



**INDUSTRIAL AND EMPLOYEE RELATIONS (HARMONISATION)  
AMENDMENT ACT 1997**

**No. 68 of 1997**

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**ELIZABETHAE II REGINAE**

A.D. 1997

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**No. 68 of 1997**

**An Act to amend the Industrial and Employee Relations Act 1994.**

[Assented to 21 August 1997]

The Parliament of South Australia enacts as follows:

**Short title**

1. (1) This Act may be cited as the *Industrial and Employee Relations (Harmonisation) Amendment Act 1997*.

(2) The *Industrial and Employee Relations Act 1994* is referred to in this Act as "the principal Act".

**Commencement**

2. This Act will come into operation on a day to be fixed by proclamation.

**Amendment of s. 3—Objects of Act**

3. Section 3 of the principal Act is amended—

(a) by striking out paragraph (j) and substituting the following paragraph:

(j) to provide employees with an avenue for expressing employment-related grievances and having them considered and remedied including provisions for a right to the review of harsh, unjust or unreasonable dismissals—

(i) directed towards giving effect to the *Termination of Employment Convention*; and

(ii) ensuring industrial fair play; and;

(b) by inserting after paragraph (m) the following paragraph:

(n) to encourage and assist employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers.

**Amendment of s. 4—Interpretation**

4. Section 4 of the principal Act is amended—

(a) by striking out from subsection (1) the definition of "Commonwealth Act" and substituting the following definition:

"Commonwealth Act" means the *Workplace Relations Act 1996* (Cwth);;

(b) by adding the following exception to paragraph (b) of the definition of "contract of employment" in subsection (1):

*Exception—*

The contract is not a contract of employment if the vehicle is a taxi and the contract would not be recognised at common law as a contract of employment.;

(c) by inserting after the definition of "industrial dispute" in subsection (1) the following definition:

"industrial instrument" means—

(a) an award or enterprise agreement under this Act; or

(b) an award or certified agreement (but not an Australian workplace agreement) under the Commonwealth Act;;

(d) by inserting after the definition of "State" in subsection (1) the following definition:

"taxi" means a vehicle—

(a) licensed or exempted from the requirement to be licensed under Part 6 (Taxis) of the *Passenger Transport Act 1994*; and

(b) with seating accommodation for not more than 12 passengers; and

(c) used predominantly for the transport of passengers rather than the transport of goods or other freight;.

**Amendment of s. 39—Constitution of Full Commission**

5. Section 39 of the principal Act is amended by striking out subsection (4) and substituting the following subsection:

(4) A Commissioner on a Full Bench of the Commission may be an Industrial Relations Commissioner or an Enterprise Agreement Commissioner (or both) but, if the Full Commission is to determine an enterprise agreement matter, at least one member of the Full Commission must be an Enterprise Agreement Commissioner.

**Amendment of s. 40—Constitution of the Commission**

6. Section 40 of the principal Act is amended by striking out subsection (2) and substituting the following subsection:

(2) If the Commission is to be constituted of a Commissioner and is to determine a matter relating to the negotiation, making, approval, variation or rescission of an enterprise agreement, the Commissioner must be an Enterprise Agreement Commissioner.

**Amendment of s. 79—Approval of enterprise agreement****7. Section 79 of the principal Act is amended—**

- (a) by striking out from subsection (1)(a)(ii) "those terms of an award (if any) that currently apply to the employees" and substituting "the terms of an industrial instrument (if any) that currently apply to the employees";
- (b) by inserting after the first dot point in subsection (1)(a)(ii) the following:
- if the agreement supersedes an earlier enterprise agreement, to identify the differences in the terms of the agreements; and;
- (c) by striking out subsection (1)(e)(iii) and substituting the following subparagraph:
- (iii) does not provide for remuneration or conditions of employment that are (considered as a whole) inferior to remuneration or conditions of employment (considered as a whole) prescribed by an award under this Act or the Commonwealth Act that applies to the employees at the time of the application for approval;;
- (d) by inserting after subsection (1) the following subsections:
- (1a) The agreement of employees to be bound by a proposed enterprise agreement may be indicated by ballot or in some other way.
- (1b) If a ballot of employees is taken—
- (a) the Commission must be satisfied that—
- (i) all employees were given a reasonable opportunity to participate in the ballot; and
  - (ii) the ballot was conducted in accordance with the rules for the conduct of ballots (if any) laid down by regulation; and
  - (iii) a majority of the employees casting valid votes at the ballot voted in favour of the proposal; and
- (b) if the Commission is so satisfied, it will be presumed that a majority of the total number of the employees (including those who did not vote at the ballot) is in favour of the proposal.;
- (e) by striking out subsection (5)(e) and substituting the following paragraph:
- (e) having regard to any relevant award under this Act or the Commonwealth Act (which should be considered as a whole) the agreement does not substantially disadvantage the employees covered by the agreement.

**Substitution of s. 83**

8. Section 83 of the principal Act is repealed and the following section is substituted:

**Duration of enterprise agreement**

83. (1) An enterprise agreement is to be made for a term (not exceeding 2 years) stated in the agreement.

(2) At least 28 days before the end of the term of an enterprise agreement, the Commission must give written notice to the parties to the agreement advising them that the term of the agreement is about to end.

(3) After giving the notice, the Commission may, on its own initiative or on the application of a party, invite the parties to an enterprise agreement to a conference to explore the possibility of renegotiating the agreement.

(4) Despite the expiration of the term stated in the enterprise agreement, the agreement continues in force until superseded or rescinded.

**Amendment of s. 99—Triennial review of awards**

9. Section 99 of the principal Act is amended by inserting after subsection (1) the following subsection:

(1a) However, in the case of the first review to be conducted after the commencement of this Act, the period allowed for the review is extended to 31 December 1997.

**Substitution of Part 6 of Chapter 3**

10. Part 6 of Chapter 3 (comprising sections 105 to 111) of the principal Act is repealed and the following Part is substituted:

**PART 6  
UNFAIR DISMISSAL****Division 1—Preliminary****Interpretation**

105. In this Part—

"adjudicating authority" means—

- (a) the Commission; or
- (b) any other court, tribunal, commission or other authority with power to grant relief for wrongful or unfair dismissal;

"non-award employee" means an employee whose employment is not covered by an industrial instrument.

**Application of this Part**

105A. (1) This Part does not apply to a non-award employee whose remuneration immediately before the dismissal took effect is \$66 200 (indexed) or more a year.

(2) The regulations may exclude from the operation of this Part or specified provisions of this Part—

- (a) employees serving a period of probation or a qualifying period providing that the period—
- (i) is determined in advance; and
  - (ii) is reasonable having regard to the nature and circumstances of the employment; and
  - (iii) does not exceed 12 months; or
- (b) employees engaged on a casual basis for a short period except where—
- (i) the employee has been engaged by the employer on a regular and systematic basis extending over a period of at least nine months; and
  - (ii) the employee has, or would have had, a reasonable expectation of continuing employment by the employer; or
- (c) employees whose terms and conditions of employment are governed by special arrangements giving rights of review of, or appeal against, decisions to dismiss from employment which, when considered as a whole, provide protection that is at least as favourable to the employees as the protection given under this Part; or
- (d) employees in relation to whom the application of this Part or the specified provisions of this Part causes or would cause substantial difficulties because of—
- (i) their conditions of employment; or
  - (ii) the size or nature of the undertakings in which they are employed; or
- (e) employees of any other class.

(3) To the extent that a regulation under subsection (2)(c), (d) or (e) is inconsistent with the *Termination of Employment Convention* it is invalid.

(4) If a contract provides for employment for a specified period or for a specified task, this Part does not apply to the termination of the employment at the end of the specified period, or on completion of the specified task.

### Division 2—Application for relief

#### Application for relief

106. (1) If an employer dismisses an employee, the employee may, before the end of a period of 21 days from the date the dismissal takes effect, apply to the Commission for relief under this Part.

(2) If an employee takes proceedings seeking a remedy for dismissal either under this Part or another law, the employee—

- (a) is taken to have elected to pursue that remedy to the exclusion of other remedies that may be available on the same facts either under this Part or under other laws; and
- (b) is estopped from taking proceedings for other remedies based on the same facts,

unless the proceedings fail for want of jurisdiction or the adjudicating authority decides not to proceed on the ground that proceedings have been brought, or might more appropriately be brought, under this Part or another law (as the case requires).

*Example—*

If an employee brings proceedings under the *Equal Opportunity Act 1984* seeking relief for dismissal on the ground that the dismissal constitutes an act of discrimination in respect of which a remedy is available under that Act, the employee is estopped from making an application under this Part based on the same facts unless the proceedings fail for want of jurisdiction or the adjudicating authority declines to proceed under subsection (3) or some equivalent power.

(3) An adjudicating authority before which an employee brings proceedings seeking a remedy for dismissal may decline to proceed if the employee has taken, or might more appropriately take, proceedings based on the same or substantially the same facts under some other Act or law.

*Example—*

The Commission might decline to proceed under this Part if, in the circumstances of the case, the employee might more appropriately bring proceedings under the *Equal Opportunity Act 1984* based on the same or substantially the same facts as the application under this Part.

(4) An application for relief under this Part must be accompanied by the fee required under the regulations.

### **Division 3—Conciliation conference**

#### **Conference of parties**

107. (1) Before an application for relief under this Part is heard by the Commission, a conference of the parties to the application must be held for the purpose of exploring the possibility of resolving the matters at issue by conciliation and ensuring that the parties are fully informed of the possible consequences of further proceedings on the application.

(2) A member of the Commission will preside at a conference under subsection (1) unless the parties are in a remote part of the State, in which case the President may authorise a stipendiary magistrate to call and preside at the conference on behalf of the Commission.

(3) The person presiding at the conference (the **presiding officer**) must, at the conclusion of the conference, make and give to the parties an assessment of the merits of the application and may, if the presiding officer thinks fit, recommend the withdrawal of an application, or make recommendations on how the questions at issue might be resolved.



**Division 4—Determination of application****Question to be determined at hearing**

**108.** (1) At the hearing of an application under this Part, the Commission must determine whether, on the balance of probabilities, the dismissal is harsh, unjust or unreasonable.

(2) In deciding whether a dismissal was harsh, unjust or unreasonable, the Commission must have regard to—

- (a) the *Termination of Employment Convention*; and
- (b) the rules and procedures for termination of employment prescribed by or under Schedule 8.

(3) If a redundancy payment is made on the dismissal in accordance with a relevant industrial instrument, the dismissal cannot be regarded as harsh, unjust or unreasonable solely on the ground that the payment is inadequate.

**Remedies for unfair dismissal from employment**

**109.** (1) If the Commission is satisfied on application under this Part that an employee's dismissal is harsh, unjust or unreasonable, the Commission may—

- (a) order that the applicant be re-employed in the applicant's former position without prejudice to the former conditions of employment; or
- (b) if it would be impracticable for the employer to re-employ the applicant in the applicant's former position, or re-employment in the applicant's former position would not, for some other reason, be an appropriate remedy—order that the applicant be re-employed by the employer in some other position (if such a position is available) on conditions determined by the Commission; or
- (c) if the Commission considers that re-employment by the employer in any position would not be an appropriate remedy—order the employer to pay to the applicant an amount of compensation determined by the Commission.

(2) If the Commission makes an order for re-employment under this section, then, subject to any contrary direction of the Commission—

- (a) the employee must be remunerated for the period intervening between the date that the dismissal took effect and the date of re-employment as if the employee's employment in the position from which the employee was dismissed had not been terminated; and
- (b) the employer is entitled to the repayment of any amount paid to the employee on dismissal on account of or arising from the dismissal; and
- (c) for the purposes of determining rights to annual leave, sick leave, long service leave, and parental leave, the interruption to the employee's continuity of service caused by the dismissal will be disregarded.

(3) The Commission must not order compensation exceeding 6 months' remuneration at the rate applicable to the dismissed employee immediately before the dismissal took effect, or \$33 100 (indexed), whichever is the greater.

(4) An order for the payment of a monetary amount under this section may provide for payment by instalments if—

- (a) the Commission is satisfied that exceptional circumstances exist justifying the making of the order; and
- (b) insofar as the order compensates loss of remuneration—the instalments of compensation are at least as favourable to the employee as the payments of remuneration (to which the order relates) would have been if the employment had continued.

#### **Division 5—Miscellaneous**

##### **Costs**

**110.** (1) If an application under this Part proceeds to hearing and the Commission is satisfied that a party to the proceedings clearly acted unreasonably in failing to discontinue or settle the matter before the hearing concluded, the Commission may, on the application of the other party to the proceedings, make an order for costs (including—if relevant—the costs of representation) against the party.

(2) If an employee discontinues proceedings under this Part more than 14 days after the conclusion of the conference of the parties, the Commission may, on the application of the employer, make an order for costs (including—if relevant—the costs of representation) against the employee if the Commission is satisfied that the employee has acted unreasonably.

(3) An application for an order for costs under this section must be made within 14 days after the determination or discontinuance of the proceedings.

##### **Decisions to be given expeditiously**

**111.** (1) The Commission must hand down its determination on an application under this Part, and its reasons for the determination, within 3 months after the parties finish making their final submissions on the application.

(2) The President may extend the time for handing down a determination, or the reasons for a determination, but only if there are special reasons in the circumstances of the individual case for doing so.

##### **Substitution of Part 1 of Chapter 4**

**11.** Part 1 of Chapter 4 (comprising sections 115 to 118) of the principal Act is repealed and the following Part is substituted:

#### **PART 1 FREEDOM OF ASSOCIATION**

##### **Division 1—Preliminary**

##### **Prohibited reason**

**115.** An employer acts for a **prohibited reason** if the employer discriminates against another person for one or more of the following reasons or for reasons that include one or more of the following:

- (a) because the other person is, has been or proposes to become an officer, delegate or member of an association;

- (b) because the other person is not, or does not propose to become, a member of an association;
- (c) because the other person—

  - (i) has one or more employees who are not, or do not propose to become, members of an association; or
  - (ii) has not paid, or does not propose to pay, a fee (however described) to an association;
- (d) because the other person has refused or failed to join in industrial action;
- (e) because the other person (being an employee) has refused or failed to agree or consent to, or vote in favour of, the making of an agreement to which an association of which the employee is a member would be a party;
- (f) because the other person has made, proposes to make or has at any time proposed to make an application to an industrial authority for an order for holding a secret ballot;
- (g) because the other person has participated in, proposes to participate in or has at any time proposed to participate in a secret ballot ordered by an industrial authority;
- (h) because the other person is entitled to the benefit of an instrument dealing with conditions of employment or an order of an industrial authority;
- (i) because the other person has made or proposes to make an inquiry or complaint to a person or body with power under a law relating to industrial relations to seek—

  - (i) compliance with that law; or
  - (ii) the enforcement of rights under an instrument dealing with conditions of employment;
- (j) because the other person has participated in, proposes to participate in, or has at any time proposed to participate in a proceeding under a law relating to industrial relations;
- (k) because the other person has given or proposes to give evidence in a proceeding under a law relating to industrial relations;
- (l) because an association is seeking better industrial conditions for the other person;
- (m) because the other person (being an employee) has absented himself or herself from work without leave if—

  - (i) the absence was for the purpose of carrying out duties or exercising rights as an officer of an association; and

- (ii) the person applied for leave before absenting himself or herself and leave was unreasonably refused or withheld;
- (n) because the other person, as an officer or member of an association, has done, or proposes to do, a lawful act within the officer's or member's authority under the rules of the association, for the purpose of furthering or protecting the industrial interests of the association.

### **Division 2—Protection of freedom of association**

#### **Freedom of association**

**116.** (1) No person may be compelled to become, or remain, a member of an association.

(2) A provision of a contract of employment, or an associated undertaking, to become or remain, or not to become or remain, a member of an association is void.

#### **General offences against the principle of freedom of association**

**116A.** A person must not—

- (a) require another to become, or remain, a member of an association; or
- (b) prevent another from becoming or remaining a member of an association of which the other person is, in accordance with the rules of the association, entitled to be a member; or
- (c) induce another to enter into a contract or undertaking not to become or remain a member of an association.

Maximum penalty: \$20 000.

#### **Dismissal etc for prohibited reason**

**116B.** (1) An employer must not, for a prohibited reason, do or threaten to do any of the following:

- (a) dismiss an employee from employment;
- (b) injure an employee in employment;
- (c) alter the position of an employee to the employee's prejudice;
- (d) refuse to employ a person;
- (e) discriminate against a person in the terms or conditions on which the employer offers to employ the person.

Maximum penalty: \$20 000.

(2) A court by which an employer is convicted of an offence against this section may, on application by the employee (or prospective employee) against whom the offence was committed—

- (a) award compensation to the applicant for loss resulting from the commission of the offence; and

- (b) if the applicant was dismissed from employment—order the employer to re-employ the applicant on conditions determined by the court.

**Prohibition of discrimination in supply or purchase of goods or services**

117. (1) A person who carries on a business involving the supply or purchase of goods or services must not discriminate against an employer by refusing to supply or purchase goods or services, or in the terms on which goods or services are supplied or purchased, on the ground that the employer's employees are, or are not, members of an association.

Maximum penalty: \$20 000.

(2) A person must not, on the ground that an employer's employees are, or are not, members of an association—

- (a) attempt to induce a person who carries on a business involving the supply or purchase of goods or services to discriminate against an employer by refusing to supply or purchase goods or services, or in the terms on which goods or services are supplied or purchased; or
- (b) attempt to prevent a person who carries on a business involving the supply or purchase of goods or services from supplying or purchasing goods or services to or from the employer.

Maximum penalty: \$20 000.

(3) This section does not prevent an association from discriminating between members and non-members of the association.

**Conscientious objection**

118. (1) If a person satisfies the Registrar by the evidence required by the Registrar that the person has a genuine conscientious objection based on religious belief to becoming a member of an association, the Registrar must issue a certificate of conscientious objection to the person.

(2) The Registrar must cancel a certificate of conscientious objection if asked to do so by the person for whom it was issued.

**Amendment of s. 198—Assignment of Commissioner to deal with dispute resolution**

12. Section 198 of the principal Act is amended by striking out subsection (2) and substituting the following subsection:

(2) A Commissioner cannot be assigned to deal with the prevention and resolution of disputes relating to the negotiation, making, approval, variation or rescission of an enterprise agreement unless the Commissioner is an Enterprise Agreement Commissioner.

**Amendment of s. 213—Powers of Full Commission on reference**

13. Section 213 of the principal Act is amended by striking out subsection (1) and substituting the following subsections:

(1) The Full Commission may ask a Deputy President or a Commissioner to provide a report on a particular matter referred to the Full Commission under this Division.

(1a) A Deputy President or Commissioner to whom such a request is given must provide a report accordingly (and must carry out any inquiry or investigation necessary for the purpose).

(1b) The Full Commission may act on a report provided under this section without itself inquiring into the matters on which the report is based.

**SCHEDULE**  
*Amendment of penalties*

The principal Act is amended as follows:

1. section 80(5)—strike out the penalty provision and substitute:  

Maximum penalty:     \$2 500.
2. section 88(1)—strike out the penalty provision and substitute:  

Maximum penalty:     \$750.
3. section 102(1)—strike out the penalty provision and substitute:  

Maximum penalty:     \$2 500.  
Expiation fee:        \$160.
4. section 102(3)—strike out the penalty provision and substitute:  

Maximum penalty:     \$2 500.  
Expiation fee:        \$160.
5. section 102(4)—strike out the penalty provision and substitute:  

Maximum penalty:     \$2 500.  
Expiation fee:        \$160.
6. section 102(5)—strike out the penalty provision and substitute:  

Maximum penalty:     \$1 250.  
Expiation fee:        \$105.
7. section 102(7)—strike out the penalty provision and substitute:  

Maximum penalty:     \$750.
8. section 103(1)—strike out the penalty provision and substitute:  

Maximum penalty:     \$750.  
Expiation fee:        \$80.
9. section 103(2)—strike out the penalty provision and substitute:  

Maximum penalty:     \$750.  
Expiation fee:        \$80.
10. section 103(4)—strike out the penalty provision and substitute:  

Maximum penalty:     \$750.  
Expiation fee:        \$80.

11. section 104(8)—strike out the penalty provision and substitute:

Maximum penalty: \$1 250.

12. section 112(5)—strike out the penalty provision and substitute:

Maximum penalty: \$2 500.

13. section 112(6)—strike out the penalty provision and substitute:

Maximum penalty: \$2 500.

14. section 127(2)—strike out the penalty provision and substitute:

Maximum penalty: \$1 250.

15. section 128(5)—strike out the penalty provision and substitute:

Maximum penalty: \$750.

16. section 139—strike out the penalty provision and substitute:

Maximum penalty: \$2 500.

17. section 140(3)—strike out the penalty provision and substitute:

Maximum penalty: \$5 000.

18. section 141(5)—strike out the penalty provision and substitute:

Maximum penalty: \$750.

19. section 141(6)—strike out the penalty provision and substitute:

Maximum penalty: \$750.

20. section 142(1)—strike out the penalty provision and substitute:

Maximum penalty: \$750.

21. section 177(1)—strike out "Division 7 fine" and substitute "maximum fine of \$2 500".

22. section 219(1)—strike out the penalty provision and substitute:

Maximum penalty: \$5 000.

23. section 223(1)—strike out the penalty provision and substitute:

Maximum penalty: \$20 000.

24. section 224—strike out the penalty provision and substitute:

Maximum penalty: \$2 500.



25. section 225(1)—strike out the penalty provision and substitute:

Maximum penalty: \$20 000.

26. section 225(3)—strike out the penalty provision and substitute:

Maximum penalty: \$20 000.

27. section 225(4)—strike out the penalty provision and substitute:

Maximum penalty: \$5 000.

28. section 226—strike out the penalty provision and substitute:

Maximum penalty: \$2 500.

29. section 228(1)—strike out the penalty provision and substitute:

Maximum penalty: \$2 500.

30. section 229(1)—strike out the penalty provision and substitute:

Maximum penalty: \$1 250.

31. section 237(2)—strike out this subsection and substitute:

(2) The regulations may impose fines not exceeding \$2 500 for offences against the regulations.

**In the name and on behalf of Her Majesty, I hereby assent to this Bill.**

**BASIL S. HETZEL, Governor's Deputy**