



New South Wales

Industrial Relations Further Amendment Act 2006 No 97

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New South Wales

Industrial Relations Further Amendment Act 2006 No 97

Act No 97, 2006

An Act to amend the *Industrial Relations Act 1996* with respect to dispute resolution by the Industrial Relations Commission, co-operation with industrial relations tribunals of other States, a NSW industrial relations website and outworkers in clothing trades; to amend the *Occupational Health and Safety Act 2000* and the *Workers Compensation Act 1987* with respect to the protection of workers from dismissal; and for other purposes. [Assented to 27 November 2006]

The Legislature of New South Wales enacts:**1 Name of Act**

This Act is the *Industrial Relations Further Amendment Act 2006*.

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.

4 Amendment of Occupational Health and Safety Act 2000 No 40

The *Occupational Health and Safety Act 2000* is amended as set out in Schedule 2.

5 Amendment of Workers Compensation Act 1987 No 70

The *Workers Compensation Act 1987* is amended as set out in Schedule 3.

6 Consequential amendment of other legislation

The Act and Rules specified in Schedule 4 are amended as set out in that Schedule.

7 Repeal of Act

- (1) This Act is repealed on the day following the day on which all of the provisions of this Act have commenced.
- (2) The repeal of this Act does not, because of the operation of section 30 of the *Interpretation Act 1987*, affect any amendment made by this Act.

Schedule 1 **Amendment of Industrial Relations Act 1996**

(Section 3)

[1] Section 6 Definition of industrial matters

Insert after section 6 (2) (j):

- (k) the mode, terms and conditions under which work is given out, whether directly or indirectly, to be performed by outworkers in the clothing trades.

[2] Sections 13 (2), 15 (2), 33 (6), 45 (2), 114 (a), 314 (6), 318 (2) and 331 (2) and clause 6 of Schedule 3

Omit “in the Industrial Gazette” wherever occurring.

Insert instead “on the NSW industrial relations website”.

[3] Chapter 2, Part 7 Protection of injured employees

Omit the Part.

[4] Section 127 Liability of principal contractor for remuneration payable to employees of subcontractor

Omit section 127 (8). Insert instead:

(8) False statement is offence

A person who gives the principal contractor a written statement knowing it to be false is guilty of an offence if:

- (a) the person is the subcontractor, or
- (b) the person is authorised by the subcontractor to give the statement on behalf of the subcontractor, or
- (c) the person holds out or represents that the person is authorised by the subcontractor to give the statement on behalf of the subcontractor.

Maximum penalty: 100 penalty units.

[5] Section 129A Definitions

Omit the definition of *outworker* in the clothing trades.

[6] Section 129B Outworkers in clothing trades employed by constitutional corporations

Omit section 129B (2). Insert instead:

- (2) To avoid doubt, the conditions referred to in subsection (1) (b) include provisions of the award relating to:
 - (a) the giving out of work, and
 - (b) the making or keeping of records in connection with the giving out of work, and
 - (c) the disclosure of information about the giving out of work, and
 - (d) the registration of persons for the purpose of giving out work.

[7] Section 129C Application of certain enforcement provisions

Insert “or in section 406 (Awards and other industrial instruments provide minimum entitlements)” after “Chapter 7”.

[8] Section 146B

Insert after section 146A:

146B Commission may exercise certain dispute resolution functions under federal workplace agreements

- (1) A person may apply to the Commission to have a dispute resolution process conducted by the Commission in relation to a matter or matters in dispute if:
 - (a) the parties to the dispute are bound by a federal workplace agreement, and
 - (b) the Commission is authorised or permitted to conduct the dispute resolution process:
 - (i) under dispute settlement procedures (within the meaning of section 353 of the federal Act) set out in the agreement, or
 - (ii) if no such dispute settlement procedures are set out in the agreement, under the federal model dispute resolution process.

Note. Section 353 of the federal Act provides that a federal workplace agreement must include procedures for settling disputes about matters arising under the agreement between the employer and the employees whose employment will be subject to the agreement. The section also provides that if the workplace agreement does not include such procedures, then the agreement is taken to include the model dispute resolution process set out in Part 13 of that Act.

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- (2) On any such application, the Commission has and may exercise such functions with respect to the resolution of the dispute as are conferred or imposed on it by or under:
- (a) the federal workplace agreement concerned or federal model dispute resolution process (as the case may be), and
 - (b) the federal Act.
- (3) The Commission is to be constituted by a single member of the Commission unless the federal workplace agreement concerned, federal model dispute resolution process or federal Act (as the case may be) requires otherwise.
- (4) Subject to subsection (5), the exercise of a function conferred or imposed on the Commission as referred to in subsection (2) is, for the purposes of any other provision of this Act, taken not to have been exercised under this Act.
- (5) The regulations may make provision for or with respect to the application of the provisions of this Act (with such modifications, if any, as may be prescribed by the regulations) to the exercise of functions conferred or imposed on the Commission as referred to in subsection (2).
- (6) The functions that the Commission is authorised or permitted to exercise as referred to in this section are in addition to, and do not derogate from, any other function of the Commission.
- (7) Nothing in this section:
- (a) makes any order, determination or other decision of the Commission in respect of the dispute binding on the parties to the dispute unless the federal workplace agreement concerned, federal model dispute resolution process or federal Act (as the case may be) operate to make any such order, determination or decision binding on the parties, or
 - (b) limits the operation of section 146A.
- (8) In this section:
- federal Act** means the *Workplace Relations Act 1996* of the Commonwealth.
- federal model dispute resolution process** means the model dispute resolution process within the meaning of the federal Act.
- federal workplace agreement** means a workplace agreement within the meaning of the federal Act.
- modification** includes addition, exception, omission or substitution.

[9] Chapter 4, Part 9A

Insert after Part 9:

Part 9A Co-operation between State industrial tribunals

206A Definitions

In this Part:

industrial law of another State means:

- (a) a law of the State corresponding, or substantially corresponding, to this Act, or
- (b) a law of the State that is declared by the regulations to be a corresponding law (whether or not the law corresponds, or substantially corresponds, to this Act).

industrial tribunal of another State means:

- (a) a tribunal established under a law of the State that has functions corresponding, or substantially corresponding, to functions conferred or imposed on the NSW Commission by this Act, or
- (b) a tribunal established under a law of the State that is declared by the regulations to be the industrial tribunal of the State (whether or not the tribunal has functions corresponding, or substantially corresponding, to functions conferred or imposed on the NSW Commission by this Act).

NSW Commission means the Industrial Relations Commission established by this Act.

206B Joint proceedings

- (1) A member of the NSW Commission may exercise, in the presence of:
 - (a) a member of an industrial tribunal of another State, and
 - (b) the parties to any proceedings before an industrial tribunal of another State, and
 - (c) any witness summoned by an industrial tribunal of another State,any of the functions that are exercisable by the member of the NSW Commission in relation to a matter.

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- (2) Evidence may be given, and submissions made, jointly for the purposes of the proceedings before the NSW Commission and the industrial tribunal of another State.

206C NSW Commission may exercise functions conferred under industrial law of another State

- (1) Subject to subsection (3), the NSW Commission has (and may exercise) such functions as may be conferred on it under the industrial law of another State.
- (2) However, the exercise of any such function by the NSW Commission is taken for the purposes of this Act not to be the exercise of a function under this Act.
- (3) Subsection (1) does not extend to any function (or class of functions) conferred under the industrial law of another State that is excluded by the regulations.

[10] Chapter 4, Part 11

Insert after Part 10:

Part 11 NSW industrial relations website

208A NSW industrial relations website

For the purposes of this Act, the *NSW industrial relations website* is the Internet website used for the time being by the Industrial Registrar to provide public access to information relating to New South Wales industrial relations matters.

208B When matter is published on NSW industrial relations website

- (1) A matter is published on the NSW industrial relations website:
- (a) if it is made accessible in full on that website, or
 - (b) if notice of its making, issue or other production is made accessible on that website and it is made accessible separately in full on that website or in any other identified location.
- (2) The date on which a matter is published on the NSW industrial relations website is the date notified by the Industrial Registrar (whether as part of the matter or elsewhere) as the date of its publication, being a date that is not earlier than the date on which it was first made so accessible.

- (3) If a matter cannot for technical or other reasons be published on the NSW industrial relations website at a particular time, the matter may be published at that time in such other manner as the Industrial Registrar determines and published on that website as soon as practicable thereafter. In that case, it is taken to have been published on that website at that earlier time.

208C Evidence of publication

- (1) The Industrial Registrar may issue a certificate that certifies either or both of the following matters:
- (a) that a specified website is currently used (or was used during a specified period or on a specified date) by the Registrar to provide public access to information relating to New South Wales industrial relations matters,
 - (b) that a specified matter was published on the NSW industrial relations website on a specified date.
- (2) For the purposes of any proceedings before a court or tribunal, a certificate purportedly issued under subsection (1) is admissible as evidence of the particulars certified in and by the certificate.
- (3) The provisions of this section are in addition to, and do not derogate from, the provisions of section 390.

[11] Section 390 Evidence of an industrial instrument or order

Omit section 390 (1) (a). Insert instead:

- (a) in relation to an instrument or order made before the commencement of Schedule 1 [10] to the *Industrial Relations Further Amendment Act 2006*—a copy of the Industrial Gazette in which the instrument or order appeared, or

[12] Section 390 (1) (b)

Insert “(or published on the NSW industrial relations website)” after “printed”.

[13] Schedule 4 Savings, transitional and other provisions

Insert at the end of clause 2 (1):

Industrial Relations Further Amendment Act 2006

[14] Schedule 4, clause 31C

Insert after clause 31B:

31C Transitional arrangements relating to Industrial Gazette

- (1) This clause applies to any provision of an Act or statutory rule that is amended by the *Industrial Relations Further Amendment Act 2006* to replace a reference to the Industrial Gazette with a reference to the NSW industrial relations website.
- (2) Any matter that was duly published in the Industrial Gazette as required or permitted by a provision to which this clause applies continues to have been duly published for the purposes of that provision on and after the relevant commencement day despite the amendment of the provision by the *Industrial Relations Further Amendment Act 2006*.
- (3) In this clause:
relevant commencement day means the day on which Schedule 1 [10] to the *Industrial Relations Further Amendment Act 2006* commences.

[15] Dictionary

Insert in alphabetical order:

NSW industrial relations website—see section 208A.

outworker in the clothing trades means a person described in clause 1 (f) of Schedule 1 as an employee.

Note. A person described in clause 1 (f) of Schedule 1 as an employee is taken to be an employee for the purposes of this Act by section 5 (3).

Schedule 2 Amendment of Occupational Health and Safety Act 2000

(Section 4)

[1] Section 23 Unlawful dismissal or other victimisation of employee

Insert “section 23A of this Act and” after “See” in the note to the section.

[2] Section 23A

Insert after section 23:

23A Application for reinstatement of employee unlawfully dismissed under section 23

(1) In this section:

reinstatement includes re-employment.

unlawful dismissal means the dismissal of an employee in contravention of section 23.

- (2) An employee who has been unlawfully dismissed may, within 21 days after the dismissal, apply to the Industrial Court of NSW for reinstatement. The Court may accept an application that is made out of time if it considers that there is a sufficient reason to do so.
- (3) An industrial organisation of employees may make such an application on behalf of the employee.
- (4) The Industrial Court of NSW may, on such an application, order the employer to reinstate the employee in accordance with the terms of the order.
- (5) If the Industrial Court of NSW is satisfied that the applicant was unlawfully dismissed:
- (a) the Court is to order the employee to be reinstated in his or her former employment or in any other employment that is no less advantageous to the employee, except as provided by paragraph (b), or
 - (b) if the employer satisfies the Court that it would be impracticable to reinstate the employee—the Court may order the employer to pay to the employee an amount of compensation determined by the Court to be appropriate in the circumstances (but not exceeding the amount of remuneration the employee would have received but for the dismissal in the period of 6 months following the dismissal).

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- (6) If the Industrial Court of NSW orders reinstatement under this section, it may order that the period of employment of the applicant with the employer is taken not to have been broken by the dismissal.
 - (7) An application under this section may be made regardless of whether the employer has been convicted of an offence against section 23.
 - (8) The Industrial Court of NSW must not make an order on an application under this section if:
 - (a) another Act or a statutory instrument provides for redress to the employee in relation to the dismissal, and
 - (b) the employee has commenced proceedings under the other Act or instrument or has not lodged a written undertaking not to proceed under the other Act or instrument.
 - (9) Evidence of the fact that the Industrial Court of NSW has made an order under this section in respect of the unlawful dismissal of an employee is not admissible in proceedings for an offence against section 23.
 - (10) In any proceedings under this section, if an employee establishes that a matter referred to in section 23 (1) (a), (b) or (c) occurred or existed before the employee's dismissal, it is presumed that the employee was dismissed because of that matter. That presumption is rebutted if the employer satisfies the Industrial Court of NSW that the matter was not a substantial and operative cause of the dismissal.

Note. Appeals against a decision of the Industrial Court of NSW under this section are dealt with under Part 7 of Chapter 4 of the *Industrial Relations Act 1996*.

[3] Schedule 3 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

Industrial Relations Further Amendment Act 2006 (but only to the extent that it amends this Act)

Schedule 3 Amendment of Workers Compensation Act 1987

(Section 5)

[1] Part 8

Insert after Part 7:

Part 8 Protection of injured workers from dismissal

240 Definitions (cf IR Act, s 91)

(1) In this Part:

Commonwealth industrial instrument means any award, workplace agreement or other agreement made under (or taken to have been made, or to have effect, under) the *Workplace Relations Act 1996* of the Commonwealth.

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

reinstatement includes re-employment.

State industrial instrument has the same meaning as **industrial instrument** has in the *Industrial Relations Act 1996*.

(2) For the purposes of this Part, an **injured worker** is a worker who receives an injury for which the worker is entitled to receive compensation under this Act or the *Workers' Compensation (Dust Diseases) Act 1942*.

(3) For the purposes of this Part, a person is the **employer** of an injured worker only if the injury arose (either wholly or partly) out of or in the course of employment with that person.

Note. For the purposes of comparison, a number of provisions of this Part contain bracketed notes in headings drawing attention ("cf IR Act") to equivalent or comparable (though not necessarily identical) provisions of the *Industrial Relations Act 1996* (as in force immediately before the commencement of this Part).

241 Application to employer for reinstatement of dismissed injured worker (cf IR Act, s 92)

(1) If an injured worker is dismissed because he or she is not fit for employment as a result of the injury received, the worker may apply to the employer for reinstatement to employment of a kind specified in the application.

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- (2) The kind of employment for which the worker applies for reinstatement cannot be more advantageous to the worker than that in which the worker was engaged when he or she first became unfit for employment because of the injury.
 - (3) The worker must produce to the employer a certificate given by a medical practitioner to the effect that the worker is fit for employment of the kind for which the worker applies for reinstatement.

242 Application to Industrial Relations Commission for reinstatement order if employer does not reinstate (cf IR Act, s 93)

- (1) If an employer does not reinstate the worker immediately to employment of the kind for which the worker has so applied for reinstatement (or to any other kind of employment that is no less advantageous to the worker), the worker may apply to the Industrial Relations Commission for a reinstatement order.
- (2) An industrial organisation of employees may make the application on behalf of the worker.
- (3) The Industrial Relations Commission may not make a reinstatement order, except in special circumstances, if the application to the employer for reinstatement was made more than 2 years after the injured worker was dismissed.

243 Order by Industrial Relations Commission for reinstatement (cf IR Act, s 94)

- (1) The Industrial Relations Commission may, on such an application, order the employer to reinstate the worker in accordance with the terms of the order.
- (2) The Industrial Relations Commission may order the worker to be reinstated to employment of the kind for which the worker has so applied for reinstatement (or to any other kind of employment that is no less advantageous to the worker), but only if the Commission is satisfied that the worker is fit for that kind of employment.
- (3) If the employer does not have employment of that kind available, the Industrial Relations Commission may order the worker to be reinstated to employment of any other kind for which the worker is fit, being:
 - (a) employment of a kind that is available but that is less advantageous to the worker, or

- (b) employment of a kind that the Commission considers that the employer can reasonably make available for the worker (including part-time employment or employment in which the worker may undergo rehabilitation).
- (4) If the Industrial Relations Commission orders the worker to be reinstated, it may order the employer to pay to the worker an amount stated in the order that does not exceed the remuneration the worker would, but for being dismissed, have received after making the application to the employer for reinstatement and before being reinstated in accordance with the order of the Commission.

244 Presumption as to reason for dismissal (cf IR Act, s 95)

- (1) In proceedings for a reinstatement order under this Part it is to be presumed that the injured worker was dismissed because he or she was not fit for employment as a result of the injury received.
- (2) That presumption is rebutted if the employer satisfies the Industrial Relations Commission that the injury was not a substantial and operative cause of the dismissal of the worker.

245 Disputes as to fitness—medical assessment (cf IR Act, s 96)

- (1) The Industrial Relations Commission may refer to an approved medical specialist any dispute as to the worker's condition or fitness for employment to be assessed as provided by Part 7 of Chapter 7 of the 1998 Act.
- (2) The approved medical specialist is to submit a report to the Industrial Relations Commission in accordance with the terms of the reference.

246 Continuity of service of reinstated worker (cf IR Act, s 97)

- (1) If a worker is reinstated under this Part, the Industrial Relations Commission may order that the period of employment of the worker with the employer is taken not to have been broken by the dismissal.
- (2) However if the Industrial Relations Commission does so, the period between dismissal and the date of the application by the worker to the employer for reinstatement is not to be taken into account in calculating for any purpose the period of service of the worker with the employer.

247 Duty to inform replacement worker (cf IR Act, s 98)

An employer who, within 2 years after dismissing an injured worker, employs a person to replace the dismissed worker is guilty of an offence unless the employer first informs the person that the dismissed worker may be entitled under this Part to be reinstated to carry out the work for which the person is to be employed.

Maximum penalty: 50 penalty units.

248 Dismissal within 6 months of injury an offence (cf IR Act, s 99)

(1) An employer of an injured worker who dismisses the worker is guilty of an offence if:

- (a) the worker is dismissed because the worker is not fit for employment as a result of the injury, and
- (b) the worker is dismissed during the relevant period after the worker first became unfit for employment.

Maximum penalty: 100 penalty units.

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

- (a) the period of 6 months after the worker first became unfit for employment, except as provided by paragraphs (b), (c) and (d), or
- (b) if the worker is entitled under a 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 worker is entitled to accident pay, or
- (c) if the worker was entitled under a State industrial instrument to accident pay as a result of the injury for a period exceeding that period of 6 months but that instrument ceased to have effect as such in relation to the worker because of the commencement of Schedule 8 to the *Workplace Relations Act 1996* of the Commonwealth—the period during which the worker would have been entitled to accident pay under the instrument if it had not ceased to have effect, or

- (d) if the worker (other than a worker referred to in paragraph (c)) is entitled under a Commonwealth industrial instrument (or was entitled under a Commonwealth industrial instrument as in force immediately before the commencement of Schedule 7 to the *Workplace Relations Act 1996* of the Commonwealth) to accident pay as a result of the injury for a period exceeding that period of 6 months—the period during which the worker is (or the period during which the worker was) entitled to accident pay, whichever is the greater period.

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

Note. Both Schedules 7 and 8 to the *Workplace Relations Act 1996* of the Commonwealth (which were inserted by the *Workplace Relations Amendment (Work Choices) Act 2005* of the Commonwealth) commenced on 27 March 2006.

- (3) It is a defence to a prosecution for an offence under this section if the employer satisfies the court that:
- (a) at the time of dismissal, the worker would not undergo a medical examination reasonably required to determine fitness for employment, or
- (b) at the time of dismissal, the employer believed on reasonable grounds that the worker was not an injured worker within the meaning of this Part.
- (4) The prosecution may establish that an injured worker was dismissed because the worker was not fit for employment as a result of the injury if the prosecution establishes that the injury was a substantial and operative cause of the dismissal.
- (5) This section applies even if the worker became unfit for employment before the commencement of this section.

249 Other rights not affected (cf IR Act, s 100)

This Part does not affect any other rights of a dismissed worker under this or any other Act or under any State industrial instrument or contract of employment.

250 Enforcement

- (1) The following provisions of the *Industrial Relations Act 1996* and the regulations made under that Act apply to and for the purposes of this Part (***the applied provisions***):
- (a) Part 7 of Chapter 5 (Entry and inspection by officers of industrial organisations),

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- (b) Part 4 of Chapter 7 (Inspectors and their powers),
 - (c) Part 5 of Chapter 7 (Evidentiary provisions),
 - (d) Part 6 of Chapter 7 (Criminal and other legal proceedings),
 - (e) any other provision prescribed by the regulations.
- (2) Accordingly, the applied provisions have effect as if they formed part of this Act.
- (3) For the purposes of the application of the applied provisions (but without limiting subsection (4) (a)), a reference in the applied provisions:
- (a) to this Act (that is, the *Industrial Relations Act 1996*) is to be read as a reference to this Part, and
 - (b) to the regulations is to be read as a reference to the regulations under this Act, and
 - (c) to the industrial relations legislation includes a reference to this Part, and
 - (d) to employment is to be read as a reference to employment of an injured worker, and
 - (e) to an employer is to be read as a reference to an employer within the meaning of this Part, and
 - (f) to employees is to be read as a reference to injured workers,
- as the case requires.
- (4) The applied provisions have effect:
- (a) subject to such modifications as are prescribed by this Part or the regulations, and
 - (b) despite any other provisions of this Act that make provision for matters for which the applied provisions make provision.
- (5) In this section:
- modification** includes addition, exception, omission or substitution.

[2] Schedule 6 Savings, transitional and other provisions

Insert after Part 19B:

**Part 19C Provisions consequent on enactment of
Industrial Relations Further Amendment
Act 2006**

1 Application of Part 8

- (1) Part 8 (as inserted by the *Industrial Relations Further Amendment Act 2006*) applies in relation to injured workers who are dismissed on or after the commencement of the Part.
- (2) The provisions of Part 7 of Chapter 2 of the *Industrial Relations Act 1996* (as in force immediately before their repeal by the *Industrial Relations Further Amendment Act 2006*) continue to apply in relation to injured employees within the meaning of that Part who were dismissed before the day on which that Part was repealed as if the provisions had not been repealed.

[3] Schedule 6, Part 20

Insert at the end of clause 1 (1):

Industrial Relations Further Amendment Act 2006—to the extent that it amends this Act and repeals Part 7 of Chapter 2 of the *Industrial Relations Act 1996*

Schedule 4 Consequential amendment of other legislation

(Section 6)

4.1 Employment Protection Act 1982 No 122

[1] Section 14 Orders of Commission

Omit “in the New South Wales Industrial Gazette” from section 14 (3) and (4) wherever occurring.

Insert instead “on the NSW industrial relations website (within the meaning of the *Industrial Relations Act 1996*)”.

[2] Section 14 (3)

Omit “not be published in that Gazette”.

Insert instead “not be published on that website”.

4.2 Industrial Relations Commission Rules 1996

[1] Rule 4 Definitions

Insert in alphabetical order in rule 4 (1):

NSW industrial relations website has the same meaning as it has in the Act.

[2] Rules 34 (2), 35 (1), 36 (3), 37 (1), 38 (1) and 89 (2) and (4)

Omit “in the Industrial Gazette” wherever occurring.

Insert instead “on the NSW industrial relations website”.

[Second reading speech made in—

Legislative Assembly on 24 October 2006

Legislative Council on 15 November 2006]

BY AUTHORITY