this Act the industrial interests of a particular class or group of employees who are eligible for membership of the organisation.
- (2) When the Commission makes a demarcation order, the Commission may, after giving each industrial organisation and each State peak council concerned an opportunity to be heard, require the rules of the organisation to be altered in accordance with the demarcation order or a subsequent order of the Commission so as to give effect to the demarcation order.
- (3) Such a requirement has effect as follows:
- (a) In the case of a State organisation incorporated under this Act, the rules of the organisation are altered as specified in the order by force of this section.
  - (b) In any other case, the Commission may cancel the registration of the organisation under Part 3 if the organisation does not alter its rules as specified in the order within the time allowed by the order.

## **Part 7 Entry and inspection by officers of industrial organisations**

### **296 Definitions**

- (1) In this Part:

**authorised industrial officer** means an officer or employee of an industrial organisation of employees who holds an instrument of authority for the purposes of this Part issued by the Industrial Registrar under section 299.

**employees' records** includes records of the remuneration of employees, part-time

work agreements with the employees or other records relating to the employees that are required to be kept by the employer by or under the industrial relations legislation or an industrial instrument.

**officer** of an industrial organisation includes any person who is concerned in, or takes part in, the management of the organisation.

**relevant employee**, when used in connection with the exercise of a power by an authorised officer of an industrial organisation, means an employee who is a member of the organisation or who is eligible to become a member of the organisation.

- (2) This Part does not confer authority on an authorised industrial officer to enter any premises for the purposes of holding discussions with employees or of an investigation if:
- (a) the persons employed at that place are employed by a person who holds a certificate of conscientious objection under section 212 (3) because of membership of a religious society or order (such as the Brethren), and
  - (b) none of the persons employed at those premises are members of an industrial organisation, and
  - (c) there are no more than 20 persons employed at those premises.

### **297 Right of entry for discussion with employees**

An authorised industrial officer may enter, during working hours, any premises where relevant employees are engaged, for the purpose of holding discussions with the employees at the premises in any lunch time or non-working time.

### **298 Right of entry for investigating breaches**

- (1) An authorised industrial officer may enter, during working hours, any premises where relevant employees are engaged, for the purpose of investigating any suspected breach of the industrial relations legislation, or of any industrial instrument that applies to any such employees.
- (2) For the purpose of investigating any such suspected breach, the authorised industrial officer may:
- (a) require any employer of relevant employees to produce for the officer's inspection, during the usual office hours at the employer's premises or at any mutually convenient time and place, any employees' records and other documents kept by the employer that are related to the suspected breach, and
  - (b) make copies of the entries in any such records or other documents related to any such suspected breach.

- (3) An authorised industrial officer must, before exercising a power conferred by this section, give the employer concerned:
  - (a) at least 24 hours' notice, except as provided by paragraph (b), or
  - (b) in respect of any requirement to produce records or other documents that are kept elsewhere than on the employer's premises—at least 48 hours' notice.
- (4) The Commission or the Industrial Registrar may, on the ex parte application of an authorised industrial officer, waive the requirement to give the employer concerned notice of an intended exercise of a power conferred by this section if the Commission or the Industrial Registrar is satisfied that to give such notice would defeat the purpose for which it is intended to be exercised.
- (5) If the requirement for notice is waived under subsection (4):
  - (a) the Commission or Industrial Registrar is to give the authorised industrial officer a warrant authorising the exercise of the power without notice, and
  - (b) the authorised industrial officer must, after entering the premises and before carrying out any investigation, give the person who is apparently in charge of the premises the warrant or a copy of the warrant.

#### **299 Provisions relating to authorities issued to officers**

- (1) The Industrial Registrar may, on application, issue an instrument of authority for the purposes of this Part to an officer or employee of an industrial organisation of employees.
- (2) An authorised industrial officer is required to produce the authority:
  - (a) if requested to do so by the occupier of any premises that the officer enters, or
  - (b) if requested to do so by a person whom the officer requires to produce anything or to answer any question.
- (3) The authority:
  - (a) remains in force until it expires or is revoked under this section, and
  - (b) expires when the person to whom it was issued ceases to be an officer or employee of the industrial organisation of employees concerned.
- (4) The Industrial Registrar may, on application, revoke the authority if satisfied that the person to whom it was issued has intentionally hindered or obstructed employers or employees during their working time or has otherwise acted in an improper manner in the exercise of any power conferred on the person by this Part.
- (5) An application for the revocation of an authority is to set out the grounds on which the



application is made.

- (6) A person to whom an authority has been issued under this section must, within 14 days after the expiry or revocation of the authority, return the authority to the Industrial Registrar for cancellation.

Maximum penalty: 20 penalty units.

### **300 No entry to residential premises without permission**

An authorised industrial officer does not have authority under this Part to enter any part of premises used for residential purposes, except with the permission of the occupier.

### **301 Offences**

- (1) An authorised industrial officer must not deliberately hinder or obstruct the employer or employees during their working time.
- (2) A person must not deliberately hinder or obstruct an authorised industrial officer in the exercise of the powers conferred by this Part.
- (3) A person must not, without lawful excuse, fail to comply with a requirement of an authorised industrial officer under this Part.
- (4) A person must not purport to exercise the powers of an authorised industrial officer under this Part if the person is not the holder of a current authority issued by the Industrial Registrar under this Part.

Maximum penalty: 100 penalty units.

### **302 Powers of Commission**

The Commission may deal with an industrial dispute about the operation of this Part, but does not have any jurisdiction to make an award or order conferring additional or inconsistent powers of entry or inspection.

## **Part 8 Legality of trade unions**

### **303 Meaning of “trade union”**

A **trade union** is any temporary or permanent combination (whether or not registered as an industrial organisation under this Act):

- (a) for regulating the relations between:
  - (i) employees and employers, or
  - (ii) employees and employees, or
  - (iii) employers and employers, or

(b) for imposing restrictive conditions on the conduct of any trade or business, whether or not such a combination would, except for this Act, be an unlawful combination because one or more of its purposes is in restraint of trade.

**304 Illegality on grounds of restraint of trade excluded** (cf *The Trade Union Act 1871* (UK), secs 2-4, *Industrial Relations Act 1971* (UK), sec 135)

The purposes of a trade union are not, by reason only that they are in restraint of trade, unlawful, so as:

- (a) to make any member of the trade union liable to criminal proceedings for conspiracy or otherwise, or
- (b) to make any agreement or trust void or voidable.

**305 Certain agreements not affected**

Nothing in this Part affects:

- (a) any agreement between partners as to their own business, or
- (b) any agreement between an employer and those employed by the employer as to such employment, or
- (c) any agreement in consideration of the sale of the goodwill of a business or of instruction in any profession, trade or occupation.

## **Chapter 6 Public vehicles and carriers**

### **Part 1 Application and definitions**

**306 Contracts to which Chapter applies**

The contracts to which this Chapter applies are contracts of bailment and contracts of carriage.

**307 Contract of bailment—meaning**

- (1) For the purposes of this Chapter, a **contract of bailment** is a contract under which:
  - (a) a public vehicle that is a taxi-cab is bailed to a person to enable the person to ply for hire, or
  - (b) a public vehicle that is a private hire vehicle is bailed to a person to transport passengers.
- (2) If a person:
  - (a) is in possession of a private hire vehicle otherwise than as a bailee or employee,

and

- (b) is engaged in transporting passengers in the private hire vehicle pursuant to a licence under the *Passenger Transport Act 1990* of which the person is not the holder,

this Chapter applies to and in respect of that person in the same way as it would apply if the person were in possession of the private hire car under a contract of bailment made with the holder of the licence.

### **308 Bailor—meaning**

For the purposes of this Chapter, a **bailor** is the bailor under a contract of bailment to which this Chapter applies.

### **309 Contract of carriage—meaning**

- (1) For the purposes of this Chapter, a **contract of carriage** is a contract (whether written or oral or partly written and partly oral) for the transportation of goods by means of a motor vehicle or bicycle in the course of a business of transporting goods of that kind by motor vehicle or bicycle, but only:
  - (a) where the carrier is not a partnership or body corporate—if no person except the carrier is, except in the prescribed circumstances, employed (whether pursuant to a contract of employment or not and whether by the carrier or not) in driving or riding on that or any other motor vehicle or bicycle in the course of that business, or
  - (b) where the carrier is a partnership—if no person other than a partner is, except in the prescribed circumstances, employed (whether pursuant to a contract of employment or not and whether by the partnership or not) in driving or riding on that or any other motor vehicle or bicycle in the course of that business, or
  - (c) where the carrier is a body corporate—if no person is, except in the prescribed circumstances, employed (whether pursuant to a contract of employment or not and whether by the body corporate or not) in driving or riding on that or any other motor vehicle or bicycle in the course of that business unless the person is:
    - (i) a director of the body corporate or a member of the family of a director of the body corporate, or
    - (ii) a person who, together with the members of his or her family, has a controlling interest in the body corporate, or
    - (iii) a member of the family of a person who, together with the members of his or her family, has a controlling interest in the body corporate.
- (2) For the purposes of subsection (1), a reference to a carrier includes a carrier carrying

on business under a franchise or other arrangement.

- (3) A contract of carriage includes any contract that the Commission declares, after inquiry, to be such a contract. The Commission may make such a declaration if, in its opinion:
- (a) the contract was entered into for the purpose of defeating, evading or avoiding the provisions of this Act relating to contracts of carriage, and
  - (b) but for being entered into for that purpose, the contract would have been a contract of carriage.
- (4) A contract of carriage does not include a contract:
- (a) that is, if the carrier is a common carrier, made in the ordinary course of the business of the carrier as a common carrier, or
  - (b) that is made in the ordinary course of business for the carriage of packaged goods for different principal contractors by the use of the same motor vehicle or bicycle, or
  - (c) for the carriage of mail by or on behalf of Australia Post, or
  - (d) for the carriage of bread, milk or cream for sale or delivery for sale, or
  - (e) for the carriage of goods that are to be sold pursuant to orders solicited during the carriage of the goods, or
  - (f) for the carriage of livestock, or
  - (g) if the principal contractor is a primary producer or a member of the family of a primary producer and the contract is for the transportation of primary produce (other than timber), or
  - (h) for the transportation of primary produce (other than timber) from or to land used for primary production, or
  - (i) for the delivery of meals by couriers to homes or other premises for consumption.

### **310 Principal contractor—meaning**

- (1) For the purposes of this Chapter, a **principal contractor** is, subject to this section, the person for whom the carrier under a contract of carriage agrees to transport goods to which the contract relates.
- (2) If:
- (a) a contract of carriage is made by the acceptance by an agent of the carrier of an offer to enter into the contract not directed specifically to that carrier, and

- (b) the agent accepted the offer in the course of a business of acting as agent for the receipt and acceptance, on behalf of 2 or more prospective carriers, of offers to enter into contracts of carriage, and
- (c) the agent has a discretion in the selection of the prospective carrier on whose behalf an offer received in the course of that business will be accepted by the agent,

the agent is, for the purposes of this Chapter, to be regarded as the principal contractor under the contract to the exclusion of the offerer.

- (3) For the purposes of section 309 (4) (a) and (b), the carrier under a contract of carriage made as referred to in subsection (2) is to be regarded as having held himself or herself out as ready to transport the goods to which the contract relates for the person required by subsection (2) to be regarded as the principal contractor and not to have held himself or herself out as ready to transport the goods for the offerer so referred to.

### **310A Authorisations for purposes of [Trade Practices Act 1974](#) of the Commonwealth**

- (1) The following things are specifically authorised by this Act for the purposes of section 51 of the [Trade Practices Act 1974](#) of the Commonwealth and the *Competition Code of New South Wales*:
  - (a) anything done by the Commission in exercising its functions under this Chapter,
  - (b) anything done by a person in order to comply with a contract determination of the Commission under this Chapter,
  - (c) the entering into of an agreement approved by the Commission under this Chapter,
  - (d) the doing of anything preparatory or incidental to the entering into of any such agreement,
  - (e) anything done under any such agreement,
  - (f) anything done by the Contracts of Carriage Tribunal in exercising its functions under this Chapter.
- (2) Things authorised to be done by subsection (1) are authorised only to the extent (if any) that they would otherwise contravene Part IV of the [Trade Practices Act 1974](#) of the Commonwealth or the *Competition Code of New South Wales*.
- (3) This section extends to any contract determination made or agreement entered into before the commencement of this section.
- (4) (Repealed)

## **Part 2 Contract determinations**

### **311 Applications to exercise functions**

- (1) An application for the exercise of a function of the Commission under this Part may be made by:
  - (a) a bailor under a contract of bailment, if the average number of different bailees with whom the bailor entered into contracts of bailment on each working day during the period of one month that last preceded the making of the application was not less than 10, or
  - (b) a principal contractor under a contract of carriage, if the average number of different carriers with whom the principal contractor entered into contracts of carriage on each working day during the period of one month that last preceded the making of the application was not less than 10, or
  - (c) an association of employing contractors, or any other association, which represents bailors or principal contractors who are, or some of whom are, parties to contracts of the class concerned, or
  - (d) an association of contract drivers or an association of contract carriers that represents bailees or carriers who are, or some of whom are, parties to contracts of the class concerned.
- (2) An application must be in such form, and contain such particulars, as are required by the rules of the Commission.

### **312 Jurisdiction of Commission with respect to contracts of bailment**

- (1) The Commission may inquire into any matter arising under contracts of bailment and may make a contract determination with respect to any of the following matters under those contracts:
  - (a) the remuneration of bailees under those contracts (including by way of a minimum rate of commission expressed as a percentage of the chargeable fares earned),
  - (b) the amounts (if any) to be paid by the bailor to the bailee as attendance money when the bailee is required to attend at a place where the public vehicle concerned is to be bailed to the bailee but no such bailment takes place and for special duties such as preparing and driving a public vehicle to a registering or licensing authority for inspection,
  - (c) annual or other holidays, sick leave and long service leave for the bailee or payments to the bailee instead of any such leave,
  - (d) the minimum number of hours per day, per week or for any longer period during

which the bailor is to bail the vehicle, if drivable, to the bailee,

(e) if satisfied that it is imperative to do so in the interest of bailors, bailees and the public—the maximum number of hours per day, per week or for any longer period that a bailee may drive a public vehicle,

(f) other conditions.

- (2) Subsection (1) (a) does not authorise the Commission to fix penalty rates of commission in relation to excess hours of work or work on specified days but, in fixing a rate of commission under subsection (1) (a), the Commission may take into account all the circumstances in which a public vehicle is driven for reward.
- (3) The Commission may, after inquiry, make a contract determination with respect to the records to be kept by bailors in respect of contracts of bailment. Any such determination is subject to any regulations with respect to the matter.

### **313 Jurisdiction of Commission with respect to contracts of carriage**

- (1) The Commission may inquire into any matter arising under contracts of carriage and may make a contract determination with respect to remuneration of the carrier, and any condition, under such a contract.
- (2) In exercising its jurisdiction under this section, the Commission may:
- (a) include in the remuneration of persons affected by its determination such allowance instead of annual or other holidays, sick leave or long service leave as it thinks fit, or
  - (b) otherwise make provision for all or any of those matters.
- (3) The Commission may, after inquiry, make a contract determination with respect to the records to be kept by principal contractors in respect of contracts of carriage.

### **314 Jurisdiction with respect to reinstatement of contracts**

- (1) The Commission may, after inquiry, make a contract determination with respect to the reinstatement of a contract of bailment or contract of carriage that has terminated.
- (2) Reinstatement of a contract includes re-engagement under a similar contract.
- (3) A contract determination under this section may be made on such terms and conditions as the Commission thinks fit, including provision for any period after the termination of the contract to be treated as a period of engagement under relevant contracts.
- (4) If the Commission considers that it would be impracticable to make a determination for reinstatement, the Commission may order the bailor to pay to the driver, or the principal contractor to pay to the carrier, an amount of compensation not exceeding

the amount of remuneration of the driver or carrier under relevant contracts during the period of 6 months immediately before the termination of the contract.

- (5) When assessing any compensation payable, the Commission is to take into account whether the driver or carrier made a reasonable attempt to find alternative engagements and the remuneration received in alternative engagements, or that would have been payable if the driver or carrier had succeeded in obtaining alternative engagements.
- (6) A contract determination under this section takes effect when it is made, and is not required to have a specified term or to be published on the NSW industrial relations website.

### **315 Conference to precede contract determination**

- (1) When application is made to the Commission to exercise its jurisdiction under this Part, the Commission must, before it considers the application, summon to attend and confer with the Commission the applicant and such other persons served with the application as the Commission may direct.
- (2) At the conference, the Commission is to:
  - (a) ascertain which of the matters with which the application is concerned are in dispute and which are not, and
  - (b) ascertain whether there are any special circumstances or problems existing with respect to contracts of the class with which the application is concerned, and
  - (c) take all reasonable steps to effect an amicable settlement of any matters in dispute.
- (3) After conferring on an application, the Commission may:
  - (a) dismiss the application, or
  - (b) proceed to hear the application or specify a time and place at which it will be heard, or
  - (c) adjourn the application for such period or periods as it thinks fit.
- (4) Before hearing an application, the Commission may require service of the application on such persons as it may direct.

### **316 Making of contract determinations**

- (1) After hearing an application for it to exercise its jurisdiction under this Part, the Commission may:
  - (a) dismiss the application, or



(b) make a contract determination with respect to the application.

(2) When the Commission makes a contract determination:

- (a) it may defer the operation of the determination wholly or in part for such period or periods as it thinks fit, and
- (b) it must specify the class or classes of contracts in respect of which the determination is to operate (including classes defined by reference to a named bailor or principal contractor).

### **317 Binding force of determination**

- (1) Subject to such exemptions and conditions as the Commission may direct, a contract determination is binding on all bailors and bailees or all principal contractors and carriers who are parties to contracts of the class to which the determination relates as the Commission may direct.
- (2) A contract determination that is binding on a carrier which is a corporation is, except to the extent that the determination otherwise provides, also binding on:
  - (a) any director of the corporation, or any member of the family of any such director, who personally does work under a contract to which the determination relates and to which the corporation is a party, and
  - (b) any holder of shares in the corporation who personally does work under any such contract if that holder, together with the members of his or her family, has a controlling interest in the corporation, and
  - (c) any member of the family of the holder of shares in the corporation who personally does work under any such contract if that holder, together with the members of his or her family, has a controlling interest in the corporation.

### **318 Commencement of determination**

- (1) A contract determination comes into force on the date specified by the Commission.
- (2) However, legal proceedings relating to the enforcement of the determination cannot be commenced until the expiration of 7 days after the day on which it is published on the NSW industrial relations website.
- (3) A contract determination may be expressed to apply retrospectively, but not earlier than the date on which:
  - (a) application for the determination was lodged with the Industrial Registrar or the Commission initiated proceedings for the determination, or
  - (b) the Commission initiated proceedings for the determination, or

(c) the dispute giving rise to the determination was notified to the Commission, as the case requires.

**Note—**

Section 190 enables the Full Bench or a Presidential Member, on such terms as it thinks fit, to stay the operation of the whole or any part of a contract determination for the purposes of appeal pending determination of the appeal or further order of the Commission.

**319 Term of determination**

- (1) A contract determination applies for the period specified in it as its nominal term and, after that period, until rescinded by the Commission. However, the Commission may specify that the determination ceases to apply at the end of its nominal term.
- (2) The nominal term of a determination must not be more than 3 years.

**320 Variation or rescission of determinations**

The Commission may vary or rescind a contract determination and, when it rescinds a determination, it may replace that determination with a new determination.

**321 Exemptions from determinations**

- (1) The Commission may, on application, grant an exemption from the whole or any part of a contract determination if satisfied it is not contrary to the public interest.
- (2) An exemption may be granted for a period not exceeding 3 years at any one time.
- (3) The Commission may, on application or on its own initiative, review any exemption, and may confirm, vary or revoke the exemption.

**Part 3 Contract agreements**

**322 Agreements concerning contract conditions**

- (1) An association of contract drivers may enter into an agreement with a bailor of a public vehicle, or with an association of employing contractors representing bailors of public vehicles, with respect to the conditions of contracts of bailment made with that bailor or with bailors represented by the association.
- (2) An association of contract carriers may enter into an agreement with a principal contractor, or with an association of employing contractors, with respect to the conditions of contracts of a specified class made with carriers by that principal contractor or with principal contractors represented by the association.
- (3) A group of carriers may enter into an agreement with a principal contractor, or with an association of employing contractors, with respect to the conditions of contracts of a specified class made with those carriers by that principal contractor or with principal

contractors represented by that association. Those carriers are taken to be one of the parties to the agreement for the purposes of this Part.

- (4) An agreement under this section is required to be in writing and signed by or on behalf of the parties to it.
- (4A) An agreement under this section must identify the parties to the agreement and describe the class of contracts to which it relates. In particular, an agreement under subsection (3) must identify each member of the group of carriers that enters into the agreement.
- (5) An agreement under this section is called a contract agreement.

### **323 Contract agreement required to be approved**

- (1) A contract agreement does not have effect unless it is approved by the Commission under this Part.
- (2) This section extends to a contract agreement that varies an earlier agreement.

### **324 Application for approval of contract agreement**

- (1) Application for approval of a contract agreement may be made by lodging the agreement with the Industrial Registrar in accordance with this Part and the rules of the Commission.
- (2) At proceedings of the Commission relating to any such application for approval, the following may appear or be represented:
  - (a) any party to the agreement,
  - (b) any association registered under this Chapter if its members or persons eligible to become members are affected by the agreement (but only with leave of the Commission),
  - (c) a State peak council (but only with leave of the Commission),
  - (d) the President of the Anti-Discrimination Board (but only with leave of the Commission).

### **325 Approval of contract agreement by Commission**

- (1) The Commission is to approve each contract agreement lodged for approval, but only if the Commission is satisfied that:
  - (a) the agreement complies with all relevant statutory requirements (including the requirements of this Part and of the [Anti-Discrimination Act 1977](#)), and
  - (b) the agreement does not, on balance, provide a net detriment to the drivers or

carriers who are to be covered by the agreement when compared with the aggregate package of conditions of engagement under relevant contract determinations that would otherwise apply to the drivers or carriers, and

(c) the parties understand the effect of the agreement, and

(d) the parties did not enter the agreement under duress.

(2) This subsection applies to a contract agreement that applies to contracts of carriage entered into by some but not all of the carriers engaged by the principal contractor or contractors bound by the agreement, unless those carriers comprise a distinct geographical, operational or organisational unit. The Commission is not to approve such a contract agreement if it is satisfied that:

(a) the contract agreement fails to cover other carriers engaged by the principal contractor or contractors who would reasonably be expected to be covered, given the nature of the work performed under the contracts to which the agreement applies and the organisational and operational relationships between the carriers bound by the agreement and those other carriers, and

(b) it is unfair not to cover the carriers excluded from the contract agreement.

(3) The Commission is to follow the principles for approval set under section 33 (Principles for approval of enterprise agreements), with any necessary modifications, when deciding whether to approve a contract agreement, unless satisfied that any departure from those principles would not prejudice the interests of any of the parties to the agreement.

**325A Special requirements relating to contract agreements to which groups of carriers are parties**

(1) A contract agreement to which a group of carriers is a party is not to be approved unless the requirements of this section have been complied with.

(2) Before or at the time the principal contractor, or association of principal contractors, first undertakes formal negotiations with a group of carriers for the purposes of a contract agreement, the principal contractor or association is to advise the Industrial Registrar in writing of the following:

(a) that a contract agreement is proposed or under negotiation,

(b) the contract determinations or contract agreements that then apply to the carriers.

(3) The Industrial Registrar is to advise such persons or bodies as are prescribed by the regulations of the proposed contract agreement.

(4) The contract agreement must be approved in a secret ballot by not less than 65% of

the carriers who enter into the agreement.

- (5) The Industrial Registrar must, after the contract agreement is lodged for approval, prepare a report for the Commission comparing the conditions of engagement under the agreement and the conditions of engagement that would otherwise apply to the carriers under relevant contract determinations.
- (6) Section 37 applies to secret ballots under this Part in the same way as it applies to secret ballots under Part 2 of Chapter 2. Section 344 extends to that application of section 37.

### **326 Persons bound by contract agreement**

- (1) A contract agreement is binding on:
  - (a) the parties to the agreement, and
  - (b) in the case of a party that is an association of employing contractors—all members of the association or a specified member or class of members, as provided by the agreement, and
  - (c) in the case of a party that is an association of contract drivers or contract carriers—all bailees or carriers who are members of the association, or who are eligible to be members of the association and who enter into contracts of the class to which the contract agreement relates.
- (2) A contract agreement that, by the operation of this Part, is binding on a corporation as a member of an association of contract carriers is, except to the extent that the agreement otherwise provides, also binding on:
  - (a) any director of the corporation, or any member of the family of any such director, who personally does work under a contract to which the agreement relates and to which the corporation is a party, and
  - (b) any holder of shares in the corporation who personally does work under any such contract if that holder, together with the members of his or her family, has a controlling interest in the corporation, and
  - (c) any member of the family of the holder of shares in the corporation who personally does work under any such contract if that holder, together with the members of his or her family, has a controlling interest in the corporation.

### **327 Contract agreements prevail over contract determinations**

The provisions of a contract agreement prevail over the provisions of any contract determination of the Commission that deal with the same matters in so far as the provisions of the determination apply to a person bound by the agreement.

### **328 Term of contract agreement**

- (1) A contract agreement applies for the period specified in it as its nominal term and, after that period, until terminated in accordance with this Part.
- (2) The nominal term of a contract agreement must not be less than 12 months nor more than 3 years.
- (3) However, a contract agreement made for a project may have a specified nominal term not exceeding the expected duration of the project.
- (4) A contract agreement varying an earlier agreement applies for the residue of the term of the agreement it varies.

### **329 Variation of a contract agreement**

- (1) A contract agreement may be varied at any time by a further contract agreement made and approved in accordance with this Part.
- (2) It does not matter that the parties to the further agreement are not the same as the parties to the earlier agreement.

### **330 Termination of contract agreement**

- (1) A contract agreement can be terminated only in accordance with this section.
- (2) A contract agreement can be terminated at any time with the approval of all the parties to it, whether during or after its nominal term.
- (3) A contract agreement can also be terminated at or after the end of its nominal term by any one of the parties giving at least 3 months' notice of intention to terminate to each other party. The notice may be served before the end of the nominal term.
- (3A) In the case of a contract agreement to which a group of carriers is a party, the proposed termination of the agreement by the carriers must be approved in a secret ballot by not less than 65% of the carriers covered by the agreement at the time the ballot is conducted.
- (4) Termination of the contract agreement is not effective until the Industrial Registrar has been given written notice of the approval to terminate or of service of the notice of intention to terminate.

### **331 Register and publication of contract agreements**

- (1) The Industrial Registrar is to keep a register of all contract agreements that have been approved by the Commission, approvals or notices to terminate contract agreements and such other particulars as the Industrial Registrar considers appropriate.
- (2) The Industrial Registrar is to publish the following details on the NSW industrial

relations website of each contract agreement as soon as practicable after the agreement is approved:

- (a) the identity of the parties to the agreement and the description of the drivers or carriers for whom it is made,
  - (b) the commencement and the nominal term of the agreement,
  - (c) a statement of whether the agreement is a new agreement or the variation of an earlier agreement.
- (3) The register of contract agreements is to be open for public inspection during ordinary office hours.
- (4) A person may make copies of any document kept in the register of contract agreements on payment of such fee, if any, as is prescribed by the regulations.

## **Part 4 Dispute resolution**

### **332 Compulsory conference with respect to disputes**

- (1) If subsection (2) or (3) applies or the Commission has reasonable cause to believe that it applies, the Commission may summon a person to a compulsory conference:
- (a) to confer, or
  - (b) to give evidence, or
  - (c) to produce documents or exhibits,
- in an endeavour to bring the interested parties to a settlement which will determine the matter in relation to which the subsection applies.
- (2) This subsection applies if an association registered under this Chapter or a bailor or a principal contractor becomes aware of an industrial dispute that might lead, or has led:
- (a) to owners of public vehicles being in breach of contracts of bailment of those vehicles or refusing to enter into contracts of bailment of those vehicles, or
  - (b) to principal contractors under contracts of carriage being in breach of those contracts or persons refusing to enter into contracts of carriage as principal contractors, or
  - (c) to bailees of public vehicles or carriers under contracts of carriage being in breach of those contracts, or
  - (d) to persons refusing to enter into contracts as bailees of public vehicles or as carriers under contracts of carriage.

- (3) This subsection applies if an industrial dispute arising from the reorganisation of the business of a principal contractor affects, or is likely to affect, the number of carriers used by the principal contractor or their remuneration.
- (4) At a compulsory conference, the Commission is to investigate the merits of the matter concerned, irrespective of whether or not industrial action is taking place.
- (5) If the Commission considers that:
  - (a) the public interest is, or could be, affected by a question, dispute or difficulty referred to in subsection (2) or (3), and
  - (b) all reasonable steps have been taken to resolve the industrial dispute by conciliation,it may make a contract determination expressed to be an interim determination made under this subsection.
- (6) An interim determination made under subsection (5):
  - (a) is, as far as practicable, to restore or maintain the conditions existing between the parties immediately before the occurrence of the events giving rise to the industrial dispute, and
  - (b) is to remain in force for such period, not exceeding one month after its making, as is specified in it.

## **Part 5 Associations of employing contractors, drivers and carriers**

### **333 Associations of employing contractors**

- (1) The Industrial Registrar may, on application, register any group or organisation as an association of employing contractors so long as, throughout the period of 6 months immediately before the making of the application, the members of the group or organisation have been:
  - (a) bailors under contracts of bailment made with not fewer than 25 different bailees, or
  - (b) principal contractors under contracts of carriage with not fewer than 25 different carriers.
- (2) An application for registration:
  - (a) is to be made in the form approved by the Industrial Registrar, and
  - (b) must be signed by a majority of the members of the governing body of the applicant group or organisation or, if there is no such governing body, by a majority of the members of the group or organisation.



- (3) A group or organisation is registered when the Industrial Registrar enters in the register of associations of employing contractors the name of the association, particulars of the class of contracts in relation to which it is registered and such other particulars as may be prescribed by the regulations.

### **334 Cancellation of registration**

- (1) The Commission in Court Session may order cancellation of the registration of an association of employing contractors:
  - (a) if the Commission is satisfied that, throughout the period of 6 months immediately before the day of the making of the order, the members of the association had not been parties to contracts, of the class in relation to which the association is registered, with at least 25 different carriers, or
  - (b) if the Commission is satisfied that the group or organisation comprising the association has ceased to exist, or
  - (c) for any other reason that to the Commission seems appropriate.
- (2) If the Commission makes such an order, the Industrial Registrar is to cancel the registration of the association by removing from the register of associations of employing contractors the name of the association.

### **335 Associations of contract drivers and contract carriers**

- (1) The Industrial Registrar may, on application:
  - (a) register as an association of contract drivers any group or organisation (including an industrial organisation of employees) claiming to represent not fewer than 50 bailees of public vehicles, or
  - (b) register as an association of contract carriers any group or organisation (including an industrial organisation of employees) claiming to represent not fewer than 50 carriers each of whom is engaged in the transportation of any goods, other than passengers, under contracts of carriage.
- (2) An application for registration:
  - (a) is to be made in the form approved by the Industrial Registrar, and
  - (b) must be signed by a majority of the members of the governing body of the applicant group or organisation or, if there is no such governing body, by a majority of the members of the group or organisation.
- (3) The Industrial Registrar is to cause notice of an application under this section to be published as prescribed by the regulations.

### **336 Objections to registration of drivers' and carriers' associations**

- (1) Any person may, by notice in writing served on the Industrial Registrar within the period prescribed by the regulations, object to the granting of an application under section 335 on the ground:
  - (a) that the applicant does not genuinely represent the interests under this Act of the bailees or carriers that it claims to represent, or
  - (b) that the interests under this Act of bailees or carriers whom the applicant claims to represent are already represented by an association of contract drivers or an association of contract carriers or that there is such an association to which the members of the applicant might conveniently belong.
- (2) The Industrial Registrar is to fix a time and place for the hearing by the Industrial Registrar of objections under this section and is to notify the applicant and all objectors of that time and place.
- (3) At the hearing of the objection, the objectors and the applicant are entitled to be heard and, after considering the evidence given and the submissions made at the hearing, the Industrial Registrar must, if the Industrial Registrar sustains the objection, refuse the application to which the objection relates.
- (4) The Industrial Registrar must notify in writing all objectors to the granting of the application, and the applicant, of the Industrial Registrar's decision on the objections and of the reasons for that decision.

### **337 Grant or refusal of applications**

- (1) Whether or not an objection is made, the Industrial Registrar can refuse to register the applicant group or organisation as an association on the basis of an application under section 335 on any ground on which an objection could be made to the application and must notify the applicant in writing of the refusal and of the reasons for the refusal.
- (2) A group or organisation that has made an application under section 335 is registered when the Industrial Registrar enters in the register of associations of contract drivers or the register of associations of contract carriers the name of the association, particulars of the class of contracts in relation to which it is registered and such other particulars as may be prescribed by the regulations.
- (3) A branch of a group or organisation is not to be registered separately as an association under this section unless, in the opinion of the Industrial Registrar, it is of sufficient importance to be separately registered.

### **338 Withdrawal or cancellation of registration**

- (1) The Industrial Registrar may issue a certificate of withdrawal of registration with

respect to an association of contract drivers or an association of contract carriers if satisfied that:

- (a) an application for such a certificate has been made in the manner prescribed by the regulations, and
- (b) written notice of the intention to apply for such a certificate has been given within the period and in the manner prescribed by the regulations, and
- (c) such other conditions as may be prescribed by the regulations have been complied with.

(2) The Commission in Court Session may order cancellation of the registration of an association of contract drivers or an association of contract carriers:

- (a) if the Commission is satisfied that the group or organisation comprising the association has ceased to exist, or
- (b) for any other reason that seems appropriate to the Commission.

(3) If, in relation to an association of contract drivers or an association of contract carriers:

- (a) a certificate of withdrawal of registration has been issued under subsection (1) and the period of 28 days immediately following the issue of the certificate has expired, or
- (b) an order has been made under subsection (2),

the Industrial Registrar is to cancel the registration of the association by removing from the relevant register the name of the association.

(4) If the registration of an association is cancelled, the Commission may cancel:

- (a) any contract determination in force with respect to members of the association, or
- (b) any contract agreement so in force.

(5) The cancellation under this section of the registration of an association or of a determination or agreement does not operate to relieve the association or any of its members from any obligations incurred, before the cancellation, under the contract determination or contract agreement or under an order of the Commission.

### **339 Demarcation questions relating to associations**

(1) The Commission may, by its order, determine any question as to the demarcation of the interests of associations in the regulation of the conditions of contracts to which this Chapter applies.

- (2) Application for an order under this section may be made by a bailor, a principal contractor or an association registered under this Part.

### **340 Change of name or amalgamation of associations**

- (1) If an association (whether of employing contractors, contract drivers or contract carriers) has changed its name or 2 or more associations have amalgamated, the Industrial Registrar may, on application, record any such change of name or amalgamation in the appropriate register or registers.
- (2) The application is to be made in the manner and form approved by the Industrial Registrar and is to be signed by a majority of the members of the governing body or bodies or committee or committees of management of the association or associations concerned.
- (3) A recording made under this section is to be considered to be a re-registration of the applicant association or associations under the name specified in the application, but the change of name or amalgamation does not affect any rights, liabilities or obligations of the applicant association or associations that existed immediately before the recording was made.
- (4) The Industrial Registrar may, in respect of an application made under this section by an association or associations of contract drivers or contract carriers, or both, refuse the application and require the association or associations to make an application for registration under this Chapter under the changed or amalgamated name.

### **341 Certificates of registration etc**

- (1) On the registration of an association of employing contractors, contract drivers or contract carriers, the Industrial Registrar is to issue to the association a certificate of registration in the form approved by the Industrial Registrar.
- (2) Such a certificate is conclusive evidence that the requirements of this Act as to registration have been satisfied.
- (3) On application made to the Industrial Registrar by a person claiming to be the secretary of an association of employing contractors, contract drivers or contract carriers, the Industrial Registrar may, if satisfied that the person has been duly elected or appointed as the secretary of the association and that the requirements of the constitution of the association relating to that election or appointment have been complied with, issue a certificate in the form approved by the Industrial Registrar that the person is the secretary of the association.
- (4) A document purporting to be a certificate under subsection (3) is admissible in evidence in any proceedings under this Act and, in the absence of proof to the contrary, is evidence that the person specified is the secretary of the association specified in the certificate.

- (5) A person to whom a certificate has been issued under subsection (3) must, on ceasing to hold office as secretary of the association specified in the certificate, or on being requested by the Industrial Registrar to do so, forthwith return the certificate to the Industrial Registrar for cancellation.

Maximum penalty: 5 penalty units.

### **342 Registers to be kept**

- (1) The Industrial Registrar is to keep a register of associations of employing contractors, a register of associations of contract drivers and a register of associations of contract carriers that are to be open to inspection by any person at the office of the Industrial Registrar at all times when that office is open for business.
- (2) A certificate purporting to be signed by the Industrial Registrar and purporting to contain a copy of a recording made in a register kept under this section:
- (a) is admissible in evidence in any proceedings under this Act, and
  - (b) is evidence of the matters specified in the certificate, and
  - (c) until the contrary is proved, is to be considered to be a true and correct copy of the recording.

## **Part 6 Applied provisions**

### **343 Application of certain provisions for the purposes of this Chapter**

- (1) The following provisions of this Act apply to and for the purposes of this Chapter (***the applied provisions***):
- (a) Section 27 (Prohibition on cashing-in of accumulated sick leave),
  - (b) Part 3 of Chapter 2 (National and State decisions),
  - (c) Part 10 of Chapter 2 (Payment of remuneration),
  - (d) Part 3 of Chapter 3 (Common law actions during conciliation of industrial disputes),
  - (e) Section 143 (Strike pay prohibited),
  - (f) Section 172 (Power to order secret ballot),
  - (g) Part 8 of Chapter 4 (Industrial Committees),
  - (h) Part 1 of Chapter 5 (Principles of association),
  - (i) Part 7 of Chapter 5 (Entry and inspection by officers of industrial organisations),

(j) Chapter 7 (Enforcement).

(2) The applied provisions have effect subject to such modifications as are prescribed by this Part or the regulations.

### **344 Interpretation of applied provisions**

For the purposes of the application of the applied provisions:

- (a) a reference to employment is to be read as a reference to engagement under a contract of bailment or carriage, and
- (b) a reference to an employer is to be read as a reference to a bailor of public vehicles or principal contractor, and
- (c) a reference to employees is to be read as a reference to bailees of public vehicles or carriers, and
- (d) a reference to remuneration of an employee (however expressed) is to be read as a reference to amounts payable to a bailee under the contract of bailment or amounts payable to a carrier under the contract of carriage, and
- (e) a reference to an award is to be read as a reference to a contract determination, and
- (f) a reference to an enterprise agreement is to be read as a reference to a contract agreement, and
- (g) a reference to an industrial organisation is to be read as a reference to an association of employing contractors, an association of contract drivers or an association of contract carriers, and
- (h) a reference to an industrial organisation of employers is to be read as a reference to an association of employing contractors, and
- (i) a reference to an industrial organisation of employees is to be read as a reference to an association of contract drivers or an association of contract carriers, and
- (j) a reference (in Part 7 of Chapter 5) to relevant employees in relation to an organisation is to be read as a reference to persons who are or are eligible to be members of an association.

## **Part 7 Compensation for termination of certain contracts of carriage**

### **345 Definitions**

In this Part:

**carrier** means an individual, partnership or body corporate who or which supplies services under contracts of carriage.

**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.

**previous carrier** means a previous carrier as referred to in section 346 (1) (a).

**previous principal contractor**, in relation to a previous carrier, means the principal contractor immediately preceding the principal contractor referred to in section 346 (1) (a) to whom the previous carrier provided services under the relevant head 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.

### **346 Claim for compensation**

- (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 under contracts of carriage 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
  - (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) A carrier is not prohibited from making a claim under this section because the carrier performs minor or incidental work for a person other than the principal contractor under the head contract of carriage.

### **347 Contract of Carriage Tribunal**

- (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 2 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.
- (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.

### **348 Compulsory conference with respect to claims**

- (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 instead by an association of contract carriers of which the carrier is a member.
- (3) Notification must be made within 3 months after the termination of the contract.
- (4) On notification, the Industrial Registrar must notify the President of the Commission.



- (5) The President of the Commission is to deal with the matter personally or allocate 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 arrange 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 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 349.

### **349 Arbitration of claim**

- (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 348 (1), is to be a party to the arbitration proceedings.
- (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 346,

- (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 re-sale 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.
- (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 a contract agreement or a contract determination.

### **350 Appeal from Tribunal to Full Bench of Commission**

Part 7 of Chapter 4 (Appeals and references to Commission) applies to a decision, order or direction of a Tribunal under this Part in the same way as it applies to a decision, order or direction of the Commission constituted by a single member.

### **351 General procedure and powers of Tribunal**

- (1) Part 5 of Chapter 4 (Procedure and powers of Commission) applies to proceedings before the Tribunal in the same way as it applies to proceedings before the Commission other than in Court Session, subject to this Part and to such exceptions and modifications as are prescribed by the regulations.
- (2) In particular, sections 179 (Finality of decisions) and 182 (Recovery of amounts ordered to be paid other than penalties) apply to decisions of the Tribunal.

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

### **352 Voting by members of Tribunal**

- (1) Each part-time member of a Tribunal has one vote.
- (2) If the part-time members both vote for or against a motion, the decision is the decision of the Tribunal.
- (3) 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.

### **353 Costs**

- (1) 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.
- (2) An order of the Tribunal for the payment of costs may only be made with the approval of the Presidential Member.

### **354 Representation of parties**

- (1) A party to proceedings before the Tribunal may appear personally or be represented by an Australian legal practitioner or by an agent who is not an Australian 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 an Australian legal practitioner without the leave of the Tribunal.
- (3) The leave of the Tribunal is not required if the Australian 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.

### **355 Contracting out prohibited in certain circumstances**

- (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.

## Chapter 7 Enforcement

### Part 1 Breach of industrial instruments

#### 356 Definition

In this Part:

**industrial court** means:

- (a) the Commission in Court Session, or
- (b) a Local Court constituted specially for the purposes of this Part by an Industrial Magistrate sitting alone.

#### 357 Civil penalty for breach of industrial instruments

- (1) If an industrial court is satisfied that a person has contravened a provision of an industrial instrument, it may order the person to pay a pecuniary penalty not exceeding \$10,000 (**a civil penalty**).

**Note—**

Section 21 of the [Interpretation Act 1987](#) provides that the expression “contravene” in an Act includes a failure to comply.

- (2) Proceedings for a civil penalty may be instituted:
  - (a) by an inspector or any other person authorised by this Act to institute proceedings for offences, or
  - (b) by an employer bound by the industrial instrument concerned, or
  - (c) by an industrial organisation concerned in the industry to which the proceedings relate.
- (3) Proceedings for a civil penalty may be instituted within 6 years after the contravention.
- (4) To avoid doubt, the rules of evidence apply to proceedings for a civil penalty.
- (5) Evidence given in proceedings for the recovery of money under Part 2 is not admissible in proceedings for a civil penalty.
- (6) In any proceedings for a civil penalty, the industrial court may award costs to either party and assess the amount of those costs. Costs cannot be awarded against the prosecutor except in the circumstances in which costs can be awarded against the prosecutor in criminal proceedings.
- (7) The following provisions apply to contraventions of industrial instruments and to proceedings for a civil penalty for such a contravention in the same way as they apply

to criminal proceedings for an offence against this Act:

- (a) Sections 400–403.
- (b) The provisions of any Act relating to the recovery of penalties imposed for an offence.
- (c) Any provision of this or any other Act relating to criminal proceedings that is applied to this section by the regulations (whether with or without modification).

### **358 Related proceedings for recovery of remuneration and other money**

- (1) An industrial court dealing with proceedings for a civil penalty under this Part that relate to the failure of the defendant to pay any money that may be recovered under Part 2 may, in the same proceedings, also make under that Part any order for the payment of money that it is authorised to make in proceedings under that Part.
- (2) Any such order may be made without motion.

### **359 Injunction to restrain further contraventions of industrial instruments**

- (1) The Commission in Court Session may, on the imposition of a civil penalty under this Part by it or another industrial court, grant an injunction to restrain the person from committing further or other contraventions of the industrial instrument concerned.
- (2) Such an injunction may be granted on application or on the Commission's own initiative.
- (3) A person who disobeys such an injunction is guilty of contempt of the Commission and may be dealt with accordingly.

#### **Note—**

Section 180 deals with proceedings for contempt.

### **360 Advertisements that contravene industrial instruments**

- (1) A person must not advertise, or cause to be advertised, that the person is offering or seeking employment on terms that would constitute a contravention of an industrial instrument.
- (2) The publisher of a newspaper or other publication in which such an advertisement has been published must, on demand by any person authorised to prosecute the offence against subsection (1), disclose to that authorised person the name and address (if known) of the person who placed the advertisement in the newspaper or other publication.
- (3) Proceedings for an offence against this section may be instituted by any person authorised to institute proceedings for a civil penalty under this Part.

Maximum penalty: 20 penalty units.

### **361 Exhibition of industrial instruments in workplace**

- (1) An employer of employees whose conditions of employment at any premises are affected by an industrial instrument must cause a copy of the instrument (or the latest official reprint of the instrument) to be exhibited in a conspicuous place at those premises.
- (2) If any of the employees concerned cannot understand the language in which an enterprise agreement is written, the employer must cause accurate (but simply expressed) summaries of the agreement to be so exhibited for each of the employees to be able to read such a summary in a language he or she understands.

Maximum penalty: 10 penalty units.

### **362 Power to amend proceedings**

- (1) If in any proceedings under this Part it appears that the industrial instrument referred to in the initiating proceedings is not the one appropriate to the proceedings and that some other industrial instrument is appropriate to the proceedings, the industrial court may amend the information and proceed to deal with the matter as though proceedings had been instituted under the application as so amended.
- (2) If the amendment appears to the industrial court to be of such a kind as to provide reasonable grounds to suspect that the defendant may have been deceived or misled with respect to the nature of the proceedings, the industrial court may adjourn the proceedings.

### **363 Secretary or agent of union receiving money for contravention of, or under, industrial instrument**

- (1) This section applies to money received or collected by the secretary of an industrial organisation or by any other person purporting to act on behalf of any industrial organisation, being:
  - (a) money paid or purporting to be paid in respect of any contravention of an industrial instrument, or
  - (b) an amount payable under an industrial instrument (within the meaning of Part 2).
- (2) A person who receives or collects any such money that is due to an employee must pay it in full to the employee as soon as practicable after it is received.
- (3) A person must not receive or collect any such money by, or for the purpose of, intimidating another person or for any other purpose that is not a lawful purpose of the organisation.

- (4) This section does not apply to money paid pursuant to an order of a court or the Industrial Registrar.

Maximum penalty: 100 penalty units.

## **Part 2 Recovery of remuneration and other amounts**

### **364 Definitions**

- (1) In this Part:

**amount payable** under an industrial instrument, includes:

- (a) remuneration payable to an employee for work done where the industrial instrument fixes the rate or amount of the remuneration, or
- (b) commission or other amount payable to a person in the circumstances specified in the industrial instrument (other than remuneration for work done), or
- (c) an amount for which an employee is required under the industrial instrument to be re-imbursed or compensated for an expense incurred or loss sustained by the employee.

**industrial court** means:

- (a) the Commission in Court Session, or
- (b) in the case of proceedings under section 380 (Small claims during other Commission proceedings)—the Commission, whether or not in Court Session, or
- (c) a Local Court constituted specially for the purposes of this Part by an Industrial Magistrate sitting alone.

- (2) In this Part, a reference to an industrial instrument and to an amount payable under the industrial instrument includes a reference to:

- (a) a permit under section 125 and the amount that may be paid to the employee in accordance with the permit, and
- (b) section 13 of the [Annual Holidays Act 1944](#), section 12 of the [Long Service Leave Act 1955](#) and section 12 of the [Long Service Leave \(Metalliferous Mining Industry\) Act 1963](#) and an amount payable to the employee under any such provision.

### **365 Order for recovery of remuneration and other amounts payable under industrial instrument**

An industrial court may, on application, order an employer to pay any amount payable under an industrial instrument that remains unpaid to the person to whom it is payable.

**366 Order for recovery of over-award payments under contract of employment**

- (1) An industrial court may, on application, order an employer to pay any amount payable to a person under a contract relating to the employment of the person that remains unpaid.
- (2) This section applies only if there is an industrial instrument that fixes the minimum rate or amount of remuneration for the work done under the contract.

**367 Order for recovery of payments not fixed by industrial instruments**

- (1) An industrial court may, on application, order an employer to pay an amount to an employee as remuneration for work done by the employee if:
  - (a) the rate or amount of that remuneration is not fixed by an industrial instrument, and
  - (b) an industrial instrument fixes the rate or amount of that remuneration when done by some other person, being an industrial instrument that is applicable to other work done by the employee or to the same work done by that employee in different circumstances (in either case being work done under the contract of employment with the same employer).
- (2) The industrial court is not to make an order under this section unless it is satisfied that in the circumstances of the case it is just and equitable for the employer to remunerate the employee for the work concerned.
- (3) For the purposes of an order under this section, the industrial court is to determine an appropriate rate or amount of remuneration for the work done. Any such determination applies only for the purposes of the application for the order and does not affect any relevant industrial instrument.

**368 Order for recovery of unpaid superannuation**

- (1) An industrial court may, on application, order an employer, who employs any person to do any work for which the employer is required under an industrial instrument to make a contribution to a superannuation fund on behalf of the person, to make a payment to or in respect of that person for the purpose of restoring the person, as far as practicable, to the position that the person would have been in had the employer not failed to make the contribution.
- (2) Without limiting the generality of subsection (1), an order under this section may direct the employer to pay to the relevant superannuation fund:
  - (a) the amount of the contribution that is unpaid, and
  - (b) the amount that, in the opinion of the industrial court, would have accrued in respect of the contribution in the fund had it been paid to the fund when due.



- (3) If, at the time an order is made, the employee no longer works for the employer, the industrial court may order the employer to pay the relevant amounts to a superannuation fund nominated by the former employee.
- (4) A certificate signed, or purporting to be signed, by a trustee of a superannuation fund, or by an agent of such a trustee, as to:
  - (a) the amount of contribution that has been, or should have been, paid in respect of an employee for a particular period of time, or
  - (b) the eligibility of an employee for membership of the fund, or
  - (c) the amount that would have accrued in respect of a contribution or a series of contributions had it been in the fund over a particular period,is evidence of the matters stated in the certificate.

### **369 Application for order**

- (1) An application for an order under this Part for the payment of money may be made:
  - (a) by the person to whom the money is payable, or
  - (b) with the written consent and on behalf of that person—by an inspector, by an officer of a Government Department or by an officer of an industrial organisation concerned in the industry to which the proceedings relate.
- (2) A single application may be made by a person for 2 or more orders against the employer. A single application may also be made by an officer of an industrial organisation for orders against an employer on behalf of 2 or more persons.
- (3) An application for an order may only be made if the money became due within the period of 6 years immediately before the application was made.

### **370 Making of order**

- (1) An industrial court may, on an application for an order under this Part, make such order as it considers just in the circumstances.
- (2) An order may be made despite any smaller payment or any express or implied agreement to the contrary.

#### **Note—**

An order under this section may also be made in connection with proceedings for a contravention of an industrial instrument (see section 358) or, in the case of a small claim, in connection with other proceedings before the Commission (see section 380).

### **371 Conciliation to be attempted before order made**

- (1) The industrial court is not to make an order under this Part until it has brought, or has used its best endeavours to bring, the parties to the application for the order to a settlement acceptable to those parties.
- (2) If such a settlement is made, the industrial court is required to make an order that, to the extent authorised by this Act, gives effect to the terms of the settlement.

### **372 Order for interest**

- (1) An industrial court may order that there is to be included, in an amount ordered to be paid under this Part (except under section 368), interest at the prescribed rate on the whole or any part of that amount for the whole or any part of the period from when the amount became due to the date of the order.
- (2) If, in relation to proceedings for such an order, the whole of the amount of money due (or any part of it) is paid before or without the order being made, the industrial court may order that interest is to be paid at the prescribed rate on the amount so paid for the whole or any part of the period from when the amount became due to the date of the payment.
- (3) This section does not:
  - (a) authorise the charging of interest on interest, or
  - (b) authorise the charging of interest otherwise than by consent on any amount for the payment of which an order is made by consent.
- (4) In this section, **prescribed rate** means the rate of interest prescribed for the time being for the purposes of section 101 of the *Civil Procedure Act 2005*.

### **373 Order for costs**

In any proceedings under this Part, the industrial court may award costs to either party and assess the amount of those costs.

### **374 Power to amend application**

- (1) Where in any proceedings under this Part it appears that the industrial instrument referred to in the application is not the one appropriate to the proceedings and that some other industrial instrument is appropriate to the proceedings, the industrial court may amend the application and proceed to deal with the matter as though proceedings had been instituted under the application as so amended.
- (2) If the amendment appears to the industrial court to be of such a kind as to provide reasonable grounds to suspect that the defendant may have been deceived or misled with respect to the nature of the proceedings, the industrial court may, on such terms

as it thinks fit, adjourn the proceedings.

### **375 Recovery of amounts ordered to be paid**

Any amount ordered to be paid by a Local Court constituted by an Industrial Magistrate under this Part may be recovered as if it were a judgment of the Local Court for the payment of a debt of the same amount (whether or not the Local Court has jurisdiction to give judgment for the payment of a debt of that amount).

### **376 Alternative proceedings for debt recovery in other courts**

A person entitled to apply for an order for the payment of money under this Part may, instead of applying for such an order, recover the money as a debt in any court of competent jurisdiction.

### **377 Age of claimant not a bar**

A person may take proceedings for recovery of money under this Part even if the person was under 18 years of age at the time of doing the work or other act for which the money became due or at the time of taking the proceedings.

### **378 Payment where employee represented by industrial organisation**

- (1) This section applies to an order for the payment of money under this Part (except under section 368) where the proceedings were taken on behalf of the employee by an industrial organisation or one of its officers.
- (2) The amount ordered to be paid may be paid to the organisation or officer who took the proceedings and a receipt by the organisation or officer for the payment is a sufficient discharge to the employer for the amount specified in the receipt.
- (3) Any amount so paid (less any costs properly incurred in connection with the proceedings and not paid by the employer) must be held on trust for the person on whose behalf the proceedings were taken.

### **379 Small claims procedure**

- (1) A person who makes an application to an industrial court for an order under this Part may request that the application be dealt with under this section.
- (2) An application that the industrial court decides to deal with under this section is called a ***small claims application***.
- (3) The maximum amount that the industrial court may order an employer to pay on a small claims application in respect of any one employee is:
  - (a) except as provided by paragraph (b)—\$10,000, or
  - (b) if some other amount is prescribed by the regulations for the purposes of this

section—that other amount.

- (4) The industrial court is not bound by the rules of evidence when dealing with a small claims application, but may inform itself of any matter in such manner as the court thinks fit.
- (5) A party to proceedings on a small claims application may be represented by an agent, but is not entitled to be represented by an agent who is an Australian legal practitioner unless the industrial court so approves. That approval is not to be given unless:
  - (a) all parties to the proceedings agree, and
  - (b) the industrial court is satisfied that the parties (other than the party who applies for approval) or any of them will not be disadvantaged.
- (6) The approval of the industrial court to be represented by an Australian legal practitioner is not required if the practitioner:
  - (a) represents a corporation and is an officer of the corporation within the meaning of the *Corporations Act 2001* of the Commonwealth, or
  - (b) represents an owners corporation constituted under the *Strata Schemes Management Act 1996* and is one of the proprietors or lessees constituting the owners corporation, or
  - (c) represents a member of an industrial organisation and is an officer or employee of the organisation, or
  - (d) represents a member of a State peak council and is an officer or employee of that council.
- (7) The approval of the industrial court to be represented by an Australian legal practitioner may be given subject to such conditions as the court considers reasonable to ensure that any other party to the proceedings is not disadvantaged by the practitioner appearing in the proceedings.
- (8) A contravention of subsections (5)–(7) does not invalidate the proceedings or any order made in those proceedings.

### **380 Small claims during other Commission hearings**

- (1) An industrial organisation may, during any proceedings before the Commission, make an application for an order under this Part and for the application to be dealt with under section 379 (Small claims procedure).
- (2) Such an application may be made only if the order is sought against another party to the proceedings.

- (3) The Commission must not deal with the matter until the party against whom the order is sought is given adequate prior notice of the application and an opportunity to be heard on the application.
- (4) The Commission may deal with the matter even though it is not constituted as the Commission in Court Session.
- (5) The Commission may, instead of dealing with the matter, remit it to an industrial court constituted by an Industrial Magistrate for determination.
- (6) An order made in accordance with this section is to be made separately from any other order in the proceedings.
- (7) This section is not to be construed as excluding an application for an order being made in respect of a former employee.

### **Part 3 Industrial Magistrates**

#### **381 Appointment of Chief and other Industrial Magistrates**

- (1) The Governor may appoint a Magistrate to be an Industrial Magistrate, and may appoint any such Industrial Magistrate to be the Chief Industrial Magistrate.
- (2) The Governor may appoint a Magistrate to act as Chief Industrial Magistrate during the illness or absence of the Chief Industrial Magistrate and the Magistrate is, while so acting, taken to be the Chief Industrial Magistrate.
- (3) A person appointed to any office under this section ceases to hold that office if the person ceases to be a Magistrate or the person resigns that office by instrument in writing addressed to the Governor.
- (4) The Chief Industrial Magistrate is entitled to be paid remuneration in accordance with the *Statutory and Other Offices Remuneration Act 1975*.
- (5) A person holding office as Industrial Magistrate is taken to hold the office on either a full-time or part-time basis, according to whether the person holds the office of Magistrate on a full-time or part-time basis under the *Local Courts Act 1982*.

#### **382 Jurisdiction of Chief and other Industrial Magistrates**

- (1) The Chief Industrial Magistrate or any other Industrial Magistrate may exercise throughout the State the jurisdiction conferred by the following Acts on a Local Court constituted by a Magistrate:

*Industrial Relations Act 1996*

Other industrial relations legislation

*Entertainment Industry Act 1989*

*Building and Construction Industry Long Service Payments Act 1986*

*Essential Services Act 1988*

*Industrial Relations (Child Employment) Act 2006*

*Industrial Relations (Ethical Clothing Trades) Act 2001*

*Occupational Health and Safety Act 2000*

*Shop Trading Act 2008*

*Workers Compensation Act 1987*

*Workplace Injury Management and Workers Compensation Act 1998*

*Apprenticeship and Traineeship Act 2001*

Any other Act that expressly confers jurisdiction on an Industrial Magistrate

- (2) The Chief Industrial Magistrate or other Industrial Magistrate constitutes a Local Court when exercising that jurisdiction.

### **383 Procedure**

- (1) The *Criminal Procedure Act 1986* and other Acts regulating the procedure before Local Courts constituted by a Magistrate (but not the *Civil Procedure Act 2005*) apply to the exercise of any jurisdiction by the Chief Industrial Magistrate or other Industrial Magistrate, except as provided by the regulations under this section.
- (2) The regulations may make provision for or with respect to procedure and other matters relating to the exercise of any such jurisdiction of the Chief Industrial Magistrate or other Industrial Magistrate that does not concern proceedings for an offence.

### **383A Recovery of amount ordered to be paid by Industrial Magistrate under other legislation**

Any amount ordered to be paid by a Local Court constituted by an Industrial Magistrate under any of the following provisions may be recovered as if it were a judgment of the Local Court for the payment of a debt of the same amount (whether or not the Local Court has jurisdiction to give judgment for the payment of a debt of that amount under Part 7 of the *Local Courts Act 1982*):

- (a) section 114 (Orders regarding costs and expenses of investigation) of the *Occupational Health and Safety Act 2000*,
- (b) section 156 (5) (Recovery of double premiums from employer not obtaining policy of insurance) of the *Workers Compensation Act 1987*,

- (c) section 175 (7) (Employers evading payment of correct premiums) of the *Workers Compensation Act 1987*.

## **Part 4 Inspectors and their powers**

### **384 Appointment of inspectors**

- (1) The Minister may appoint eligible persons as inspectors for the purposes of this Act.
- (2) The following persons are eligible to be appointed as inspectors:
  - (a) public servants,
  - (b) officers of any public or local authority (including an authority of the Commonwealth or of another State or Territory),
  - (c) any person of a class prescribed by the regulations.
- (3) A person appointed as an inspector ceases to hold that office if removed from that office by the Minister or if the person ceases to be eligible to be appointed as an inspector.
- (4) An inspector has such functions as are conferred or imposed by or under this or any other Act or law on inspectors appointed for the purposes of this Act.
- (5) The Minister is to provide each inspector with a certificate of authority as an inspector.
- (6) The functions of an inspector may be limited by the certificate of authority.
- (7) An inspector is required to produce the certificate of authority:
  - (a) if requested to do so by the occupier of any premises that the inspector enters, or
  - (b) if requested to do so by a person whom the inspector requires to produce anything or to answer any question.
- (8) The Minister may delegate any function under this section to the Departmental Head of any Department responsible to the Minister.

### **385 Inspectors' powers**

- (1) An inspector may exercise powers under this section only for the purpose of investigating possible contraventions of the industrial relations legislation or of any industrial instrument, whether on complaint or by way of routine investigation.
- (2) An inspector may, at any reasonable time:
  - (a) inspect any premises that the inspector has reasonable grounds to suspect are the premises of an employer, and inspect any work being done there, and

- (b) require an employer to produce for the inspector's examination, at such time and place as the inspector may specify, any specified records required to be kept under the industrial relations legislation or an industrial instrument with respect to the employees of the employer (and retain any such record for such period as may be necessary in order to take copies of or extracts from it), and
- (c) require an employer to deliver to the inspector, within such time and to such place as the inspector may specify, any specified information concerning the conditions of employment of the employees of the employer, and
- (d) question any employee or employer as to any matter concerning the conditions of employment of the employee.

(3) A requirement of an inspector under this section may be made personally or by notice in writing served by post.

### **386 No entry to residential premises without permission or search warrant**

- (1) An inspector does not have authority under this Act to enter any part of premises used for residential purposes, except:
  - (a) with the permission of the occupier, or
  - (b) under the authority conferred by a search warrant.
- (2) This section does not apply to any part of premises used both for residential purposes and for work in or in connection with the clothing trades.

### **387 Offences relating to obstruction etc of inspectors**

- (1) A person must not deliberately hinder or obstruct an inspector in the exercise of the functions conferred by this Part.
- (2) A person must not, without lawful excuse, fail to comply with a requirement of an inspector under this Part.
- (3) A person must not, on demand by an inspector to state his or her name and place of residence in connection with the exercise of those functions, refuse to do so or state a false name or place of residence.
- (4) A person must not purport to exercise the powers of an inspector under this Part if the person is not an inspector.

Maximum penalty: 100 penalty units.

### **388 Search warrant**

- (1) An inspector may apply to an authorised officer for the issue of a search warrant if the inspector has reasonable grounds for believing that a provision of the industrial



relations legislation or an industrial instrument has been or is being contravened in any premises.

- (2) The authorised officer to whom the application is made may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising the inspector named in the warrant, when accompanied by a police officer:
  - (a) to enter the premises, and
  - (b) to search the premises for evidence of a contravention of the industrial relations legislation or industrial instrument.
- (3) Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* applies to a search warrant issued under this section.
- (4) In this section:

**authorised officer** has the same meaning as it has in the *Law Enforcement (Powers and Responsibilities) Act 2002*.

### **389 Disclosure of information**

- (1) A person who is, or was at any time, an inspector or public servant engaged in the administration of the industrial relations legislation must not disclose any information relating to any manufacturing or commercial secrets or working processes obtained by him or her in connection with the administration of the industrial relations legislation.  
Maximum penalty: 100 penalty units.
- (2) Subsection (1) does not operate to prevent the disclosure of information if that disclosure is:
  - (a) made in connection with the administration of the industrial relations legislation, or
  - (b) made with the prior permission of the Minister, or
  - (c) ordered by a court, or by any other body or person authorised by law to examine witnesses, in the course of, and for the purpose of, the hearing and determination by that court, body or person of any matter or thing.
- (3) The Minister may grant permission for any such disclosure only if the Minister is satisfied that to do so would be in the public interest.
- (4) In this section, **industrial relations legislation** includes the *Industrial Arbitration Act 1940* and the *Industrial Relations Act 1991*.

## **Part 5 Evidentiary provisions**

### **390 Evidence of an industrial instrument or order**

- (1) Evidence of an industrial instrument or order of the Commission may be given in any proceedings by the production of:
  - (a) in relation to an instrument or order made before the commencement of Schedule 1 [10] to the *Industrial Relations Further Amendment Act 2006*—a copy of the Industrial Gazette in which the instrument or order appeared, or
  - (b) a document purporting to be a copy of the instrument or order printed (or published on the NSW industrial relations website) under the authority of the Industrial Registrar, or
  - (c) a document certified by the Industrial Registrar to be a true copy of the instrument or order.
- (2) A document certified by the Industrial Registrar as being a true copy of an industrial instrument or order of the Commission as in force at a specified date or during a specified period is evidence of the instrument or order as so in force.
- (3) A document purporting to have been certified by the Industrial Registrar is taken to have been so certified in the absence of proof to the contrary.

### **391 Evidence of registration of industrial organisation**

A document purporting to be a certificate of registration of an industrial organisation issued by the Industrial Registrar under section 221 is evidence, in any proceedings, of the registration of the organisation specified in the certificate in the absence of proof to the contrary.

### **392 Evidence of rules of industrial organisation**

A copy of the rules of an industrial organisation certified by the Industrial Registrar to be a true and correct copy is evidence, in any proceedings, of the rules of the organisation.

### **393 Evidence of membership of, or office in, industrial organisation**

A certificate issued by the Industrial Registrar stating that a specified person was or was not at a specified time or during a specified period a member or officer of a specified industrial organisation is, in any proceedings, evidence that the facts are as stated.

### **394 List of officers to be evidence**

A list of the officers of an industrial organisation lodged with the Industrial Registrar on behalf of the organisation under this Act, or a copy of any such list certified by the Industrial Registrar, is evidence, in any proceedings, that the persons named in the list were, on the day when the list was lodged, officers of the organisation.

### **395 Trade and other financial secrets tendered as evidence**

- (1) In a proceeding before the Commission:
  - (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.
- (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 Commission.
- (3) If information is given as evidence under subsection (2), it must not be published in any newspaper, or otherwise, unless the Commission, by order, permits the publication.
- (4) If the Commission 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 Commission 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.
- (7) In this section, **Commission** includes the Contract of Carriage Tribunal established by Part 7 of Chapter 6.

## **Part 6 Criminal and other legal proceedings**

### **396 Penalty notices**

- (1) An authorised officer may serve a penalty notice on a person if it appears to the officer that the person has committed an offence against this Act or the regulations, being an offence prescribed by the regulations as a penalty notice offence.
- (2) A penalty notice is a notice to the effect that, if the person served does not wish to have the matter determined by a court, the person may pay, within the time and to the person specified in the notice, the amount of penalty prescribed by the regulations for the offence if dealt with under this section.
- (3) A penalty notice may be served personally or by post.
- (4) If the amount of penalty prescribed for an alleged offence is paid under this section,

no person is liable to any further proceedings for the alleged offence.

- (5) Payment under this section is not to be regarded as an admission of liability for the purpose of, and does not in any way affect or prejudice, any civil claim, action or proceeding arising out of the same occurrence.
- (6) The regulations may:
  - (a) prescribe an offence for the purposes of this section by specifying the offence or by referring to the provision creating the offence, and
  - (b) prescribe the amount of penalty payable for the offence if dealt with under this section, and
  - (c) prescribe different amounts of penalties for different offences or classes of offences.
- (7) The amount of a penalty prescribed under this section for an offence is not to exceed the maximum amount of penalty that could be imposed for the offence by a court.
- (8) This section does not limit the operation of any other provision of, or made under, this or any other Act relating to proceedings that may be taken in respect of offences.
- (9) In this section, **authorised officer** means an inspector appointed under this Act or the [Occupational Health and Safety Act 2000](#) or any other person of a class prescribed by the regulations.

### **397 Summary procedure for offences under this Act or regulations**

- (1) Proceedings for an offence against this Act or the regulations are to be dealt with summarily:
  - (a) before a Local Court, or
  - (b) before the Commission in Court Session.
- (2) The maximum penalty that may be imposed in those proceedings by a Local Court is a monetary penalty of 100 penalty units or the maximum monetary penalty provided in respect of the offence, whichever is the lesser.
- (3) The maximum penalty that may be imposed in those proceedings by the Commission in Court Session is the maximum penalty provided in respect of the offence.

### **398 Time for instituting proceedings**

Proceedings for an offence against this Act or the regulations may be commenced not later than 12 months after the offence was alleged to have been committed.

### **399 Authority to prosecute**

- (1) Proceedings for an offence against this Act or the regulations may be instituted only:
  - (a) by the Minister or by a person with the written consent of the Minister, or
  - (b) by an inspector, or
  - (c) by a person, or a person of a class, prescribed by the regulations.
- (2) In any such proceedings, a consent to institute the proceedings, purporting to have been signed by a person authorised to give a consent under this section is evidence of that consent without proof of the signature or authority of the person.
- (3) Any such proceedings instituted by an officer of a Government Department may be prosecuted on his or her behalf by any officer of that Department.
- (4) This section does not limit any function that may be exercised by the Commission under section 164 (2) with respect to any contempt of the Commission.

### **400 Offences by corporation**

- (1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision if the person knowingly authorised or permitted the contravention.
- (2) A person may be proceeded against and convicted under a provision pursuant to this section whether or not the corporation has been proceeded against or been convicted under that provision.
- (3) Nothing in this section affects any liability imposed on a corporation for an offence committed by the corporation against this Act or the regulations.
- (4) In this section, **corporation** does not include an industrial organisation.

### **401 Proceedings by and against unincorporated associations**

- (1) For the purposes of this Act, the secretary of an unincorporated association is taken to be the employer of a person employed for the purposes or on behalf of the association. Any proceeding that may be taken under this Act by or against the association may be taken by or against the secretary on behalf of the association.
- (2) The secretary is authorised to retain out of the funds of the association sufficient money to meet payments made by the secretary on behalf of the association under this section (including the payment of any penalty imposed on the association).
- (3) In this section, **secretary** includes a person having possession or control of any funds of an unincorporated association.

#### 402 Recovery of penalty by appointment of receiver

(1) If:

- (a) an industrial organisation fails to pay a penalty for an offence imposed under this Act on the organisation, or
- (b) a person who is a member of the committee or other executive body of an industrial organisation fails to pay a penalty for an offence imposed under this Act on the person,

the amount of the penalty becomes a charge on the assets of the organisation in favour of the State, unless subsection (2) applies.

- (2) The amount of such a penalty does not become a charge on the assets of an industrial organisation if the person who incurred the penalty did so because of an act done in contravention of the express resolutions or directions of the organisation or its committee or other executive body.
- (3) Despite any other Act, a person referred to in subsection (1) (b) is not liable to imprisonment for default in payment of a penalty so referred to but the amount of the penalty is recoverable as a debt due by the person to the State at the time of failure to pay the penalty.
- (4) The Commission in Court Session may, on the application of the Minister and on terms determined by the Commission, appoint a receiver for the purpose of entering into possession, or assuming control, of the property of the organisation in order to enforce the charge.
- (5) A receiver appointed under this section:
  - (a) has the functions conferred on the receiver by order of the Commission in Court Session, and
  - (b) is entitled to recover the costs and expenses of the receivership from the assets of the organisation to which the appointment relates.

(6) In this section:

**penalty** includes any costs and expenses imposed in relation to the penalty.

**committee or other executive body**, in relation to a State organisation, means a collective body of the organisation that has powers of the kind mentioned in the definition of **office** in the Dictionary.

#### 403 Payment of penalties

- (1) If any penalty for an offence has been imposed under this Act in proceedings instituted by an officer of an industrial organisation, the court concerned may order

that the penalty, or part of the penalty, be paid to the Industrial Registrar for payment to the industrial organisation.

- (2) In any other case, any penalty recovered is to be paid into the Consolidated Fund or as otherwise provided by law.

## **Chapter 8 Miscellaneous**

### **404 Act binds the Crown**

This Act binds the Crown in right of New South Wales and, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

### **405 Statutory provisions relating to public sector employees**

- (1) Any award or order of the Commission does not have effect to the extent that it is inconsistent with:
- (a) a right of appeal under the *Government and Related Employees Appeal Tribunal Act 1980* or the *Police Service Act 1990*, or
  - (b) a function under the *Police Service Act 1990* with respect to the discipline, promotion or transfer of a police officer, or with respect to police officers who are hurt on duty.
- (2) The regulations may provide that an award or order of the Commission has effect despite any right or function referred to in subsection (1).
- (3) This section does not affect any decision of the Commission under Part 6 of Chapter 2 (Unfair dismissals).

### **406 Awards and other industrial instruments provide minimum entitlements**

- (1) The conditions of employment set by an industrial instrument are the minimum entitlements of employees.
- (2) The provisions of a contract of employment or other contract do not have effect to the extent that they provide an employee with a benefit that is less favourable to the employee than the benefit to which the employee is entitled under an industrial instrument.
- (3) In the case of a contract determination or contract agreement, a reference in this section to an employee is a reference to a driver or carrier and a reference to employment is a reference to engagement as a driver or carrier.

#### **406A Costs agreements**

- (1) In this section:

**costs agreement** means an agreement between a party to proceedings under this Act (**the client**) and an industrial agent or other person (not being an Australian legal practitioner) as to the costs of representing the party in the proceedings.

- (2) A costs agreement may not provide that costs are to be determined as a proportion of, or are to vary according to, the amount recovered in any proceedings to which the agreement relates.
- (3) If an industrial agent or other person (not being an Australian legal practitioner) enters a costs agreement that contains a provision referred to in subsection (2) with a client:
  - (a) the client need not pay the costs of the representation, and
  - (b) the industrial agent or person may not maintain proceedings for the recovery of the costs.

#### **407 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) In particular, the regulations may prescribe the forms required or permitted to be used for the purposes of this Act or the regulations (including provision for any such forms to be as approved by the Minister or other body or officer).
- (3) A regulation may create an offence punishable by a penalty not exceeding 50 penalty units.

#### **408 Repeal of [Industrial Relations Act 1991 No 34](#) and regulations**

- (1) The [Industrial Relations Act 1991](#) is repealed.
- (2) The [Industrial Relations Regulation 1992](#) and any other regulation made under the [Industrial Relations Act 1991](#) are repealed.

#### **409 Savings, transitional and other provisions**

Schedule 4 has effect.

#### **410 (Repealed)**

#### **411 Review of Act**

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.



- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (3) A report of the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

## **Schedule 1 Persons deemed to be employees**

(Section 5 (3))

### **1 Persons to be treated as employees**

The following persons are taken to be employees:

#### **(a) Milk vendors**

Any person (not being registered as a milk vendor to sell milk or cream from a vehicle or any other conveyance) who sells or delivers for the purpose of sale milk or cream from any vehicle. (In such a case, the employer is taken to be any person whose milk or cream is so delivered or who supplies the milk or cream so delivered.)

#### **(b) Cleaners**

Any person (other than the owner or occupier of the premises or a bona fide cleaning contractor employing labour for the purpose) who performs any work of cleaning premises or a part of premises for which work, if performed by an employee, a price or rate is for the time being fixed by an industrial instrument. (In such a case, the owner or, where there is an occupier other than the owner, the occupier of the premises is taken to be the employer.)

#### **(c) Carpenters, joiners or bricklayers**

Any person (other than the owner or, where the owner is not occupying the building or premises, the occupier of any building or premises or a bona fide contractor employing labour for that purpose) who performs carpentry or joinery or bricklaying work upon any building or premises the erection, construction, repair, alteration or maintenance of which is being carried out under a contract between the owner or occupier and a contractor. (In such a case, the last-mentioned contractor is taken to be the employer. This provision does not apply to work of repair, alteration or addition to existing premises used as residences.)

#### **(d) Painters**

Any person (other than the owner or, where the owner is not the occupier, the occupier of any building or premises or a bona fide contractor employing labour for that purpose who has entered into a contract with such owner or occupier or with a bona fide contractor who has contracted to erect, renovate, repair or maintain such building or premises) who performs the work of house or general painting. (In such a

case, the owner or occupier is taken to be the employer. This provision does not apply to work of repair, alteration or addition to existing premises used as residences.)

(e) **Bread vendors**

Any person (not being a bread manufacturer) who performs the work of delivery of bread or bread rolls on any bread round from a vehicle, conveyance or receptacle. (In such a case, the employer is taken to be the bread manufacturer who manufactured, prepared or baked the bread or bread rolls.)

(f) **Outworkers in clothing trades**

Any person (not being the occupier of a factory) who performs outside a factory any work in the clothing trades or the manufacture of clothing products, whether directly or indirectly, for the occupier of a factory or a trader who sells clothing by wholesale or retail. (In such a case, the occupier or trader is taken to be the employer.)

(g) **Timber cutter and supplier**

Any person (in this paragraph referred to as **the contractor**) who, in response to an advertisement or other notification placed by a person (in this paragraph referred to as **the principal**) requiring the delivery or supply of timber to the principal or as directed by the principal, notifies the principal in writing that the contractor will deliver or supply the whole or part of the timber and who engages in the work of cutting, delivering and supplying timber to the principal or at the principal's direction until the principal by written notice withdraws the offer to accept timber so delivered or supplied. (In such a case, the principal is taken to be the employer.)

(h) **Plumber, drainer or plasterer**

Any person (other than the owner or, where the owner is not occupying the building or premises, the occupier of any building or premises or a bona fide contractor employing labour for that purpose) who performs the work of plumbing, draining, plastering, fibrous plaster fixing or fixing of gypsum plaster board on any building or premises the erection, construction, repair, alteration or maintenance of which is being carried out under a contract between the owner or occupier and a contractor. (In such a case, the last-mentioned contractor is taken to be the employer. This provision does not apply to work of repair, alteration or maintenance of existing premises used as residences.)

(i) **Blinds fitter**

Any person (not being a bona fide contractor employing labour for that purpose) who, as a trade or occupation, performs the work of fitting blinds in or on a building (including the work of taking measurements for blinds, or of assembling or selling blinds, in connection with their fitting) if the blinds or component parts have been supplied to the person by the manufacturer or a distributor of the blinds or

components under an agreement for their supply for the purpose of being fitted by the person in the course of his or her trade or occupation. (In such a case, the manufacturer or distributor is taken to be the employer.)

(j) **Council swimming centre manager or supervisor**

Any person (other than an excluded person) who performs the work of managing or supervising swimming activities at a swimming centre under the care and control of a local council pursuant to a contract with the local council. (In such a case, the local council is taken to be the employer).

(k) **Ready-mixed concrete driver**

Any person who owns or hires a vehicle and drives the vehicle when it is being used for the carriage of ready-mixed concrete (or of materials to be made into ready-mixed concrete on the vehicle) if the concrete or materials have been supplied to the person for their delivery by a manufacturer who carries on the business of manufacturing, supplying or distributing ready-mixed concrete. (In such a case, the manufacturer is taken to be the employer.)

(l) **RTA lorry driver**

Any person (other than an excluded person) who owns a motor lorry and drives the motor lorry when it is being used for road work under a contract between the person and the Roads and Traffic Authority (or between them and others). (In such a case, the RTA is taken to be the employer.)

(m) **Others prescribed by regulations**

Any person of a class prescribed by the regulations (whether or not of the same kind as the other classes of persons referred to in this clause). Any such regulation must specify the person who, for the purposes of this Act, is taken to be the employer of any person of a class so prescribed.

## 2 Definitions

(1) For the purposes of:

(a) clause 1 (f): **factory** has the same meaning as “Factory” had in the *Factories, Shops and Industries Act 1962* immediately before that definition was repealed by Schedule 2.4 [2] to the *Occupational Health and Safety Act 2000*, but does not include an office, building or place (whether or not required to be registered as a factory under that Act) in which mechanical power of less than 0.75 kilowatt is used, and **occupier** has the same meaning as “Occupier” had in the *Factories, Shops and Industries Act 1962* immediately before that definition was amended by Schedule 2.4 [3] to the *Occupational Health and Safety Act 2000*,

(b) clause 1 (g):

- (i) the notice of intention by the contractor to deliver or supply timber must be in the prescribed form and must indicate the nature of the work to be undertaken and the locality where and time within which the work is to be carried out,
- (ii) the notice may be given personally or by letter posted to the principal at his or her place of business or usual address,
- (iii) **timber** includes sleepers, piles, poles, girders, logs and pit timber, and **cutting** includes felling, sawing, obtaining, preparing and doing any related work in connection with timber.

(1A) For the purposes of clause 1 (j):

(a) **excluded person** means:

- (i) a bona fide contractor employing labour for the purpose of performing the work referred to in clause 1 (j), or
- (ii) a person who performs that work as a partner in a bona fide partnership (whether or not employing labour for the purpose), or
- (iii) an employee of any such contractor or partnership.

(b) **contract** includes any lease, licence or arrangement.

(c) **swimming centre** means any public facility used predominantly for the purpose of swimming.

(d) a swimming centre does not cease to be under the care and control of a local council or councils because it is managed on behalf of the council or councils by a committee appointed by the council or councils under the [Local Government Act 1993](#).

(2) For the purposes of clause 1 (l):

(a) **contract** includes any agreement or arrangement,

(b) **motor lorry** means any motor vehicle (whether or not in combination with any trailer) that is constructed principally for the conveyance of goods or merchandise or for the conveyance of any kind of materials used in any trade, business or industry, or for use in any work whatsoever other than the conveyance of persons, but does not include a motor cycle or a tractor,

(c) **road work** means the carriage of goods or materials for use in (or for the purpose of) the construction or maintenance of roads by or on behalf of the Roads and Traffic Authority,

(d) **excluded person** means:

- (i) a person who employs another to drive or assist in driving a motor lorry when it is being used for road work (except where the person employs another during his or her absence on holidays or long service leave or due to sickness, accident or other reasonable cause),
  - (ii) a person (whether or not a common carrier) who is engaged in the business of transporting for the public generally freight in containers,
- (e) a person **owns** a motor lorry if:
- (i) the person alone (or with others) owns the motor lorry, or
  - (ii) a proprietary company owns the motor lorry and the person is a director of the company or owns not less than 20 per cent of the issued shares of the company, or
  - (iii) the person has the use of the motor lorry under a contract,
- (f) a person **employs** another if that other person is employed:
- (i) by the person alone (or with others), or
  - (ii) by a proprietary company and the first-mentioned person is a director of the company or owns not less than 20 per cent of the issued shares of the company,
- (g) a person who has a beneficial interest in a motor lorry or shares is taken to be the owner of the motor lorry or shares,
- (h) ownership or employment by any one or more members of a partnership is taken to be ownership or employment by all members of the partnership,
- (i) a contract made with any one or more members of a partnership is taken to have been made with all the members of the partnership.

### 3 Substitution of employer

- (1) In any proceedings for a breach of this Act or of an industrial instrument or for the recovery of money under this Act brought against any person taken because of this Schedule to be an employer, it is a defence if the person required to be taken to be an employer joins as a party to the proceedings some other person whom he or she alleges to be the employer and proves that, apart from the operation of this Schedule, that other person was at the relevant time the employer.
- (2) The other person is to have the right to appear and defend the allegation made by the person taken to be an employer and, if the other person is held to be the employer, the same orders may be made against the other person and the other person is to be in the same position as if the proceedings had been originally instituted against the

other person at the time they were instituted against the person required to be taken to be the employer.

## **Schedule 2 Provisions relating to members of Commission**

(Section 150)

### **1 Acting President of Commission**

- (1) The Vice-President is the Acting President during the absence from duty of the President.
- (2) If the President and the Vice-President are or are to be both absent from duty, the Minister may appoint a Deputy President to be Acting President during the absence.
- (3) An Acting President has the functions of the President and anything done by an Acting President in the exercise of those functions has effect as if it had been done by the President.
- (4) In this section, absence from duty includes a vacancy in the relevant office.

### **2 Acting Deputy Presidents and acting Commissioners**

- (1) The Governor may, by commission under the public seal of the State, appoint as an Acting Deputy President or Acting Commissioner a person qualified for appointment as such if satisfied that the additional member is necessary to enable the Commission to exercise its functions effectively during the period of the appointment.
- (2) The person's appointment is for the period (not exceeding 12 months) specified in the person's commission.
- (3) An Acting Deputy President or Acting Commissioner has the functions of, and is taken to be, a Deputy President or Commissioner, as the case requires, subject to any conditions or limitations as are specified in the person's commission.
- (4) The person so appointed may, despite the expiration of the period of the person's appointment, complete or otherwise continue to deal with any matters relating to proceedings that have been heard, or partly heard, by the person before the expiration of that period.

### **3 Acting judicial members**

- (1) The Governor may, by commission under the public seal of the State, appoint as an acting member of the Commission in Court Session (an **acting judicial member**) a person qualified for appointment as a judicial member (including an acting member of the Commission so qualified).
- (2) A person who was formerly a judicial member or a Judge of another court may be appointed as an acting judicial member (and also appointed as an acting Deputy

President or Commissioner under clause 2) even though the person has reached the age of 72 years (or will have reached that age before the appointment expires). However, the person may not be so appointed for any period that extends beyond the date that the person reaches 75 years of age.

- (3) The person's appointment as an acting judicial member is for the period (not exceeding 12 months) specified in the person's commission.
- (4) An acting judicial member:
  - (a) has the functions of a judicial member, and
  - (b) is taken to be a judicial member,subject to any conditions or limitations as are specified in the person's commission.
- (5) The conditions specified in the commission may exclude the whole or any part of the period of appointment as an acting judicial member from being regarded as a period served in a prior judicial office as referred to in section 8 (2) of the *Judges' Pensions Act 1953*.
- (6) The person so appointed may, despite the expiration of the period of the person's appointment, complete or otherwise continue to deal with any matters relating to proceedings that have been heard, or partly heard, by the person before the expiration of that period.

#### **4 Age of judicial members**

A person of or above the age of 72 years is not eligible to be appointed as a judicial member.

#### **5 Age of members (other than judicial members)**

- (1) A person of or above the age of 65 years is not eligible to be appointed as a member of the Commission, unless the person is or is to be appointed as a judicial member.
- (2) However, a person who is or was a member of the Commission may be appointed as such a member after the person reaches the age of 65 years.
- (3) Any appointment under subclause (2):
  - (a) may not be made in respect of a person so as to extend beyond the date on which the person reaches the age of 72 years, and
  - (b) may be made before the person reaches the age of 65 years (in which case the appointment has effect on and from the date the person reaches that age), and
  - (c) is to be made for a term not exceeding 3 years at any one time.

## **6 Oaths**

The regulations may make provision for the oaths to be taken by members of the Commission (including judicial members).

## **7 Status, remuneration etc of judicial members**

- (1) Each judicial member has the same rank, title, status and precedence and, subject to subclause (3), the same remuneration and other rights, as a Judge of the Supreme Court (other than the Chief Justice or the President or a Judge of the Court of Appeal).
- (2) In particular, a judicial member is entitled to be called a Judge and to use the title of "Justice".
- (3) The remuneration of a judicial member who is the President or Vice-President of the Commission is to be determined under the *Statutory and Other Offices Remuneration Act 1975*.

## **8 Protection and immunities of other members**

A member of the Commission who is not a judicial member has the same protection and immunities as a judicial member.

## **9 Remuneration of other members**

- (1) A member of the Commission (other than a member who is also a judicial member) is entitled to be paid:
  - (a) remuneration in accordance with the *Statutory and Other Offices Remuneration Act 1975*, and
  - (b) such travelling and subsistence allowances as the Minister may from time to time determine in respect of the member.
- (2) A member of the Commission who is also a judicial member is only entitled to be paid remuneration as a judicial member.

## **10 Vacancy in office of member**

- (1) The office of a member of the Commission (including a judicial member) becomes vacant if the member is removed or retired from office in accordance with the applicable provisions of Part 9 of the *Constitution Act 1902* and Parts 7 and 8 of the *Judicial Officers Act 1986*.
- (1A) A member of the Commission who is not a judicial member may only be removed from office in accordance with the provisions of Part 9 of the *Constitution Act 1902* relating to the removal from office of judicial members.
- (2) A member of the Commission who is also a judicial member ceases to hold both



offices if so removed or retired from either office.

(3) The office of a member also becomes vacant if the member:

(a) dies, or

(b) is appointed for a limited period and the period expires without the member being re-appointed.

## **11 Seniority of members**

(1) The members of the Commission have seniority according to the following order of precedence:

(a) the President,

(b) the Vice-President,

(c) the Deputy Presidents, according to the days on which their commissions took effect or, if the commissions of 2 or more of them took effect on the same day, according to the precedence assigned to them by their commissions,

(d) the Commissioners, according to the days on which their commissions took effect or, if the commissions of 2 or more of them took effect on the same day, according to the precedence assigned to them by their commissions.

(2) If a member is re-appointed under this Act, the member's seniority is to be determined as if there had been no break in the member's service.

## **12 Leave for members**

(1) The entitlement of a member of the Commission to annual and other leave is to be as stated in the instrument of appointment as a member.

(2) A member of the Commission may be granted leave:

(a) in the case of the President—by the Minister, and

(b) in any other case—by the President.

(3) This clause is subject to clause 7.

## **13 Superannuation and leave—preservation of rights**

(1) In this clause:

**eligible member** means a member of the Commission who, immediately before becoming such a member, was a public servant or an officer or employee of a public authority declared by an Act or proclamation to be an authority to which this clause applies.

**superannuation scheme** means a scheme, fund or arrangement under which any superannuation or retirement benefits are provided and which is established by or under an Act.

- (2) An eligible member:
- (a) may continue to contribute to any superannuation scheme to which he or she was a contributor immediately before becoming an eligible member, and
  - (b) is entitled to receive any payment, pension or gratuity accrued or accruing under the scheme,
- as if he or she had continued to be such a contributor during service as a member of the Commission.
- (3) Service by the eligible member as a member of the Commission is taken to be service as an officer in his or her previous employment for the purposes of any law under which the member continues to contribute to the scheme or by which an entitlement under the scheme is conferred.
- (4) The eligible member is to be regarded as an officer or employee, and the State is to be regarded as the employer, for the purposes of the scheme.
- (5) This section ceases to apply to the eligible member if he or she becomes a contributor to another superannuation scheme, but the eligible member is not prevented from receiving a resignation benefit from the first superannuation scheme.
- (6) An eligible member retains any rights to annual leave, extended or long service leave and sick leave accrued or accruing in his or her previous employment.
- (7) An eligible member is not entitled to claim, under both this Act and any other Act, dual benefits of the same kind for the same period of service.

### **Schedule 3 Provisions relating to members and procedure of Industrial Committees**

(Section 201)

#### **1 Definitions**

In this Schedule:

**Committee** means an Industrial Committee (including an Industrial Committee established for the purposes of Chapter 6).

**nominee member of a Committee** means a member of the Committee other than the Chairperson.

## **2 Allowances for nominee members**

A nominee member of a Committee is not entitled to remuneration as such a member but is entitled to be paid such travelling and subsistence allowances as the Minister may from time to time determine in respect of the member.

## **3 Deputy nominee members**

- (1) Such number of deputies as the Industrial Registrar determines are to be appointed for each nominee member of a Committee in the same way as the member.
- (2) A deputy, while representing a member in the absence of the member, is to be taken to be the member.
- (3) This Act applies to a deputy representing a member of a Committee in the same way as it applies to the member.

## **4 Vacation of office by nominee members**

- (1) The office of a nominee member of a Committee becomes vacant if:
  - (a) the member dies, or
  - (b) the member resigns the office by instrument in writing addressed to the Industrial Registrar, or
  - (c) the nominator of the member withdraws the nomination by giving notice to that effect to the Industrial Registrar, or
  - (d) the Committee is dissolved or expires.
- (2) If a nominee member of a Committee ceases to hold the office, the Industrial Registrar may appoint an appropriately qualified person to the vacant office. The regulations may make provision for or with respect to the nomination of any such person for appointment to the vacant office.

## **5 Oaths**

The regulations may make provision for the oaths to be taken by members of a Committee.

## **6 Notices of appointment or termination**

The Industrial Registrar is to cause a notice of the appointment of a member to a Committee or the termination of any such appointment to be published on the NSW industrial relations website.

## **7 Continuation of hearing**

A Committee to which an appointment is made to fill a vacancy in its membership may, as

constituted with the new member, continue to hear, and may determine, any matter under consideration by it at the time the vacancy occurred.

## **8 Procedure and powers of Committees**

- (1) Part 5 of Chapter 4 applies to proceedings before a Committee in the same way as it applies to proceedings before the Commission other than in Court Session, subject to such exceptions and modifications as are prescribed by the regulations.
- (2) A Committee is not to award costs under the provisions as so applied unless the decision is supported by its Chairperson.

## **9 Meetings of Committees**

- (1) Meetings of a Committee are, subject to the rules of the Commission, to be convened by the Industrial Registrar.
- (2) The conduct of business at a meeting of a Committee is, subject to the rules of the Commission, to be determined by the Committee.
- (3) The Chairperson of a Committee is to preside at a meeting of the Committee.
- (4) Each member of a Committee present at a meeting, except the Chairperson, has one vote and:
  - (a) if the votes for and against a motion are unequal, the decision according to the majority of the votes is the decision of the Committee, or
  - (b) if the votes for and against a motion are equal, the Chairperson is to decide the question and the decision of the Chairperson is the decision of the Committee.
- (5) Any question before a Committee as to the admissibility of evidence is to be decided by the Chairperson of the Committee, and the decision of the Chairperson is final.
- (6) The Chairperson may refer to the Commission for determination or directions any question or matter arising at a meeting of the Committee.

## **Schedule 4 Savings, transitional and other provisions**

(Section 409)

### **Part 1 Preliminary**

#### **1 Definitions**

In this Schedule:

**1940 Act** means the *Industrial Arbitration Act 1940*.

**1991 Act** means the *Industrial Relations Act 1991*.

**former 1940 Act Commission** means the Industrial Commission of New South Wales established under the 1940 Act.

**former 1991 Act Commission** means the Industrial Relations Commission of New South Wales established under the 1991 Act.

**former Industrial Court** means the Industrial Court of New South Wales established under the 1991 Act.

**new Commission** means the Industrial Relations Commission established under this Act.

## 2 Regulations

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

*Industrial Relations Act 1996*

*Industrial Relations Amendment Act 1996*

*Industrial Relations Amendment (Unfair Contracts) Act 1998*

*Industrial Relations Amendment (Federal Award Employees) Act 1998*

*Local Courts Amendment (Part-time Magistrates) Act 1999*

*Industrial Relations Amendment Act 2000*

*Industrial Relations Amendment (Leave for Victims of Crime) Act 2001*

*Industrial Relations Amendment (Casual Employees Parental Leave) Act 2001*

*Workers Compensation Legislation Further Amendment Act 2001*

*Industrial Relations Amendment (Unfair Contracts) Act 2002*

*Industrial Relations Amendment (Industrial Agents) Act 2002*

*Industrial Relations Amendment (Adoption Leave) Act 2003*

*Industrial Relations Amendment (Public Vehicles and Carriers) Act 2003*

*Courts Legislation Amendment Act 2003*, but only in relation to the amendments made to this Act

*Industrial Relations Amendment Act 2005*

*Industrial Relations Amendment Act 2006*

*Industrial Relations Further Amendment Act 2006*

### *Shop Trading Act 2008*

- (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.
- (3) To the extent to which such a provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
  - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
  - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

## **Part 2 Provisions relating to Chapter 2 (Employment)**

### **Division 1 Awards**

#### **3 Existing awards**

An award made under the 1991 Act by the former 1991 Act Commission or the former Industrial Court (or made under the 1940 Act and taken by the 1991 Act to be an award under the 1991 Act), being an award in force immediately before the repeal of the 1991 Act, is taken to be an award made under the corresponding provision of this Act by the new Commission.

#### **4 Existing exemptions**

An exemption from an award granted under the 1991 Act (being an exemption in force immediately before the repeal of that Act) is taken to have been granted under this Act.

#### **5 Pending applications**

Any application for an award or exemption made under the 1991 Act and not determined immediately before the repeal of that Act is to continue to be dealt with as if made under this Act.

### **Division 2 Former enterprise and industrial agreements**

#### **6 Continuation in force of existing enterprise agreements**

- (1) Any enterprise agreement registered (or taken to be registered) under the 1991 Act and in force immediately before the repeal of that Act (a **former enterprise agreement**) is taken to be an enterprise agreement approved under this Act.
- (2) Any enterprise agreement lodged for registration under the 1991 Act and not

registered immediately before the repeal of the 1991 Act is to continue to be dealt with under the relevant provisions of the 1991 Act despite its repeal. If it is registered, subclause (1) applies to the agreement.

(3) The Commission must, on the application of an industrial organisation of which employers or employees who are parties to the agreement are (or are eligible to be) members, by order terminate an agreement to which subclause (1) applies if the Commission is satisfied that the agreement:

(a) is not consistent with the principles prescribed by section 33, or

(b) does not comply with the conditions of approval prescribed by section 35.

The agreement may also be terminated in accordance with section 44.

## **7 Continuation in force of existing former industrial agreements**

An industrial agreement filed under section 11 of the 1940 Act (including a variation of such an agreement) that was continued in force by the 1991 Act and was in force immediately before the repeal of the 1991 Act (a **former industrial agreement**) continues in force under this Act and (except as otherwise provided by this Act) is taken to be an enterprise agreement approved under this Act.

## **8 Variation of existing agreements**

A former enterprise or industrial agreement may be varied at any time by an enterprise agreement made and approved in accordance with this Act, but not otherwise.

## **9 Termination of existing agreements**

(1) Unless each of the parties agrees to terminate the agreement during its term or after its term has expired, a former enterprise or industrial agreement can be terminated only at or after the expiration of its term by one of the parties giving to the other party or all other parties at least 3 months' written notice of intention to terminate. The notice may be served before the end of its term.

(2) Termination of the agreement is not effective unless the Industrial Registrar has been given written notice of an agreement to terminate or of service of the notice of intention to terminate.

## **10 Effect of existing agreement**

The provisions of a former enterprise or industrial agreement prevail over the provisions of any award or order of the Commission that deal with the same matters in so far as they apply to a person bound by the agreement (but the provisions of a former industrial agreement do not prevail over a former or any other enterprise agreement).

## 11 Persons bound by existing agreement

- (1) A former enterprise agreement is binding on:
  - (a) the parties to the agreement, and
  - (b) each person from time to time employed in the enterprise for which the agreement was made who, whether or not a member of an industrial organisation or a works committee that is a party to the agreement or otherwise a named party to the agreement, is employed in a trade or occupation to which the agreement relates, and
  - (c) each successor to an employer who was a party to the agreement.
- (2) A former industrial agreement is binding on:
  - (a) the parties to the agreement, and
  - (b) every member for the time being of an industrial organisation of employees that is a party to the agreement, being a member to whom the agreement applies, and
  - (c) every member for the time being of an industrial organisation of employers that is a party to the agreement, and
  - (d) each person from time to time employed by the employer or each employer for whom the agreement was made who, although not a member of an industrial organisation of employees, is employed in a trade or occupation to which the agreement relates, and
  - (e) each successor to any such employer.

## Division 3 Parental leave

### 12 Things done under previous parental leave provisions

- (1) For the purposes of this clause, the ***previous parental leave provisions*** are the provisions of Part 14A of the 1940 Act and the provisions of Division 3 of Part 2 of Chapter 2 of the 1991 Act.
- (2) Anything done by an employee or employer for the purposes of the previous parental leave provisions is taken to have been done for the purposes of the corresponding provisions of this Act.
- (3) Any entitlement (to leave or otherwise) in accordance with the previous parental leave provisions subsisting immediately before the repeal of the 1991 Act becomes an entitlement in accordance with the corresponding provisions of this Act.
- (4) Leave taken under the previous parental leave provisions is taken to have been taken under the corresponding provisions of this Act.



### **13 Pregnancy/birth/adoption before commencement of this Act**

- (1) Part 4 of Chapter 2 (Parental leave) applies to and in respect of a pregnancy that began before, and a birth or adoption that occurred before, the commencement of that Part.
- (2) The employer may waive the application of any notice requirements under that Part, or reduce the period of notice required, in the case of such a pregnancy, birth or adoption.

### **13A Parental leave for casual employees—[Industrial Relations Amendment Act 2000](#) and [Industrial Relations Amendment \(Casual Employees Parental Leave\) Act 2001](#)**

- (1) The amendments to Part 4 of Chapter 2 made by the [Industrial Relations Amendment Act 2000](#) or the [Industrial Relations Amendment \(Casual Employees Parental Leave\) Act 2001](#) extend to persons employed as casual employees on the commencement of those amendments.
- (2) The employment of those persons before the commencement of those amendments may be taken into account for the purposes of the 24-month qualifying period of service referred to in section 57 (3) (as in force before the commencement of the [Industrial Relations Amendment \(Casual Employees Parental Leave\) Act 2001](#)) or for the purposes of the 12-month qualifying period of service referred to in section 57 (3) (as in force after the commencement of that Act).

### **13B Adoption leave—[Industrial Relations Amendment \(Adoption Leave\) Act 2003](#)**

The amendment made to section 55 (4) by the [Industrial Relations Amendment \(Adoption Leave\) Act 2003](#) does not apply to or in respect of an adoption of a child if placement of the child occurred before the commencement of that Act.

## **Division 4 Other employment provisions**

### **14 Transitional provision consequent on prohibition on cashing-in of accumulated sick leave in 1993**

- (1) Section 27 does not affect the cashing-in of accumulated sick leave under an existing provision on termination of employment (whether by resignation, retirement, death or otherwise), but the maximum number of days (or other periods) of that leave that may be cashed-in is to be calculated as follows:

#### **Step 1**

Calculate the number of days (or other periods) of accumulated sick leave, as at the date of termination of employment, that the employee could cash-in in accordance with the existing provision as in force on that date.

## Step 2

Calculate the number of days (or other periods) of accumulated sick leave, as at 15 February 1993, that the employee could have cashed-in if his or her employment had been terminated immediately before that date and all conditions in the existing provision that had to be satisfied before accumulated sick leave could be paid to the employee (for example, attaining a specified age or completing a specified period of employment) were satisfied.

The maximum number of days (or other periods) of accumulated leave that may be cashed-in is the lesser of the numbers calculated under step 1 and step 2.

- (2) An existing provision may be duly repealed or varied, but not so as to increase the number of days (or other periods) of accumulated sick leave that may be cashed-in.
- (3) Section 27 does not affect any payment made or due to an employee before 15 February 1993.
- (4) In this clause:

**award** means an award within the meaning of section 27.

**existing provision** means a provision of an award that allows or requires an employee to cash-in the employee's accumulated sick leave on termination of employment (whether by resignation, retirement, death or otherwise), being a provision that commenced before 15 February 1993.

### Note—

15 February 1993 is the date of commencement of section 99A of the 1991 Act—the predecessor of the above clause.

## 15 Basic wage

- (1) The adult basic wage on the repeal of the 1991 Act is \$121.40 per week.
- (2) The adult basic wage may be varied by the Commission. Notice of any such variation is to be published in the Industrial Gazette by the Industrial Registrar.
- (3) A reference in another Act, in an industrial instrument, in an instrument made under an Act or in any document to the adult basic wage is to be read as a reference to the adult basic wage in force under this clause.

## 16 Saving for existing part-time work agreements

A part-time work agreement made under Division 4 of Part 2 of Chapter 2 of the 1991 Act and in force immediately before the repeal of that Act is taken to be a part-time agreement under Part 5 of Chapter 2 of this Act.

## **17 Saving for pending application for unfair dismissals**

An application made but not determined under Part 8 of Chapter 3 of the 1991 Act immediately before the repeal of that Act is to continue to be dealt with as if made under Part 6 of Chapter 2 of this Act.

### **17A Federal award employees**

- (1) Section 90A (which was inserted by the *Industrial Relations Amendment (Federal Award Employees) Act 1998*) does not apply to a termination of employment that occurred before the commencement of that section.
- (2) Section 83 (1A) (as replaced by the *Industrial Relations Amendment Act 2000*) does not apply to a termination of employment that occurred before the commencement of that replacement subsection.

### **17B Industrial agents**

Section 90A (as inserted by the *Industrial Relations Amendment (Industrial Agents) Act 2002*) does not apply to or in respect of proceedings that were commenced before the commencement of that section.

## **18 Saving for pending application for reinstatement of dismissed injured employee**

An application made but not determined under Part 7 of Chapter 3 of the 1991 Act immediately before the repeal of that Act is to continue to be dealt with as if made under Part 7 of Chapter 2 of this Act.

## **19 Protection of accrued entitlements on transfer of business**

Part 8 of Chapter 2 (Protection of entitlements on transfer of business) applies to a transferred employee only if the transfer of business occurs or occurred on or after 1 April 1987.

### **19A Transitional provision consequent on changes to unfair contracts jurisdiction**

Section 109A (which was inserted by the *Industrial Relations Amendment (Unfair Contracts) Act 1998*) does not affect the jurisdiction of the Commission under Part 9 of Chapter 2 in connection with the dismissal of an employee before the commencement of that section.

### **19B Transitional provision relating to unfair contracts arising from 2005 amending Act**

Section 106 (2A), as inserted by the *Industrial Relations Amendment Act 2005* applies to a contract made before the commencement of that provision and to proceedings pending in the Commission at that commencement that have not been finally determined by the Commission. However, section 106 (2A) does not apply to any proceedings pending in any other court or tribunal on that commencement.

## **20 Saving of existing permits for under-award pay for impaired workers**

A permit issued, or taken to be issued, under section 21 of the 1991 Act and in force immediately before the repeal of that section is taken to have been granted under section 125 of this Act.

## **Part 3 Provisions relating to Chapter 3 (Industrial disputes)**

### **21 Pending industrial disputes**

- (1) An industrial dispute being dealt with by the former 1991 Act Commission immediately before the repeal of the 1991 Act is to continue to be dealt with by the new Commission according to the procedures for conciliation and arbitration of the 1991 Act despite its repeal. Any dispute order made in the proceedings is taken to be a dispute order made under this Act (whether or not such an order could be made under this Act).
- (2) Any proceedings for a breach of a dispute order, or for an injunction in connection with industrial action, pending before the former Industrial Court immediately before the repeal of the 1991 Act is to continue to be dealt with by the new Commission in Court Session according to the relevant provisions of the 1991 Act despite its repeal. Any order made in the proceedings is taken to be an order made under this Act (whether or not such an order could be made under this Act).
- (3) Despite subclause (1), if immediately before the repeal of the 1991 Act, the industrial dispute was being dealt with by conciliation and a certificate of attempted conciliation had not been issued, the dispute is taken to be an industrial dispute notified to the new Commission under Chapter 3 and is to continue to be dealt with according to the procedures for conciliation and arbitration of that Chapter.

## **Part 4 Provisions relating to Chapter 4 (The Industrial Relations Commission)**

### **21A Representation of parties**

Section 166 (2) (as amended by the [Industrial Relations Amendment \(Industrial Agents\) Act 2002](#)) does not apply to or in respect of conciliation proceedings that were commenced before the commencement of the amendment.

### **22 Abolition of 1991 Act Commission and appointment of members to new Commission**

- (1) The Industrial Relations Commission of New South Wales established under the 1991 Act is abolished on the repeal of the 1991 Act.
- (2) On the repeal of the 1991 Act:
  - (a) the person holding office as President of the former 1991 Act Commission

immediately before that repeal is by this Act appointed as President of the new Commission, and

- (b) the person holding office as Vice-President of the former 1991 Act Commission immediately before that repeal is by this Act appointed as Vice-President of the new Commission, and
- (c) a person holding office as a Deputy President of the former 1991 Act Commission immediately before that repeal is by this Act appointed as a Deputy President of the new Commission, and
- (d) a person holding office as a Conciliation Commissioner of the former 1991 Act Commission immediately before that repeal is by this Act appointed as a Commissioner of the new Commission, and
- (e) a person holding office as an Acting Deputy President of the former 1991 Act Commission immediately before that repeal is by this Act appointed as an Acting Deputy President of the new Commission, and
- (f) a person holding office as an Acting Conciliation Commissioner of the former 1991 Act Commission immediately before that repeal is by this Act appointed as an Acting Commissioner of the new Commission.

(3) Any such person who was holding office as a regional member for a specified region under the 1991 Act is by this Act appointed as a regional member for that region under this Act.

(4) Any such person who was holding office for a specified term is taken to have been appointed to the new office for the balance of that term of office.

### **23 Abolition of Industrial Court and appointment of Judges as judicial members of new Commission**

(1) The Industrial Court of New South Wales established under the 1991 Act is abolished on the repeal of the 1991 Act.

(2) On the repeal of the 1991 Act:

- (a) a person holding office as a Judge of the former Industrial Court (including the Chief Judge and the Deputy Chief Judge) immediately before that repeal is by this Act appointed as a member of the new Commission in Court Session (a **judicial member** of the new Commission), and
- (b) if any such person does not also hold office as a member of the former 1991 Act Commission, the person is by this Act appointed as a Deputy President of the new Commission, and
- (c) a person holding office as an Acting Judge of the former Industrial Court

immediately before that repeal is by this Act appointed as an acting member of the new Commission in Court Session (an **acting judicial member** of the new Commission), and

(d) if any such person does not also hold office as a member or acting member of the former 1991 Act Commission, the person is by this Act appointed as an acting member of the new Commission.

(3) Any such person who was holding office for a specified term is taken to have been appointed to the new office for the balance of that term of office.

#### **24 Provisions relating to Judges of former Industrial Court taken to be judicial members**

(1) This clause applies to a person who was a Judge of the former Industrial Court (including the Chief Judge and Deputy Chief Judge) and who is appointed as a judicial member of the new Commission under this Part.

(2) In the case of a person who is by this Act appointed as a judicial member and also as President or Vice-President of the new Commission, the remuneration that the person is entitled to be paid is to be not less than the remuneration from time to time determined on the basis of the same comparison with a Judge of the Supreme Court as that on which the remuneration of the person had been determined immediately before the repeal of the 1991 Act. This subclause has effect despite the provisions of the [Statutory and Other Offices Remuneration Act 1975](#) relating to the President and Vice-President.

(3) In the case of a person who is by this Act appointed as another judicial member, Schedule 2 to this Act provides that the remuneration payable is to be the same as that payable to a Judge of the Supreme Court (other than the Chief Justice and the President or a Judge of the Court of Appeal).

(4) Service as a judicial member of the former 1940 Act Commission or as a Judge of the former Industrial Court of a person to whom this clause applies is to be reckoned for all purposes as service as a judicial member of the new Commission.

#### **25 Provisions relating to Presidential members of former 1991 Act Commission (other than Judges) taken to be appointed as Presidential members of new Commission**

(1) This clause applies to a person who was a Presidential member of the former 1991 Act Commission (and was not also a Judge of the former Industrial Court) and who is appointed as a Presidential member of the new Commission under this Part.

(2) Any such person has, while holding the office to which the person is by this Act appointed, the same rank, status, precedence and other rights as the person had under the 1991 Act immediately before the repeal of that Act.

(3) The remuneration that a person to whom this clause applies is entitled to be paid is to

be not less than the remuneration from time to time determined on the basis of the same comparison with a Judge of the Supreme Court as that on which the remuneration of the person had been determined immediately before the repeal of the 1991 Act. This subclause has effect despite the provisions of the *Statutory and Other Offices Remuneration Act 1975* relating to Presidential members of the new Commission.

- (4) The *Judges' Pensions Act 1953* does not apply to a person to whom this clause applies.
- (5) Service as a non-judicial member of the former 1940 Act Commission or as Presidential member of the former 1991 Act Commission of a person to whom this clause applies is to be reckoned for all purposes as service as a Presidential member of the new Commission.

## **26 Provisions relating to Conciliation Commissioners taken to be appointed as Commissioners of new Commission**

- (1) This clause applies to a person who was a Conciliation Commissioner under the 1991 Act and who is appointed as a Commissioner of the new Commission under this Part.
- (2) The remuneration that a person to whom this clause applies is entitled to be paid is to be not less than the remuneration that was payable to the person as a Conciliation Commissioner immediately before the repeal of the 1991 Act. This subclause has effect despite the provisions of the *Statutory and Other Offices Remuneration Act 1975* relating to Commissioners of the new Commission.
- (3) Despite their repeal, the provisions of section 15 (1A) (a), (7), (8), (8A) and (8B) of the 1940 Act continue to apply to a person to whom this clause applies if those provisions applied to the person immediately before the repeal of the 1991 Act because of clause 7 of Schedule 2 to the 1991 Act, and so apply in the same way as they applied to the person when the person was a Conciliation Commissioner under the 1940 Act.
- (4) Despite their repeal, the provisions of section 327 of the 1991 Act continue to apply to a person to whom this clause applies, and so apply in the same way as they applied to the person when the person was a Conciliation Commissioner under the 1991 Act.
- (5) Service as a Conciliation Commissioner under the 1940 Act and the 1991 Act of a person to whom this clause applies is to be reckoned for all purposes as service as a Commissioner of the new Commission.

## **27 Conciliation and other Committees**

- (1) A Conciliation Committee or Contract Regulation Committee established under the 1991 Act and in existence immediately before the repeal of that Act is taken to have been established under this Act as an Industrial Committee.

- (2) For the purposes of calculating the duration of any such Committee, the Committee is taken to have been established on the repeal of that Act.
- (3) Proceedings pending before the Committee on the repeal of that Act are to be continued as if they were pending under this Act.

## **28 Industrial Registrar, Deputy Industrial Registrar, inspectors and other staff**

- (1) Any person appointed under Part 2 of the *Public Sector Management Act 1988* to the office of Industrial Registrar, Deputy Industrial Registrar or inspector for the purposes of the 1991 Act and holding that office immediately before the repeal of the 1991 Act is by this Act so appointed to the corresponding office for the purposes of this Act.
- (2) Any other persons employed under Part 2 of the *Public Sector Management Act 1988* for the purposes of the 1991 Act or to enable the former Industrial Court to exercise its functions are by this Act so employed for the purposes of this Act.

## **29 Issue of replacement commission**

The Governor may issue an appropriate commission under the public seal of the State to a person who is appointed to a new office under this Part. The appointment is effective whether or not such a commission is issued.

## **30 Transitional arrangements pending making of rules of Commission**

- (1) Until rules of the Commission are in force with respect to any matter for which rules may be made, the regulations may make provision with respect to that matter.
- (2) Until rules or regulations are made, the following regulations under the 1991 Act (as in force immediately before the repeal of that Act) apply to the matter with such modifications as may be necessary:
  - (a) in the case of proceedings before the Commission in Court Session—*Industrial Court Rules (Transitional) Regulation 1992*,
  - (b) except in the case of proceedings before the Commission in Court Session—*Industrial Relations Commission Rules (Transitional) Regulation 1992*.

## **31 Pending proceedings under 1991 Act**

- (1) If, before the repeal of the 1991 Act, proceedings in relation to a matter were instituted (or taken to be instituted) in the former 1991 Act Commission or the former Industrial Court, but the hearing of the matter had not been commenced before that repeal, the proceedings are taken to be proceedings instituted in the new Commission.
- (2) If, before the repeal of the 1991 Act, the former 1991 Act Commission or the former Industrial Court, had commenced the hearing of, but had not determined, a matter, the person or persons constituting the Commission hearing the matter are to continue



the hearing, and are to determine the matter, sitting as the new Commission.

- (3) If proceedings referred to in subclause (2) are proceedings before the former Industrial Court, the new Commission sitting to determine the matter is to be the Commission in Court Session (whether or not the matter is one within the jurisdiction of the new Commission in Court Session under this Act).
- (4) The repeal of the 1991 Act does not affect any proceedings pending before a Local Court under that Act, whether or not constituted by an Industrial Magistrate.
- (5) Section 191 (Nature of appeal) applies to appeals made under the 1991 Act, but not determined before the repeal of that Act.

### **31A Costs agreements**

Sections 181A and 406A (as inserted by the *Industrial Relations Amendment (Industrial Agents) Act 2002*) do not apply to or in respect of proceedings that were commenced before the commencement of those sections.

### **31B Finality of decisions**

The amendments made to section 179 by the *Industrial Relations Amendment Act 2005* apply to decisions and proceedings of the Commission made or instituted before the commencement of the amendments, and to proceedings pending in any State court or tribunal (other than the Commission) on that commencement. However, those amendments do not affect any order or decision made by any such court or tribunal before that commencement.

### **31C Transitional arrangements relating to Industrial Gazette**

- (1) This clause applies to any provision of an Act or statutory rule that is amended by the *Industrial Relations Further Amendment Act 2006* to replace a reference to the Industrial Gazette with a reference to the NSW industrial relations website.
- (2) Any matter that was duly published in the Industrial Gazette as required or permitted by a provision to which this clause applies continues to have been duly published for the purposes of that provision on and after the relevant commencement day despite the amendment of the provision by the *Industrial Relations Further Amendment Act 2006*.
- (3) In this clause:

**relevant commencement day** means the day on which Schedule 1 [10] to the *Industrial Relations Further Amendment Act 2006* commences.

## **Part 5 Provisions relating to Chapter 5 (Industrial organisations)**

**Note—**

Section 223 provides that all industrial organisations registered or recognised under the *Industrial Relations Act 1991* immediately before the repeal of that Act by this Act are taken to be registered under Chapter 5 of this Act as State organisations or separate organisations, as the case requires.

### **32 Union officials' rights of entry—saving of existing authorities**

Any authority issued under section 733 of the 1991 Act to an officer of an industrial organisation of employees (within the meaning of that section) and in force immediately before the repeal of that section by this Act is taken to be an authority issued under Part 7 of Chapter 5 of this Act.

## **Part 6 Provisions relating to Chapter 6 (Public vehicles and carriers)**

### **33 Contract determinations**

- (1) A contract determination made under Chapter 6 of the 1991 Act (or made under Part 8A of the 1940 Act and taken by the 1991 Act to have been made under the 1991 Act), being a contract determination in force immediately before the repeal of the 1991 Act, is taken to have been made by the new Commission under Chapter 6 of this Act.
- (2) Any application for a contract determination made under Chapter 6 of the 1991 Act and not determined immediately before the repeal of that Act is to continue to be dealt with as if made under Chapter 6 of this Act.

### **34 Continuation in force of existing contract agreements**

Any agreement registered (or taken to be registered) under Chapter 6 of the 1991 Act and in force immediately before the repeal of that Act is taken to be a contract agreement approved under Chapter 6 of this Act.

### **35 Previous extension of Chapter 6 from motor lorries to motor vehicles**

Contract agreements and contract determinations made before the commencement of the *Industrial Relations (Public Vehicles and Carriers) Amendment Act 1993* apply, until such time as they are varied, only to motor lorries.

### **36 Extension of Chapter 6 from motor vehicles to bicycles**

Contract agreements and contract determinations made before the commencement of this Act apply, until such time as they are varied, only to motor vehicles.

### **37 Continuation of registration of existing associations**

Any association registered (or taken to be registered) under Chapter 6 of the 1991 Act immediately before the repeal of that Act is taken to be an association registered under Chapter 6 of this Act.

### **38 Transitional—provisions relating to termination of head contracts of carriage**

Part 7 of Chapter 6 applies to the termination of a head contract of carriage that occurs on or after 1 August 1994 (being the commencement of the predecessor of that Part enacted by the *Industrial Relations (Contracts of Carriage) Amendment Act 1994*), and so applies whether the head contract of carriage was entered into before or after that date.

## **Part 7 Provisions relating to Chapter 7 (Enforcement)**

### **39 Chief and other Industrial Magistrates**

- (1) On the repeal of the 1991 Act, a person holding office as Chief Industrial Magistrate or Industrial Magistrate under the 1991 Act immediately before that repeal is by this Act appointed as Chief Industrial Magistrate or Industrial Magistrate under this Act.
- (2) Until a relevant determination is made and takes effect under the *Statutory and Other Offices Remuneration Act 1975*, an Industrial Magistrate holding office on a part-time basis is entitled to be paid in accordance with the determination in force for the time being for Industrial Magistrates, but on a pro rata basis (according to time spent in service), as calculated by the Attorney General.

## **Part 8 Miscellaneous provisions**

### **40 Construction of superseded references**

A reference in another Act, in an instrument made under an Act or in any document:

- (a) to the 1940 Act or the 1991 Act—is to be read as a reference to this Act, or
- (b) to the *Trade Union Act 1881* or the *Truck Act 1900*—is to be read as a reference to the corresponding provisions of this Act, or
- (c) to the former 1940 Act Commission or the former 1991 Act Commission—is to be read as a reference to the new Commission, or
- (d) to the former Industrial Court—is to be read as a reference to the new Commission in Court Session, or
- (e) to a Conciliation Committee established under the 1940 Act or under the 1991 Act—is to be read as a reference to an Industrial Committee established under this Act, or
- (f) to a Contract Regulation Tribunal established under the 1940 Act or a Contract Regulation Committee established under the 1991 Act—is to be read as a reference to an Industrial Committee established under this Act, or
- (g) to an award under the 1940 Act or the 1991 Act—is to be read as a reference to an award under this Act, or
- (h) to an industrial agreement or enterprise agreement under the 1940 Act or the 1991

Act—is to be read as a reference to an enterprise agreement under this Act (unless otherwise provided), or

- (i) to a contract determination under the 1940 Act or the 1991 Act—is to be read as a reference to a contract determination under this Act, or
- (j) to a registered agreement under section 91H of the 1940 Act or under Chapter 6 of the 1991 Act—is to be read as a reference to a contract agreement under this Act, or
- (k) to an industrial union of employees or employers is to be read as a reference to an industrial organisation of employees or employers registered under Chapter 5, or
- (l) to the holder of an authority issued under section 733 of the 1991 Act is to be read as a reference to the holder of an authority issued under Part 7 of Chapter 5 of this Act.

#### **41 Orders**

- (1) An order made under the 1991 Act by the former 1991 Act Commission or the former Industrial Court (or made under the 1940 Act and taken by the 1991 Act to be an order under the 1991 Act), being an order having effect immediately before the repeal of the 1991 Act, is taken to be an order made under the corresponding provision of this Act by the new Commission.
- (2) Any application for an order made under the 1991 Act and not determined immediately before the repeal of that Act is to continue to be dealt with as if made under this Act (but only if there is a corresponding provision of this Act under which the order could be made).
- (3) This clause is subject to the other provisions of this Schedule.

#### **42 Expiration of current period**

If, for any purpose, time had commenced to run under a provision of the 1991 Act before, but had not expired before, the repeal of the provision, it expires for the corresponding purpose under this Act at the time at which it would have expired if the provision had not been repealed.

#### **43 General saving**

- (1) If anything done or commenced under the 1991 Act before the repeal of that Act and still having effect or not completed immediately before that repeal could have been done or commenced under this Act if this Act had been in force when the thing was done or commenced:
  - (a) the thing done continues to have effect, or
  - (b) the thing commenced may be completed,as if it had been done or commenced under this Act.

(2) A reference in this clause to anything done or commenced under the 1991 Act includes a reference to anything done or commenced under the 1940 Act and continuing to have effect under the 1991 Act.

(3) This clause is subject to any express provision of this Act on the matter.

#### **44 Validation of exercise of jurisdiction by Industrial Magistrates**

(1) For the avoidance of doubt, any exercise or purported exercise of jurisdiction by the Chief Industrial Magistrate or other Industrial Magistrate under any of the following Acts (or regulations under those Acts) before the commencement of this clause is as valid as it would have been had the amendments made by Schedule 7 to the *Workers Compensation Legislation Further Amendment Act 2001* been in force at the time of the exercise or purported exercise of the jurisdiction:

*Building and Construction Industry Long Service Payments Act 1986*

*Essential Services Act 1988*

*Occupational Health and Safety Act 2000*

*Shops and Industries Act 1962*

*Workers Compensation Act 1987*

*Workplace Injury Management and Workers Compensation Act 1998*

(2) For the avoidance of doubt, any exercise or purported exercise of jurisdiction by the Chief Industrial Magistrate or other Industrial Magistrate under any of the following Acts (or regulations under those Acts) before the repeal of the Act concerned is as valid as it would have been had that Act been specified in section 382 (1) at the time of the exercise or purported exercise of the jurisdiction:

*Construction Safety Act 1912*

*Occupational Health and Safety Act 1983*

### **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.

### **Part 9 Provisions consequent on enactment of other Acts**

#### **45 Provision consequent on enactment of [Coal Mine Health and Safety Act 2002](#)**

In relation to a decision in proceedings for an offence under the [Occupational Health and Safety Act 1983](#) or the regulations under that Act:

- (a) section 197A of this Act does not apply to a decision made before the commencement of Schedule 2.9 to the [Coal Mine Health and Safety Act 2002](#) (which substituted section 197A (10)), and

- (b) section 197A extends to proceedings commenced before the commencement of Schedule 2.9 to the *Coal Mine Health and Safety Act 2002*.

#### **46 Provision consequent on enactment of Industrial Relations Amendment (Public Vehicles and Carriers) Act 2003**

If the *Industrial Relations Amendment (Public Vehicles and Carriers) Act 2003* commences after the day that is 2 years after the date of commencement of section 310A:

- (a) the authorisation conferred by section 310A is taken not to have ceased to have effect despite section 310A (4), and
- (b) anything done before the commencement of that Act that would (but for section 310A (4)) have been specifically authorised by this Act for the purposes of section 51 of the *Trade Practices Act 1974* of the Commonwealth and the *Competition Code of New South Wales* is specifically authorised.

#### **47 Provisions consequent on enactment of Courts Legislation Amendment Act 2003**

- (1) Sections 153 and 164, as amended by Schedule 4 to the *Courts Legislation Amendment Act 2003*:
  - (a) extend to any contempt committed before the commencement of Schedule 4 [2] to that Act, and
  - (b) do not extend to proceedings for any such contempt that are pending in the Commission immediately before that commencement.
- (2) Section 164A, as inserted by Schedule 4 [4] to the *Courts Legislation Amendment Act 2003*, extends to proceedings before the Commission that were commenced, but not finally determined, before the commencement of that section.

### **Part 10 Provisions consequent on appointment of APEC public holiday**

#### **49 Definition**

In this Part, **the APEC public holiday** means 7 September 2007, being the day appointed by the notice published under section 19 (3) of the *Banks and Bank Holidays Act 1912* in Gazette No 36 of 2 March 2007 as a day to be observed as a public holiday in the local government areas specified in the Schedule to the notice.

#### **50 APEC public holiday**

A reference in any industrial instrument to a public holiday (whether described as a “holiday”, “public holiday”, “proclaimed”, “gazetted”, “for the State”, “for a special purpose” or otherwise) is taken to include a reference to the APEC public holiday, but only in respect of employment in the local government areas in which that holiday is to be observed.



## Part 11 Provisions consequent on repeal of [Shops and Industries Act 1962](#)

### 51 Day baking

- (1) Any person exercising the trade or calling of a pastrycook, whether an employer of labour or not, or any person employed in such a trade or calling, who in any area makes or bakes for trade or sale any pastry before the time that may be fixed by a State award for the time being in force in the area for the commencement of ordinary hours of work by employees engaged in the making or baking of pastry, or after the time that may be so fixed for the cessation of the ordinary hours of work by employees so engaged, is guilty of an offence.

Maximum penalty: 25 penalty units.

- (2) The Minister may, in the case of any emergency or unforeseen circumstances, or in order to meet the exigencies of the trade carried on in a particular bakehouse, exempt any person exercising or employed in the trade or calling of a pastrycook from the operation of all or any of the provisions of this clause for such periods and subject to such conditions as the Minister determines.
- (3) A person who contravenes a condition of an exemption under this clause is guilty of an offence.

Maximum penalty: 25 penalty units.

- (4) In this clause:

**pastry** includes cakes, biscuits, muffins and crumpets and any goods usually made by pastrycooks.

- (5) This clause (with minor modifications) re-enacts Division 5 of Part 4 of the [Shops and Industries Act 1962](#). This clause is a transferred provision to which section 30A of the [Interpretation Act 1987](#) applies.

### Schedule 5 (Repealed)

#### Dictionary

(Section 4)

**Australian Industrial Relations Commission** means the Australian Industrial Relations Commission constituted under the [Workplace Relations Act 1996](#) of the Commonwealth, and includes any successor to that tribunal.

**award** means an award made, or taken to be made, by the Commission under this Act, and includes any order of the Commission under this Act that sets conditions of employment.

**bailor**—see section 308.

**Commission** means the Industrial Relations Commission of New South Wales established by this Act.

**Commission in Court Session** means the Commission constituted as referred to in section 151.

**committee of management** of an organisation, means the group or body of persons (however described) that manages the affairs of the organisation.

**conditions of employment** includes any provisions about an industrial matter.

**contract agreement** means an agreement approved, or taken to be approved, by the Commission under Part 3 of Chapter 6.

**contract determination** means a contract determination made, or taken to be made, by the Commission under Part 2 of Chapter 6.

**contract of bailment**—see section 307.

**contract of carriage**—see section 309.

**dispute order**—see Part 2 of Chapter 3.

**employee**—see section 5.

**employer** means a person who employs an employee within the meaning of this Act:

- (a) whether the person is an individual, a corporation, an unincorporated body or the State, and
- (b) whether the person does so on the person's own behalf or on behalf of some other person.

**enterprise agreement** means an enterprise agreement approved, or taken to be approved, by the Commission under this Act.

**exercise** a function includes perform a duty.

**former industrial agreement**—see clause 6 of Schedule 4.

**function** includes a power, authority or duty.

**industrial action** means a strike by employees or a lock-out by an employer, and includes:

- (a) a practice relating to the performance of work, adopted in connection with an industrial dispute, that restricts, limits or delays the performance of work, or
- (b) a ban, limitation or restriction affecting the performance of work, or the offering or acceptance of work, that is adopted in connection with an industrial dispute, or
- (c) any failure or refusal in connection with an industrial dispute to attend for work or to perform work,

but does not include any action taken by employees with the agreement of their employer or any action taken by employers with the agreement of their employees.

**industrial agent** means a person (other than an Australian legal practitioner or an employee or officer of an industrial organisation) who represents a party in proceedings before the Commission for fee or other reward.

**industrial agent service** means any service performed by a person in the person's capacity as an industrial agent.

**Industrial Committee** means an Industrial Committee of the Commission established, or taken to be established, under this Act.

**industrial dispute** means a dispute (including a question or difficulty) about an industrial matter, and includes the following:

- (a) a demarcation dispute,
- (b) a threatened or likely industrial dispute,
- (c) a situation that is likely to give rise to an industrial dispute if preventative action is not taken.

**Industrial Gazette** means the publication of that name published under the authority of the Industrial Registrar.

**industrial instrument**—see section 8.

**industrial matters**—see section 6.

**industrial organisation** means an industrial organisation of employees or an industrial organisation of employers.

**industrial organisation of employees** means an industrial organisation of employees registered, or taken to be registered, under Chapter 5.

**industrial organisation of employers** means an industrial organisation of employers registered, or taken to be registered, under Chapter 5.

**Industrial Registrar** means the Industrial Registrar referred to in section 207.

**industrial relations legislation** means any of the following Acts and the regulations made under any such Act:

This Act

[Annual Holidays Act 1944](#)

[Employment Protection Act 1982](#)

[Long Service Leave Act 1955](#)

[Long Service Leave \(Metalliferous Mining Industry\) Act 1963.](#)

**industry**—see section 7.

**inspector** means an inspector appointed for the purposes of this Act.

**judicial member** of the Commission means a member of the Commission in Court Session.

**member of the family** of a person, means (in section 265 and Chapter 6) the person's spouse (including a person with whom the person has a de facto relationship), parent, grandparent, child or

sibling, any such relative by marriage or de facto relationship and any step-parent or step-child (with **de facto relationship** having the same meaning in this definition as in the [Property \(Relationships\) Act 1984](#)).

**motor vehicle** means a motor vehicle or trailer within the meaning of the [Road Transport \(General\) Act 2005](#).

**NSW industrial relations website**—see section 208A.

**office** in an organisation, means:

- (a) an office of president, vice-president, secretary or assistant secretary of the organisation, or
- (b) the office of a voting member of a collective body of the organisation, being a collective body that has power in relation to any of the following functions:
  - (i) the management of the financial or other affairs of the organisation,
  - (ii) the determination of policy for the organisation,
  - (iii) the making, alteration or rescission of rules of the organisation,
  - (iv) the enforcement of rules of the organisation, or the performance of functions in relation to the enforcement of such rules, or
- (c) an office the holder of which is, under the rules of the organisation, entitled to participate directly in any of the functions referred to in paragraph (b) (i) or (iv), other than an office the holder of which participates only in accordance with directions given by a collective body or another person for the purpose of implementing existing policy of the organisation or decisions concerning the organisation, or
- (d) an office the holder of which is, under the rules of the organisation, entitled to participate directly in any of the functions referred to in paragraph (b) (ii) or (iii), or
- (e) the office of a person holding (whether as trustee or otherwise) property of the organisation or property in which the organisation has a beneficial interest.

**officer** of an organisation means a person who holds an office in the organisation.

**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).

**party** to an industrial instrument includes the successor of a party to the instrument.

**pay equity** means equal remuneration for men and women doing work of equal or comparable value.

**penalty unit** see section 17 of the [Crimes \(Sentencing Procedure\) Act 1999](#).

**Note—**

Penalties for offences are expressed in penalty units. At the time of this update the penalty unit was \$110.

**premises** includes any mine, structure, building, aircraft, vehicle, vessel and place (whether built on or not), and any part of it.

**Presidential Member** of the Commission—see section 147 (2).

**principal contractor**—see section 310.

**public sector employee** includes an employee of a public authority and a member of the Government Service, the NSW Police Force, the NSW Health Service or the Teaching Service.

**public sector industrial agreement** means an agreement under section 64 of the [Public Sector Management Act 1988](#), section 86 of the [Police Service Act 1990](#), section 14 of the [Teaching Service Act 1980](#) or section 26 (4) of the [Area Health Services Act 1986](#) or any similar kind of agreement relating to public sector employees.

**public vehicle** means a taxi-cab or private hire vehicle within the meaning of the [Passenger Transport Act 1990](#).

**resolution** of an industrial dispute includes the avoidance or settlement of the dispute.

**rules** of an organisation includes, in the case of an organisation that is a company, the memorandum or articles of association of the organisation.

**State peak council** means:

- (a) Unions NSW (being the State peak council for employees), or
- (b) an organisation approved for the time being by the Commission under section 216 as a State peak council for employers.

**successor** includes transferee, assignee, devisee or other successor at law.