

Industrial Relations (Child Employment) Act 2006 No 96

[2006-96]



New South Wales

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Industrial Relations (Child Employment) Act 2006 No 96



New South Wales

An Act to make provision with respect to the employment of certain children by trading, financial or foreign corporations; to make a consequential amendment to the *Industrial Relations Act 1996*; and for other purposes.

Part 1 Preliminary

1 Name of Act

This Act is the *Industrial Relations (Child Employment) Act 2006*.

2 Commencement

- (1) This Act commences on the date of assent to this Act, except as provided by subsection (2).
- (2) The provisions of Part 2 commence on a day or days to be appointed by proclamation.

3 Definitions

- (1) In this Act—

ABN means an Australian Business Number registered under the *A New Tax System (Australian Business Number) Act 1999* of the Commonwealth.

ACN has the same meaning as it has in the *Corporations Act 2001* of the Commonwealth.

affected employer, in relation to a child, means an employer of a child to whose employment section 4 applies.

child means any person who is under the age of 18 years.

Commission means the Industrial Relations Commission of New South Wales.

compliance notice means a compliance notice issued under Division 2 of Part 2.

conditions of employment has the same meaning as it has in the *Industrial*

Relations Act 1996.

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

Note—

Paragraph 51 (xx) of the Commonwealth Constitution confers power on the Commonwealth Parliament to make laws with respect to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.

contravene includes fail to comply with.

dismissal, in relation to an employee, has the same meaning as it has in Part 6 of Chapter 2 of the *Industrial Relations Act 1996*.

employ means employ an employee within the meaning of the *Industrial Relations Act 1996*.

employer has the same meaning as it has in the *Industrial Relations Act 1996*.

exercise a function includes perform a duty.

function includes a power, authority or duty.

industrial court means—

- (a) the Industrial Court of New South Wales, or
- (b) if (but only if) the no net detriment principles have been set and published under section 5—the Local Court constituted specially for the purposes of this Act by an Industrial Magistrate sitting alone.

industrial organisation has the same meaning as it has in the *Industrial Relations Act 1996*.

Industrial Registrar has the same meaning as it has in the *Industrial Relations Act 1996*.

industrial relations legislation has the same meaning as it has in the *Industrial Relations Act 1996*.

inspector means an inspector appointed for the purposes of the *Industrial Relations Act 1996*.

introduction day means the day on which the Bill for this Act was first introduced into Parliament.

minimum conditions of employment for a child—see section 4 (3).

modification includes addition, exception, omission or substitution.

no net detriment principles—see section 5.

premises has the same meaning as it has in the [Industrial Relations Act 1996](#).

State award has the same meaning as it has in section 28A of the [Industrial Relations Act 1996](#).

State industrial instrument means an industrial instrument within the meaning of the [Industrial Relations Act 1996](#).

Note—

The [Interpretation Act 1987](#) contains definitions and other provisions that affect the interpretation and application of this Act.

(2) Notes included in this Act do not form part of this Act.

Part 2 Minimum conditions of employment for children

Division 1 Conditions of employment

4 Employer to ensure at least minimum conditions provided

- (1) This section applies to the employment of a child by an employer if—
- (a) the child is employed under an agreement or other arrangement entered into on or after 27 March 2006, and
 - (b) the employer of the child is a constitutional corporation that is not bound by a State industrial instrument with respect to the employment of the child, and
 - (c) a State award is in force that covers employees performing similar work to that performed by the child (a **comparable State award**) and that award does not bind the employer in respect of the employment of the child.
- (2) An employer of a child to whose employment this section applies (an **affected employer**) must ensure that—
- (a) the child is provided with the same conditions of employment as the minimum conditions of employment for the child, or
 - (b) if the conditions of employment provided to the child are different to the minimum conditions of employment for the child—the conditions of employment provided to the child do not, on balance, result in a net detriment to the child when compared to the minimum conditions of employment.

Note—

A contravention of this section by an affected employer of a child may expose the employer to a civil penalty under section 15.

- (3) The ***minimum conditions of employment*** for a child are—
- (a) the conditions of employment for employees performing similar work to that performed by the child for which provision is made from time to time in the comparable State award, and
 - (b) such other conditions of employment for which the industrial relations legislation makes provision that would have applied to the employment of the child if the employer of the child were bound by the comparable State award.
- (4) In determining whether or not an affected employer of a child has provided the child with conditions of employment that, on balance, result in a net detriment to the child when compared to the minimum conditions of employment for the child, an industrial court is to take into account the following matters—
- (a) the no net detriment principles set by the Commission from time to time,
 - (b) any other matter that the court considers relevant.
- (5) For the avoidance of doubt, nothing in this section requires an affected employer of a child to provide a condition of employment to the child if the employer is already required to provide the same condition by or under another law of the State.

5 Full Bench of Commission to set no net detriment principles

- (1) A Full Bench of the Commission is required to set principles (the ***no net detriment principles***) to be followed by an industrial court in determining whether or not an affected employer of a child has provided the child with conditions of employment that, on balance, result in a net detriment to the child when compared to the minimum conditions of employment for the child.
- (2) In determining those principles, the Full Bench of the Commission is to have regard, in particular, to the following—
- (a) evidence about the kinds of occupations and industries in which children are employed,
 - (b) the State awards that apply to those occupations and industries,
 - (c) any industrial relations legislation that may apply generally to the employment of children,
 - (d) any provisions of any such State awards or industrial relations legislation that operate to provide conditions of employment that are particularly important for ensuring the well-being of children who are employed,
 - (e) the provision of any other laws of the State that may be relevant to the employment of children or to their well-being while employed (for example, laws

dealing with occupational safety, education or child protection).

- (3) Without limiting subsection (1) or (2), the Full Bench of the Commission may determine that a particular condition or conditions of employment of the kind referred to in subsection (2) (d) is or are of such importance for ensuring the well-being of children who are employed that a failure to provide that condition or those conditions will of itself result in a net detriment to the child when compared to the minimum conditions of employment for the child.
- (4) A Full Bench of the Commission is to review the no net detriment principles at least once every 3 years.
- (5) The no net detriment principles may be set or reviewed on the application of the Minister or on the Commission's own initiative.
- (6) 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 no net detriment principles.
- (7) The Industrial Registrar is to publish the no net detriment principles—
 - (a) if Part 11 (NSW industrial relations website) of Chapter 4 (as inserted by the *Industrial Relations Further Amendment Act 2006*) has not commenced—in the Industrial Gazette, or
 - (b) if that Part has commenced—on the NSW industrial relations website.
- (8) The initial no net detriment principles are to be set and published under this section within 6 months after the commencement of this section.

6 Exhibition of comparable State awards in workplace

An affected employer of any child must cause a copy of the comparable State award (or the latest official reprint of the award) that is applicable for the purposes of section 4 to the employment of the child at any premises to be exhibited in a conspicuous place at those premises.

Maximum penalty—10 penalty units.

Note—

Part 6 of Chapter 7 of the *Industrial Relations Act 1996* (as applied to and for the purposes of this Part by section 16) makes provision with respect to the bringing of criminal and other legal proceedings.

7 Record-keeping requirements

- (1) For each child for whom an employer is an affected employer, the employer is to ensure that records are kept of the following matters—
 - (a) the name of the employer,

- (b) the ACN (if any) and ABN of the employer,
- (c) the name of the child,
- (d) the date of birth of the child as provided to the employer,
- (e) the date on which the child's employment began,
- (f) whether the child's employment is full-time or part-time,
- (g) whether the child's employment is permanent, temporary or casual,
- (h) any remuneration paid to the child,
- (i) the days on which the child works for the employer (including the starting and finishing times and the total number of hours worked on each day),
- (j) if the child's employment is terminated—the date on which the child's employment is terminated,
- (k) such other matters concerning the employment of the child as may be prescribed by the regulations.

(2) The records are to be kept in the manner and form prescribed by the regulations.

(3) The employer must ensure that the records are kept for a period of at least 6 years.

(4) 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.

(5) A person who contravenes this section or the regulations under this section is guilty of an offence.

Maximum penalty—20 penalty units.

Note—

The following provisions of the *Industrial Relations Act 1996* (as applied to and for the purposes of this Part by section 16) should be noted—

- (a) Section 385 (as applied) enables an inspector to require an employer to produce records required to be kept under this section to the inspector for examination.
- (b) Section 387 (as applied) makes it an offence to fail, without reasonable excuse, to comply with a requirement of an inspector.
- (c) Part 6 of Chapter 7 (as applied) makes provision with respect to the bringing of criminal and other legal

proceedings.

Division 2 Compliance notices

8 Issue of compliance notices

- (1) If an inspector is of the opinion that an affected employer of a child—
 - (a) is contravening section 4, or
 - (b) has contravened section 4 in circumstances that make it likely that the contravention will continue or be repeated,the inspector may issue to the employer a notice (in the form, if any, prescribed by the regulations) requiring the employer to remedy the contravention or the matters occasioning it within the period specified in the notice.
- (2) The period within which an affected employer of a child is required by a compliance notice to remedy a contravention or the matters occasioning the contravention must be at least a period of 14 days after the issue of the notice.
- (3) However, an inspector may specify a period that is less than 14 days after the issue of the compliance notice if satisfied that it is reasonably practicable for the employer to comply with the requirements imposed by the notice by the end of that period.
- (4) A compliance notice must—
 - (a) state that the inspector is of the opinion referred to in subsection (1), and
 - (b) state the reasons for that opinion, and
 - (c) include information about appeal rights under this Division against the notice.

9 Compliance notices may include directions

- (1) An inspector may include in a compliance notice directions as to the measures to be taken to remedy any contravention or matter to which the notice relates or to otherwise comply with the notice.
- (2) Without limiting subsection (1), any such direction may offer the person to whom it is issued a choice of ways in which to remedy the contravention or matter or to comply with the notice.

10 Withdrawal of compliance notices

- (1) A compliance notice may be withdrawn at any time by the inspector who issued the notice (or by another inspector authorised to do so, whether in the particular case or generally for the purposes of this section, by the Director-General of the Department of Commerce) if the inspector is satisfied that the notice was issued in error or is

incorrect in some respect.

- (2) The withdrawal has effect when notice of the withdrawal is given to the person to whom the notice was issued.

11 Offence: refusal or failure to comply with compliance notice

An affected employer who, without reasonable excuse, refuses or fails to comply with a requirement imposed by a compliance notice issued to the employer is guilty of an offence.

Maximum penalty—100 penalty units.

Note—

Part 6 of Chapter 7 of the *Industrial Relations Act 1996* (as applied to and for the purposes of this Part by section 16) makes provision with respect to the bringing of criminal and other legal proceedings.

12 Appeal to Industrial Court

- (1) A person to whom a compliance notice is issued may appeal against the notice to the Industrial Court of New South Wales.
- (2) An appeal to the Industrial Court under this section does not operate to stay the notice the subject of the appeal except as otherwise ordered by the Court.
- (3) The Industrial Court may, on the appeal, confirm the notice, vary it or revoke it.
- (4) If the Industrial Court confirms a compliance notice, the Court may also in the same proceedings determine any application made under section 15 for a civil penalty in respect of the contravention of section 4 to which the notice relates.
- (5) Regulations may be made for or with respect to appeals under this section, including the time and manner in which such an appeal is to be made.
- (6) Without limiting subsection (5), the regulations may apply (whether with or without modification) provisions of the *Industrial Relations Act 1996* and the regulations under that Act for or with respect to appeals under this section.

13 Revocation or withdrawal of compliance notice does not prevent issue of another notice

The revocation or withdrawal of a compliance notice does not prevent the issue of another compliance notice.

14 Proceedings for offences or civil penalties not affected by compliance notices

The issue, variation, revocation or withdrawal of a compliance notice does not affect any proceedings for an offence against this Act or for the recovery of a civil penalty in connection with any matter in respect of which the notice was issued.

Division 3 Civil penalty

15 Civil penalty for contravention of section 4

(1) If an industrial court is satisfied that an affected employer of a child has contravened section 4, it may order the employer to pay a pecuniary penalty not exceeding \$10,000 (**a civil penalty**).

(2) Proceedings for a civil penalty may be instituted by an inspector.

Note—

A civil penalty may also be sought in proceedings on an appeal under section 12. See section 12 (4).

(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 of Chapter 7 of the *Industrial Relations Act 1996* (as applied to and for the purposes of this Part by section 16) is not admissible in proceedings for a civil penalty.

(6) In determining the amount of the pecuniary penalty that an affected employer of a child should be ordered to pay, the industrial court may take into account any of the following matters—

(a) whether or not the employer has made a reasonable effort to provide the child with the minimum conditions of employment for the child,

(b) whether or not the child understood and consented to the provision of the conditions of employment that the employer has actually provided to the child,

(c) any other matter that the court considers relevant.

(7) 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.

(8) The following provisions apply to contraventions of section 4 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 the *Industrial Relations Act 1996*—

(a) Sections 400–403 of the *Industrial Relations Act 1996* (as applied to and for the purposes of this Part by section 16).

(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).

Division 4 Applied enforcement provisions

16 Applied provisions of *Industrial Relations Act 1996*

- (1) The following provisions of the *Industrial Relations Act 1996* and the regulations made under that Act apply to and for the purposes of this Part (***the applied enforcement provisions***)—
- (a) section 162A (Transfer of certain proceedings to Industrial Magistrates),
 - (b) section 181 (2) (d),
 - (c) section 197 (Appeals from Local Court),
 - (d) Part 1 of Chapter 7 (Breach of industrial instruments), other than sections 357 and 361,
 - (e) Part 2 of Chapter 7 (Recovery of remuneration and other amounts), other than section 380,
 - (f) Part 4 of Chapter 7 (Inspectors and their powers),
 - (g) Part 5 of Chapter 7 (Evidentiary provisions),
 - (h) Part 6 of Chapter 7 (Criminal and other legal proceedings),
 - (i) any other provision prescribed by the regulations.
- (2) Accordingly, the applied enforcement provisions have effect as if they formed part of this Act.
- (3) For the purposes of the application of the applied enforcement provisions (but without limiting subsection (6)), a reference in the applied enforcement provisions—
- (a) to this Act (that is, the *Industrial Relations Act 1996*) is to be read as a reference to this Part, and
 - (b) to the regulations is to be read as including a reference to the regulations under this Act made for the purposes of this Part, and
 - (c) to the industrial relations legislation is to be read as including a reference to this Part, and
 - (d) to an industrial court is to be read as a reference to an industrial court within the meaning of this Act, and
 - (e) to employment is to be read as a reference to employment of a child to which

section 4 of this Act applies, and

- (f) to an employer is to be read as a reference to an affected employer of a child, and
- (g) to employees is to be read as a reference to children to whose employment section 4 of this Act applies, and
- (h) to a civil penalty is to be read as a reference to a civil penalty imposed under section 15 of this Act, and
- (i) to the recovery of money under Part 2 of Chapter 7 is to be read as a reference to the recovery of money under Part 2 of that Chapter (as applied to and for the purposes of this Part by this section), and
- (j) to an industrial instrument is to be read as including a reference to section 4 to the extent that it requires an employer of a child to provide the minimum conditions of employment for the child or conditions of employment that do not, on balance, result in a net detriment to the child when compared with the minimum conditions of employment for the child,

as the case requires.

- (4) Without limiting subsections (3) and (6), a reference in Part 2 of Chapter 7 (Recovery of remuneration and other amounts) of the *Industrial Relations Act 1996* (as applied to and for the purposes of this Part by this section) to an amount payable under an industrial instrument is to be read as a reference to an amount payable to a child under the minimum conditions of employment for the child in circumstances where the employer has contravened section 4.
- (5) Section 153 (1) of the *Industrial Relations Act 1996* applies to proceedings under Part 1 or Part 2 of Chapter 7 of that Act (as applied to and for the purposes of this Part by this section) in the same way as it applies to proceedings under those Parts apart from this section.
- (6) The applied enforcement provisions have effect subject to such modifications as are prescribed by this Part or the regulations.
- (7) Nothing in this section authorises the Industrial Court of New South Wales to transfer any proceedings under this Act to a Local Court constituted by an Industrial Magistrate sitting alone unless the no net detriment principles have been set and published under section 5.
- (8) Unless the regulations provide otherwise, nothing in this section prevents the application of provisions of the *Industrial Relations Act 1996* that would be applicable to a matter arising under this Part (including the exercise of a function conferred or imposed on the Commission by or under this Part) apart from this section.

Note—

For example, nothing in this section limits the application of the provisions of the *Industrial Relations Act 1996* dealing with the constitution of the Commission, its practice and procedure and appeals from its decisions.

Part 3 Unfair dismissal of children by constitutional corporations

17 Unfair dismissal of children employed by constitutional corporations

- (1) This section applies to any dismissal by a constitutional corporation, on or after the introduction day, of a child from employment by the corporation.
- (2) The following provisions of the *Industrial Relations Act 1996* and the regulations made under that Act apply to and for the purposes of any dismissal of a child from employment to which this section applies (***the applied unfair dismissal provisions***)—
 - (a) Part 6 (Unfair dismissals) of Chapter 2, other than section 83 (1A),
 - (b) section 181 (2) (c) and (c1),
 - (c) any other provision prescribed by the regulations.
- (3) Accordingly, the applied unfair dismissal provisions have effect as if they formed part of this Act.
- (4) For the purposes of the application of the applied unfair dismissal provisions (but without limiting subsection (6)), a reference in the applied unfair dismissal provisions—
 - (a) to employment is to be read as a reference to employment of a child by a constitutional corporation, and
 - (b) to an employer is to be read as a reference to an employer that is a constitutional corporation, and
 - (c) to employees is to be read as a reference to children who are employed by a constitutional corporation, and
 - (d) to proceedings under Part 6 of Chapter 2 is to be read as a reference to proceedings under Part 2 of that Chapter (as applied by this section to and for the purposes of any dismissal of a child from employment to which this section applies), and
 - (e) to an industrial instrument is to be read as a reference to a State industrial instrument,as the case requires.
- (5) Section 153 (1) of the *Industrial Relations Act 1996* applies to proceedings under Part

6 of Chapter 2 of that Act (as applied by this section to and for the purposes of any dismissal of a child from employment to which this section applies) in the same way as it applies to proceedings under that Part apart from this section.

- (6) The applied unfair dismissal provisions have effect subject to such modifications as are prescribed by this Part or the regulations.
- (7) Unless the regulations provide otherwise, nothing in this section prevents the application of provisions of the *Industrial Relations Act 1996* that would be applicable to a matter arising under this Part (including the exercise of a function conferred or imposed on the Commission by or under this Part) apart from this section.

Note—

For example, nothing in this section limits the application of the provisions of the *Industrial Relations Act 1996* dealing with the constitution of the Commission, its practice and procedure and appeals from its decisions.

Part 4 Miscellaneous

18 Act to bind Crown

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.

19 Relationship with other legislation

The provisions of this Act are in addition to, and do not derogate from, the provisions of the following legislation with respect to the employment of children to the extent that the provisions of such legislation would apply to such employment apart from this Act—

- (a) the industrial relations legislation,
- (b) the *Industrial Relations (Ethical Clothing Trades) Act 2001*,
- (c) the *Children's Guardian Act 2019*,
- (d) the *Apprenticeship and Traineeship Act 2001*,
- (e) a statutory rule made under an Act referred to in paragraph (b), (c) or (d),
- (f) any other Act or statutory rule prescribed by the regulations.

20 Giving of notices and other documents

- (1) For the purposes of this Act, a notice or other document may be given to a person (or a notice or other document may be served on a person)—
 - (a) in the case of a natural person—
 - (i) by delivering it to the person personally, or

- (ii) by sending it by post to the address specified by the person for the giving or service of documents or, if no such address is specified, the residential or business address of the person last known to the person giving or serving the document, or
 - (iii) by sending it by facsimile transmission to the facsimile number of the person, or
- (b) in the case of a body corporate—
- (i) by leaving it with a person apparently of or above the age of 16 years at, or by sending it by post to, the head office, a registered office or a principal office of the body corporate or to an address specified by the body corporate for the giving or service of documents, or
 - (ii) by sending it by facsimile transmission to the facsimile number of the body corporate.
- (2) Nothing in this section affects the operation of any provision of a law or of the rules of a court authorising a document to be served on a person in any other manner.

21 Regulations

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.

22 Savings, transitional and other provisions

Schedule 1 has effect.

23 (Repealed)

24 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 on 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 Savings, transitional and other provisions

(Section 22)

Part 1 General

1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts—
 - this Act
- (2) Any such provision may, if the regulations so provide, take effect from—
 - (a) the introduction day (in the case of this Act), or
 - (b) the date of assent to the Act concerned (in the case of any other Act),or a later date.
- (3) To the extent to which any such 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.