

FIRST PRINT

INDUSTRIAL ARBITRATION (EMPLOYMENT PROTECTION) AMENDMENT BILL 1986

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The object of this Bill is to amend the Industrial Arbitration Act 1940—

- (a) to provide for the insertion of provisions in an award or industrial agreement which will set out the rights and obligations of employers and employees on the termination or proposed termination of an employee's employment; and
- (b) to preserve entitlements of an employee which accrue under an award or industrial agreement where the business in which the employee is employed is transferred from one employer to another.

The Bill also provides for the repeal of the Employment Protection Act 1982.

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides that the proposed Act will, with minor exceptions, commence on a day to be appointed by the Governor-in-Council.

Clause 3 is a formal provision that gives effect to the Schedule of amendments to the Principal Act.

Clause 4 provides for the repeal of the Employment Protection Act 1982 on a day to be appointed by the Governor-in-Council.

Clause 5 is a transitional provision which provides that the Employment Protection Act 1982—

- (a) does not apply to an employee if provisions for the protection of the employee's employment have been inserted in an award or industrial agreement covering the employee; and
- (b) continues to apply after its repeal (except where paragraph (a) applies) to a termination or proposed termination of employment which occurs before its repeal.

Schedule 1 (1) omits the provision from the Principal Act which deals with its arrangement. The provision will be replaced by a more comprehensive Table of Provisions when the Principal Act is reprinted.

Schedule 1 (2) inserts Part VIIIb (proposed sections 91s–91z) into the Principal Act:

- (a) Proposed section 91s is an interpretative provision for the purposes of Division 1 of the proposed new Part. It defines "appropriate tribunal" to mean the Industrial Commission, a conciliation committee or an apprenticeship conciliation committee.
- (b) Proposed section 91t requires the appropriate tribunal, on application, to insert in an award or industrial agreement provisions ("employment protection provisions") relating to the obligations, duties, responsibilities and rights of an employer and an employee on the termination or proposed termination of the employee's employment.
- (c) Proposed section 91u requires the appropriate tribunal, when considering the insertion of employment protection provisions, to have regard to any relevant principles established by the Industrial Commission under the Employment Protection Act 1982 or disclosed in orders made by the Commission under that Act. The provision makes it clear that the appropriate tribunal may have regard to such other matters as it thinks fit and may also develop its own principles.
- (d) Proposed section 91v is an interpretative provision for the purposes of Division 2 of the proposed new Part. An important definition is that of "transferred employee" which means an employee who becomes an employee of a new employer as a result of a transfer of business from the employee's former employer to the new employer.
- (e) Proposed section 91w provides that the provisions of the proposed Part for the protection of accrued entitlements of transferred employees apply only where the transfer of business occurs on or after the commencement of the proposed Act.
- (f) Proposed section 91x provides that a transferred employee's service with the former employer is deemed to be service with the new employer for the purpose of determining the employee's entitlements under an award or industrial agreement. The provision also deems the continuity of the employee's contract of employment not to have been broken by the transfer of business.

- (g) Proposed section 91Y makes provision for the situation where the former employer has failed to provide an entitlement in breach of an award or industrial agreement. In the case of an entitlement to money for work done, the new employer does not become liable to pay the money under the proposed provisions and the entitlement subsists against the former employer. In the case of any other entitlement, the new employer becomes liable but is entitled to be indemnified by the former employer for the cost.
 - (h) Proposed section 91Z makes it clear that the proposed new Division does not operate to entitle an employee to a benefit from different employers for the same period of service.
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INDUSTRIAL ARBITRATION (EMPLOYMENT PROTECTION) AMENDMENT BILL 1986

NEW SOUTH WALES



TABLE OF PROVISIONS

1. Short title
2. Commencement
3. Amendment of Act No. 2, 1940
4. Repeal of Act No. 122, 1982
5. Transitional

SCHEDULE 1—AMENDMENTS TO THE INDUSTRIAL ARBITRATION ACT 1940

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**INDUSTRIAL ARBITRATION (EMPLOYMENT
PROTECTION) AMENDMENT BILL 1986**

NEW SOUTH WALES



No. , 1986

A BILL FOR

An Act to amend the Industrial Arbitration Act 1940 to make provision for the protection of employees whose employment is terminated or transferred and for the repeal of the Employment Protection Act 1982.

Industrial Arbitration (Employment Protection) Amendment 1986

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:

5 Short title

1. This Act may be cited as the "Industrial Arbitration (Employment Protection) Amendment Act 1986".

Commencement

2. (1) Sections 1 and 2 shall commence on the date of assent to this
10 Act.

(2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor and notified by proclamation published in the Gazette.

Amendment of Act No. 2, 1940

15 3. The Industrial Arbitration Act 1940 is amended in the manner set forth in Schedule 1.

Repeal of Act No. 122, 1982

4. On a day to be appointed by the Governor and notified by proclamation published in the Gazette, the Employment Protection Act
20 1982 is repealed.

Transitional

5. (1) After the commencement of this Act, the Employment Protection Act 1982 does not apply to a termination or proposed termination of employment of an employee which occurs when provisions under section
25 91T of the Industrial Arbitration Act 1940 are in force in an award or industrial agreement applicable to the employee.

(2) After the repeal of the Employment Protection Act 1982, that Act, as in force immediately before its repeal, continues to apply to a termination or proposed termination of employment of an employee which occurs before
30 that repeal, unless that Act would not apply as a result of subsection (1).

SCHEDULE 1

(Sec. 3)

AMENDMENTS TO THE INDUSTRIAL ARBITRATION ACT 1940

(1) Section 2 (**Division into Parts**)—

5 Omit the section.

(2) Part VIII B—

After Part VIII A, insert:

PART VIII B

EMPLOYMENT PROTECTION

10 DIVISION 1—*Insertion of provisions
in awards or agreements***Interpretation**

91s. In this Division—

15 “appropriate tribunal”, in relation to an application under this
Division, means—

(a) the commission; or

20 (b) a conciliation committee or an apprenticeship
conciliation committee that has power to make an
award binding on employees to whom the application
relates.**Provisions in awards and agreements**91T. (1) On application, the appropriate tribunal shall insert
employment protection provisions in an award or industrial
agreement.25 (2) Employment protection provisions are provisions relating
to the obligations, duties, responsibilities and rights of an
employer and an employee on the termination or proposed
termination of the employment of the employee.30 (3) The provisions may be inserted in the award or industrial
agreement by way of variation or otherwise.

Industrial Arbitration (Employment Protection) Amendment 1986

SCHEDULE 1—*continued*

AMENDMENTS TO THE INDUSTRIAL ARBITRATION ACT 1940—
continued

(4) This section does not affect any power of an appropriate tribunal to refer or remit a matter or question to another appropriate tribunal for opinion, direction or determination.

5 (5) This section applies to an award or industrial agreement whether made before or after the commencement of this section.

Matters to be considered

91U. (1) In exercising its functions under this Division, the appropriate tribunal—

10 (a) shall have regard to those established principles which it considers to be relevant; and

(b) may have regard to such other matters as it thinks fit.

(2) Established principles are principles established by, or disclosed in the orders of, the commission under the Employment Protection Act 1982.

15 (3) An appropriate tribunal may establish principles for the exercise of functions under this Division.

DIVISION 2—*Protection of accrued entitlements*

Interpretation

91V. (1) In this Division—

20 “transfer of a 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;

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

*Industrial Arbitration (Employment Protection) Amendment 1986*SCHEDULE 1—*continued*AMENDMENTS TO THE INDUSTRIAL ARBITRATION ACT 1940—
continued

(2) A person shall 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—

- 5 (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 Division.

10 (3) For the purposes of the operation of this Division, the termination of employment of such a transferred employee shall be deemed not to have occurred.

Application of Division

15 91w. This Division applies to a transferred employee only where the transfer of business occurs on or after the commencement of this Division.

Continuity of service for determining entitlements

20 91x. (1) This section applies for the purpose of determining a transferred employee's entitlements under an award or industrial agreement as an employee of the new employer.

(2) For the purpose of determining those entitlements—

- (a) the continuity of the employee's contract of employment shall be deemed not to have been broken by the transfer of business; and
- 25 (b) a period of service with the former employer (including service before the commencement of this Division) shall be deemed to be a period of service with the new employer.

30 (3) Service with the former employer includes service which is deemed by this section to be service with that employer as a result of a previous transfer of the business.

Industrial Arbitration (Employment Protection) Amendment 1986

SCHEDULE 1—*continued*

AMENDMENTS TO THE INDUSTRIAL ARBITRATION ACT 1940—
continued

Entitlements where award or agreement breached

5 91Y. (1) This section applies only to an entitlement (“the avoided entitlement”) that a former employer has, in breach of an award or industrial agreement, failed to provide to a transferred employee.

(2) If the avoided entitlement is to the payment of money for work done, this Division does not operate—

(a) to create an entitlement to payment by the new employer;
or

10 (b) to relieve the former employer from liability for the payment.

15 (3) If the avoided entitlement is to anything else and the new employer is required because of this Division to provide the entitlement, the new employer is entitled to be indemnified by the former employer for the reasonable cost of providing it.

Prevention of double entitlement

91Z. This Division does not entitle a transferred employee to claim a benefit from more than one employer in respect of the same period of service.

BY AUTHORITY

D. WEST, GOVERNMENT PRINTER, NEW SOUTH WALES—1986

INDUSTRIAL ARBITRATION (EMPLOYMENT PROTECTION) AMENDMENT ACT 1986 No. 185

NEW SOUTH WALES



TABLE OF PROVISIONS

1. Short title
2. Commencement
3. Amendment of Act No. 2, 1940
4. Repeal of Act No. 122, 1982
5. Transitional

SCHEDULE 1—AMENDMENTS TO THE INDUSTRIAL ARBITRATION ACT 1940



**INDUSTRIAL ARBITRATION (EMPLOYMENT
PROTECTION) AMENDMENT ACT 1986 No. 185**

NEW SOUTH WALES



Act No. 185, 1986

An Act to amend the Industrial Arbitration Act 1940 to make provision for the protection of employees whose employment is terminated or transferred and for the repeal of the Employment Protection Act 1982. [Assented to 18 December 1986]

Industrial Arbitration (Employment Protection) Amendment 1986

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:

Short title

1. This Act may be cited as the "Industrial Arbitration (Employment Protection) Amendment Act 1986".

Commencement

2. (1) Sections 1 and 2 shall commence on the date of assent to this Act.

(2) Except as provided by subsection (1), this Act shall commence on such day as may be appointed by the Governor and notified by proclamation published in the Gazette.

Amendment of Act No. 2, 1940

3. The Industrial Arbitration Act 1940 is amended in the manner set forth in Schedule 1.

Repeal of Act No. 122, 1982

4. On a day to be appointed by the Governor and notified by proclamation published in the Gazette, the Employment Protection Act 1982 is repealed.

Transitional

5. (1) After the commencement of this Act, the Employment Protection Act 1982 does not apply to a termination or proposed termination of employment of an employee which occurs when provisions under section 91T of the Industrial Arbitration Act 1940 are in force in an award or industrial agreement applicable to the employee.

(2) After the repeal of the Employment Protection Act 1982, that Act, as in force immediately before its repeal, continues to apply to a termination or proposed termination of employment of an employee which occurs before that repeal, unless that Act would not apply as a result of subsection (1).

Industrial Arbitration (Employment Protection) Amendment 1986

SCHEDULE 1

(Sec. 3)

AMENDMENTS TO THE INDUSTRIAL ARBITRATION ACT 1940

(1) Section 2 (**Division into Parts**)—

Omit the section.

(2) Part VIII B—

After Part VIII A, insert:

PART VIII B

EMPLOYMENT PROTECTION

DIVISION 1—*Insertion of provisions
in awards or agreements***Interpretation**

91s. In this Division—

“appropriate tribunal”, in relation to an application under this Division, means—

- (a) the commission; or
- (b) a conciliation committee or an apprenticeship conciliation committee that has power to make an award binding on employees to whom the application relates.

Provisions in awards and agreements

91T. (1) On application, the appropriate tribunal shall insert employment protection provisions in an award or industrial agreement.

(2) Employment protection provisions are provisions relating to the obligations, duties, responsibilities and rights of an employer and an employee on the termination or proposed termination of the employment of the employee.

(3) The provisions may be inserted in the award or industrial agreement by way of variation or otherwise.

Industrial Arbitration (Employment Protection) Amendment 1986

SCHEDULE 1—*continued*

AMENDMENTS TO THE INDUSTRIAL ARBITRATION ACT 1940—
continued

(4) This section does not affect any power of an appropriate tribunal to refer or remit a matter or question to another appropriate tribunal for opinion, direction or determination.

(5) This section applies to an award or industrial agreement whether made before or after the commencement of this section.

Matters to be considered

91U. (1) In exercising its functions under this Division, the appropriate tribunal—

(a) shall have regard to those established principles which it considers to be relevant; and

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Interpretation

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“transfer of a 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 a business to that employer from another employer (“the former employer”).

SCHEDULE 1—*continued*AMENDMENTS TO THE INDUSTRIAL ARBITRATION ACT 1940—
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- (a) the person is employed by the new employer after the transfer of business; and
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- (b) a period of service with the former employer (including service before the commencement of this Division) shall be deemed to be a period of service with the new employer.

(3) Service with the former employer includes service which is deemed by this section to be service with that employer as a result of a previous transfer of the business.

Industrial Arbitration (Employment Protection) Amendment 1986

SCHEDULE 1—*continued*

AMENDMENTS TO THE INDUSTRIAL ARBITRATION ACT 1940—
continued

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