

Contractual Benefits Bill 2007

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Defined Terms

Western Australia

LEGISLATIVE ASSEMBLY

Contractual Benefits Bill 2007

A Bill for

An Act to —

- **confer jurisdiction on The Western Australian Industrial Relations Commission to determine claims by employees of constitutional corporations; and**
- **amend the *Industrial Relations Act 1979*; and**
- **amend the *Occupational Safety and Health Act 1984*.**

The Parliament of Western Australia enacts as follows:

Part 1 — Preliminary

1. Short title

This is the *Contractual Benefits Act 2007*.

2. Commencement

5 This Act comes into operation as follows:

- (a) sections 1 and 2 — on the day on which this Act receives the Royal Assent;
- (b) the rest of the Act — on a day fixed by proclamation, and different days may be fixed for different provisions.

3. Terms used in this Act

10 (1) In this Act —

“**Arbitrator**” means the IR Commission constituted by a public service arbitrator under the IR Act Part IIA Division 2;

“**claim**” means a claim referred under section 6;

15 “**commissioner**” means a commissioner appointed under the IR Act and includes the Chief Commissioner, the Senior Commissioner and an acting commissioner under that Act;

“**Commonwealth instrument**” means —

- 20 (a) a pre-reform award as defined in the Workplace Relations Act section 4;
- (b) an award made under the Workplace Relations Act section 539;
- (c) a notional agreement preserving State awards as defined in the Workplace Relations Act Schedule 8 clause 1;
- 25 (d) a transitional award as defined in the Workplace Relations Act Schedule 6 clause 2;
- (e) a workplace agreement as defined in the Workplace Relations Act section 4;

-
- 5 (f) a pre-reform certified agreement as defined in the Workplace Relations Act Schedule 7 clause 1;
- (g) a pre-reform AWA as defined in the Workplace Relations Act Schedule 7 clause 1;
- 10 (h) a preserved State agreement as defined in the Workplace Relations Act Schedule 8 clause 1;
- (i) a workplace determination made under the Workplace Relations Act Part 9 Division 8;
- (j) the Australian Fair Pay and Conditions Standard within the meaning given to that term by the Workplace Relations Act section 171(3);
- 15 (k) the APCS as defined in the Workplace Relations Act section 178;
- (l) any other instrument made under, or referred to in, the Workplace Relations Act and prescribed under the IR Act section 113 for the purposes of this definition;

“contractual benefit” means a benefit to which an employee is entitled under a contract of employment whether —

- 20 (a) as included in the contract; or
- (b) as an implied condition of employment under the *Minimum Conditions of Employment Act 1993* or as otherwise implied in the contract,

25 but does not include a benefit to which an employee is entitled under a Commonwealth instrument;

“employee” has the meaning given in the Workplace Relations Act section 5(1) but does not include a government officer;

30 **“employer”** has the meaning given in paragraph (a) of the definition of “employer” in the Workplace Relations Act section 6(1);

“employment” has the meaning given in the Workplace Relations Act section 7;

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“**government officer**” has the meaning given in the IR Act section 80C(1);

“**industrial matter**” has the meaning given in the IR Act section 7;

5 “**IR Act**” means the *Industrial Relations Act 1979*;

“**IR Commission**” means The Western Australian Industrial Relations Commission continued and constituted under the IR Act;

10 “**Workplace Relations Act**” means the *Workplace Relations Act 1996* of the Commonwealth.

(2) A reference in this Act to an employee or employer includes a reference to a former employee or former employer.

(3) For the purposes of this Act, if a person (“**the principal**”) —

15 (a) is a corporation to which section 51(xx) of the Constitution of the Commonwealth applies; and

(b) engages a person, or a group of persons, under a contract to personally give a performance as, or as part of, musical, theatrical, dance or comic entertainment,

20 the principal is to be regarded as the employer of the person, or each person in the group.

Part 2 — Claims in respect of contractual benefits

4. Jurisdiction of IR Commission

- (1) The IR Commission has jurisdiction to hear and determine claims referred to it under section 6.
- 5 (2) Without limiting the functions of the IR Commission under this Act and subject to the provisions of this Act, the IR Commission —
- 10 (a) has the same authority to enquire into and deal with a claim as it has in relation to an industrial matter under the IR Act section 23(1); and
- (b) may hear and determine a claim as if the claim were a claim referred to the IR Commission under the IR Act section 28A.

5. Constitution of IR Commission

- 15 For the purposes of this Act, the IR Commission is to be constituted by a single commissioner.

6. Referral of claim

- 20 (1) Subject to subsections (2) and (3), an employee may refer to the IR Commission under this section a claim that the employee has not been allowed a contractual benefit by his or her employer.
- (2) An employee cannot refer to the IR Commission a claim in respect of a contractual benefit to which the employee is entitled as an implied condition of employment under the *Minimum Conditions of Employment Act 1993* (a “**denied MCE benefit**”) unless the employee also refers to the IR Commission a claim in respect of a contractual benefit to which the employee is entitled under the same contract of employment that is not a denied MCE benefit.
- 25 (3) A claim cannot be referred to the IR Commission under this section if —
- 30

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- (a) the refusal or failure to allow the employee the contractual benefit occurred —
- (i) if the claim is not an industrial matter — before the commencement of this section; or
- 5 (ii) if the claim is an industrial matter — before 27 March 2006;
- or
- (b) 6 years have elapsed since the employer refused or failed to allow the contractual benefit.
- 10 (4) The employee must serve a copy of the claim on the employer.

7. Parties to proceedings

Subject to the IR Act section 27(1)(j) (as applied by section 8(1)(c)) the parties to proceedings pursuant to a claim are —

- 15 (a) the employee who referred the claim; and
- (b) the employer on whom or which a copy of the claim is served.

8. Applied provisions of IR Act

- 20 (1) The following provisions (the “**applied provisions**”) of the IR Act apply to and in relation to the performance of functions conferred on the IR Commission under this Act —
- (a) section 22B;
- (b) section 26(1)(a) and (b), (2) and (3);
- (c) section 27;
- 25 (d) section 28;
- (e) section 30;
- (f) section 31(1), (2), (3), (5) and (6);
- (g) section 32A;
- (h) section 33;

- (i) section 34;
 - (j) section 35;
 - (k) section 36;
 - (l) section 49(1), (2), (2a) and (3) to (12);
 - 5 (m) section 90;
 - (n) section 91;
 - (o) section 92.
- (2) The IR Act sections 3, 16, 16A, 17 and 104 apply to and in relation to this Act as if a reference in those sections to “this Act” included a reference to this Act.
- 10 (3) The applied provisions and the provisions referred to in subsection (2) have effect —
- (a) subject to the provisions of this Act; and
 - (b) with the modifications that are provided for in subsection (4); and
 - 15 (c) for the provisions referred to in subsection (1)(a) to (k), with any other modifications that the IR Commission determines to be necessary or appropriate.
- (4) For the purposes of subsection (1) —
- 20 (a) the IR Act section 31(1) has effect as if paragraph (c) were deleted and the following paragraph were inserted instead —
- “
- (c) by a legal practitioner;
- 25 ”;
- and
- (b) the IR Act section 33(6) has effect as if “section 44” were deleted and the following inserted instead —
- “ the *Contractual Benefits Act 2007* section 10 ”;
- 30 and

- (c) the IR Act section 90(1) has effect as if paragraph (a) were deleted and the following paragraph were inserted instead —

“

- 5 (a) on the ground that the decision is in excess of jurisdiction;

”.

9. Conciliation

- 10 (1) Subject to section 12(1), the IR Commission must endeavour to resolve a claim by conciliation.

- (2) In endeavouring to resolve a claim by conciliation the IR Commission —

- 15 (a) must do all such things as appear to it to be right and proper to assist the parties to reach agreement on terms for the settlement of the claim; and

- (b) for that purpose may —

- 20 (i) arrange conferences of the parties or their representatives presided over by the IR Commission; and
- (ii) arrange for the parties or their representatives to confer amongst themselves at a conference at which the IR Commission is not present; and
- 25 (iii) otherwise encourage the parties to exchange or divulge attitudes or information that in the opinion of the IR Commission will assist in the settlement of the claim.

- (3) The IR Commission may give any direction or make any order or declaration that the IR Commission thinks expedient for the purposes of this section.

- 30 (4) If the IR Commission gives or makes a direction, order or declaration under subsection (3) the IR Commission must —

- 5
- (a) if it is given or made orally, reduce the direction, order or declaration to writing as soon as is practicable; and
- (b) make the text of the direction, order or declaration available to the parties as soon as is practicable after it is given or made.
- (5) A direction, order or declaration made or given under subsection (3) binds only the parties to the relevant conciliation proceeding.
- 10 (6) A conciliation proceeding must be held in private and only persons specified by the IR Commission, or agreed to by the parties, may be present.
- (7) If the parties request the IR Commission to make recommendations about particular aspects of the claim about which they are unable to reach agreement, the IR Commission
- 15 may make recommendations about those aspects of the claim.
- (8) A direction, order or declaration given or made under subsection (3) is enforceable under the IR Act section 84A as if it were given or made under the IR Act section 32.

10. Compulsory attendance at conciliation

- 20 (1) Subject to this section, the IR Commission may summon any person to attend, at a time and place specified in the summons, at conciliation proceedings under section 9.
- (2) A summons under this section —
- 25 (a) may be given in the manner prescribed by regulations made under the IR Act section 113; and
- (b) when so given, is to be taken, in any proceedings relating to the summons, to have been served on the person to whom it is directed unless that person, in those proceedings, satisfies the IR Commission or the Full Bench (as defined in the IR Act section 7(1)), as the case
- 30 may be, that he or she did not receive the summons.

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(3) Any person so summoned must, except for good cause, proof of which is on that person, attend the conciliation proceedings at the time and place specified in the summons and continue to attend at that place as directed by the IR Commission.

5 (4) The requirement to attend imposed by subsection (3) is enforceable in accordance with section 9(8) as if it were a direction, order or declaration referred to in that provision.

11. Settlement of claim or part of claim

Where at conciliation under section 9 —

- 10 (a) agreement is reached between the parties in relation to any aspect of the claim; and
- (b) the parties consent to the making of an order under this section,

15 the IR Commission may make an order in terms of that agreement binding on the parties.

12. Determination of claim where no resolution by conciliation

(1) The IR Commission may hear and determine a claim if it is of the opinion that —

- 20 (a) reasonable attempts to settle the claim by conciliation have been, or are likely to be, unsuccessful; or
- (b) although there has been no attempt to settle the claim by conciliation, any attempt is likely to be unsuccessful.

25 (2) Subject to subsection (4), the IR Commission may, for the hearing and determination of the claim, be constituted by a commissioner who exercised conciliation powers in relation to the claim.

30 (3) If the commissioner referred to in subsection (2) proposes to constitute the IR Commission for the purpose mentioned in that subsection, the commissioner must, at the conclusion of the conciliation advise the parties of his or her intention to do so.

- (4) If, before the hearing commences, a party objects to the IR Commission being constituted as proposed under subsection (3), the commissioner must not constitute the IR Commission for the hearing and determination of the claim.
- 5 (5) The commissioner is not taken to have exercised conciliation powers in relation to a claim merely because —
- (a) the commissioner arranged for a conference of the parties or their representatives to be presided over by the commissioner, but the conference did not take place or
10 was not presided over by the commissioner; or
- (b) the commissioner arranged for the parties or their representatives to confer among themselves at a conference at which the commissioner was not present.

13. Costs

15 Despite the IR Act section 27(1)(c) (as applied by section 8(1)(c)), on hearing and determining a claim the IR Commission may make an order giving costs to any party to the proceedings for the services of a legal practitioner or agent of that party if, in the opinion of the IR Commission, the
20 proceedings were frivolously or vexatiously instituted or defended, as the case requires, by the party against whom or which the order is made.

14. Claims on behalf of government officers

- (1) By this section the Arbitrator has jurisdiction to enquire into and
25 deal with a claim that may be made under this section.
- (2) Subject to subsections (3) and (4), a person who can refer an industrial matter under the IR Act section 80F(1) may refer to the Arbitrator under this section a claim that a government officer has not been allowed a contractual benefit by his or her
30 employer.
- (3) A claim in respect of a contractual benefit cannot be referred under this section unless the claim is an industrial matter.

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- 5 (4) A claim in respect of a contractual benefit to which a government officer is entitled as an implied condition of employment under the *Minimum Conditions of Employment Act 1993* (a “**denied MCE benefit**”) cannot be referred under this section unless the claimant also refers a claim in respect of a contractual benefit to which the government officer is entitled under the same contract of employment that is not a denied MCE benefit.
- 10 (5) A claim cannot be referred under this section if —
- (a) the refusal or failure to allow the government officer the contractual benefit occurred before 27 March 2006;
 - or
 - (b) 6 years have elapsed since the employer refused or failed to allow the contractual benefit.
- 15 (6) In relation to a claim referred under this section the Arbitrator has all of the functions he would have if the claim were an industrial matter referred to the Arbitrator under the IR Act section 80E, and the provisions of the IR Act apply accordingly.

15. Enforcement of orders in industrial magistrate’s court

- 20 (1) In this section —
- “**order**” means —
- (a) an order made by the IR Commission under section 11, 12 or 13; or
 - (b) an order made by the Arbitrator under section 14.
- 25 (2) An order is an instrument to which the IR Act section 83 applies.
- (3) For the purposes of subsection (2), the IR Act sections 82A, 83, 83A, 83C, 83F, 84, 90, 91 and 92 have effect —
- (a) with the modifications that are provided for in
- 30 subsection (4); and

(b) for sections 82A, 83, 83A, 83C and 83F, with any other modifications that the industrial magistrate's court determines to be necessary or appropriate.

(4) For the purposes of subsection (2) the IR Act section 83(1) has effect as if paragraphs (b) to (f) were deleted and the following paragraphs were inserted instead —

“

(b) a party to the proceeding in respect of which the order was made;

(c) an organisation —

(i) that is registered under the IR Act Part II Division 4; or

(ii) as defined in the Workplace Relations Act section 4(1),

in which the employee in relation to whom the order is made is eligible to be enrolled as a member or an association that represents such an organisation.

”.

16. Effect of other proceedings

The IR Commission must not deal with a claim if proceedings in respect of the subject matter of the claim have already been commenced under another law of the State or Commonwealth unless those proceedings —

- (a) have been discontinued; or
- (b) have failed for want of jurisdiction.

17. Transfer of claim

(1) If the IR Commission decides that it has jurisdiction under the IR Act to determine a claim made under this Act and that it would be appropriate to do so in the circumstances, the IR Commission may order that the claim be dealt with under that Act.

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- (2) If the IR Commission makes an order under subsection (1) in relation to a claim —
- (a) the claim is taken to have been referred to it under the IR Act; and
 - (b) any proceedings under this Act in relation to the claim are taken to be proceedings under the IR Act.

18. Act does not derogate from IR Act

The functions conferred on the IR Commission under this Act are in addition to, and do not derogate from, any function of the IR Commission under the IR Act.

Part 3 — Regulations

19. Regulations

- 5
- (1) Regulations may be made under the IR Act section 113 prescribing any matter that is required or permitted by this Act to be prescribed, or that is necessary or convenient to be prescribed for giving effect to the purposes of this Act.
- 10
- (2) Without limiting subsection (1), regulations may be made under the IR Act regulating the practice and procedure to be followed in relation to the referral, bringing, hearing and determination of claims and appeals under this Act.

Part 4 — Consequential amendments

Division 1 — Amendments to *Industrial Relations Act 1979*

20. The Act amended

5 The amendments in this Division are to the *Industrial Relations Act 1979*.

21. Section 81CA amended

Section 81CA(1) is amended in the definition of “general jurisdiction” by inserting after paragraph (b) —

10 “
or
(c) section 15 of the *Contractual Benefits Act 2007*;
”.

15 **Division 2 — Amendments to *Occupational Safety and Health Act 1984***

22. The Act amended

The amendments in this Division are to the *Occupational Safety and Health Act 1984*.

23. Section 51K amended

20 Section 51K(4)(a) and “and” after it are deleted and the following is inserted instead —

“
(a) an employee has referred to the Commission a claim of the kind described in —
25 (i) section 28A of the *Industrial Relations Act 1979*; or

(ii) section 6(1) of the *Contractual Benefits Act 2007*;

and

”.



Defined Terms

Defined Terms

*[This is a list of terms defined and the provisions where they are defined.
The list is not part of the law.]*

Defined Term	Provision(s)
applied provisions	8(1)
Arbitrator	3(1)
claim	3(1)
commissioner	3(1)
Commonwealth instrument	3(1)
contractual benefit	3(1)
denied MCE benefit	6(2), 14(4)
employee	3(1)
employer	3(1)
employment	3(1)
government officer	3(1)
industrial matter	3(1)
IR Act	3(1)
IR Commission	3(1)
order	15(1)
the principal	3(3)
Workplace Relations Act	3(1)