

Industrial and Related Legislation Amendment Bill 2007

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Western Australia

LEGISLATIVE ASSEMBLY

(As amended during consideration in detail)

**Industrial and Related Legislation
Amendment Bill 2007**

A Bill for

An Act to amend —

- **the *Industrial Relations Act 1979*; and**
- **the *Magistrates Court (Civil Proceedings) Act 2004*; and**
- **the *Children and Community Services Act 2004*; and**
- **the *Occupational Safety and Health Act 1984*; and**
- **the *Workers' Compensation and Injury Management Act 1981*;
and**
- **the *Minimum Conditions of Employment Act 1993*; and**
- **the *Public Sector Management Act 1994*.**

The Parliament of Western Australia enacts as follows:

Part 1 — Preliminary

1. Short title

This is the *Industrial and Related Legislation Amendment Act 2007*.

5 **2. Commencement**

This Act comes into operation as follows:

- (a) Part 1 — 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.
- 10

Part 2 — Amendments to the *Industrial Relations Act 1979*

3. The Act amended

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

4. Section 6 amended

Section 6 is amended as follows:

(a) by inserting after “The principal objects of this Act are” —

“ as follows ”;

(b) by inserting after paragraph (ca) —

“

(cb) to provide remedies for breaches of contracts of employment;

”;

(c) by deleting “and” after paragraph (f).

5. Section 7 amended

(1) Section 7(1) is amended as follows:

(a) by deleting the definitions of “deputy registrar”, “industrial inspector” and “Registrar” and inserting instead —

“

“**deputy registrar**” means a person designated as a deputy registrar under this Act;

“**industrial inspector**” means a person designated as an industrial inspector under this Act;

“**Registrar**” means the chief executive officer of the Registrar’s Department or, if another person is designated as the Registrar under this Act, that person;

”;

s. 5

(b) by inserting in the appropriate alphabetical positions —

“

“**CEO**” means the chief executive officer of the Department;

5

“**Department**” means the department of the Public Service principally assisting the Minister in the administration of this Act;

“**departmental officer**” means a person employed in the Department as referred to in section 98B(2);

10

“**officer of the Commission**” means —

(a) the Registrar, a deputy registrar or any other Registrar’s Department officer assisting the Commission in the performance of its functions; or

15

(b) an officer appointed under section 93(1a);

“**officer of the Court**” means the clerk of the Court or any other Registrar’s Department officer assisting the Court in the performance of its functions;

20

“**Registrar’s Department**” means the department of the Public Service known as the Department of the Registrar Western Australian Industrial Relations Commission;

25

“**Registrar’s Department officer**” means a person employed in the Registrar’s Department as referred to in section 98B(2);

”.

(2) Section 7(7) is amended by deleting “section 29(1)(b)(ii)” and inserting instead —

“ section 28A ”.

6. Section 8 amended

Section 8(2)(d) is amended by inserting after “this Act” —

“

and any other Act under which the Commission
exercises jurisdiction

”.

7. Section 14 amended

Section 14(2) is amended by deleting “this Act” and inserting
instead —

“ this or any other Act ”.

8. Section 16 amended

(1) Section 16(1ab) is repealed and the following subsection is
inserted instead —

“

(1ab) Subject to this Act, the Chief Commissioner may —

- (a) allocate and reallocate the work of the
Commission; and
- (b) assign or appoint commissioners for the
purposes of constituting the Commission, or
altering the constitution of the Commission, in
relation to a matter in respect of which
jurisdiction is conferred on the Commission
under this or another Act; and
- (c) assign commissioners for the purpose of acting
as mediators under the *Magistrates Court (Civil
Proceedings) Act 2004* Part 4A.

”.

(2) Section 16(2)(b) is amended by inserting after “this Act” —

“

and, to the extent that the Commission exercises
jurisdiction under any other Act, that Act

”.

s. 9

9. Section 25 amended

(1) Section 25(1) is amended by deleting “and Divisions 2A to 2G” and inserting instead —

“ , Divisions 2A to 2G and any other Act ”.

5 (2) Section 25(2)(a) is amended by deleting “or Division 2A to 2G under which the Commission is to be” and inserting instead —

“

Divisions 2A to 2G or any other Act under which the Commission is to be or may be

10

”.

(3) After section 25(2) the following subsection is inserted —

“

(3) Without limiting subsection (1), if the Chief Commissioner is of the opinion that a claim under section 28A involves an important principle of law or complex facts or issues, the Chief Commissioner may, with the consent of the President —

15

(a) allocate the matter directly to the Full Bench; or

(b) notwithstanding that the Chief Commissioner has allocated the matter to a commissioner or the Commission in Court Session, revoke that allocation and allocate the matter directly to the Full Bench.

20

”.

25 **10. Sections 28A and 28B inserted**

After section 28 the following sections are inserted —

“

28A. Claims for denied contractual benefits

(1) In this section —

30

“**contractual benefit**” means a benefit to which an

- employee is entitled under a contract of employment whether —
- (a) as included in the contract; or
 - (b) as an implied condition of employment under the MCE Act or as otherwise implied in the contract.
- 5
- (2) Subject to subsection (3) and section 28B, a claim that an employee has not been allowed a contractual benefit by his or her employer, not being a benefit under an award or order, irrespective of whether or not the claim is an industrial matter, may be referred to the Commission by —
- (a) an employee; or
 - (b) an organisation in which the employee is eligible to be enrolled as a member or an association that represents such an organisation.
- 10
- (3) A claim cannot be referred to the Commission in respect of a contractual benefit to which the employee is entitled as an implied condition of employment under the MCE Act (a “**denied MCE benefit**”) unless 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 is also referred to the Commission.
- 15
- (4) Without limiting the other powers of the Commission under this section and section 28B, on a referral under this section of a claim that is not an industrial matter —
- (a) the Commission may treat the claim as if the claim were an industrial matter; and
 - (b) a reference in this Act to an industrial matter is to be taken to include a reference to the claim.
- 20
- (5) Without limiting the other powers of the Commission under this Act, on a referral under this section the
- 25
- 30

s. 10

Commission may do any one or more of the following —

- 5
- (a) hear and determine any set-off or counterclaim by an employer;
- (b) make an order for the payment of a sum of money —
- 10
- (i) found by the Commission to be owing by one party to another party; or
- (ii) by way of damages (including exemplary damages and damages in the nature of interest); or
- (iii) by way of restitution;
- (c) make an order in the nature of an order for specific performance of the relevant contract;
- 15
- (d) order a party to do, or to refrain from doing, something.
- (6) This section applies in respect of a contract of employment whether the contract was entered into before or after the commencement of the *Industrial and Related Legislation Amendment Act 2007* section 10.
- 20
- (7) A claim that is not an industrial matter cannot be referred under this section if the refusal or failure to allow the employee the contractual benefit occurred before the commencement of the *Industrial and Related Legislation Amendment Act 2007* section 10.
- 25
- (8) A claim made under section 29(1)(b)(ii) that is not finalised before the commencement of the *Industrial and Related Legislation Amendment Act 2007* section 11 may be dealt with as if it were a claim under this section.
- 30

28B. Commission must not act, or can refuse to act, in certain circumstances

- 5 (1) The Commission must not act in relation to a claim referred under section 28A if the matter that is the subject of the claim is the subject of proceedings, or has already been settled as a result of proceedings, under this Act or another law of the State or the Commonwealth.
- 10 (2) The Commission may, at any time after a claim has been referred under section 28A, decide to take no action on the claim, or to suspend or discontinue any proceeding on the claim, if the Commission is of the opinion that —
- 15 (a) the claim should be resolved in some other manner; or
- (b) there is some other reasonable cause that justifies a decision not to proceed with, or to suspend or discontinue, the proceeding.

”.

20 **11. Section 29 amended**

- (1) Section 29(1)(b) is deleted and the following paragraph is inserted instead —

“

- 25 (b) in the case of a claim by an employee that the employee has been harshly, oppressively or unfairly dismissed from employment — by the employee.

”.

- 30 (2) Section 29(2) is amended by deleting “subsection (1)(b)(i)” and inserting instead —

“ subsection (1)(b) ”.

s. 12

- (3) Section 29(3) is amended by deleting “subsection (1)(b)(i)” and inserting instead —

“ subsection (1)(b) ”.

12. Section 29AA amended

5 Section 29AA(3), (4) and (5) are repealed.

13. Section 29AB inserted

After section 29AA the following section is inserted —

“

29AB. Transfer of claim

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

15 (2) If the Commission makes an order under subsection (1) in respect of a claim —

(a) the claim is taken to have been referred to it under the other written law; and

20 (b) any proceedings under this Act in relation to the claim are taken to be proceedings under the other written law.

”.

14. Section 29A amended

25 Section 29A(2a) is repealed and the following subsection is inserted instead —

“

(2a) The Chief Commissioner may, if of the opinion that it is appropriate to do so in the circumstances, direct that

the area and scope provisions of the proposed award or industrial agreement —

- (a) need not be published in the *Industrial Gazette*;
or
- (b) need not be published at all.

”.

15. Section 31 amended

Section 31(1)(c)(ii) is amended by inserting after “Commission under section” —

“ 28A or ”.

16. Section 50A amended

- (1) Section 50A(1) is amended by deleting “before 1 July in each year” and inserting instead —

“ in each calendar year ”.

- (2) Section 50A(5) is amended as follows:

- (a) by deleting “1 July in the year it is made” and inserting instead —

“

the day specified in the order as the day on which it takes effect, being a day that is not earlier than the day on which the order is made, or if a day is not so specified, on the day on which the order is published under section 51BE,

”.

- (b) by deleting “date.” and inserting instead —

“ day. ”.

s. 17

17. Section 80ZF replaced

Section 80ZF is repealed and the following section is inserted instead —

“

5 **80ZF. Terms used in this Part**

In this Part —

“**Australian Commission**” includes a reference to a member of the Australian Commission;

“**corresponding authority**” means —

- 10 (a) the Australian Commission; or
- (b) any board or court of conciliation or arbitration or other tribunal, body or persons having authority under the laws of another State or a Territory to exercise any power of
- 15 conciliation or arbitration with reference to industrial relations; or
- (c) any special board constituted under any law of another State or a Territory relating to factories; or
- 20 (d) any other board, court, tribunal or body of another State or a Territory prescribed for the purposes of this definition;

“**General Order**” means a General Order under Part II Division 3.

25

”.

18. Section 80ZGA inserted

After section 80ZG the following section is inserted —

“

30 **80ZGA. Joint proceedings with other industrial authorities**

- (1) This section applies if —
- (a) the Chief Commissioner considers that it is appropriate to deal with matters relating to a

proposed General Order before the Commission in Court Session in proceedings in joint session with a corresponding authority of another State or a Territory; and

- 5 (b) the corresponding authority agrees.
- (2) The Chief Commissioner, or another member of the Commission authorised by the Chief Commissioner to do so, may, despite anything in this Act —
- 10 (a) hear and receive evidence jointly with the corresponding authority; and
- (b) confer with the corresponding authority about the proceedings and the decision to be made in the proceedings; and
- (c) exercise in the presence of —
- 15 (i) the corresponding authority; and
- (ii) the parties to the proceedings; and
- (iii) any witnesses summoned by the corresponding authority,
- 20 any of the powers of the Commission in Court Session that are exercisable in relation to proceedings relating to a General Order, other than the power to make a General Order.
- (3) If, after the proceedings have started, the Chief Commissioner decides that proceedings should not be held in joint session —
- 25 (a) the commissioner participating in the proceedings must immediately stop participating; and
- (b) the proceedings may continue before the Commission in Court Session.
- 30 (4) The commissioner participating in the proceedings must report any results of the joint session to the Commission in Court Session.

s. 19

- (5) The report may be given orally or in writing.
- (6) The Commission in Court Session may take all or any part of the report into account when making a General Order on a matter to which the report relates.
- 5 (7) Despite section 26(3), the Commission in Court Session is not required to notify the parties concerned about the report or its contents or give the parties an opportunity to be heard in relation to the report if the Commission in Court Session is satisfied that before
- 10 the report was made the parties were given an opportunity of being heard in relation to the matters and information in the report.

”

19. Section 80ZI amended

15 Section 80ZI(3) is repealed.

20. Section 81AA replaced

Section 81AA is repealed and the following section is inserted instead —

“

20 **81AA. Jurisdiction under other Acts**

In addition to its jurisdiction under this Act, an industrial magistrate’s court has the jurisdiction conferred on it by or under any other Act.

”

25 **21. Section 81CA amended**

Section 81CA(1) is amended at the end of the definition of “general jurisdiction” by inserting —

“

or

(d) section 84AO of the *Workers' Compensation and Injury Management Act 1981*;

”.

22. Section 83E amended

5 Section 83E(6a) is repealed and the following subsection is inserted instead —

“

10 (6a) Subsection (6)(c) does not apply in the case of a contravention of a provision mentioned in column 1 of the Table to this subsection of the corresponding Act mentioned in column 2 of that Table.

Table

s. 8(3), 44(3), 45(1)	MCE Act
s. 26(2), 26A(1)	<i>Long Service Leave Act 1958</i>
s. 200(1), 202(2), 203(2), 203(4), 204(2), 228(2)	<i>Children and Community Services Act 2004</i>
s. 84AA(1), 84AB(1)	<i>Workers' Compensation and Injury Management Act 1981</i>

”.

23. Section 85 amended

15 Section 85(7) is repealed and the following subsections are inserted instead —

“

20 (7) Subject to subsection (9), the chief executive officer of the Registrar's Department is to be the clerk of the Court.

(8) The *Public Sector Management Act 1994* section 32(1) does not apply to the performance of functions of the clerk of the Court by the chief executive officer of the Registrar's Department.

s. 24

- (9) The chief executive officer of the Registrar's Department may designate a Registrar's Department officer to be the clerk of the Court.

”.

5 **24. Section 93 amended**

- (1) Section 93(1) is repealed and the following subsections are inserted instead —

“

- 10 (1) Subject to subsection (1ab), the chief executive officer of the Registrar's Department is to be the Registrar.

- (1aa) The *Public Sector Management Act 1994* section 32(1) does not apply to the performance of functions of the Registrar by the chief executive officer of the Registrar's Department.

- 15 (1ab) The chief executive officer of the Registrar's Department may, after consultation with the Chief Commissioner, designate a Registrar's Department officer to be the Registrar.

- 20 (1ac) The Registrar may designate a Registrar's Department officer to be a deputy registrar.

- (1ad) There are to be as many deputy registrars as are necessary for the purposes of this Act.

”.

- 25 (2) Section 93(1a) is amended by deleting “appointed under and subject to Part 3 of the *Public Sector Management Act 1994*.” and inserting instead —

“ public service officers. ”.

- (3) After section 93(2) the following subsection is inserted —

“

- 30 (2a) Subsection (2) applies despite the *Public Sector Management Act 1994* but if the chief executive officer

of the Registrar's Department is the Registrar, nothing in that subsection affects the functions of the Registrar as chief executive officer.

”

5 **25. Section 96 amended**

(1) After section 96(2)(a) the following paragraph is inserted —

“

10 (ab) claims under section 28A or under another written law in relation to a contractual benefit to which an employee is entitled under a contract of employment;

”

(2) Section 96(3) is amended as follows:

15 (a) by inserting “and” after paragraph (a);

(b) by deleting paragraph (b) and inserting instead —

“

20 (b) to make an order under this Act or another written law in relation to a contractual benefit to which an employee is entitled under a contract of employment; and

”

26. Section 98 amended

Section 98(1) is repealed and the following subsections are inserted instead —

25 “

(1) The Minister may designate a departmental officer to be an industrial inspector.

30 (1a) There are to be as many industrial inspectors as are necessary to perform the functions conferred on industrial inspectors by this Act or any other written law.

s. 27

- (1b) A person ceases to be an industrial inspector if the designation of the person under subsection (1) is revoked or ceases to have effect.

”

5 **27. Sections 98A, 98B and 98C inserted**

After section 98 the following sections are inserted —

“

98A. Identity card

- 10 (1) Every industrial inspector is to be provided with an identity card signed by the Minister or by the CEO or a departmental officer authorised in that behalf by the CEO.
- 15 (2) An industrial inspector must produce the identity card to a person if —
- (a) the industrial inspector has performed, or is about to perform, any function in relation to a person under this Act or any other written law; and
- 20 (b) the person requests the industrial inspector to produce identification.
- (3) An identity card purporting to have been provided under subsection (1) is, without proof of the signature of the person purporting to have signed it or of the person’s authority to have signed it, evidence in a
- 25 court —
- (a) of the appointment to which the identity card purports to relate; and
- (b) of any other matter specified on the identity card.
- 30 (4) If the designation of a person under section 98(1) is revoked or ceases to have effect, the person must, as soon as practicable, return the identity card to the CEO

or a departmental officer authorised by the CEO to receive it.

98B. Staff

(1) In this section —

5 “**employed**” in the Department or the Registrar’s Department includes seconded to perform functions or services for, or duties in the service of, that department.

10 (2) As many public service officers are to be employed in the Department as are necessary for the purposes of this Act.

(3) As many public service officers are to be employed in the Registrar’s Department as are necessary —

15 (a) for the performance of the Court’s functions; and

(b) for the performance of the Commission’s functions; and

(c) otherwise for the purposes of this Act.

98C. Designation of officers, generally

20 (1) This section applies to —

(a) the designation of a person under section 85(9) to be the clerk of the Court; and

(b) the designation of a person under section 93(1ab) to be the Registrar; and

25 (c) the designation of a person under section 93(1ac) to be a deputy registrar; and

(d) the designation of a person under section 98(1) to be an industrial inspector.

s. 28

- (2) The power to make a designation includes —
- (a) the power to revoke a designation previously made under that power; and
 - (b) the power to designate a person to perform functions of another person who has that designation when it is impractical for that other person to perform the functions.
- (3) A designation referred to in subsection (1)(a), (b) or (c) ceases to have effect if the person designated ceases to be a Registrar’s Department officer.
- (4) A designation referred to in subsection (1)(d) ceases to have effect if the person designated ceases to be a departmental officer.
- (5) The chief executive officer of the Registrar’s Department, the Registrar or the Minister, as the case may be, may delegate the power to make a designation to another person.
- (6) These are to be in writing —
- (a) a designation;
 - (b) a revocation of a designation;
 - (c) a delegation of the power to make a designation.

”.

28. Section 113 amended

- (1) Section 113(1) is amended as follows:
- (a) in paragraph (d)(ii) after “matters,” by inserting —
“ applications, ”;
 - (b) after paragraph (d)(ii)(V) by inserting —
“
and

(VI) the *Children and Community Services Act 2004*; and

(VII) the *Workers' Compensation and Injury Management Act 1981*;

5

”.

(c) after each of items II, III and IV by inserting —
“ and ”.

10

(2) Section 113(3) is amended by deleting “this Act,” and inserting instead —

“ this Act or another written law, ”.

Part 3 — Amendments to the *Magistrates Court (Civil Proceedings) Act 2004*

29. The Act amended

5 The amendments in this Part are to the *Magistrates Court (Civil Proceedings) Act 2004*.

30. Section 3 amended

Section 3(1) is amended by inserting after the definition of “defence” —

“

10 “**employment-related claim**” has the meaning given by section 33B;

“**employment-related mediation**” means mediation carried out in accordance with Part 4A Division 2 and the rules of court;

15 “**general procedure**” means the procedure prescribed by Part 3 and the rules of court other than the rules of court made for the purposes of Part 4 or 4A;

”.

31. Section 23 amended

20 After section 23(2) the following subsection is inserted —

“

(3) This section does not apply to a case on an employment-related claim.

”.

25 **32. Section 26 amended**

Section 26(1) is amended as follows:

- (a) by deleting the subsection designation “(1)”; and
- (b) by deleting the definition of “general procedure”.

33. **Part 4A inserted**

After section 33 the following Part is inserted —

“

**Part 4A — Employment-related claims
procedure**

5

Division 1 — Preliminary

33A. Meaning of terms used in this Part

(1) In this Part —

10

“**Chief Commissioner**” has the meaning given in the
Industrial Relations Act 1979 section 7(1);

“**Commission**” has the meaning given in the *Industrial
Relations Act 1979* section 7(1);

“**commissioner**” has the meaning given in the
Industrial Relations Act 1979 section 7(1);

15

“**employee**” has the meaning given in the *Industrial
Relations Act 1979* section 7;

“**employer**” has the meaning given in the *Industrial
Relations Act 1979* section 7;

20

“**mediator**” means a commissioner assigned under
section 33D;

“**relevant organisation or association**”, for a party,
means —

25

(a) an organisation or association as defined in
the *Industrial Relations Act 1979*
section 7(1); or

(b) an organisation as defined in the *Workplace
Relations Act 1996* of the Commonwealth
section 4,

30

of which the party is a member or is eligible to
become a member.

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- (2) A reference in this Part to an employee or employer includes a reference to a former employee or former employer.
- 5 (3) For the purposes of the definitions of “employee” and “employer” in subsection (1), if a person (“**the principal**”) 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, the principal is to be regarded as
- 10 employing the person, or each person in the group, to do work.

33B. Application of Part

- (1) This Part applies to a claim by an employee arising out of a breach of a contract of employment between the
- 15 employee and the employee’s employer (an “**employment-related claim**”).
- (2) If a person making an employment-related claim also makes a claim for relief or the imposition of a penalty under the *Workplace Relations Act 1996* of the
- 20 Commonwealth in relation to the same employer, this Part applies to the person’s claim under that Act as if the claim were an employment-related claim.

33C. Decision of Court about whether claim is an employment-related claim

- 25 (1) The Court may, on the application of a party, decide whether a claim is or is not an employment-related claim.
- (2) Subsection (3) applies if —
- 30 (a) the Court decides a claim is not an employment-related claim; and
- (b) the plaintiff discontinues or withdraws the claim; and

- (c) the plaintiff later refers a claim under the *Industrial Relations Act 1979* that is based on the same subject matter as the claim in the Court.
- 5 (3) For the purposes of the *Industrial Relations Act 1979* —
- (a) if there is a time limit under that Act for referring a claim mentioned in subsection (2)(c), the period starting on the day the claim was made to the Court and ending on the day the Court’s decision under this section is made must be disregarded; and
- 10
- (b) any mediation of the case under this Part is taken to be conciliation of the claim referred to the Commission.
- 15

Division 2 — Mediation

33D. Assignment of mediator

- (1) A registrar must, as soon as practicable after an employment-related claim is made to the Court, advise the Chief Commissioner that the claim has been made.
- 20
- (2) The Chief Commissioner must assign a commissioner as the mediator for the case.
- (3) A Commission deputy registrar or Commission associate may assist the mediator in the preparation and conduct of the employment-related mediation.
- 25
- (4) In subsection (3) —
- “**Commission associate**” means an associate appointed under the *Industrial Relations Act 1979* section 93(1a);

“Commission deputy registrar” means a deputy registrar as defined in the *Industrial Relations Act 1979* section 7(1).

33E. Attendance and participation in mediation

- 5 (1) A mediator may, by written notice, require the parties to an employment-related mediation to do either or both of the following —
- (a) attend before the mediator at a stated time and place to participate in the mediation;
- 10 (b) participate in the mediation in a way specified in the notice.
- (2) The parties must comply with a requirement made by a mediator under subsection (1).

33F. Representation of parties

- 15 (1) A party to an employment-related mediation may appear in person or be represented before the mediator by —
- (a) a relevant organisation or association; or
- (b) a person other than a relevant organisation or association if —
- 20 (i) all parties agree; or
- (ii) the mediator is satisfied that it is in the interests of justice for the party to be represented by that person.
- 25 (2) Without limiting subsection (1), a party to an employment-related mediation who is a party referred to in section 44(2)(b) or (c) may be represented before the mediator by a person who may represent the party under section 44(2)(b) or (c).

33G. No fees or costs for mediation

The parties to an employment-related mediation are not liable to pay any fees or costs for mediation.

33H. Mediator may file certificate

- 5 (1) If the mediator is satisfied that the parties to an employment-related mediation are unable to settle all or part of the case the mediator must issue a certificate in accordance with rules of court.
- 10 (2) The Court must not hear and determine a case on an employment-related claim unless a mediator has issued a certificate under subsection (1).
- (3) Subsection (2) does not stop the Court making a determination under section 33C.

Division 3 — Proceedings in Court

15 **33I. Application**

This Division applies to a case heard in the Court involving an employment-related claim.

33J. Representation of parties

- 20 (1) Despite section 44, an employee or officer of a relevant organisation or association may appear for a party to the case without the leave of the Court.
- (2) Section 44(4) does not apply to an employee or officer of a relevant organisation or association who appears for a party to the case.

25 **33K. Employment-related claims procedure**

- (1) The Court is to act with as little formality as the Court thinks is reasonable.

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(2) The Court is not bound by rules or practice as to evidence but may inform itself on any matter in such manner as it thinks fit.

5 (3) The Court may order that an employment-related claim be dealt with under the general procedure if —

(a) all the parties so request; or

(b) the case involves an important principle of law or complex facts or issues.

33L. Costs

10 (1) A successful party to a case on an employment-related claim is entitled to an order under section 25(1) in relation to the party's costs only if the Court is satisfied that —

15 (a) because of the existence of exceptional circumstances an injustice would be done to the successful party if that party's costs were not ordered to be paid; or

(b) the unsuccessful party's claim or defence was wholly without merit.

20 (2) This section does not affect section 33G.

33M. Rules of court for employment-related proceedings

Rules of court made for the purposes of this Part may —

25 (a) provide for procedures to be followed when conducting a case on an employment-related claim; and

(b) specify the circumstances in which any of the Court's powers in Part 3 may be exercised; and

- (c) provide that all or some of the general procedure, with or without modifications, applies to cases on employment-related claims.

”.

5 **34. Section 34 amended**

Section 34 is amended as follows:

- (a) by deleting the definition of “compulsory mediation” and inserting instead —

“

10

“compulsory mediation” means —

- (a) mediation carried out by a mediator in accordance with an order of the Court and the rules of court; or
- (b) employment-related mediation;

15

”;

- (b) in the definition of “mediator” by inserting after “section 35” —

“

20

and in sections 36, 37(5) and 38 includes a mediator as defined in section 33A(1)

”.

35. Section 36 amended

- (1) Section 36 is amended by inserting before “The” the subsection designation “(1)”.

25

- (2) At the end of section 36 the following subsection is inserted —

“

30

- (2) The *Magistrates Court Act 2004* section 37 applies to a Commission deputy registrar or Commission associate (as those terms are defined in section 33D(4)) in respect of his or her performance or purported

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performance of functions under section 33D(3) as if
that person were a Court officer.

”.

Part 4 — Amendments to the *Children and Community Services Act 2004*

36. The Act amended

5 The amendments in this Part are to the *Children and Community Services Act 2004*.

37. Part 7 heading amended

The heading to Part 7 is deleted and the following heading is inserted instead —

10 “ **Part 7 — Prohibitions and limitations on certain kinds of employment of children** ”

38. Part 8 inserted

After section 196 the following Part is inserted —

15 “ **Part 8 — Other protections for children in employment** ”

Division 1 — Preliminary

197. Terms used in this Part

20 In this Part —

“**affected employer**” has the meaning given to that term in section 198;

“**applied provisions of the IR Act**” has the meaning given to that term in section 199;

25 “**Chief Commissioner**” has the meaning given to that term in the IR Act section 7(1);

“**commissioner**” has the meaning given to that term in the IR Act section 7(1);

5

“**comparable State award**”, in relation to work carried out by a child, means a State award that regulates the terms and conditions of employment of employees carrying out the same kind of work as the work carried out by the child;

“**compliance notice**” means a notice issued under section 206;

10

“**constitutional corporation**” means a corporation to which section 51(xx) of the Constitution of the Commonwealth applies;

“**industrial inspector**” means a person designated as an industrial inspector under the IR Act;

15

“**industrial magistrate’s court**” has the meaning given to that term in the IR Act section 7(1);

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

20

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

“**parent**”, in relation to a child, means a person, including the CEO, who at law has responsibility for the day-to-day care, welfare and development of the child;

25

“**State award**” has the meaning given to the term “award” in the IR Act section 7(1).

198. Affected employers and employment

(1) In this section —

30

“**workplace agreement**” has the meaning given to that term in the *Workplace Relations Act 1996* of the Commonwealth section 4(1).

- 5
- (2) A person is an **“affected employer”** of a child for the purposes of this Part if —
- (a) the person is a constitutional corporation that is the employer, as defined in the IR Act section 7(1), of a child; and
 - (b) the child is employed under —
 - (i) a workplace agreement; or
 - (ii) an agreement or arrangement prescribed by the regulations;
- 10 and
- (c) a comparable State award is in force in relation to the work carried out by the child.
- (3) A person is also an **“affected employer”** of a child for the purposes of this Part if —
- 15 (a) the person engages a child under a contract for services other than a contract for services for the child to carry out work of a kind prescribed by the regulations; and
 - 20 (b) a comparable State award is in force in relation to the work carried out by the child.
- (4) A reference in this Part to the employment of a child by an affected employer includes, for an affected employer referred to in subsection (3), a reference to the engagement of a child as referred to in that subsection.
- 25

199. Applied provisions of the IR Act

- (1) A reference in this Part to the **“applied provisions of the IR Act”** is a reference to the following provisions of the IR Act —
- 30 (a) section 22B;
 - (b) section 26(1)(a) and (b), (2) and (3);

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- (c) section 27;
 - (d) section 28;
 - (e) section 30;
 - (f) section 31;
 - 5 (g) section 32A;
 - (h) section 33(1), (2), (3), (5) and (6);
 - (i) section 34;
 - (j) section 35;
 - (k) section 36;
 - 10 (l) section 49(1), (2), (2a) and (3) to (12);
 - (m) section 90;
 - (n) section 91;
 - (o) section 92.
- (2) The applied provisions of the IR Act have effect for the
- 15 purposes of this Part —
- (a) subject to the provisions of this Part; and
 - (b) with the modifications that are provided for in subsection (3); and
 - (c) with any modifications that are prescribed
 - 20 under the IR Act section 113; and
 - (d) 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.
- (3) For the purposes of subsection (1) —
- (a) the IR Act section 31(1) has effect as if paragraph (c) were deleted and the following paragraph were inserted instead —
 - 25 “ (c) by a legal practitioner. ”;
 - 30 and

- (b) the IR Act section 33(6) has effect as if
“section 44” were deleted and the following
were inserted instead —

“

5 the *Children and Community Services Act 2004*
section 232G

”.

and

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

“

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

”.

Division 2 — Minimum conditions of employment for children

Subdivision 1 — Affected employers to provide minimum conditions of employment for children

20 **200. Affected employers to provide minimum conditions
of employment for children**

- 25 (1) An affected employer of a child must ensure that the
child is provided with conditions of employment not
less favourable than the minimum conditions of
employment for the child.
- 30 (2) The “**minimum conditions of employment**” for a
child are —
- (a) the rates of salary or wages that are not less
than the rates of salary or wages provided for
from time to time under the comparable State
award; and

(b) any other conditions of employment provided for from time to time under the comparable State award that are prescribed by the regulations.

5 (3) Nothing in this section limits the operation of the *Minimum Conditions of Employment Act 1993*.

(4) Nothing in this section prohibits a child from being engaged to carry out unpaid work on a trial basis in accordance with Division 4.

10 **201. Determination of comparable award by Registrar**

(1) In this section —
“**Registrar**” has the meaning given to that term in the IR Act section 7(1).

15 (2) If an affected employer of a child is unsure which comparable State award will be applicable for the purposes of section 200, the affected employer may apply in writing to the Registrar for the making of a determination of that matter.

20 (3) On such an application being made, the Registrar must determine which comparable State award will be applicable for the purposes of section 200.

25 (4) A determination under subsection (3) is binding on the IR Commission or an industrial magistrate’s court, as the case requires, for the purposes of proceedings under Subdivision 3 unless the IR Commission or court considers that the circumstances existing at the time when the determination was made have changed in a material way.

202. Affected employers to display comparable State awards at workplaces

(1) In this section —

“**comparable State award**” includes a document —

- 5 (a) containing a summary of that State award approved by the Registrar for the purposes of the IR Act section 97UG; and
- 10 (b) having a statement at the head of the document to the effect that it is a summary of that State award so approved;

“**Registrar**” has the meaning given to that term in the IR Act section 7(1).

- 15 (2) An affected employer of a child must cause a copy of the comparable State award that is applicable for the purposes of section 200 to the employment of the child at any premises to be conspicuously displayed at those premises.

203. Requirements relating to keeping records

(1) In this section —

20 “**ABN**” (which stands for “Australian Business Number”) has the meaning given to that term in the *A New Tax System (Australian Business Number) Act 1999* of the Commonwealth section 41;

25 “**ACN**” (which stands for “Australian Company Number”) has the meaning given to that term in the *Corporations Act 2001* of the Commonwealth section 9.

- 30 (2) An affected employer of a child must ensure that records are kept of the following matters —
- (a) the name of the affected employer;

- 5
- (b) the ACN (if any) and ABN of the affected employer;
- (c) the name of the child;
- (d) the date of birth of the child, as provided to the affected employer by the child;
- (e) the date on which the child's employment began;
- (f) whether the child's employment is full-time or part-time;
- 10 (g) whether the child's employment is permanent, temporary or casual;
- (h) any remuneration paid to the child;
- (i) the days on which the child works for the affected employer (including the starting and finishing times, and the total hours worked, on each day);
- 15 (j) if the child's employment is terminated — the date on which the child's employment is terminated;
- 20 (k) any other matters concerning the child's employment that are prescribed by the regulations.
- (3) The records are to be kept in accordance with the regulations.
- 25 (4) The affected employer of a child must ensure that an entry made in the records is kept for a period of at least 7 years after the entry is made.

204. Access to records

- 30 (1) In this section —
“**authorised person**”, in relation to an affected employer of a child, means the child or a person authorised in writing by the child;

“relevant records” means the records required to be kept under section 203(2).

- 5
- (2) On the written request of an authorised person, an affected employer of a child must, not later than 14 days after the request is made —
- (a) produce to the authorised person the relevant records relating to the child; and
 - (b) let the authorised person inspect those records.
- 10
- (3) The duty placed on an affected employer by subsection (2) —
- (a) continues so long as the relevant records are required to be kept under section 203(4); and
 - (b) is not affected by the fact that the child is no longer employed by the affected employer; and
 - 15 (c) includes the further duties —
 - (i) to let the authorised person enter premises of the affected employer for the purpose of inspecting the relevant records; and
 - 20 (ii) to let the authorised person take copies of or extracts from those records.

205. Enforcement of sections 200, 202, 203 and 204

- 25
- (1) A contravention of section 200(1), 202(2), 203(2) or (4) or 204(2) is not an offence, but those provisions are civil penalty provisions for the purposes of the IR Act section 83E.
- 30
- (2) In proceedings under the IR Act section 83E for a contravention of section 200(1) by an affected employer in respect of a child, a declaration by the IR Commission under section 216(6)(c) that the affected employer failed to ensure that the child was provided with conditions of employment not less

favourable than the minimum conditions of employment for the child in accordance with section 200(1) is prima facie evidence that the affected employer contravened that provision.

5

Subdivision 2 — Compliance notices

206. Issue of compliance notices

- (1) Subsection (2) applies if an industrial inspector is of the opinion that an affected employer of a child —
- (a) is contravening section 200(1); or
- 10 (b) has contravened section 200(1) in circumstances that make it likely that the contravention will continue or be repeated.
- (2) If this subsection applies, the industrial inspector may issue to the affected employer a notice in the form
- 15 prescribed by the regulations requiring the affected employer to remedy the contravention or the matters giving rise to the contravention within the specified period, of not less than 14 days, after the issue of the notice.
- (3) An industrial inspector may specify a period that is less than 14 days after the issue of the compliance notice if the inspector is satisfied that it is reasonably
- 20 practicable for the affected employer to comply with the notice within the specified period.
- (4) A compliance notice is to —
- (a) state that the industrial inspector is of the opinion referred to in subsection (1); and
- (b) state the reasons for that opinion.

207. Compliance notices may include directions

- 30 (1) An industrial inspector may include in a compliance notice directions as to the measures to be taken to

remedy any contravention or matter to which the notice relates or to otherwise comply with the notice.

- 5 (2) Without limiting subsection (1), any such direction may offer the affected employer a choice of ways in which to remedy the contravention or matter or to comply with the notice.

208. Withdrawal of compliance notices

- 10 (1) An authorised industrial inspector may withdraw a compliance notice at any time if the inspector is satisfied that the notice was issued in error or is incorrect in some respect.

- (2) In subsection (1) —

“authorised industrial inspector” means —

- 15 (a) the industrial inspector who issued the compliance notice; or
20 (b) another industrial inspector authorised to withdraw the compliance notice by the officer prescribed by the regulations of the department of the Public Service principally assisting in the administration of the IR Act.

- (3) The withdrawal of a compliance notice has effect when written notice of the withdrawal is given to the affected employer.

25 **209. Withdrawal of compliance notice does not prevent issue of another notice**

The withdrawal of a compliance notice issued to an affected employer does not prevent the issue of another compliance notice to the affected employer.

210. Proceedings not affected by compliance notices

The issue or withdrawal of a compliance notice does not affect any proceedings under this Part in connection with any matter in respect of which the notice was issued.

5

Subdivision 3 — Proceedings in the IR Commission and industrial magistrate's court

211. Conferral of jurisdiction on IR Commission

By this section the IR Commission has jurisdiction to hear and determine applications that may be made to the IR Commission under section 213.

10

212. Jurisdiction to be exercised by commissioner with necessary qualifications

- (1) The jurisdiction conferred by section 211 in respect of a matter is to be exercised by the IR Commission constituted by a commissioner.
- (2) In allocating a matter for the purposes of subsection (1), the Chief Commissioner must have regard to the desirability of the commissioner concerned having relevant knowledge of this Part.

15

20

213. Applications to IR Commission alleging contraventions of section 200(1)

- (1) An application may be made to the IR Commission for a determination whether an affected employer of a child has contravened section 200(1).
- (2) An application under subsection (1) may be made by —
 - (a) the child, a parent of the child or a person authorised in writing by the child to do so; or

25

- 5
- (b) an organisation, as defined in the IR Act section 7(1), of which the child is, or is eligible to be, a member; or
- (c) an association, as defined in the IR Act section 7(1), that represents an organisation referred to in paragraph (b); or
- 10 (d) an organisation, as defined in the *Workplace Relations Act 1996* of the Commonwealth section 4(1), of which the child is, or is eligible to be, a member; or
- (e) an industrial inspector.
- (3) The application may be made whether or not a compliance notice has been issued to the affected employer in respect of the contravention.
- 15 (4) The applicant must serve a copy of the application on the affected employer of the child.
- (5) The application is to be made to the IR Commission not later than 6 years after the day on which —
- 20 (a) the affected employer was given a compliance notice in respect of the contravention; or
- (b) if no such notice was given — the alleged contravention occurred.

214. Parties to proceedings

25 Subject to the IR Act section 27(1)(j) (as applied by section 215), the parties to proceedings on an application under section 213 are —

- (a) the applicant; and
- (b) the affected employer on whom or which a copy of the application is served.

215. Applied provisions of IR Act: practice, procedure and appeals

5

The applied provisions of the IR Act that apply to and in relation to the exercise of the jurisdiction under the IR Act of the IR Commission constituted by a commissioner apply to the exercise of the jurisdiction conferred by section 211.

216. Determination of application where no resolution by conciliation

10

(1) If—

(a) an application is made to the IR Commission under section 213; and

(b) the IR Commission —

15

(i) endeavours to resolve the issues involved in the application by conciliation under section 232F, but the parties do not reach agreement for the resolution of those issues; or

20

(ii) does not endeavour to resolve those issues by conciliation under section 232F,

the IR Commission may hear and determine the application in accordance with section 211.

25

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

30

(3) If the commissioner referred to in subsection (2) proposes to constitute the IR Commission for the hearing and determination of the application, the commissioner must, at the conclusion of the

conciliation proceeding, advise the parties of his or her intention to do so.

- 5
- (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 application.
- 10
- (5) The commissioner is not to be taken to have exercised conciliation powers in relation to an application merely because —
- 15
- (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 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.
- 20
- (6) In determining the application, the IR Commission may do one or more of the following —
- 25
- (a) make an order that the affected employer pay to the child a specified amount by way of compensation, whether for the child having been underpaid or otherwise;
- 30
- (b) make an order that the affected employer do, or refrain from doing, any specified thing;
- (c) make a declaration that the affected employer failed to ensure that the child was provided with conditions of employment not less favourable than the minimum conditions of employment for the child in accordance with section 200(1);
- (d) make an order dismissing the application;

- (e) make any ancillary or incidental order that the IR Commission thinks necessary for giving effect to an order made under this subsection.

217. Costs of representation may be awarded in certain circumstances

5

10

15

- (1) Despite the IR Act section 27(1)(c) (as applied by section 215) but subject to subsection (2), on hearing and determining an application to which section 213 applies, 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 proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the party against which the order is made.
- (2) The IR Commission cannot make an order giving costs against an industrial inspector.

218. Enforcement of orders in industrial magistrate's court

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25

30

- (1) An order made by the IR Commission under section 216(6) or 217 is an instrument to which the IR Act section 83 applies.
- (2) For the purposes of subsection (1), the IR Act sections 82A, 83, 83A, 83C, 83F, 84, 90, 91 and 92 have effect —
 - (a) with any modifications that are prescribed under the IR Act section 113; 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.

Division 3 — Unfair dismissal and denial of contractual benefits

219. Terms used in this Division

(1) In this Division —

5

“**Commonwealth instrument**” means an award, agreement or other instrument of a kind prescribed by the regulations;

10

“**contractual benefit**” means a benefit to which a child is entitled under a contract of employment with a constitutional corporation whether —

15

- (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,

but does not include a benefit to which a child is entitled under a Commonwealth instrument;

20

“**employment**” means the engagement of a child to carry out work under a contract of employment with a constitutional corporation.

25

(2) For the purposes of this Division and subject to subsection (3), if a constitutional corporation engages a child, or a group of children, under a contract to personally give a performance as, or as part of, musical, theatrical, dance or comic entertainment, the constitutional corporation is to be regarded as employing the child, or each child in the group, under a contract of employment.

30

(3) Subsection (2) has effect only to the extent necessary to enable a claim of the kind referred to in section 222(1)(b) to be referred to, and dealt with by, the IR Commission in respect of a child who would not be engaged by a constitutional corporation under a

contract of employment but for the operation of subsection (2).

220. Conferral of jurisdiction on IR Commission

5 By this section the IR Commission has jurisdiction to hear and determine claims that may be referred to the IR Commission under section 222.

221. Jurisdiction to be exercised by commissioner with necessary qualifications

10 (1) The jurisdiction conferred by section 220 in respect of a matter is to be exercised by the IR Commission constituted by a commissioner.

(2) In allocating a matter for the purposes of subsection (1), the Chief Commissioner must have regard to the desirability of the commissioner concerned having relevant knowledge of this Part.

222. Claims referred to IR Commission of unfair dismissal and denial of contractual benefit

20 (1) A claim may be referred under this section to the IR Commission that a child —
(a) has been harshly, oppressively or unfairly dismissed by a constitutional corporation from his or her employment; or
(b) has not been allowed a contractual benefit by a constitutional corporation.

25 (2) Subsection (1) applies to —
(a) a dismissal of a child from his or her employment that occurs on or after the day on which this section comes into operation; or
30 (b) a failure to allow a child a contractual benefit that occurs on or after 27 March 2006.

- 5
- 10
- 15
- 20
- 25
- (3) A claim under subsection (1) may be referred to the IR Commission by —
 - (a) the child, a parent of the child or a person authorised in writing by the child to do so; or
 - (b) an organisation, as defined in the IR Act section 7(1), of which the child is, or is eligible to be, a member; or
 - (c) an association, as defined in the IR Act section 7(1), that represents an organisation referred to in paragraph (b); or
 - (d) an organisation, as defined in the *Workplace Relations Act 1996* of the Commonwealth section 4(1), of which the child is, or is eligible to be, a member; or
 - (e) an industrial inspector.
 - (4) The claimant must serve a copy of the claim on the constitutional corporation.
 - (5) Subject to subsection (6), the claim is to be referred to the IR Commission not later than —
 - (a) 28 days after the day on which the child was dismissed from his or her employment; or
 - (b) 6 years after the day on which the child was not allowed the contractual benefit,as the case requires.
 - (6) The IR Commission may accept a claim under subsection (1)(a) that is out of time if the IR Commission considers that it would be unfair not to do so.

223. Parties to proceedings

Subject to the IR Act section 27(1)(j) (as applied by section 224), the parties to proceedings on a claim under section 222 are —

- 5
- (a) the claimant; and
 - (b) the constitutional corporation on which a copy of the claim is served.

224. Applied provisions of IR Act: practice, procedure and appeals

10 The applied provisions of the IR Act that apply to and in relation to the exercise of the jurisdiction under the IR Act of the IR Commission constituted by a commissioner apply to the exercise of the jurisdiction conferred by section 220.

15 **225. Determination of claim where no resolution by conciliation**

- (1) If—
- (a) a claim is referred to the IR Commission under section 222; and
 - 20 (b) the IR Commission —
 - (i) endeavours to resolve the issues involved in the claim by conciliation under section 232F, but the parties do not reach agreement for the resolution of those issues; or
 - 25 (ii) does not endeavour to resolve those issues by conciliation under section 232F,

30 the IR Commission may hear and determine the claim in accordance with section 220.

- 5
- (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.
- 10
- (3) If the commissioner referred to in subsection (2) proposes to constitute the IR Commission for the hearing and determination of the claim, the commissioner must, at the conclusion of the conciliation proceeding, advise the parties of his or her intention to do so.
- 15
- (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.
- 20
- (5) The commissioner is not to be 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 was not presided over by the commissioner; or
- 25
- (b) the commissioner arranged for the parties or their representatives to confer among themselves at a conference at which the commissioner was not present.
- 30
- (6) The IR Commission is to determine a claim to which section 222(1)(a) applies in accordance with the IR Act section 23A.
- (7) The IR Commission is to determine a claim to which section 222(1)(b) applies as if the claim were referred to the IR Commission under the IR Act section 28A.

(8) Without limiting the application of the IR Act section 23A(7) to a claim to which section 222(1)(a) applies, a child is not entitled to compensation both under this section and otherwise for, as the case requires —

- (a) the same dismissal from employment by a constitutional corporation; or
- (b) the same failure by a constitutional corporation to allow the child a contractual benefit.

226. Costs of representation may be awarded in certain circumstances

- (1) Despite the IR Act section 27(1)(c) (as applied by section 224) but subject to subsection (2), on hearing and determining a claim to which section 222 applies, 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 proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the party against which the order is made.
- (2) The IR Commission cannot make an order giving costs against an industrial inspector.

227. Enforcement of orders in industrial magistrate's court

- (1) An order made by the IR Commission for the purposes of section 225(6) is an order to which the IR Act section 83B applies.
- (2) An order made by the IR Commission for the purposes of section 225(7) or under section 226 is an instrument to which the IR Act section 83 applies.

- 5 (3) For the purposes of—
- (a) subsection (1), the IR Act sections 82A, 83B, 83C, 83F, 84, 90, 91 and 92; and
 - (b) subsection (2), the IR Act sections 82A, 83, 83A, 83C, 83F, 84, 90, 91 and 92,
- have effect—
- (c) with any modifications that are prescribed under the IR Act section 113; and
 - (d) for sections 82A, 83, 83A, 83B, 83C and 83F, with any other modifications that the industrial magistrate’s court determines to be necessary or appropriate.
- 10

Division 4 — Unpaid work on a trial basis

15 **228. Obligations of persons engaging children to carry out unpaid work**

- (1) In this section—
- “**unpaid work**” means work for which either no payment or other reward, or only a nominal payment or other reward, is received;
- 20 “**unpaid work on a trial basis**” means unpaid work that is carried out with a view to obtaining paid work with the person for whom the unpaid work is carried out, whether under a contract of service, a contract for services or other arrangement, but
- 25 does not include unpaid work carried out as prescribed by the regulations.
- (2) A person who engages a child to carry out unpaid work on a trial basis must ensure that the child carries out that work—
- 30 (a) on not more than one day in any calendar year; and

- (b) for a period, excluding any break of not less than 30 minutes, of not more than 7 hours; and
- (c) for a period of not more than 5 hours without a break of not less than 30 minutes.

5 **229. Enforcement of section 228**

- (1) A contravention of section 228(2) is not an offence, but that provision is a civil penalty provision for the purposes of the IR Act section 83E.
- (2) In proceedings under the IR Act section 83E for a
10 contravention of section 228(2) by a person in respect
 of a child, a declaration by the IR Commission under
 section 232C(6)(c) that the person failed to ensure that
 the child carried out work in accordance with
 section 228(2) is prima facie evidence that the person
15 contravened that provision.

230. Conferral of jurisdiction on IR Commission

By this section the IR Commission has jurisdiction to hear and determine applications that may be made to the IR Commission under section 232.

20 **231. Jurisdiction to be exercised by commissioner with necessary qualifications**

- (1) The jurisdiction conferred by section 230 in respect of a matter is to be exercised by the IR Commission constituted by a commissioner.
- (2) In allocating a matter for the purposes of
25 subsection (1), the Chief Commissioner must have regard to the desirability of the commissioner concerned having relevant knowledge of this Part.

**232. Applications to IR Commission alleging
contravention of section 228**

- 5 (1) An application may be made to the IR Commission for a determination whether a person has contravened section 228(2) in respect of a child.
- (2) An application under subsection (1) may be made by —
- 10 (a) the child, a parent of the child or a person authorised in writing by the child to do so; or
- (b) an organisation, as defined in the IR Act section 7(1), of which the child is, or is eligible to be, a member; or
- 15 (c) an association, as defined in the IR Act section 7(1), that represents an organisation referred to in paragraph (b); or
- (d) an organisation, as defined in the *Workplace Relations Act 1996* of the Commonwealth section 4(1), of which the child is, or is eligible to be, a member; or
- 20 (e) an industrial inspector.
- (3) The applicant must serve a copy of the application on the person who engaged the child to carry out the work that is the subject of the application.
- 25 (4) The application is to be made to the IR Commission not later than 6 years after the day on which the alleged contravention occurred.

232A. Parties to proceedings

- 30 Subject to the IR Act section 27(1)(j) (as applied by section 232B), the parties to proceedings on an application under section 232 are —
- (a) the applicant; and

- (b) the person on whom or which a copy of the application is served.

232B. Applied provisions of IR Act: practice, procedure and appeals

5 The applied provisions of the IR Act that apply to and in relation to the exercise of the jurisdiction under the IR Act of the IR Commission constituted by a commissioner apply to the exercise of the jurisdiction conferred by section 230.

10 **232C. Determination of application where no resolution by conciliation**

(1) If—

(a) an application is made to the IR Commission under section 232; and

15 (b) the IR Commission —

(i) endeavours to resolve the issues involved in the application by conciliation under section 232F, but the parties do not reach agreement for the resolution of those issues; or

20 (ii) does not endeavour to resolve those issues by conciliation under section 232F,

the IR Commission may hear and determine the application in accordance with section 230.

25

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

30 (3) If the commissioner referred to in subsection (2) proposes to constitute the IR Commission for the hearing and determination of the application, the

commissioner must, at the conclusion of the conciliation proceeding, advise the parties of his or her intention to do so.

- 5 (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 application.
- 10 (5) The commissioner is not to be taken to have exercised conciliation powers in relation to an application merely because —
- 15 (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 was not presided over by the commissioner; or
- 20 (b) the commissioner arranged for the parties or their representatives to confer among themselves at a conference at which the commissioner was not present.
- (6) In determining the application, the IR Commission may do one or more of the following —
- 25 (a) make an order that the person pay to the child a specified amount by way of compensation, whether for the child not having been paid or otherwise;
- 30 (b) make an order that the person do, or refrain from doing, any specified thing;
- (c) make a declaration that the person failed to ensure that the child carried out work in accordance with section 228(2);
- (d) make an order dismissing the application;

- (e) make any ancillary or incidental order that the IR Commission thinks necessary for giving effect to an order made under this subsection.

232D. Costs of representation may be awarded in certain circumstances

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- (1) Despite the IR Act section 27(1)(c) (as applied by section 232B) but subject to subsection (2), on hearing and determining an application to which section 232 applies, 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 proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the party against which the order is made.
- (2) The IR Commission cannot make an order giving costs against an industrial inspector.

232E. Enforcement of orders in industrial magistrate's court

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30

- (1) An order made by the IR Commission under section 232C(6) or 232D is an instrument to which the IR Act section 83 applies.
- (2) For the purposes of subsection (1), the IR Act sections 82A, 83, 83A, 83C, 83F, 84, 90, 91 and 92 have effect —
 - (a) with any modifications that are prescribed under the IR Act section 113; 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.

Division 5 — Conciliation

232F. Conciliation

- (1) This section applies if —
- 5 (a) an application is made to the IR Commission under section 213 or 232; or
- (b) a claim is referred to the IR Commission under section 222.
- (2) If the IR Commission considers that the issues
- 10 involved in the application or claim may be resolved by conciliation —
- (a) the IR Commission may endeavour to assist the parties to reach an agreement on those issues; and
- (b) for that purpose the IR Commission may —
- 15 (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 among themselves at a conference at which the IR Commission is not present; and
- 20 (iii) otherwise encourage the parties to exchange or divulge attitudes or information that, in the opinion of the IR Commission, would assist in the resolution of the issues.
- 25 (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.

- 5
- (4) If the IR Commission gives or makes a direction, order or declaration under subsection (3), the IR Commission must —
- (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.
- 10
- (5) A direction, order or declaration given or made under subsection (3) binds only the parties to the relevant conciliation proceeding.
- (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.
- 15
- (7) If the parties request the IR Commission to make recommendations about particular aspects of the application or claim about which they are unable to reach agreement, the IR Commission may make recommendations about those aspects of the application or claim.
- 20
- (8) If the IR Commission —
- (a) takes action under subsection (2)(a); and
- (b) is satisfied that the parties have reached agreement on all of the issues involved,
- 25
- the IR Commission may, with the consent of the parties, make a determination by order for the purposes of section 211, 220 or 230, as the case requires, in terms of that agreement.
- 30
- (9) Any —
- (a) direction, order or declaration given or made by the IR Commission under subsection (3); or

- (b) order made by the IR Commission containing a determination under subsection (8),

is enforceable under the IR Act section 84A as if it were given or made under the IR Act section 32.

5 **232G. Compulsory attendance at conciliation**

- (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 232F.

- 10 (2) A summons under this section —

- (a) is to be given in the form and manner prescribed by regulations made by the Chief Commissioner under the IR Act section 113(1); and

15 (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

20 Full Bench, as the case may be, that he or she did not receive the summons.

- (3) In subsection (2) —
“**Full Bench**” has the meaning given to that term in the IR Act section 7(1).

25 (4) 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.

30 (5) The requirement to attend imposed by subsection (4) is enforceable in accordance with section 232F(9) as if it

were a direction, order or declaration referred to in that provision.

Division 6 — General

232H. Obstruction of industrial inspectors

5 The IR Act section 102(1)(a) and (b), (2) and (3) apply, with any modifications prescribed by the regulations, to and in relation to the performance by industrial inspectors of functions for the purposes of this Part.

232I. Civil penalties

10 For the purposes of the application of the IR Act section 83E to a contravention of section 102(1) or (2) of that Act (as applied by section 232H), the IR Act section 83E(6)(a), (b) and (c) do not apply.

232J. Effect of other proceedings

15 The IR Commission must not deal with an application or claim under this Part if proceedings in respect of the subject matter of the application or claim have already been commenced before the IR Commission under the IR Act or a court or other body under the IR Act or
20 other written law, unless those proceedings —

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

232K. Transfer of claim

25 (1) If the IR Commission decides that it has jurisdiction under the IR Act to determine a claim referred under Division 3, the IR Commission may order that the claim be dealt with under that Act.

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

232L. Part does not derogate from IR Act

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

232M. Part 7 not limited

- (1) Subject to subsection (2), nothing in this Part limits the operation of Part 7.
- (2) Sections 195 and 196 do not apply for the purposes of this Part.

”.

Part 5 — Amendments to the *Occupational Safety and Health Act 1984*

39. The Act amended

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

40. Section 35D amended

(1) Section 35D(1) is amended as follows:

(a) in paragraph (a)(ii) after “earnings” by inserting —

10 “
or any other detriment to which the
claimant was subjected
”;

(b) in paragraph (b) after “fit” by inserting —

“ as compensation ”.

15 (2) Section 35D(2) is amended after “fit” by inserting —

“ as compensation ”.

(3) Section 35D(4) is amended after “earnings or” in both places
where it occurs by inserting —

“ other ”.

20 **41. Section 51G amended**

Section 51G(1) is amended either —

(a) if that subsection ends “and 51A(1).”, by deleting “and
51A(1).” and inserting instead —

“ , 51A(1), 56A(1) and 56C(1). ”; or

25 (b) if that subsection ends “and 60A.”, by deleting “and
60A.” and inserting instead —

“ , 56A(1), 56C(1) and 60A. ”.

Note: Paragraph (a) or (b) will have effect depending on whether section 51G(1) has or has not been amended, as proposed in the *Occupational Safety and Health Legislation Amendment Bill 2007*, when this section comes into operation.

5 **42. Section 51J amended**

(1) Section 51J(1) is amended by deleting “or 39G.” and inserting instead —

“ , 39G or 56C(1). ”.

(2) After section 51J(3) the following subsections are inserted —

10 “

(3a) If the enforcement of any direction, order or declaration to which subsection (3) applies results in the imposition on a principal of a penalty under the *Industrial Relations Act 1979* section 84A(5)(a)(ii), the principal is to be taken to be an employer for the purposes of that subparagraph.

15

(3b) In subsection (3a) —

“**principal**” has the meaning given to that term in section 23D(1).

20

”.

43. Part VIII Division 1 and Part VIII Division 2 heading inserted

Before section 56 the following Division and heading are inserted in Part VIII —

25 “

Division 1 — Preliminary

56AA. Terms used in this Part

(1) In this Part —

“**bullying**” has the meaning given to that term in section 56AB;

30

“**contractor**” and “**principal**” have the meanings given to those terms in section 23D(1).

- 5 (2) A reference in Division 2 or 3 to an “**employer**”, an “**employee**”, a “**principal**” or a “**contractor**” includes a reference to a former employer, a former employee, a former principal or a former contractor, as the case requires.

56AB. Bullying

- 10 (1) When this Part refers to bullying it means unreasonable or inappropriate behaviour at a workplace —
- (a) that is repeatedly directed towards an employee or contractor or a group of employees or contractors; and
 - (b) that creates a risk to safety or health.
- 15 (2) When this Part refers to bullying it does not include —
- (a) reasonable action taken in a reasonable manner by an employer to transfer, demote, discipline, counsel, retrench or dismiss an employee; or
 - 20 (b) reasonable action taken in a reasonable manner by a principal in relation to a contractor that is action of a kind described in paragraph (a); or
 - (c) a decision by an employer, based on reasonable grounds, not to award or provide a promotion, transfer or benefit in connection with an
 - 25 employee’s employment; or
 - (d) a decision by a principal, based on reasonable grounds, that, in connection with a contractor’s engagement, is a decision of a kind described in paragraph (c); or
 - 30 (e) reasonable administrative action taken in a reasonable manner by an employer or a principal in connection with an employee’s

employment or a contractor's engagement, as the case may be; or

- (f) reasonable action taken in a reasonable manner under an enactment affecting an employee or contractor.

5

Division 2 — Discrimination

”.

44. Section 56 amended

- (1) Section 56(1) is amended by deleting “in any way treats an employee or prospective employee less favourably than would otherwise be the case” and inserting instead —

10

“

causes disadvantage to an employee or prospective employee

15

”.

- (2) After section 56(1) the following subsection is inserted —

“

- (1a) If a principal causes disadvantage to a contractor for the dominant or substantial reason that the contractor —

20

- (a) is or has been a member of a safety and health committee; or
- (b) performs or has performed any function as a member of a safety and health committee; or
- (c) gives or has given assistance or information to an inspector, safety and health representative or any member of a safety and health committee; or
- (d) makes or has made a complaint in relation to safety or health to —
- (i) the Commissioner; or

25

30

s. 44

- (ii) an inspector; or
- (iii) a person who is or was —
 - (I) a principal in relation to the contractor; or
 - (II) another contractor in relation to such a principal;
- or
- (iv) a safety and health representative; or
- (v) a member of a safety and health committee,

the principal commits an offence.

”.

(3) After section 56(2) the following subsections are inserted —

“

- (3) For the purposes of subsection (1), an employer causes disadvantage to an employee if the employer —
 - (a) dismisses the employee from employment; or
 - (b) demotes the employee or fails to give the employee a promotion that the employee could reasonably have expected; or
 - (c) detrimentally alters the employee’s employment position; or
 - (d) detrimentally alters the employee’s pay or other terms and conditions of employment.
- (4) For the purposes of subsection (1), a prospective employer causes disadvantage to a prospective employee if the prospective employer refuses to employ the prospective employee.
- (5) For the purposes of subsection (1a), a principal causes disadvantage to a contractor if the principal —
 - (a) terminates the engagement of the contractor; or

(b) subjects the contractor to any other detriment.

”

45. Sections 56A and 56B inserted

After section 56 the following sections are inserted —

5

“

56A. Claim may be referred to the Tribunal

(1) A person may —

(a) refer to the Tribunal a claim that —

10

(i) the person’s employer or prospective employer has caused disadvantage to the person in contravention of section 56(1); or

15

(ii) if the person is a contractor, a principal in relation to the person has caused disadvantage to the person in contravention of section 56(1a);

and

(b) request the Tribunal to make one or more of the orders provided for by section 56B.

20

(2) Subsection (1) applies whether or not —

(a) the employer or prospective employer has been convicted of an offence under section 56(1); or

(b) the principal has been convicted of an offence under section 56(1a).

25

(3) A referral under subsection (1) may also be made on a person’s behalf by an agent or legal practitioner referred to in the *Industrial Relations Act 1979* section 31.

30

(4) The *Industrial Relations Act 1979* section 80E(1) does not apply to a claim referred under subsection (1) by a government officer within the meaning of that section.

56B. Remedies that may be granted

- 5
- (1) If, on the hearing of a claim under section 56A(1)(a)(i), the Tribunal is satisfied that an employer has contravened section 56(1), the Tribunal may order the employer —
- (a) if the disadvantage caused to the claimant consisted of or included the claimant being dismissed from employment —
- 10 (i) to reinstate the claimant; or
- (ii) to pay to the claimant such sum of money as the Tribunal considers adequate as compensation for loss of employment or loss of earnings or any other detriment to which the claimant was subjected; or
- 15 (iii) both to reinstate the claimant and to pay the claimant the sum of money referred to in subparagraph (ii),
- as the Tribunal thinks fit; or
- 20 (b) if paragraph (a) does not apply to the disadvantage caused to the claimant — to pay to the claimant such sum of money as the Tribunal considers adequate as compensation for loss of earnings or any other detriment to which the claimant was subjected.
- 25
- (2) Without limiting subsection (1), in determining a claim under section 56A(1)(a)(i) in relation to an employer, the Tribunal may make any order of the kind mentioned in the *Industrial Relations Act 1979* section 23A(3), (4) and (5)(a) as if the claim were a claim to which section 23A of that Act applied.
- 30
- (3) If, on the hearing of a claim under section 56A(1)(a)(i), the Tribunal is satisfied that a prospective employer has contravened section 56(1), the Tribunal may order

that person to pay the claimant such sum of money as the Tribunal thinks fit as compensation.

- 5 (4) If, on the hearing of a claim under section 56A(1)(a)(ii), the Tribunal is satisfied that a principal has contravened section 56(1a), the Tribunal may order the principal to pay the claimant such sum of money as the Tribunal thinks fit as compensation.
- 10 (5) In the determination of the amount of compensation for any loss of employment, loss of earnings or other detriment —
- (a) the Tribunal is to have regard to any redress the claimant has obtained under another enactment; and
- 15 (b) the claimant is not entitled to compensation both under this section and otherwise for the same loss of employment, loss of earnings or other detriment.

”

20 **46. Part VIII Division 3 and Part VIII Division 4 heading inserted**

Before section 57 the following Division and heading are inserted —

“

Division 3 — Bullying

25 **56C. Claims of bullying may be referred to the Tribunal**

- (1) A person may —
- (a) refer to the Tribunal a claim that —
- 30 (i) if the person is an employee or contractor — the person has been subjected to bullying at the workplace; or

- (ii) if the person is an employer — one or more employees employed by the person have been subjected to bullying at the workplace; or
- 5 (iii) if the person is a principal — one or more contractors engaged by the person have been subjected to bullying at the workplace;
- and
- 10 (b) request the Tribunal to make one or more of the orders provided for by section 56F.
- (2) Subsection (1) applies whether or not a person has been convicted of an offence under this Act in relation to the conduct that is the subject of the referral under that
- 15 subsection.
- (3) A referral under subsection (1) may also be made on a person's behalf by an agent or legal practitioner referred to in the *Industrial Relations Act 1979* section 31.
- 20 (4) The *Industrial Relations Act 1979* section 80E(1) does not apply to a claim referred under subsection (1) by a government officer within the meaning of that section.

56D. Compulsory attendance at conciliation for claims of bullying

- 25 (1) Subject to this section, the Tribunal may summon any person to attend, at a time and place specified in the summons, at conciliation proceedings under section 51J in respect of a claim referred to the Tribunal under section 56C(1).
- 30 (2) A summons under this section —
- (a) is to be given in the form and manner prescribed by regulations made by the Chief

Commissioner under the *Industrial Relations Act 1979* section 113(1); and

- 5 (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 Tribunal or the Full Bench, as the case may be, that he or she did not receive the summons.
- 10 (3) In subsection (2) —
“**Full Bench**” has the meaning given to that term in the *Industrial Relations Act 1979* section 7(1).
- 15 (4) Any person so summoned must, except for good cause, proof of which is on that person, attend for the purposes of conciliation at the time and place specified in the summons and continue to attend at that place as directed by the Tribunal.
- 20 (5) The requirement to attend imposed by subsection (4) is enforceable in accordance with section 51J(3) as if it were a direction, order or declaration given or made by the Tribunal under section 51J(3), and section 51J(3a) applies accordingly in relation to the enforcement of the requirement.

56E. Several claims may be heard together

- 25 (1) If —
- (a) 2 or more claims are referred to the Tribunal under section 56C(1); and
- (b) each claim relates to —
- 30 (i) the bullying of one or more employees employed by the same employer (the “**relevant employees**”); or

- (ii) the bullying of one or more contractors engaged by the same principal (the “**relevant contractors**”),

5 the relevant employees or the relevant contractors, as the case requires, may agree in writing that all the claims may be heard and determined by the Tribunal at the same time in the same proceeding.

- 10 (2) An agreement under subsection (1) is to be made before the Tribunal has begun to hear any of the claims to which the agreement applies.
- (3) If the Tribunal is satisfied that it is appropriate to do so, the Tribunal is to hear and determine all the claims to which an agreement under subsection (1) applies at the same time in the same proceeding.
- 15 (4) Nothing in this section limits the powers of the Tribunal under the *Industrial Relations Act 1979* section 27(1)(s) (as applied by section 51I).

56F. Remedies that may be granted

- 20 (1) If —
- (a) a claim is referred to the Tribunal under section 56C(1); and
- (b) the Tribunal —
- 25 (i) endeavours to resolve the issues involved in the claim by conciliation under section 51J, but the parties do not reach agreement for the resolution of those issues; or
- (ii) does not endeavour to resolve those issues by conciliation under section 51J,
- 30 the Tribunal may hear and determine the claim in accordance with section 51G.

(2) If, on the hearing of a claim under section 56C(1), the Tribunal is satisfied that a person has been subjected to bullying by another person, the Tribunal may do one or more of the following —

- 5 (a) order a person to do, or to refrain from doing, any specified thing, including to refrain from engaging in specified behaviour;
- 10 (b) without limiting paragraph (a), order an employer or principal to make specified arrangements to deal with bullying at the workplace;
- 15 (c) without limiting paragraph (a), order a person to complete, at the person's expense, a course relevant to bullying;
- (d) make a declaration that a person engaged in bullying.

56G. Costs of representation may be awarded in certain circumstances

- 20 (1) Despite the *Industrial Relations Act 1979* section 27(1)(c) (as applied by section 51I), on hearing and determining a claim to which section 56C(1) applies, the Tribunal may make an order giving costs to any party to the proceedings for the services of any legal practitioner or agent of that party if, in the
25 opinion of the Tribunal, the proceedings have been frivolously or vexatiously instituted or defended, as the case requires, by the party against which the order is made.
- 30 (2) An order made by the Tribunal under subsection (1) is an instrument to which the *Industrial Relations Act 1979* section 83 applies.

Division 4 — General

”.

Part 6 — Amendments to the *Workers' Compensation and Injury Management Act 1981*

Division 1 — Preliminary

47. The Act amended

5 The amendments in this Part are to the *Workers' Compensation and Injury Management Act 1981*.

Division 2 — Amendments relating to reinstatement of employment

48. Section 84AA amended

10 Section 84AA(1) is amended by deleting the penalty provision.

49. Section 84AB amended

Section 84AB(1) is amended by deleting the penalty provision.

50. Section 84AC inserted

15 After section 84AB the following section is inserted in Part III —

“

84AC. Enforcement of sections 84AA(1) and 84AB(1)

20 (1) A contravention of section 84AA(1) or 84AB(1) is not an offence, but those subsections are civil penalty provisions for the purposes of the *Industrial Relations Act 1979* section 83E.

25 (2) In proceedings under the *Industrial Relations Act 1979* section 83E for a contravention of section 84AA(1) by an employer in respect of a worker, a declaration by the IR Commission under section 84AL(6)(c) that the employer failed to provide a position to the worker in accordance with section 84AA(1) is prima facie evidence that the employer contravened that provision.

- (3) In proceedings under the *Industrial Relations Act 1979* section 83E for a contravention of section 84AB(1) by an employer in respect of a worker, a declaration by the IR Commission under section 84AL(6)(d) that the employer dismissed the worker without complying with section 84AB(1) is prima facie evidence that the employer contravened that provision.

51. Part IIIA inserted

After Part III the following Part is inserted —

Part IIIA — Proceedings for reinstatement of employment

84AD. Terms used in this Part

In this Part —

“**Chief Commissioner**” has the meaning given to that term in the IR Act section 7(1);

“**commissioner**” has the meaning given to that term in the IR Act section 7(1);

“**compensation order**” has the meaning given to that term in section 84AL(6)(b);

“**industrial inspector**” has the meaning given to that term in the IR Act section 7(1);

“**industrial magistrate’s court**” has the meaning given to that term in the IR Act section 7(1);

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

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

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“reinstatement order”, in relation to a worker, means an order for —

- 5
- (a) the reinstatement of the worker under the IR Act section 23A(3); or
 - (b) the re-employment of the worker under the IR Act section 23A(4),
- as the IR Commission considers appropriate.

84AE. Conferral of jurisdiction on IR Commission

10 By this section the IR Commission has jurisdiction to hear and determine applications that may be made to the IR Commission under section 84AH.

84AF. Jurisdiction to be exercised by commissioner with necessary qualifications

- 15
- (1) The jurisdiction conferred by section 84AE in respect of a matter is to be exercised by the IR Commission constituted by a commissioner.
 - (2) In allocating a matter for the purposes of subsection (1), the Chief Commissioner must have regard to the desirability of the commissioner concerned having relevant knowledge of this Act.
- 20

84AG. Applied provisions: practice, procedure and appeals

- 25
- (1) The following provisions (the **“applied provisions”**) of the IR Act that apply to and in relation to the exercise of the jurisdiction under the IR Act of the IR Commission constituted by a commissioner apply to the exercise of the jurisdiction conferred by section 84AE —
- (a) section 22B;
 - (b) section 26(1)(a) and (b), (2) and (3);
 - (c) section 27;
- 30

- 5 (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);
- 10 (m) section 90;
- (n) section 91;
- (o) section 92.
- (2) The applied provisions have effect —
- 15 (a) subject to the provisions of this Part; and
- (b) with the modifications that are provided for in subsection (3); and
- (c) with any modifications that are prescribed under the IR Act section 113; and
- 20 (d) 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.
- (3) For the purposes of subsection (1) —
- 25 (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. ”; and

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- (b) the IR Act section 33(6) has effect as if “section 44” were deleted and the following were inserted instead —

“

5 the *Workers' Compensation and Injury Management Act 1981* section 84AK

”.

and

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

“

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

”.

84AH. Application to IR Commission for reinstatement order

- (1) If —

- 20 (a) an employer dismisses a worker, who has been incapacitated by injury, in the period that —
- (i) begins on the day the injury occurred; and
- (ii) ends 12 months from the day the worker becomes entitled to receive weekly payments of compensation from the employer in respect of the injury;

25

and

- (b) the worker attains partial or total capacity for work in that period,

30 the following persons may apply to the IR Commission for a reinstatement order —

- (c) the worker;

- 5
- (d) an organisation, as defined in the IR Act section 7(1), of which the worker is, or is eligible to be, a member;
- (e) an association, as defined in the IR Act section 7(1), that represents an organisation referred to in paragraph (d);
- 10 (f) an organisation, as defined in the *Workplace Relations Act 1996* of the Commonwealth section 4(1), of which the worker is, or is eligible to be, a member.
- (2) The applicant must serve a copy of the application on the employer.
- 15 (3) Subject to subsection (4), the application is to be made to the IR Commission not later than 28 days after the end of the period referred to in subsection (1).
- (4) The IR Commission may accept an application under subsection (1) that is out of time if the IR Commission considers that it would be unfair not to do so.

84AI. Parties to proceedings

20 Subject to the IR Act section 27(1)(j) (as applied by section 84AG), the parties to proceedings on an application under section 84AH are —

- 25 (a) the applicant; and
- (b) the employer on whom or which a copy of the application is served.

84AJ. Conciliation

- (1) This section applies if an application is made to the IR Commission under section 84AH.

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- (2) If the IR Commission considers that the issues involved in the application may be resolved by conciliation —
- 5 (a) the IR Commission may endeavour to assist the parties to reach an agreement on those issues; and
- (b) for that purpose the IR Commission may —
- 10 (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 among themselves at a conference at which the IR Commission is not present; and
- 15 (iii) otherwise encourage the parties to exchange or divulge attitudes or information that, in the opinion of the IR Commission, would assist in the resolution of the issues.
- 20 (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.
- (4) If the IR Commission gives or makes a direction, order or declaration under subsection (3), the IR Commission
- 25 must —
- (a) if it is given or made orally, reduce the direction, order or declaration to writing as soon as is practicable; and
- 30 (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
- (5) A direction, order or declaration made or given under subsection (3) binds only the parties to the relevant conciliation proceeding.
- (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.
- 10
- (7) If the parties request the IR Commission to make recommendations about particular aspects of the application about which they are unable to reach agreement, the IR Commission may make recommendations about those aspects of the application.
- (8) If the IR Commission —
- 15
- (a) takes action under subsection (2)(a); and
- (b) is satisfied that the parties have reached agreement on all of the issues involved,
- the IR Commission may, with the consent of the parties, make a determination by order for the purposes of section 84AE in terms of that agreement.
- 20
- (9) Any —
- (a) direction, order or declaration given or made by the IR Commission under subsection (3); or
- (b) order made by the IR Commission containing a determination under subsection (8),
- 25
- is enforceable under the IR Act section 84A as if it were given or made under the IR Act section 32.

84AK. Compulsory attendance at conciliation

- 30
- (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 84AJ.

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- (2) A summons under this section —
- (a) is to be given in the form and manner prescribed by regulations made by the Chief Commissioner under the IR Act section 113(1); 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 the case may be, that he or she did not receive the summons.
- (3) In subsection (2) —
“**Full Bench**” has the meaning given to that term in the IR Act section 7(1).
- (4) 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) The requirement to attend imposed by subsection (4) is enforceable in accordance with section 84AJ(9) as if it were a direction, order or declaration referred to in that provision.

84AL. Determination of application where no resolution by conciliation

- (1) If —
- (a) an application is made to the IR Commission under section 84AH; and
 - (b) the IR Commission —
 - (i) endeavours to resolve the issues involved in the application by conciliation under section 84AJ, but the

parties do not reach agreement for the resolution of those issues; or

- (ii) does not endeavour to resolve those issues by conciliation under section 84AJ,

5

the IR Commission may hear and determine the application in accordance with section 84AE.

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

10

- (3) If the commissioner referred to in subsection (2) proposes to constitute the IR Commission for the hearing and determination of the application, the commissioner must, at the conclusion of the conciliation proceeding, advise the parties of his or her intention to do so.

15

- (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 application.

20

- (5) The commissioner is not to be taken to have exercised conciliation powers in relation to an application merely because —

25

- (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 was not presided over by the commissioner; or

30

- (b) the commissioner arranged for the parties or their representatives to confer among

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themselves at a conference at which the commissioner was not present.

- 5
- (6) In determining the application, the IR Commission may do one or more of the following —
- (a) subject to subsections (9) and (11), make a reinstatement order;
- 10 (b) subject to subsections (10) and (11), make an order (a “**compensation order**”) that the employer pay to the worker an amount of compensation for loss or injury caused by the dismissal of the worker;
- (c) make a declaration that the employer failed to provide a position to the worker in accordance with section 84AA(1);
- 15 (d) make a declaration that the employer dismissed the worker without complying with section 84AB(1);
- (e) make an order dismissing the application.
- 20 (7) The IR Act section 23A(5), (11) and (12) apply, with any necessary modifications, for the purposes of the making of a reinstatement order.
- (8) The IR Act section 23A(7) to (12) apply, with any necessary modifications, for the purposes of the making of a compensation order.
- 25 (9) The IR Commission may make a reinstatement order only if the IR Commission is satisfied that the worker is fit for the kind of employment to which the worker is to be reinstated or in which the worker is to be re-employed.
- 30 (10) The IR Commission may make a compensation order only if the IR Commission considers that the making of a reinstatement order would be impracticable.

- (11) The IR Commission must not make a reinstatement order or compensation order if the employer proves that the worker was dismissed on the ground of serious or wilful misconduct.

5 **84AM. Referral of question as to worker's capacity for work for determination by arbitrator**

- 10 (1) If an issue involved in an application under section 84AH is a question as to the worker's capacity for work, the IR Commission may refer the question to the Director for determination by an arbitrator.
- 15 (2) The question is to be referred to the Director in the form and manner prescribed by regulations made by the Chief Commissioner under the IR Act section 113(1).
- 20 (3) If a question as to the worker's capacity for work is referred under subsection (1), the IR Commission —
- (a) is not to hear and determine the application under section 84AH until the IR Commission has been given the decision of the arbitrator on that question; and
- (b) to the extent that the determination of that application relates to the worker's capacity for work — is bound by that decision.
- 25 (4) If a question as to the worker's capacity for work is referred under subsection (1) —
- (a) the decision of the arbitrator on that question; and
- 30 (b) despite the IR Act section 49 (as applied by section 84AG), the determination of the application under section 84AH to the extent that that determination gives effect to that decision,

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are not subject to an appeal or amenable to judicial review.

84AN. Proceedings, functions, practice and procedure of arbitrators

- 5 (1) The Governor, on the recommendation of WorkCover WA, may make regulations providing for —
- 10 (a) the functions and proceedings of an arbitrator determining a question as to a worker's capacity for work referred to the Director under section 84AM(1); and
- (b) the practice and procedure governing those functions and proceedings.
- 15 (2) Except as otherwise provided by regulations referred to in subsection (1), the provisions of this Act that apply to or in relation to the examination, hearing and determination of disputes by arbitrators do not apply to or in relation to a question as to a worker's capacity for work that is referred to the Director under section 84AM(1).

20 **84AO. Conferral of jurisdiction on industrial magistrate's court**

By this section an industrial magistrate's court has jurisdiction to hear and determine applications that may be made to the court under section 84AP.

25 **84AP. Application to enforce reinstatement or compensation order**

If an employer contravenes or fails to comply with a reinstatement order or compensation order, the following persons may apply to an industrial magistrate's court for the enforcement of the order —

- 30 (a) the worker;

- 5
- (b) an organisation, as defined in the IR Act section 7(1), of which the worker is, or is eligible to be, a member;
- (c) an association, as defined in the IR Act section 7(1), that represents an organisation referred to in paragraph (b);
- 10 (d) an organisation, as defined in the *Workplace Relations Act 1996* of the Commonwealth section 4(1), of which the worker is, or is eligible to be, a member;
- (e) an industrial inspector.

84AQ. Applied provisions: practice, procedure and appeals

- 15 (1) The following provisions (the “**applied provisions**”) of the IR Act that apply to and in relation to the exercise of the jurisdiction under the IR Act of an industrial magistrate’s court apply to the exercise of the jurisdiction conferred by section 84AO —
- 20 (a) section 82A;
- (b) section 83B(3) to (10);
- (c) section 83C;
- (d) section 83F;
- (e) section 84;
- (f) section 90;
- (g) section 91;
- 25 (h) section 92;
- (i) section 102A(2).
- (2) The applied provisions have effect —
- (a) with the modification provided for in subsection (3); and
- 30 (b) with any modifications that are prescribed under the IR Act section 113; and

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

5 (3) For the purposes of subsection (1), the IR Act section 83C(1) applies as if "the Registrar, a deputy registrar, or" were deleted.

84AR. Other rights of workers not limited

10 Nothing in this Part limits any other rights of a worker under this Act or any other written law.

84AS. Part does not derogate from IR Act

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

”.

Division 3 — Other amendments

52. Section 5 amended

Section 5(1) is amended in the definition of "industrial award" as follows:

- 20 (a) in paragraph (d) —
- (i) by deleting "or certified agreement," and inserting instead —
" , collective agreement or APCS, ";
 - (ii) at the end of the paragraph by deleting the
25 comma and inserting instead —
" ; or ";

(b) after paragraph (d) by inserting —

“

- (e) a transitional award, as that term is defined in the *Workplace Relations Act 1996* of the Commonwealth Schedule 6 clause 2(1); or
- (f) a pre-reform certified agreement, as that term is defined in the *Workplace Relations Act 1996* of the Commonwealth Schedule 7 clause 1; or
- (g) a notional agreement preserving State awards or preserved collective State agreement, as those terms are defined in the *Workplace Relations Act 1996* of the Commonwealth Schedule 8 clause 1(1),

”;

(c) after each of paragraphs (a) and (b) by inserting —

“ or ”.

53. Section 83 amended

Section 83(1) is amended by deleting “certified” and inserting instead —

“ collective ”.

54. Schedule 1 amended

Schedule 1 clause 11(2) is amended in the definition of “Amount E” by deleting “under the *Minimum Conditions of Employment Act 1993*,” and inserting instead —

“

if at that time the worker were an employee to whom the *Minimum Conditions of Employment Act 1993* applied;

”.

Part 7 — Amendments to the *Minimum Conditions of Employment Act 1993*

55. The Act amended

5 The amendments in this Part are to the *Minimum Conditions of Employment Act 1993*.

56. Section 7 amended

Section 7(c) is deleted and the following paragraph is inserted instead —

“

- 10 (c) where the condition is implied in a contract of employment —
- (i) subject to the IR Act section 28A, under Part II of that Act; or
 - 15 (ii) under the IR Act section 83 as if it were a provision of an award, industrial agreement or order other than an order made under section 32 or 66 of that Act.

”

Part 8 — Amendments to *Public Sector Management Act 1994*

57. The Act amended

5 The amendments in this Part are to the *Public Sector Management Act 1994*.

58. Section 52 amended

Section 52(2) is amended by deleting “is not an industrial matter for the purposes of the *Industrial Relations Act 1979*.” and inserting instead —

10 “

is not —

(a) an industrial matter for the purposes of the *Industrial Relations Act 1979*; or

15

(b) a matter that can be the subject of a claim under the *Industrial Relations Act 1979* section 28A.

”.

59. Section 78 amended

(1) Section 78(2) is amended by deleting “section 29(b)” and inserting instead —

20

“ section 29(1)(b) ”.

(2) Section 78(3) is amended by deleting “section 29(b)” and inserting instead —

“ section 29(1)(b) ”.

=====