

FIRST PRINT

**INDUSTRIAL ARBITRATION (VOLUNTARY UNIONISM)
AMENDMENT BILL 1990 (No. 2)**

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 prevent awards or agreements made or registered under the Industrial Arbitration Act 1940 from granting preference in employment to members of industrial unions; and
- (b) to allow closed shop arrangements to be made in accordance with specified procedures so as to apply in limited circumstances; and
- (c) to enable conscientious objectors to be exempted from membership of industrial unions of employees; and
- (d) to create an offence if a person is victimised by an employer or industrial union because the person is or is not a member of an industrial union or is a conscientious objector; and
- (e) to empower the Industrial Commission of New South Wales to make various orders (such as orders for reinstatement or damages) in favour of persons who have been so victimised; and
- (f) to make other consequential provisions.

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides for the commencement of the proposed Act.

Clause 3 gives effect to the Schedule of amendments.

Clause 4 provides that, even after the repeal of section 95 of the Industrial Arbitration Act by the proposed Act, orders for the payment of wages may be made and directions for reinstatement may be given under that section in respect of a person whose dismissal constituted an offence under that section.

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SCHEDULE 1

PART 1—AMENDMENT RELATING TO VOLUNTARY UNIONISM

Part 1 of Schedule 1 inserts proposed Part 10B (consisting of proposed sections 106E–106I) relating to voluntary unionism into the Industrial Arbitration Act. Of the proposed sections:

Section 106E (No preference for unionists in awards or agreements) declares that awards or industrial agreements cannot confer preference in employment on members of industrial unions of employees. The proposed section applies to awards and agreements already made or entered into but does not affect any law granting preference in employment to former members of the armed services.

Section 106F (Post-entry closed shop arrangements) establishes the procedures by which an employer may (at the employer's discretion) make an arrangement with one or more industrial unions of employees under which the employer may restrict employment at a particular workplace or particular workplaces to members of the union or unions concerned and conscientious objectors. Such an arrangement is required to be approved by the Commission and at least 65% of the employees to which it will apply. It will have a maximum term of 4 years, but further such arrangements may be made.

An employee at a workplace subject to a closed shop arrangement may be dismissed unless the employee is a member of an industrial union that is or becomes a party to the arrangement or holds a certificate of exemption as a conscientious objector. However, any such employee will have at least 3 months to become such a member or obtain such a certificate.

A post-entry closed shop arrangement does not authorise an employer to refuse to employ a person because the person is not a member of an industrial union of employees nor to dismiss an employee who is not such a member in contemplation of the 3 months expiring.

Section 106G (Conscientious objectors) allows a person to obtain on the grounds of conscientious belief a certificate from the Industrial Registrar exempting the person from membership of any industrial union of employees. The conscientious belief need not be of a religious nature.

An applicant for such a certificate must pay to a charity an amount equivalent to any subscription that would otherwise be payable for membership of the industrial union (if any) that covers the applicant's trade or occupation or an amount (if any) fixed by the regulations.

A certificate of exemption will be in force for 12 months but further certificates may be obtained.

Section 106H (Victimisation: offence) creates an offence if an employer or an industrial union victimises a person because the person is a conscientious objector, does not belong to an industrial union, has refused to take part in strikes or other industrial action or for other specified reasons related to industrial matters.

Victimisation is defined to include, in the case of an employer, dismissing or refusing to employ a person or injuring a person in his or her employment. In the case of an industrial union, victimisation is defined to include inciting an employer to victimise a person or taking strike or other industrial action against an employer with intent to coerce the employer to victimise a person.

The maximum penalty for the offence is 100 penalty units (currently \$10,000).

Proceedings for the offence may be taken by anyone, with the Minister's consent, or in specified cases by the secretary of an industrial union or an elected representative of employees.

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Section 106I (Victimisation: reinstatement, damages etc.) provides that a person who has been subjected to a contravention of proposed section 106H (whether or not proceedings for an offence have been brought) may apply to the Commission for any order that the Commission considers appropriate to make under the proposed section.

The orders that may be made can provide for reinstatement, promotion, payment of lost wages or other damages and various other specified matters. The Commission may also award costs.

PART 2—CONSEQUENTIAL AMENDMENTS

Victimisation

Item (1) (a) inserts a definition of “industrial action” for the purposes of proposed section 106H described above. The term includes strikes, lock-outs and various other specified matters, and may be expanded by regulation.

Item (5) repeals section 95 (which currently provides an offence for unlawful dismissal) because that provision is restated with extensive modifications.

Item (6) amends section 119 so that any order for the payment of money made by the Commission under proposed section 106I can be enforced as a judgment.

Post-entry closed shop arrangements

Item (1) (b) updates a cross-reference to make it clear that the Commission may deal with the issue of competing interests of unions involved in an application for a post-entry closed shop arrangement as an “industrial matter”.

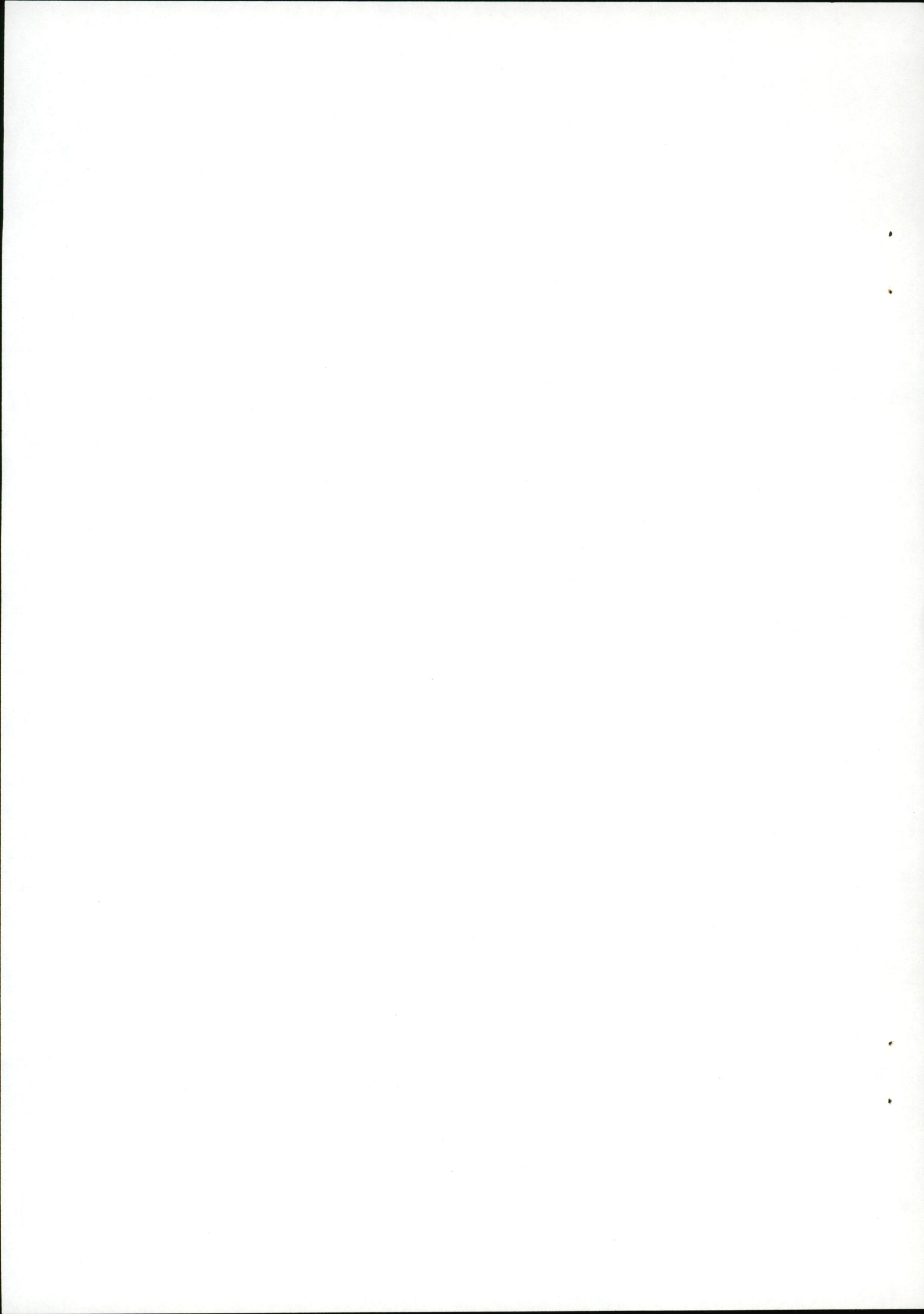
Item (2) inserts proposed section 8AA which will allow the Registrar to amend rules of an industrial union to give effect to a post-entry closed shop arrangement. An appeal lies to the Commission against any such amendment.

Preferences in awards and agreements

Item (3) removes a provision relating to the granting of preferences to members of industrial unions by awards (which will not be appropriate because of the proposed new scheme for post-entry closed shop arrangements).

Item (4) substitutes section 90A (1) so as to allow the Registrar to certify and arrange for the reprinting of awards with clauses granting preferences to members of industrial unions omitted from them.

Item (7) repeals section 129B which currently provides for the insertion of provisions into awards or agreements conferring preference in employment on members of industrial unions and for the issue of certificates to conscientious objectors. These provisions are inconsistent with the proposed new scheme.



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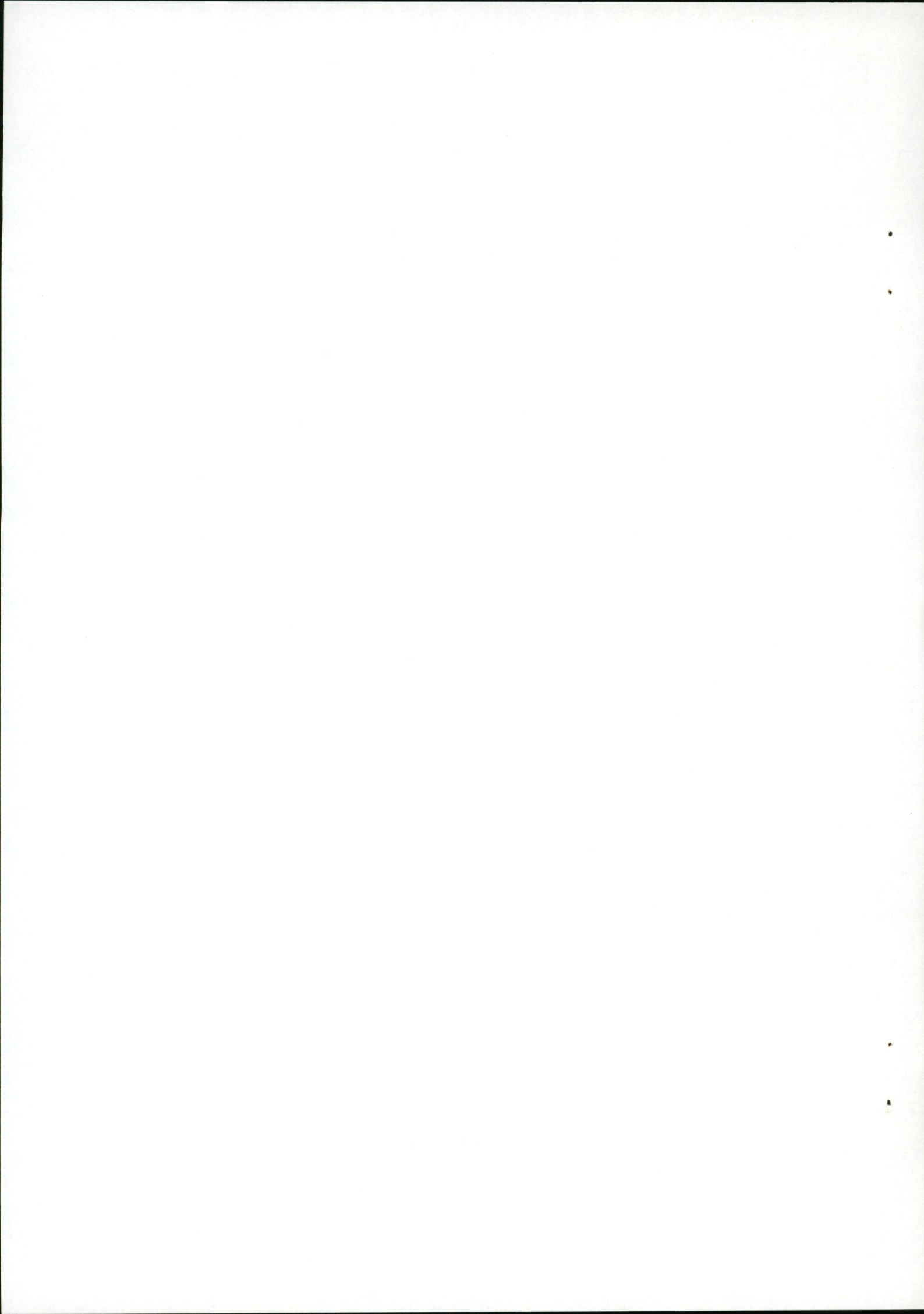


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**INDUSTRIAL ARBITRATION (VOLUNTARY UNIONISM)
AMENDMENT BILL 1990 (No. 2)**

NEW SOUTH WALES



No. , 1990

A BILL FOR

An Act to amend the Industrial Arbitration Act 1940 with respect to
voluntary unionism.

Industrial Arbitration (Voluntary Unionism) Amendment 1990 (No. 2)

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Industrial Arbitration (Voluntary Unionism) Amendment Act 1990.

Commencement

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

Amendment of Industrial Arbitration Act 1940 No. 2

3. The Industrial Arbitration Act 1940 is amended as set out in Schedule 1.

Saving

4. An order may be made or a direction given under section 95 of the Industrial Arbitration Act 1940 with respect to an offence committed under that section before its repeal as if that section had not been repealed.

SCHEDULE 1—AMENDMENTS

(Sec. 3)

PART 1—AMENDMENT RELATING TO VOLUNTARY UNIONISM

Part 10B:

After Part 10A (Secret ballots on industrial matters), insert:

PART 10B—VOLUNTARY UNIONISM

No preference for unionists in awards or agreements

106E. (1) An award or agreement cannot confer a right of preference of employment in favour of a member of an industrial union of employees over a person who is not a member of an industrial union of employees.

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SCHEDULE 1—AMENDMENTS—*continued*

(2) This section applies to awards or agreements made before or after the commencement of this Part and so applies despite any provision made before the commencement of this section in an award or agreement.

(3) Nothing in this Act limits or in any way affects any law relating to preference in employment to persons who have served as members of the Naval, Military or Air Forces of the Commonwealth.

Post-entry closed shop arrangements

106F. (1) A post-entry closed shop arrangement is an arrangement made in accordance with this section that has the effect of authorising an employer to restrict employment with the employer, of persons who have been employed for 3 months or more in the particular workplace or particular workplaces subject to the arrangement, to members of one or more industrial unions of employees and conscientious objectors.

(2) Such an arrangement may be entered into between a single employer and one or more industrial unions of employees, but only with the approval of the commission.

(3) The commission may approve of such an arrangement being entered into only if:

- (a) an application for the approval has been made to the commission by the industrial union or unions intending to be parties to the proposed arrangement; and
- (b) the commission is satisfied that notice of the application has been given to the employer concerned and any other industrial union of employees that has members who would or might be affected by the arrangement; and
- (c) the commission is satisfied that the employer intending to be a party to the proposed arrangement has consented to the arrangement; and
- (d) after giving each of the industrial unions of employees concerned the opportunity to make submissions to it, the commission has determined which of those unions may be parties to the proposed arrangement or will be excluded from it and the extent of their coverage, if

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SCHEDULE 1—AMENDMENTS—*continued*

those industrial unions have not agreed on those matters; and

- (e) after compliance with paragraphs (a)–(d), the arrangement is supported, in a secret ballot conducted in accordance with the regulations by, or by a person authorised by, the Electoral Commissioner at the expense of the industrial union or unions whose members would have the benefit of the proposed arrangement, by at least 65% of the employees who would be covered by the arrangement.

(4) The expense of conducting any such secret ballot may be recovered by the Electoral Commissioner in a court of competent jurisdiction as a debt due to the Crown by the industrial union or unions who applied for the approval.

(5) A post-entry closed shop arrangement commences on the day on which the arrangement is notified to the registrar in the manner approved by the registrar and has no effect until it is so notified.

(6) The term of such an arrangement must not exceed 4 years, but further post-entry closed shop arrangements for a workplace or workplaces may be made in accordance with this section.

(7) An employer who is a party to a post-entry closed shop arrangement that is in force does not contravene this Act or any award or agreement by terminating the employment at a workplace to which the arrangement applies of a person:

- (a) who has been employed at such a workplace by the employer for a period of 3 months for all of which the arrangement has been in force; and
- (b) who is neither a member of an industrial union covering employees at the workplace nor a conscientious objector.

(8) This section does not authorise the employer to terminate the employment of any such person before the period of 3 months has expired or to refuse to employ any person.

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SCHEDULE 1—AMENDMENTS—*continued*

Conscientious objectors

106G. (1) In this section, “**conscientious belief**” includes any conscientious belief, whether the grounds for it are or are not of a religious character and whether the belief is or is not part of the doctrine of any religion.

(2) Any person who:

- (a) objects on the grounds of conscientious belief to being a member of an industrial union; and
- (b) applies to the registrar in the manner approved by the registrar for a certificate of exemption from membership of industrial unions of employees; and
- (c) satisfies the registrar that the objection on the grounds of conscientious belief is genuine; and
- (d) satisfies the registrar that the person has paid to a charity registered or exempted from registration under the Charitable Collections Act 1934 the relevant amount,

must be issued by the registrar with a certificate of exemption from membership of industrial unions of employees.

(3) The relevant amount is equivalent to the annual subscription payable under the rules of the industrial union to which a person (not being a conscientious objector) would ordinarily belong if employed in the current trade or occupation of the applicant or, if the applicant has no current trade or occupation, the amount (if any) fixed by the regulations.

(4) Any application for a certificate of exemption must be verified by a statutory declaration and the registrar is entitled to rely on the truth of any matter so verified.

(5) A certificate of exemption has a term of 12 months commencing with the date of its issue or with such later date as is specified in it as the date on which it takes effect, but further such certificates may be issued in accordance with this section.

(6) The holder of a current certificate of exemption is a conscientious objector for the purposes of this Act and is

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SCHEDULE 1—AMENDMENTS—*continued*

entitled to exemption from membership of any industrial union of employees.

(7) The holder of a certificate of exemption from membership of industrial unions must, within 28 days after being requested to do so by any industrial union of employees, produce the certificate of exemption or a copy of it to the industrial union.

(8) A certificate of exemption issued under section 129B (2) and in force immediately before the repeal of that provision is taken to have been issued under this section but expires at the end of the period specified in it.

Victimisation: offence

106H. (1) An employer, or an industrial union, must not victimise a person because:

- (a) the person is a conscientious objector; or
- (b) the person does not belong to an industrial union of employees; or
- (c) the person has refused to engage in industrial action; or
- (d) the person is a member of a trade union or an industrial union of employees or is a person who is an officer or delegate of a trade union or an industrial union of employees or is otherwise an elected representative of employees; or
- (e) the person is a member of a conciliation committee; or
- (f) the person claims a benefit of an award or agreement to which the person is entitled; or
- (g) the person has informed any person that a breach or a suspected breach of an award or agreement has been committed by the employer; or
- (h) the person has appeared as a witness, or has given evidence in proceedings, relating to an industrial matter; or
- (i) the person has engaged in, or contemplates engaging in, any public or political activity (not being an activity which interferes with the performance of duties as an employee); or

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SCHEDULE 1—AMENDMENTS—*continued*

- (j) the person, after applying for (and being unreasonably refused) leave without pay for the purpose, is absent from work through being engaged in duties as a member of an industrial union of employees in respect of a matter affecting the industry in which the employee is working or in other duties as a member of a conciliation committee.

Maximum penalty: 100 penalty units.

- (2) An employer victimises a person if the employer:

- (a) dismisses or threatens to dismiss the person from employment with the employer, unless the dismissal is authorised by a post-entry closed shop arrangement; or
 (b) alters or threatens to alter the position of the person in his or her employment with the employer to the person's prejudice; or
 (c) otherwise injures or threatens to injure the person in his or her employment with the employer; or
 (d) refuses to employ the person.

- (3) An industrial union of employers or employees victimises a person if the industrial union:

- (a) advises, encourages or incites an employer to victimise the person; or
 (b) takes, or threatens to take, industrial action against an employer with intent to coerce the employer to victimise the person; or
 (c) takes, or threatens to take, action having the effect, directly or indirectly, of injuring the person in his or her employment.

- (4) For the purposes of this section, anything done:

- (a) by the committee of management of an industrial union or of a branch of any such union; or
 (b) by an officer, employee or agent of an industrial union, or of a branch of any such union, acting in that capacity; or
 (c) by a member or a group of members of an industrial union or of a branch of any such union, acting under the rules of the industrial union or branch; or

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SCHEDULE 1—AMENDMENTS—*continued*

- (d) by a member of an industrial union, who performs the function of dealing with an employer on behalf of the member and other members of the industrial union of employees, acting in that capacity,

is taken to have been done by the industrial union concerned.

(5) In any proceedings for an offence under this section or for an order under section 106I in which it is necessary to prove that this section has been contravened:

- (a) if all matters necessary to prove the contravention alleged (other than the reason for the defendant's action) are proved, the defendant has the onus of proving that the defendant was not activated by the reason alleged; and
- (b) if the contravention alleged involves a person's having been unreasonably refused leave without pay, the defendant has the onus of proving that the leave was not unreasonably refused.

(6) Proceedings for an offence under this section must be taken before the commission and may be taken only:

- (a) in any case, by a person authorised by the Minister; or
- (b) by the secretary of the industrial union concerned in the industry in which the person alleged to have been victimised was employed; or
- (c) if the person is alleged to have been victimised because the person was an elected representative of employees, by the elected representative.

(7) If the commission convicts a person of an offence under this section, the commission may also make any order that it could have made if the person who was victimised had applied for an order under section 106I.

Victimisation: reinstatement, damages etc.

106I. (1) For the purposes of this section, a person is victimised if the person is the subject of a contravention of section 106H by an employer or an industrial union, whether or not proceedings have been brought for an offence under that section in respect of the contravention.

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SCHEDULE 1—AMENDMENTS—*continued*

(2) A person who alleges that he or she has been victimised may apply to the commission for an order under this section.

(3) If the commission decides, on the balance of probabilities, that a person who makes such an application has been victimised, the commission may make an order for such one or more of the following as the commission considers appropriate with respect to the kind of victimisation concerned:

- (a) for reinstatement of the person in the employment of the employer concerned in the position that the person held immediately before dismissal or demotion by the employer or in a position no less favourable than that position;
- (b) for the employer concerned not to carry out a threat of dismissal or to cease making such a threat, or both;
- (c) for the employer concerned to promote the person or otherwise advance the person in his or her employment with the employer;
- (d) for the employer concerned not to carry out a threat to demote or otherwise injure the person in his or her employment or to cease making such a threat, or both;
- (e) for the employer to employ the person;
- (f) for payment, by the employer or industrial union concerned, of the whole or any part of wages lost by the person;
- (g) for payment, by the employer or industrial union concerned, of other damages in such sum as appears to the commission to be appropriate to compensate the person for other loss suffered by the person.

(4) If an employee is reinstated pursuant to an order made under this section, the period of employment with the employer concerned is taken not to have been broken by the dismissal or demotion.

(5) The jurisdiction of the commission under this section may be exercised only by a judicial member of the commission.

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(6) The commission may make such order for the payment of costs, in any proceedings under this section, as may appear to it to be just and may assess the amount of the costs.

PART 2—CONSEQUENTIAL AMENDMENTS

(1) Section 5 (**Definitions**):

(a) In section 5 (1), after the definition of “Improver”, insert:

“**Industrial action**” means:

- (a) the performance of work in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work, the result of which in either case is a restriction or limitation on, or a delay in, the performance of the work, where the terms and conditions of the work are wholly or partly governed by an award or agreement, or by a determination, order or direction of the commission; or
- (b) a ban, limitation or restriction on the performance of work, or on an acceptance of or offering for work, in accordance with the terms and conditions of an award or agreement, or of a determination, order or direction of the commission; or
- (c) a ban, limitation or restriction on the performance of work, or on an acceptance of or offering for work, that is adopted in connection with a question, dispute or difficulty concerning an industrial matter; or
- (d) a failure or refusal by persons to attend for work or a failure or refusal to perform any work at all by persons who attend for work; or
- (e) a lock-out or (without limiting the scope of that term) a closing of a place of employment, or a suspension of work, or a refusal by an employer to employ any number of employees with a view to compelling those employees, or to aid another employer in compelling employees, to accept conditions of employment; or

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SCHEDULE 1—AMENDMENTS—*continued*

- (f) a strike or (without limiting the scope of that term) the cessation of work by any number of employees acting in combination, or a concerted refusal under a common understanding by any number of employees to continue to work for an employer with a view to compelling their employer, or to aid other employees in compelling their employer, to accept conditions of employment, or with a view to enforcing compliance with demands made by them or other employees on employers; or

- (g) anything prescribed by the regulations as industrial action,

unless it is an action by employees that has been authorised or agreed to by their employer or is an action by an employer that has been authorised or agreed to by or on behalf of employees of the employer.

- (b) In section 5 (1), from paragraph (c) of the definition of “Industrial matters”, omit “paragraph (g) of subsection (1) of section 20”, insert instead “section 106F”.

- (2) Section 8AA:

After section 8, insert:

Amendment of rules because of closed shop arrangement

8AA. (1) The registrar may alter the rules of each industrial union of employees concerned so as to give effect to a post-entry closed shop arrangement made in accordance with this Act, but only after giving the industrial unions an opportunity to make submissions to the registrar about the proposed alteration.

(2) If the rules of an industrial union are so altered, each industrial union concerned may, in accordance with the regulations, appeal to the commission which may give directions to the registrar about the alteration.

- (3) Section 20 (**Original jurisdiction**):

Omit section 20 (1) (g).

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SCHEDULE 1—AMENDMENTS—*continued*

- (4) Section 90A (**Incorporation of variation in reprint of awards**):
Omit section 90A (1), insert instead:
(1) If an award has been varied by or under this Act, the registrar may arrange for the award to be reprinted in a form certified as correct by the registrar.
- (5) Section 95 (**Penalty for unlawful dismissal**):
Omit the section.
- (6) Section 119 (**Enforcement of certain orders**):
From section 119 (1), omit “or 118”, insert instead “, 118 or 106I”.
- (7) Section 129B (**Preference to unionists**):
Omit the section.
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