First print

New South Wales

Industrial Relations Amendment Bill 2000

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to make a number of miscellaneous amendments to the *Industrial Relations Act 1996*, including the following:

(a) to empower the Industrial Relations Commission to declare any class of persons (working as contractors but not under a contract of employment) to be employees for the purposes of the *Industrial Relations Act 1996* if it considers they would be more appropriately regarded as employees,

(b) to enable the parties to a project award or an award relating to a single employer (or to two or more associated employers) to agree to the award commencing retrospectively from any earlier date than the date of the commencement of proceedings for (or that give rise to) the award,

(c) to clarify the application of the "no net detriment" test in relation to the approval of enterprise agreements that apply to employees to whom a Federal award applies or to employees to whom no award (State or Federal) applies,

(d) to dispense with the requirement that the minimum term for which an enterprise agreement can be made to apply is 12 months,

(e) to extend to casual employees who work on a regular and systematic basis the entitlement to 12 months' unpaid maternity, paternity or adoption leave,

(f) to enable some employees covered by a Federal award to bring unfair dismissal claims before the Industrial Relations Commission of New South Wales,

(g) to extend the period of 6 months during which an injured worker cannot be dismissed because he or she is unfit for work to any longer period of accident pay to which the injured employee is entitled under an industrial instrument,

(h) to enable an employee, for whom the employer is required to make superannuation contributions to a fund designated by an industrial instrument, to revoke any nomination of the employee under section 124 of a different fund to which the contributions are to be paid,

(i) to dispense with the requirement that an employer must obtain the permission of the Industrial Registrar to keep employee records at a place other than the workplace,

(j) to confer a right of appeal to the Full Bench of the Commission against a decision of an Industrial Magistrate to dismiss proceedings for a civil penalty for a breach of an industrial instrument in addition to the existing right of appeal against a decision to impose such a penalty,

(k) to provide that in proceedings to enforce rights against victimisation there is to be a rebuttable presumption that any detrimental action taken against an employee was victimisation,

(l) to reduce the notice required to be given by an authorised industrial officer who wishes to enter premises to investigate industrial law breaches from 48 hours to 24 hours, but to allow a further period of 24 hours for a person to produce any records not kept on the premises,

(m) to provide that a non-judicial member of the Commission may only be removed from office in the same way as a judicial member, that is, by the Governor on the address of both Houses of Parliament.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision giving effect to the amendments to the *Industrial Relations Act 1996* set out in Schedule 1.

Schedule 1 contains the amendments mentioned above. The amendments are explained in detail in the explanatory note relating to the amendment concerned set out in the Schedule.

First print

New South Wales

Industrial Relations Amendment Bill 2000

Contents

New South Wales

Industrial Relations Amendment Bill 2000

No , 2000

A Bill for

An Act to amend the *Industrial Relations Act 1996* to make further provision with respect to industrial relations.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Industrial Relations Amendment Act 2000*.

2 Commencement

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

3 Amendment of Industrial Relations Act 1996 No 17

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

Schedule 1 Amendments

(Section 3)

[1] Section 5 Definition of employee

Insert after section 5 (3):

(3A) **Declared employees**
The persons declared to be employees by an order of the Commission under Part 9A of Chapter 2 that is in force are taken to be employees for the purposes of this Act. The employer of such an employee is the person taken to be the employer under that Part.

Explanatory note
This amendment is consequential on the proposed insertion of Part 9A into Chapter 2 of the Principal Act.

[2] Section 15 Commencement of award

Insert after section 15 (3):

(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.

Explanatory note
Section 15 of the Principal Act, which provides for the commencement of awards, specifies that an award, though it can be expressed to apply retrospectively, cannot commence earlier than the commencement of proceedings for (or that give rise to) the award. The section is amended so as to provide that a project award or an award relating to one or more associated employers may, with the consent of the parties to the making of the award, commence retrospectively from any earlier date selected by the parties to it.

[3] Section 28A

Insert before section 29:

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.

Explanatory note

This amendment is consequential on the proposed amendment of section 35 (1) by item [5] with respect to the applicable test for the approval of enterprise agreements.

[4] Section 31 Parties to an enterprise agreement

Insert "Section 36 (5A) provides that an industrial organisation can become a party to the agreement." after "secret ballot." in the note to section 31 (2).

Explanatory note

The amendment is consequential on the amendment made by item [8] to insert section 36 (5A).

[5] Section 35 Approval of enterprise agreement by Commission

Omit section 35 (1) (b). Insert instead:

(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

Explanatory note

Sections 32–37 of the Principal Act (the NSW Act) provide for the approval by the Industrial Relations Commission of enterprise agreements before they have effect. The Commission is required to approve each enterprise agreement lodged for approval but only if the Commission is satisfied that the criteria set out in section 35 apply. One of those criteria is the "no net detriment" test, which requires the Commission to approve an enterprise agreement only if the agreement does not, on balance, result in a net detriment to the employees who are to be covered by the agreement when compared with the aggregate package of conditions of employment under the relevant State award that would otherwise apply to the employees.

Section 152 of the *Workplace Relations Act 1996* of the Commonwealth (the Federal Act) provides that Federal award coverage does not prevent the making of State enterprise agreements that prevail over Federal awards, provided that certain conditions are satisfied in relation to the making of the State agreements. One of those conditions (set out in section 152 (5) (a) of the Federal Act) is that the State industrial authority that approves the enterprise agreement must be satisfied that the employees covered by the agreement are not disadvantaged in comparison to their entitlements under the relevant Federal award. Under the current wording of the "no net detriment" test, the criteria considered by the Industrial Relations Commission of New South Wales, and the comparisons required to be made, are not expressed in the same terms as those required by the Federal Act, so that enterprise agreements approved under the NSW Act might not prevail over Federal awards in the manner anticipated by the Federal Act.

The application of the "no net detriment" test to employees to whom no award applies is also unclear. The current test requires a comparison to be made between the conditions of employment under the enterprise agreement and those under "relevant awards that would otherwise apply to the employees". In the case of non-award employees there are no awards against which to make the comparison.

The amendment to section 35 (1) of the Principal Act restates the "no net detriment" test so as to accommodate the test under the Federal Act and to provide for an appropriate comparison in the case of employees not covered by any award (State or Federal), namely an award the Commission determines covers employees performing similar work. The application of the "no net detriment" test to State award employees remains unchanged.

[6] Section 35 (4)

Omit the subsection.

[7] Section 36 Special requirements relating to enterprise agreements to which employees are parties

Omit "awards" wherever occurring in section 36 (2) (b) and (5).

Insert instead "State or Federal awards".

Explanatory note (items [6] and [7])

The amendments are consequential on the proposed amendment of section 35 (1) by item [5] with respect to the applicable test for the approval of enterprise agreements.

[8] Section 36 (5A)

Insert after section 36 (5):

(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.

Explanatory note

At present section 31 of the Principal Act provides that an enterprise agreement may be made between an employer and any industrial organisations representing the employees or between an employer and the employees. All enterprise agreements are required to be approved by the Commission before they have effect. The amendment enables an industrial organisation that represents any of the employees who have made an enterprise agreement directly with an employer to become a party to the agreement at any time before its approval by the Commission if at least one of those employees has requested the industrial organisation to become a party to the agreement. As a result, section 40 of the Principal Act provides that the agreement will bind the industrial organisation and section 44 of the Principal Act provides that the industrial organisation may terminate the agreement after the end of its nominal term or join the other parties to terminate the agreement during its nominal term.

[9] Section 36 (6)

Omit the subsection.

Explanatory note

The amendment is consequential on the proposed amendment of section 35 (1) by item [5] with respect to the applicable test for the approval of enterprise agreements.

[10] Section 36A

Insert after section 36:

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).

Explanatory note

The amendment is consequential on the proposed amendment of section 35 (1) by item [5] with respect to the applicable test for the approval of enterprise agreements. It enables the prospective parties to an enterprise agreement for employees not covered by an award to obtain a determination of the Industrial Registrar on a relevant State or Federal award against which the enterprise agreement can be compared for the purposes of the application of the "no net detriment" test.

[11] Section 41 Enterprise agreements prevail over State awards

Omit "award" wherever occurring in section 41 (1).

Insert instead "State award".

[12] Section 41 (3)

Omit the subsection.

[13] Section 41, note

Insert at the end of section 41:

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.

Explanatory note (items [11]–[13])

These amendments are consequential on the proposed amendment of section 35 (1) by item [5] with respect to the applicable test for the approval of enterprise agreements.

[14] Section 42 Term of enterprise agreement

Omit "less than 12 months nor" from section 42 (2).

Explanatory note

Section 42 of the Principal Act currently provides that, in general, the minimum term for which an enterprise agreement can be made to apply is 12 months. The section is amended to dispense with this requirement.

[15] Section 53

Omit the section. Insert instead:

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.

Explanatory note

At present the Principal Act provides a period of 12 months' unpaid maternity, paternity or adoption leave (called parental leave) for all employees other than casual or seasonal employees. The amendment extends that entitlement to 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.

[16] Section 57 Length of service for eligibility

Insert after section 57 (2):

(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 24 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).

Explanatory note

At present the Principal Act provides that a full-time or part-time employee is only entitled to parental leave if the employee has had at least 12 months of continuous service with an employer. The amendment provides that a regular casual employee requires 24 months of continuous service before being entitled to parental leave.

[17] Section 66 Return to work after parental leave

Omit section 66 (1) (b). Insert instead:

(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

Explanatory note

At present the Principal Act provides that a woman who worked part-time because of pregnancy before proceeding on maternity leave is entitled to be employed in her original full-time position on return from maternity leave. The amendment extends that right to a woman who transferred to casual work before proceeding on maternity leave.

[18] Section 66 (5)

Insert after section 66 (4):

(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.

Explanatory note

At present the Principal Act provides that an employer must make available to an employee returning from parental leave the position in which the employee was employed before proceeding on leave or, if that position no longer exists, a comparable position. The amendment provides that, in the case of casual employees, employment in a position is to be construed as work for the employer on a regular and systematic basis.

[19] Section 83 Application of Part

Omit section 83 (1A). Insert instead:

(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 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.

Explanatory note

Part 6 of Chapter 2 of the Principal Act (the NSW Act) sets out a procedure for dismissed employees who claim that their dismissal is harsh, unjust or unreasonable to seek certain remedies in the Industrial Relations Commission of New South Wales. Sections 170CE–170CJ of the Federal Act make provision for applications to be made to the Australian Industrial Relations Commission for relief in respect of termination of employment on the ground that the termination was harsh, unjust or unreasonable. The provisions of the Federal Act apply to Commonwealth and Territory public servants, employees who are covered by Federal awards or agreements and are employed by constitutional corporations, and certain other employees.

In 1997, the Full Bench of the Industrial Relations Commission of New South Wales found that employees to whom Federal awards applied were not covered by the unfair dismissal provisions of the NSW Act: see *Moore v Newcastle City Council* (1997) 77 IR 210.

After that decision, section 83 (1A) and section 90A were inserted in the NSW Act. Section 83 (1A) provides that Part 6 of the NSW Act applies to the termination of employment of a Federal award employee (as defined in the Federal Act) to the extent provided by section 90A of the NSW Act. That section purports to enable the Australian Industrial Relations Commission, and the Federal Court of Australia, to exercise functions relating to the dismissal of employees who are covered by Federal awards or agreements but who are not employed by corporations. The High Court has since held that such a conferral of State jurisdiction on Federal courts was invalid: see *Re Wakim, Ex parte McNally* [1999] HCA 27.

The amendment to section 83 enables those employees to whom Federal awards apply to bring unfair dismissal claims before the Industrial Relations Commission of New South Wales under the NSW Act, but only if they are unable to apply to the Australian Industrial Relations Commission for relief under the Federal Act in respect of the termination of their employment on the ground that the termination was harsh, unjust or unreasonable.

[20] Section 83 (5)

Omit the definitions of ***Federal Act*** and ***Federal award employee***.

Insert instead:

> ***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.

Explanatory note

The amendment is consequential on the proposed amendment of section 83 by item [19] with respect to the termination of employment of persons employed under Federal awards.

[21] Sections 90A and 90B

Omit the sections.

Explanatory note

The amendment omits redundant provisions of the Principal Act consequent on the amendments made by item [19] with respect to the termination of employment of persons employed under Federal awards.

[22] Section 99 Dismissal within 6 months of injury an offence

Omit section 99 (1) (b). Insert instead:

(b) the employee is dismissed during the relevant period after the employee first became unfit for employment.

[23] Section 99 (1A)

Insert after section 99 (1):

(1A) For the purposes of subsection (1), the ***relevant period*** is:

(a) the period of 6 months after the employee first became unfit for employment, except as provided by paragraph (b), or

(b) if the employee is entitled under a Commonwealth or State industrial instrument to accident pay as a result of the injury for a period exceeding that period of 6 months—the period during which the employee is entitled to accident pay.

Accident pay is an entitlement of the employee to payment by the employer, while the employee is unfit for employment, that is described as accident pay in the relevant industrial instrument.

Explanatory note (items [22] and [23])

At present the Principal Act provides that, if an employee who is injured at work (in circumstances giving rise to an entitlement to workers compensation), the employer is guilty of an offence if the employer dismisses the injured employee, because he or she is unfit for work as a result of the injury, at any time within 6 months after the employee first became unfit for work. The amendments extend that period of 6 months to any longer period of accident pay to which the injured employee is entitled under an industrial instrument.

[24] Chapter 2, Part 9, Division 3 Determination of remuneration of contractors under unfair building and certain other contracts

Omit the Division.

[25] Chapter 2, Part 9

Omit "Division" from Division 2 wherever occurring . Insert instead "Part".

Omit the headings to Divisions 1 and 2.

Explanatory note (items [24] and [25])

These amendments are consequential on the proposed insertion of Part 9A into Chapter 2 of the Principal Act. The existing provisions enable the Commission to determine rates of remuneration payable to contractors engaged in building and certain other door-to-door work if it first declares that the contract concerned is unfair. Under Part 9A, rates of remuneration will be able to be set if the Commission declares that the contractors concerned should be treated as employees.

[26] Chapter 2, Part 9A

Insert after Part 9 of Chapter 2:

Part 9A Declared employees

116A Definition

In this Part:

contract means any contract or arrangement, or any related condition or collateral arrangement, but does not include a Commonwealth or State industrial instrument.

116B Commission may declare independent contractors to be employees

(1) A Full Bench of the Commission may make an order declaring a class of persons who perform work in an industry under contracts for services (***independent contractors***) to be employees for the purposes of this Act.

(2) The Full Bench may make the order only if it considers the class of independent contractors concerned would be more appropriately regarded as employees.

(3) In determining whether to make an order, the Full Bench may take into account any or all of the following:

(a) the relative bargaining power of the class of independent contractors concerned,

(b) the economic dependency of the class of independent contractors concerned on their contracts for services,

(c) the particular circumstances and needs of the class of independent contractors concerned, including low-paid persons, women, persons from a non-English speaking background, young persons and outworkers,

(d) whether the contracts for services are designed to, or do, avoid the provisions of an industrial instrument,

(e) the consequences of not making an order for the class of independent contractors concerned.

(4) If the Full Bench makes the order, the employer of the independent contractors declared to be employees is:

(a) the person specified in the order as the person who is to be treated as the employer of those independent contractors, or

(b) if no such person is specified in the order—the person with whom the independent contractors contract to provide services.

116C Persons not eligible to be declared to be employees

The following persons are not eligible to be declared to be employees under this Part:

(a) a person described in Schedule 1 (Persons deemed to be employees),

(b) a bailee under a contract of bailment, or a carrier under a contract of carriage, to which Chapter 6 applies.

116D Who may apply for order

(1) An order may be made under this Part on the application of:

(a) the Minister, or

(b) a State peak council, or

(c) an industrial organisation,

and not otherwise.

(2) Anyone who can apply for an order under this Part, or who will be directly affected by the making of the order, may become a party to proceedings for the making of an order.

116E Assessment of costs and benefits of making order

(1) An applicant for an order under this Part is required to furnish to the Full Bench of the Commission a statement of the costs and benefits of the making of the order sought. Any other party to the proceedings may also furnish such a statement.

(2) The statement is to assess the likely costs and benefits of the proposed order for:

(a) the class of independent contractors who are to be declared to be employees, and

(b) the persons who will be treated as the employers of those independent contractors, and

(c) the industry in which those independent contractors work.

The statement is to contain details of any relevant matter that the Full Bench is authorised to consider under section 116B (3).

(3) The statement is to address economic and social costs and benefits and set out any net public benefit of making the order.

(4) The Full Bench is required to take the statement into account when deciding whether or not to make the order sought.

(5) The regulations may make further provision for or with respect to the furnishing or content of a statement under this section.

116F Publication and taking effect of order

(1) An order under this Part takes effect on the date on which a copy of the order is published in the Industrial Gazette by the Industrial Registrar or, if the order so provides, on a later day specified in the order.

(2) An order under this Part applies to work performed, and other acts or omissions, in connection with a contract after the order takes effect, even if the contract was made before the order takes effect. This subsection is subject to subsection (3).

(3) An order under this Part may provide that it applies only to contracts made after the order takes effect.

Note. See section 406 (2) which provides that any provision of a contract does not have effect if it provides an employee with a benefit that is less favourable to the employee than the benefit provided by an industrial instrument.

116G Review and variation or revocation of orders

(1) A Full Bench of the Commission may review an order in force under this Part and may confirm, vary or revoke the order.

(2) The Full Bench may review an order on its own initiative or on the application of anyone who was or could have become a party to the making of the order. Anyone who can apply for a review may become a party to proceedings on the review.

(3) The Full Bench is to determine whether the independent contractors declared to be employees by an order under review continue to be more appropriately regarded as employees.

(4) The Full Bench may, in accordance with this section, periodically review orders in force under this Part.

(5) The revocation of an order does not prevent the making of a subsequent order in respect of the same or a similar class of independent contractors.

116H Exemption from orders

(1) The Commission may, on application, exempt a person or class of persons from being declared to be an employee or employees by an order in force under this Part if it is satisfied that it is not contrary to the public interest.

(2) The Commission may, on application or on its own initiative, review any exemption, and may confirm, vary or revoke the exemption.

(3) An application under this section may be made by any person authorised to apply for the order or by any person who is treated as an employee or employer because of the order.

Explanatory note

At present the Principal Act defines employees in terms that exclude independent contractors who perform work under contracts for services rather than contracts of service (apart from a number of independent contractors described in Schedule 1 who are deemed to be employees). The amendment adapts a provision contained in section 275 of the *Industrial Relations Act 1999* of Queensland that enables a Full Bench of the Industrial Relations Commission to declare any class of persons who work under a contract for services to be employees for the purposes of the Principal Act.

[27] Section 124 Superannuation fund contributions

Insert after section 124 (2):

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

Explanatory note

Section 124 of the Principal Act provides that, where an industrial instrument requires an employer to make superannuation contributions to a designated fund on behalf of an employee, the employer can, at the employee's request, contribute to a fund selected by the employee. The section is amended so as to allow the employee to require the employer to re-direct the contributions back to the fund specified in the industrial instrument.

[28] Section 129 Records to be kept by employers concerning employees

Omit section 129 (2).

Explanatory note

Section 129 of the Principal Act is amended to dispense with the requirement that an employer must obtain the permission of the Industrial Registrar to keep employee records at a place other than the workplace.

[29] Section 197 Appeals from Local Court

Insert "(including a dismissal on the ground that it does not have jurisdiction to deal with the application)" after "such an order" in section 197 (1) (a).

Explanatory note

Section 197 of the Principal Act currently provides an appeal to the Industrial Relations Commission against an order of a Local Court for the payment of money owed under an industrial instrument to a person or the dismissal of an application for such an order (See Part 2 of Chapter 7).

The amendment of section 197 creates a right to appeal to the Full Bench of the Industrial Relations Commission against a decision of a Local Court that it does not have jurisdiction to hear an application for an order under Part 2 of Chapter 7. In the case of non-industrial matters dealt with by Local Courts, the Supreme Court may exercise its supervisory jurisdiction to grant relief where a Magistrate refuses to deal with a matter for lack of jurisdiction.

[30] Section 197 (1) (c)

Insert "or the dismissal by the Local Court of proceedings for such a civil penalty" after "industrial instrument".

Explanatory note

The amendment creates a right to appeal to the Full Bench of the Industrial Relations Commission against a decision of a Local Court to dismiss proceedings under Part 1 of Chapter 7 for a civil penalty for a contravention of an industrial instrument.

[31] Section 210 Freedom from victimisation

Insert at the end of the section:

(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.

Explanatory note

Section 210 of the Act declares that an employer may not victimise an employee for any of the reasons set out in that section (including membership of an industrial organisation). Section 213 enables the Commission to enforce that obligation by ordering the reinstatement of an employee who is dismissed or the taking of other action to rectify any other detrimental action taken against the employee. The amendment provides that in any such enforcement proceedings there is to be a rebuttable presumption that any detrimental action taken against an employee was victimisation within the meaning of section 210.

[32] Section 298 Right of entry for investigating breaches

Omit section 298 (3). Insert instead:

(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.

Explanatory note

Section 298 of the Principal Act, which regulates the entry by authorised industrial officers on to premises to investigate breaches of the law, currently requires that the employer be given 48 hours' notice of the intention to enter the premises. The section is amended to reduce the requisite notice to 24 hours, reflecting a similar provision in Commonwealth legislation, and to allow the employer a further period of 24 hours to produce for inspection any records or documents that are not kept at the workplace.

[33] Section 348 Compulsory conference with respect to claims

Omit section 348 (3). Insert instead:

(3) Notification must be made within 3 months after the termination of the contract.

Explanatory note

Section 348 of the Principal Act permits a carrier to claim compensation in respect of a terminated contract of carriage. The claim is initiated by notice to the Industrial Registrar. Notice must be given within 28 days, or within such further time (not exceeding 3 months) as the Industrial Registrar may allow. The section is amended to specify a 3-month period within which the notice may, as of right, be lodged.

[34] Section 375

Omit the section. Insert instead:

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).

Explanatory note

Section 375 of the Principal Act currently provides for the enforcement of monetary judgments of an Industrial Magistrate in different courts. The criterion for determining the proper court of enforcement is that it must be one whose jurisdiction enables it to give judgments in an equivalent amount. The section is amended so as to provide that all such judgments of an Industrial Magistrate may be enforced in the Local Court, irrespective of amount.

[35] Section 380 Small claims during other Commission hearings

Insert after section 380 (6):

(7) This section is not to be construed as excluding an application for an order being made in respect of a former employee.

Explanatory note

Section 380 of the Principal Act currently enables an industrial organisation to make an application for an order for the recovery of remuneration and other money due to an employee by any other party to proceedings before the Commission. The amendment removes any doubt that an application can be made in respect of a former employee.

[36] Schedule 2 Provisions relating to members of Commission

Insert after clause 10 (1):

(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.

Explanatory note

At present, the *Judicial Officers Act 1986* provides that both judicial and non-judicial members of the Industrial Relations Commission are judicial officers for the purposes of that Act (and accordingly provision is made for the suspension of those members from office, for complaints about those officers and for recommendations by the Judicial Commission for their removal from office). Part 9 of the *Constitution Act 1902* makes provision for the removal of judicial members of the Industrial Relations Commission from office by the Governor on the address of both Houses of Parliament. There is no specific provision in the Principal Act for the removal of non-judicial members of the Commission (although section 47 of the *Interpretation Act 1987* provides that a power under an Act to appoint a person includes a power to remove or suspend the person so appointed). The amendment provides that a non-judicial member of the Commission may only be removed from office in the same way as a judicial member, that is, by the Governor on the address of both Houses of Parliament.

[37] Schedule 4 Savings, transitional and other provisions

Insert at the end of clause 2 (1):

Industrial Relations Amendment Act 2000

Explanatory note

The amendment enables regulations of a savings or transitional nature to be made as a consequence of the enactment of the proposed Act.

[38] Schedule 4, clause 6

Insert after clause 6 (2):

(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.

Explanatory note

On the enactment of the Principal Act, Schedule 4 to the Act preserved enterprise agreements in force under the *Industrial Relations Act 1991*. The relevant provision is amended to provide that, if the agreement is one that could not be made today because it does not meet the principles and standards that are prerequisite to approval by the Commission, the Commission must, on application by a party to the agreement, terminate the agreement.

[39] Schedule 4, clause 13A

Insert after clause 13:

13A Parental leave for casual employees—Industrial Relations Amendment Act 2000

(1) The amendments to Part 4 of Chapter 2 made by the *Industrial Relations Amendment Act 2000* 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-months qualifying period of service referred to in section 57 (3).

Explanatory note

The amendment inserts transitional provisions with respect to the amendments made to sections 53, 57 and 66.

[40] Schedule 4, clause 17A

Insert at the end of clause 17A:

(2) Section 83 (1A) (as substituted by the *Industrial Relations Amendment Act 2000*) does not apply to a termination of employment that occurred before the commencement of that replacement subsection.

Explanatory note

The amendment makes a transitional provision consequent on the proposed amendment of section 83 by item [19] with respect to the termination of employment of persons employed under Federal awards.