



New South Wales

Industrial Relations Amendment (Industrial Agents) Bill 2002

Explanatory note

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

Overview of Bill

The object of this Bill is to amend the *Industrial Relations Act 1996*:

- (a) to prohibit certain fee agreements that provide for costs or fees, or both, to be determined as a proportion of, or to vary according to, the amount recovered in proceedings, and
- (b) to regulate the activities of industrial agents (that is, persons, other than legal practitioners or employees or officers of industrial organisations, who represent a party in proceedings before the Industrial Relations Commission for fee or other reward) by:
 - (i) prohibiting an industrial agent from representing a party in conciliation proceedings without the leave of the Commission, and
 - (ii) requiring an industrial agent to disclose his or her fee structure to a client and the Commission before or at the commencement of proceedings, and

- (iii) making payments to industrial agents an ineffective means of extinguishing the rights or liabilities of an applicant or employer arising from proceedings under Part 6 of Chapter 2, and
- (iv) requiring an industrial agent representing an applicant or an employer in proceedings under Part 6 of Chapter 2 in which compensation is sought to certify that there are reasonable grounds for believing, on the basis of provable facts, that there is a reasonable prospect of success in the proceedings.

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 Amendments

Schedule 1 contains the amendments to the *Industrial Relations Act 1996* described in the Overview of the Bill.

Industrial agents

Schedule 1 [10] amends the Dictionary to the Act to insert definitions of *industrial agent* and *industrial agent service*. An *industrial agent* means a person (other than a 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. An *industrial agent service* means any service performed by a person in the person's capacity as an industrial agent.

Schedule 1 [1] inserts sections 90A and 90B into the Act.

Proposed section 90A prevents an industrial agent from representing an applicant or employer in proceedings on a claim under Part 6 of Chapter 2 of the Act in which an order for compensation is sought unless the agent has filed a certificate with the Industrial Registrar 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 has reasonable prospects of success.

Schedule 1 [3] amends section 181 of the Act to enable the Commission to make a costs order against an industrial agent who fails to file a certificate as required by proposed section 90A or who files a certificate 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 has reasonable prospects of success when the agent does not have such grounds for believing that the claim or response has reasonable prospects of success.

Proposed section 90B makes payments to industrial agents made after the commencement of the section an ineffective means of extinguishing the rights or liabilities of an applicant or employer arising from a proceeding under Part 6 of Chapter 2 of the Act.

Schedule 1 [2] amends section 166 of the Act to prohibit an industrial agent from representing a party in any conciliation proceedings without the leave of the Commission.

Disclosure of costs and costs agreements

Schedule 1 [4] inserts section 181A into the Act.

Proposed section 181A is based on the provisions of Division 2 (Disclosure of matters relating to costs) of Part 11 of the *Legal Profession Act 1987*.

Proposed section 181A requires an industrial agent who acts for a client in proceedings before the Commission to disclose to the client and the Commission in accordance with the section the basis of the costs to be charged for any industrial agent services provided by him or her in the proceedings and specifies certain matters that must be disclosed.

If an industrial agent fails to make a disclosure to a client in accordance with the section, the client need not pay the costs of the representation and the industrial agent may not maintain proceedings for the recovery of the costs.

Proposed section 181A requires a disclosure to be made at or before the commencement of the proceedings in which the industrial agent is representing the client. It must be in writing and be in clear plain language. It may be made separately or in a costs agreement or in any other contract relating to the representation of the client in the proceedings. A disclosure is not required to be made under the section when it would not be reasonable to require it.

Provision is made for the making of regulations for or with respect to the information to be disclosed under the section and when it would not be reasonable to require a disclosure to be made under that section.

Schedule 1 [5] inserts section 406A into the Act.

Proposed section 406A is based on section 188 of the *Legal Profession Act 1987*. It prohibits a costs agreement (an agreement between a party to proceedings under the Act and an industrial agent or person other than a legal practitioner as to the costs of representing the party in the proceedings) from providing 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.

Savings, transitional and other provisions

Schedule 1 [6] inserts a savings and transitional regulation-making power into Schedule 4 to the Act.

Schedule 1 [7], [8] and [9] amend Schedule 4 to the Act to insert the savings and transitional provisions related to the amendments described above.



New South Wales

Industrial Relations Amendment (Industrial Agents) Bill 2002

Contents

	Page
1 Name of Act	2
2 Commencement	2
3 Amendment of Industrial Relations Act 1996 No 17	2
Schedule 1 Amendments	3



New South Wales

Industrial Relations Amendment (Industrial Agents) Bill 2002

No , 2002

A Bill for

An Act to amend the *Industrial Relations Act 1996* with respect to certain fee agreements and industrial agents; and for other purposes.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Industrial Relations Amendment (Industrial Agents) Act 2002</i> .	3 4
2 Commencement	5
This Act commences on a day or days to be appointed by proclamation.	6 7
3 Amendment of Industrial Relations Act 1996 No 17	8
The <i>Industrial Relations Act 1996</i> is amended as set out in Schedule 1.	9

Schedule 1 Amendments

1

(Section 3)

2

[1] Sections 90A and 90B

3

Insert after section 90:

4

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

5

6

(1) In this section:

7

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

8

9

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).

10

11

12

13

(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.

14

15

16

17

18

19

(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.

20

21

22

23

24

25

(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.

26

27

28

(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.

29

30

31

32

33

-
- | | | |
|------|---|--|
| (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. | 1
2
3
4
5 |
| (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. | 6
7
8
9 |
| (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. | 10
11
12
13
14
15
16
17 |
| (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. | 18
19
20
21
22
23
24 |
| (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: | 25
26
27
28
29
30
31
32
33 |
| (a) | the client is the client to whom the industrial agent services were provided or consents to its disclosure, or | 34
35 |
| (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. | 36
37
38 |

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 a practising legal practitioner on behalf of the applicant or employer, or
- (d) to another person in accordance with the directions of the Commission.

[2] Section 166 Representation of parties

Insert “or an agent who is an industrial agent” after “practising legal practitioner” in section 166 (2).

[3] Section 181 Costs

Insert after section 181 (2) (c):

- (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

[4] Section 181A	1
Insert after section 181:	2
181A Obligation to disclose costs to clients and Commission	3
(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.	4 5 6 7 8
(2) The following matters are to be disclosed to the client and the Commission:	9 10
(a) the amount of the costs, if known,	11
(b) if the amount of the costs is not known, the basis of calculating the costs,	12 13
(c) the billing arrangements,	14
(d) any other matter required to be disclosed by the regulations.	15 16
(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.	17 18 19
(4) A disclosure under this section must be made in writing and be expressed in clear plain language.	20 21
(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.	22 23 24
(6) A disclosure is not required to be made under this section when it would not be reasonable to require it.	25 26
(7) The regulations may make provision for or with respect to:	27
(a) the information to be disclosed under this section, and	28
(b) when it would not be reasonable to require a disclosure to be made under this section.	29 30
(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.	31 32 33 34

(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.	1 2 3 4
(10) In this section: <i>costs agreement</i> means an agreement between a party to proceedings before the Commission (<i>the client</i>) and an industrial agent as to the costs of representing the party in the proceedings.	5 6 7 8 9
[5] Section 406A	10
Insert after section 406:	11
406A Costs agreements	12
(1) In this section: <i>costs agreement</i> means an agreement between a party to proceedings under this Act (<i>the client</i>) and an industrial agent or other person (not being a legal practitioner) as to the costs of representing the party in the proceedings.	13 14 15 16 17
(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.	18 19 20 21
(3) If an industrial agent or other person (not being a legal practitioner) enters a costs agreement that contains a provision referred to in subsection (2) with a client:	22 23 24
(a) the client need not pay the costs of the representation, and	25 26
(b) the industrial agent or person may not maintain proceedings for the recovery of the costs.	27 28
[6] Schedule 4 Savings, transitional and other provisions	29
Insert at the end of clause 2 (1):	30
<i>Industrial Relations Amendment (Industrial Agents) Act 2002</i>	31

[7] Schedule 4	1
Insert after clause 17A:	2
17B Industrial agents	3
Section 90A (as inserted by the <i>Industrial Relations Amendment (Industrial Agents) Act 2002</i>) does not apply to or	4
in respect of proceedings that were commenced before the	5
commencement of that section.	6
	7
[8] Schedule 4	8
Insert before clause 22:	9
21A Representation of parties	10
Section 166 (2) (as amended by the <i>Industrial Relations Amendment (Industrial Agents) Act 2002</i>) does not apply to or	11
in respect of conciliation proceedings that were commenced	12
before the commencement of the amendment.	13
	14
[9] Schedule 4	15
Insert after clause 31:	16
31A Costs agreements	17
Sections 181A and 406A (as inserted by the <i>Industrial Relations Amendment (Industrial Agents) Act 2002</i>) do not	18
apply to or in respect of proceedings that were commenced	19
before the commencement of those sections.	20
	21

[10] Dictionary	1
Insert in alphabetical order:	2
<i>industrial agent</i> means a person (other than a legal practitioner	3
or an employee or officer of an industrial organisation) who	4
represents a party in proceedings before the Commission for	5
fee or other reward.	6
<i>industrial agent service</i> means any service performed by a	7
person in the person's capacity as an industrial agent.	8