

INDUSTRIAL AND EMPLOYEE RELATIONS ACT 1994

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[Each Chapter is numbered from page 1. Subscribers to the Consolidation Service will receive complete replacement Chapters incorporating amendments to this Act as they come into force.]

SOUTH AUSTRALIA

INDUSTRIAL AND EMPLOYEE RELATIONS ACT 1994

*This Act is reprinted pursuant to the Acts Republication Act 1967 and incorporates all amendments in force as at **4 September 1997**.*

It should be noted that the Act was not revised (for obsolete references, etc.) by the Commissioner of Statute Revision prior to the publication of this reprint.

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INDUSTRIAL AND EMPLOYEE RELATIONS ACT 1994

being

Industrial and Employee Relations Act 1994 No. 52 of 1994
[Assented to 16 June 1994]¹

as amended by

Public Sector Management Act 1995 No. 39 of 1995 [Assented to 4 May 1995]²

Industrial and Employee Relations (Miscellaneous Provisions) Amendment Act 1995 No. 67 of 1995 [Assented to 17 August 1995]³

Statutes Amendment (Courts) Act 1995 No. 84 of 1995 [Assented to 30 November 1995]⁴

Industrial and Employee Relations (Miscellaneous) Amendment Act 1996 No. 57 of 1996 [Assented to 8 August 1996]

Industrial and Employee Relations (President's powers) Amendment Act 1996 No. 74 of 1996 [Assented to 14 November 1996]⁵

Industrial and Employee Relations (Transitional Arrangements) Amendment Act 1996 No. 86 of 1996 [Assented to 12 December 1996]

Industrial and Employee Relations (Registered Associations) Amendment Act 1997 No. 48 of 1997 [Assented to 31 July 1997]

Industrial and Employee Relations (Harmonisation) Amendment Act 1997 No. 68 of 1997 [Assented to 21 August 1997]⁶

¹ Came into operation (except s. 3 of Sched. 1) 8 August 1994; s. 3 of Sched. 1 came into operation 1 November 1994: *Gaz.* 4 August 1994, p. 328.

² Came into operation 17 July 1995: *Gaz.* 13 July 1995, p. 54.

³ Came into operation 31 August 1995: *Gaz.* 24 August 1995, p. 498.

⁴ Came into operation 21 December 1995: *Gaz.* 21 December 1995, p. 1759.

⁵ Came into operation (except s. 2) on assent; s. 2 came into operation 8 August 1994: s. 2(2).

⁶ **Came into operation 4 September 1997: *Gaz.* 21 August 1997, p. 408.**

NOTE:

- *Asterisks indicate repeal or deletion of text.*
- *Entries appearing in bold type indicate the amendments incorporated since the last reprint.*
- *For the legislative history of the Act see Appendix.*

Industrial and Employee Relations Act 1994

An Act about the relationship of employer and employee; and other matters.

The Parliament of South Australia enacts as follows:

**CHAPTER 1
PRELIMINARY**

Short title

1. This Act may be cited as the *Industrial and Employee Relations Act 1994*.

Commencement

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

Objects of Act

3. The objects of this Act are—

- (a) to promote goodwill in industry; and
- (b) to contribute to the economic prosperity and welfare of the people of South Australia; and
- (c) to facilitate industrial efficiency and flexibility, and improve the productiveness of South Australian industry; and
- (d) to encourage enterprise agreements that are relevant, flexible and appropriate; and
- (e) to provide for awards that are relevant, flexible and expressed in non-technical language; and
- (f) to provide a framework for making enterprise agreements, awards and determinations affecting industrial matters that is fair and equitable to both employers and employees;
- (g) to encourage prevention and settlement of industrial disputes by amicable agreement, and to provide a means of conciliation for that purpose; and
- (h) to provide a means for settling industrial disputes that cannot be resolved by amicable agreement as expeditiously as possible and with a minimum of legal formality and technicality; and
- (i) to ensure compliance with agreements and awards made for the prevention or settlement of industrial disputes; and
- (j) to provide employees with an avenue for expressing employment-related grievances and having them considered and remedied including provisions for a right to the review of harsh, unjust or unreasonable dismissals—
 - (i) directed towards giving effect to the *Termination of Employment Convention*; and
 - (ii) ensuring industrial fair play; and
- (k) to provide for absolute freedom of association and choice of industrial representation; and
- (l) to encourage the democratic control of representative associations of employers or employees, and the full participation by members in their affairs; and

- (m) to help prevent and eliminate discrimination in employment in accordance with State and Commonwealth law; and
- (n) to encourage and assist employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers.

Interpretation

4. (1) In this Act, unless the contrary intention appears—

"**adult**" means a person of or above 21 years of age;

"**apprentice**" means an apprentice as defined in the *Industrial and Commercial Training Act 1981*;

"**association**" means—

- (a) an association, society or body formed to represent, protect or further the interests of employers or employees; or
- (b) an organisation, or a branch of an organisation, registered under the Commonwealth Act;

"**award**" means an order of the Commission regulating remuneration or other industrial matters;

"**Commission**" means the Industrial Relations Commission of South Australia (and according to context means the Commission in its Industrial Relations Division or in its Enterprise Agreement Division);

"**Committee**" means the *Industrial Relations Advisory Committee*;

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

"**Commonwealth Commission**" means the Australian Industrial Relations Commission (or an industrial authority that takes the place of the Commission under Commonwealth law);

"**contract of employment**" means—

- (a) a contract recognised at common law as a contract of employment under which a person is employed for remuneration in an industry; or
- (b) a contract under which a person (the "**employer**") engages another (the "**employee**") to drive a vehicle that is not registered in the employee's name to provide a public passenger service (even though the contract would not be recognised at common law as a contract of employment); or

Exception—

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

- (c) a contract under which a person (the "**employer**") engages another (the "**employee**") to carry out personally the work of cleaning premises (even though the contract would not be recognised at common law as a contract of employment); or

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- (d) a contract under which a person (the "**employer**") engages another (the "**employee**") to carry out work as an outworker (even though the contract would not be recognised at common law as a contract of employment);

"**Court**" means the Industrial Relations Court of South Australia;

"**decision**" includes a refusal or failure to make a decision;

"**demarcation dispute**" includes—

- (a) a dispute within an association or between associations about the rights, status or functions of members of the association or associations in relation to the employment of those members; or
- (b) a dispute between employers and employees, or between members of different associations, about the demarcation of functions of employees or classes of employees; or
- (c) a dispute about the representation under this Act of the industrial interests of employees by an association of employees;

"**Deputy President**" means a Deputy President of the Commission;

"**determination**" means an award, order, declaration, approval or decision;

"**employee**" means a person employed for remuneration under a contract of employment and includes a public employee;

"**Employee Ombudsman**" means the Employee Ombudsman appointed under this Act—*See section 58*;

"**employer**" means—

- (a) for public employees—the body or person (not being a Minister) declared by regulation to be the employer of the employees;
- (b) for other employees—a person who employs the employees for remuneration in an industry under a contract of employment;

"**enterprise agreement**" means an agreement under Chapter 3 Part 2 of this Act between an employer and a group of employees regulating remuneration or other industrial matters (and includes a provisional enterprise agreement);

"**enterprise agreement matter**" means—

- (a) a matter arising under Chapter 3, Part 2 (Regulation of Industrial Matters by Enterprise Agreements); or
- (b) a matter related to an industrial dispute between the parties to an enterprise agreement but not a matter under Chapter 3, Part 6 (Unfair dismissal);

"**Equal Remuneration Convention**" means the Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value set out in Schedule 6;

"evidentiary material" means a document, object or substance of evidentiary value in proceedings before the Court or the Commission and includes a document, object or substance that should, in the opinion of the Court or the Commission, be produced for the purpose of enabling the Court or the Commission to determine whether or not it has evidentiary value;

"examinable arrangements" means—

- (a) contractual arrangements under which work is carried out by outworkers; or
- (b) other contractual arrangements classified by regulation as examinable arrangements;

"Full Commission"—*See section 39;*

"Full Court"—*See section 21;*

"group of employees"—*See subsection (2);*

"(indexed)"—*See subsection (4);*

"industrial action" means—

- (a) a work practice, or a way of performing work, adopted in connection with an industrial dispute, that restricts, limits or delays the performance of the work; or
- (b) a ban, limitation, or restriction affecting the performance of work, or the offering or acceptance of work; or
- (c) a failure or refusal in connection with an industrial dispute to attend for work, or to perform work;

but does not include action taken by an employer with the agreement of the employees, or action taken by employees with the agreement of the employer;

"industrial authority" means—

- (a) a State industrial authority; or
- (b) a commission, court, board, tribunal, or body having authority under the law of the Commonwealth or another State to exercise powers of conciliation or arbitration in industrial matters; or
- (c) a body declared by regulation to be an industrial authority for the purposes of this definition;

"industrial dispute" means a dispute, or a threatened, impending or probable dispute, about an industrial matter (and an industrial dispute does not come to an end only because the parties, or some of them, cease to be in the relationship of employer and employee);

"industrial instrument" means—

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

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"industrial matter" means a matter affecting the rights, privileges or duties of employers or employees (including prospective employers or employees), or the work to be done in employment, including, for example—

- (a) the wages, allowances or remuneration of employees or prospective employees in an industry, or the piece-work, contract or other prices paid or to be paid for the employment, including any loading or amount that may be included in wages, allowances, remuneration or prices as compensation for lost time and the wages, allowances or remuneration to be paid for work done during overtime or on holidays, or for other special work, and also the question whether piece-work will be allowed in an industry;
- (b) the hours of employment in an industry, including the lengths of time to be worked, and the quantum of work or service to be done, to entitle employees to any given wages, allowances, remuneration or prices, and what times are to be regarded as overtime;
- (c) the age, qualification or status of employees, and the manner, terms and conditions of employment;
- (d) the relationship of employer and apprentice;
- (e) the employment of juniors and apprentices in an industry (including the number or proportion that may be employed);
- (f) the employment of any person, or of any class of persons, in addition to those referred to above, in an industry;
- (g) the refusal or neglect, without reasonable cause or excuse, of any person bound by an award, order or enterprise agreement to offer or accept employment, or to continue to be employed on the terms of the award, order or agreement;
- (h) any established or allegedly established custom or usage of an industry, either generally or in a particular locality;
- (i) the monetary value of allowances granted to or enjoyed by employees;
- (j) the dismissal of an employee by an employer;
- (k) a demarcation dispute;
- (l) the performance of work nude or partially nude, or in transparent clothing;
- (m) a matter classified as an industrial matter by regulation;
- (n) all questions of what is right and fair in relation to an industrial matter having regard to the interests of the persons immediately concerned and of society as a whole;

"Industrial Registrar" or **"Registrar"** means the Industrial Registrar and includes—

- (a) a Deputy Industrial Registrar; or
- (b) an officer appointed under the Commonwealth Act who may, by arrangement between the Minister and the Minister responsible for the administration of the Commonwealth Act, exercise powers of the Industrial Registrar under this Act;

"**industry**" means a trade, business or occupation in which employees are employed;

"**inspector**"—*See section 64*;

"**junior**" means an employee under the age of 21 years (but not an apprentice or a trainee);

"**legal practitioner**" means a person admitted to practise the profession of the law in this State;

"**order**" includes direction;

"**organisation**" means an organisation registered under the Commonwealth Act;

"**outworker**"—*See section 5*;

"**place**" includes—

- (a) a building or structure; and
- (b) a vehicle; and
- (c) a ship or vessel;

"**President**" means the President of the Commission;

"**Presidential Member**" means the President or a Deputy President of the Commission;

"**public employee**" means—

- (a) a person employed under, or subject to, the *Government Management and Employment Act 1985*; or
- (b) any other person employed for salary or wages in the service of the State;

"**registered agent**" means a person who is entitled to represent a party in proceedings before the Court or the Commission by registration as an agent under this Act (*See Chapter 5, Part 1, Division 2*);

"**registered association**" means an association (which may include an organisation or branch) registered under Chapter 4 (Associations);

"**remuneration**" means—

- (a) wages or salary; or
- (b) payment to or for the benefit of an employee in the nature of piece-work rates, penalty rates, shift premiums, overtime or special work rates; or
- (c) allowances;

"**rules**" means rules of the Court or the Commission (as the context requires);

"**single business**" means—

- (a) a business carried on by a single employer; or

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- (b) a business carried on by two or more employers as a joint venture or common enterprise; or
- (c) a single project or undertaking; or
- (d) activities carried on by—
 - (i) the State; or
 - (ii) a body, association, office or other entity established for a public purpose by or under a law of the State; or
 - (iii) another body in which the State has a controlling interest;

"**State**" includes a Territory of the Commonwealth;

"**taxi**" means a vehicle—

- (a) licensed or exempted from the requirement to be licensed under Part 6 (Taxis) of the *Passenger Transport Act 1994*; and
- (b) with seating accommodation for not more than 12 passengers; and
- (c) used predominantly for the transport of passengers rather than the transport of goods or other freight;

"**Termination of Employment Convention**" means the Convention concerning Termination of Employment at the Initiative of the Employer set out in Schedule 7;

"**trainee**" means a person who is being trained under the *Australian Vocational Training Scheme* or another scheme prescribed by regulation for the purposes of this definition.

(2) A **group of employees** consists of—

- (a) the employees employed, or a particular class of the employees employed, in a single business; or
- (b) the employees employed, or a particular class of the employees employed, at a particular workplace or workplaces;

(and if there is only one employee, or one employee of a particular class, employed in a single business, the employee constitutes a group).

(3) However, a group of employees cannot be defined by reference to membership of a particular association.

(4) If a monetary sum is followed by the word "**(indexed)**", the amount is to be adjusted on 1 January of each year by multiplying the stated amount by a proportion obtained by dividing State average full-time adult total earnings (seasonally adjusted) as at 30 June in the previous year by State average full-time adult total earnings (seasonally adjusted) as at 30 June in the year in which the stated amount was fixed by Parliament.

Outworkers

5. (1) A person is an outworker if—

- (a) the person is engaged, for the purposes of the trade or business of another (the "**employer**") to—
 - (i) work on, process or pack articles or materials; or
 - (ii) carry out clerical work; or
- (b) a body corporate of which the person is an officer or employee and for which the person personally performs all or a substantial part of the work undertaken by the body corporate is engaged, for the purposes of the trade or business of another (the "**employer**") to—
 - (i) work on, process or pack articles or materials; or
 - (ii) carry out clerical work,

and the work is carried out in or about a private residence or premises of a prescribed kind that are not business or commercial premises.

(2) A person is also an outworker if—

- (a) the person is engaged, for the purposes of the trade or business of another (the "**employer**") to—
 - (i) negotiate or arrange for the performance of work by outworkers; or
 - (ii) distribute work to, or collect work from, outworkers; or
- (b) a body corporate of which the person is an officer or employee and for which the person personally performs all or a substantial part of the work undertaken by the body corporate is engaged, for the purposes of the trade or business of another (the "**employer**") to—
 - (i) negotiate or arrange for the performance of work by outworkers;
 - (ii) distribute work to, or collect work from, other outworkers.

(3) This Act applies to the employment of outworkers only to the extent it is extended to such employment under the terms of an award or enterprise agreement.

Application of Act to employment

6. This Act does not apply to—

- (a) employment by the employee's spouse or parent; or
- (b) employment excluded by regulation from the ambit of this Act.

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**CHAPTER 2
JUDICIAL AND ADMINISTRATIVE INDUSTRIAL AUTHORITIES**

**PART 1
STATUTORY INDUSTRIAL AUTHORITIES**

Industrial authorities

7. (1) The industrial authorities constituted by this Act consist of—

- (a) the Industrial Relations Court of South Australia; and
- (b) the Industrial Relations Commission of South Australia; and
- (c) the Industrial Relations Advisory Committee; and
- (d) the Employee Ombudsman; and
- (e) the inspectors.

(2) The Court is a judicial authority with the jurisdiction conferred by this Act to adjudicate on rights and liabilities arising out of employment.

(3) The Commission is an industrial authority with the jurisdiction conferred by this Act to regulate industrial matters and to prevent and settle industrial disputes.

(4) The Committee is a statutory authority with the advisory functions conferred by this Act.

(5) The Employee Ombudsman and the inspectors are administrative authorities with the powers conferred by this Act to ensure obligations related to employment are respected and enforced.

**PART 2
THE INDUSTRIAL RELATIONS COURT**

DIVISION 1—ESTABLISHMENT OF COURT

Continuation of the Court

8. The Industrial Court of South Australia continues in existence as the Industrial Relations Court of South Australia.

Court is court of record

9. The Court is a court of record.

Seal

10. (1) The Court has a seal and may have more than one seal.

(2) A document apparently sealed with a seal of the Court will, in the absence of evidence to the contrary, be taken to have been duly issued under the authority of the Court.

DIVISION 2—JURISDICTION OF COURT

Jurisdiction to interpret awards and enterprise agreements

11. (1) The Court has jurisdiction to interpret an award or enterprise agreement.

(2) In exercising its interpretative jurisdiction—

(a) the Court should have regard to any evidence that is reasonably available to it of what the author of the relevant part of the award or enterprise agreement, and the parties to the award or enterprise agreement, intended it to mean when it was drafted; and

(b) if a common intention is ascertainable—give effect to that intention.

Jurisdiction to decide questions of law and jurisdiction

12. The Court has jurisdiction—

(a) to hear and determine a question of law referred to it by the Commission; and

(b) to hear and determine jurisdictional or other questions about the validity of determinations of the Commission.

Declaratory jurisdiction

13. The Court has jurisdiction to make declaratory judgments conferred by other provisions of this Act¹.

Jurisdiction to decide monetary claims

14. The Court has jurisdiction to hear and determine monetary claims of the following kinds—

(a) a claim for a sum due to an employee or former employee from an employer or former employer under—

(i) this Act, an award, enterprise agreement or contract of employment; or

(ii) the Commonwealth Act, or an award or agreement under the Commonwealth Act; or

¹ See, for example, section 111(3).

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- (b) a claim for a sum due to an employer or former employer from an employee or former employee under—
 - (i) this Act, an award, enterprise agreement or contract of employment; or
 - (ii) the Commonwealth Act, or an award or agreement under the Commonwealth Act; or
- (c) a claim for compensation to an employee or former employee from an employer or former employer for failure to make contributions (before or after the commencement of this Act) for the benefit of the claimant to a superannuation fund under—
 - (i) this Act, an award, enterprise agreement or contract of employment; or
 - (ii) the Commonwealth Act, or an award or agreement under the Commonwealth Act; or
- (d) a claim for payment of a benefit against the trustee of a superannuation fund to which contributions have been made under—
 - (i) this Act, an award, enterprise agreement or contract of employment; or
 - (ii) the Commonwealth Act, or an award or agreement under the Commonwealth Act.

Injunctive remedies

15. (1) The Court has jurisdiction to order a person who contravenes or fails to comply with a provision of this Act, an award or an enterprise agreement—

- (a) to take steps, specified in the order, within a time specified in the order, to remedy the contravention or non-compliance; or
- (b) to refrain from further contravention of, or non-compliance with, the provision.

(2) If there are reasonable grounds to believe that a person is about to contravene or to fail to comply with a provision of this Act, an award or enterprise agreement, the Court has jurisdiction to order the person to refrain from the contravention or non-compliance.

DIVISION 3—THE COURT’S JUDICIARY

Composition of the Court

16. The Court’s judiciary consists of—

- (a) the Senior Judge² of the Court; and
- (b) the other Judges of the Court; and
- (c) the industrial magistrates.

The Senior Judge

17. (1) The Senior Judge is the principal judicial officer of the Court.

² Note, however, that a person who becomes the principal judicial officer of the Court under the transitional provisions, retains the title "President" (See schedule 1, section 10).

(2) The Senior Judge is responsible for the administration of the Court.

(3) If the Senior Judge is absent from official duties, responsibility for administration of the Court devolves on a Judge of the Court appointed by the Governor to act in the Senior Judge's absence or, if no such appointment has been made, on the most senior of the Judges who is available to undertake the responsibility.

DIVISION 4—JUDICIAL OFFICE

The Senior Judge

18. (1) The Senior Judge of the Court is—

- (a) a District Court Judge assigned by the Governor, by proclamation, to be Senior Judge of the Court; or
- (b) a person eligible for appointment as a District Court Judge appointed by the Governor to be Senior Judge of the Court.

(2) Before the Governor assigns a District Court Judge to be Senior Judge of the Court, the Attorney-General must consult with the Chief Judge of the District Court about the proposed assignment.

(3) A person assigned to the office of Senior Judge of the Court ceases to hold that office if the person ceases to be a District Court Judge.

(4) Subject to any relevant determination by the Remuneration Tribunal, the Senior Judge of the Court holds office on the same terms and conditions as a District Court Judge.

Other Judges of the Court

19. (1) A Judge of the Court is—

- (a) a District Court Judge assigned by the Governor, by proclamation, to be a Judge of the Court; or
- (b) a person eligible for appointment as a District Court Judge appointed by the Governor to be a Judge of the Court.

(2) There will be as many Judges of the Court as the Governor considers necessary.

(3) Before the Governor assigns a District Court Judge to be a Judge of the Court, the Attorney-General must consult with the Senior Judge of the Court and the Chief Judge of the District Court about the proposed assignment.

(4) A person assigned to the office of Judge of the Court ceases to hold that office if the person ceases to be a District Court Judge.

(5) Subject to any relevant determination by the Remuneration Tribunal, a person appointed to the office of Judge of the Court holds office on the same terms and conditions as a District Court Judge.

Industrial magistrates

19A. (1) An industrial magistrate is a magistrate under the *Magistrates Act 1983* assigned by the Governor, by proclamation, to be an industrial magistrate.

(2) There will be as many industrial magistrates as the Governor considers necessary.

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(3) Before the Governor assigns a magistrate to be an industrial magistrate, the Attorney-General must consult with the Senior Judge of the Court and the Chief Magistrate of the Magistrates Court about the proposed assignment.

(4) A person ceases to hold office as an industrial magistrate if the person ceases to hold office as a magistrate under the *Magistrates Act 1983*.

(5) The Senior Judge has the powers of the Chief Magistrate under the *Magistrates Act 1983* in place of the Chief Magistrate in relation to an industrial magistrate who is a member of the Court's principal judiciary.

Classification into principal and ancillary judiciary

20. (1) The Court's judiciary is made up of the members of its principal judiciary (*ie.*, those members of its judiciary who are occupied predominantly in the Court) and its ancillary judiciary (*ie.*, those members of its judiciary who are not occupied predominantly in the Court).

(2) The principal judiciary consists of—

(a) the Senior Judge; and

(b) the Judges who were appointed specifically to the Court (as distinct from the Judges assigned to be Judges of the Court); and

(c) the Judges and industrial magistrates who are classified as members of the Court's principal judiciary by the proclamations under which they were assigned to be members of the Court's judiciary.

(3) A proclamation assigning a person to be a member of the Court's judiciary must classify the person either as a member of the Court's principal judiciary or as a member of the Court's ancillary judiciary.

(4) An assignment to be a member of the Court's principal judiciary is effective for as long as the member continues to hold office as a District Court Judge or a magistrate under the *Magistrates Act 1983* (as the case requires) but an assignment to be a member of the Court's ancillary judiciary will be for a term specified in the proclamation of assignment which may be renewed or extended by proclamation from time to time but may not extend beyond the time when the member ceases to hold office as a District Court Judge or a magistrate under the *Magistrates Act 1983* (as the case requires).

(5) However, the Governor may, by proclamation, made at the request or with the consent of the Judge or magistrate concerned—

(a) change the terms of an assignment so that a member of the Court's principal judiciary becomes a member of its ancillary judiciary, or a member of the Court's ancillary judiciary becomes a member of its principal judiciary; or

(b) revoke an assignment to the Court's principal or ancillary judiciary.

DIVISION 5—CONSTITUTION OF COURT**Constitution of the Court**

21. (1) The Full Court is constituted of two or more judges.

(2) The Court, when not sitting as the Full Court, is constituted as the Senior Judge directs of—

(a) a judge; or

(b) an industrial magistrate.

Full Court to act by majority decision

22. (1) A decision in which a majority of the judges constituting the Full Court agree is a decision of the Full Court.

(2) If the Full Court is constituted of an even number of judges, and the judges are equally divided in opinion on whether an appeal should be allowed or dismissed, the appeal must be dismissed.

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PART 3

THE INDUSTRIAL RELATIONS COMMISSION OF SOUTH AUSTRALIA

DIVISION 1—ESTABLISHMENT OF THE COMMISSION

Continuation of the Commission

23. The Industrial Commission of South Australia continues in existence as the Industrial Relations Commission of South Australia.

Seal

24. (1) The Commission has a seal and may have more than one seal.

(2) A document apparently sealed with a seal of the Commission will, in the absence of evidence to the contrary, be taken to have been duly issued under the authority of the Commission.

DIVISION 2—DIVISIONS OF THE COMMISSION

Divisions of the Commission

25. The Commission consists of two divisions—

- (a) the Industrial Relations Division; and
- (b) the Enterprise Agreement Division.

DIVISION 3—JURISDICTION OF THE COMMISSION

Jurisdiction of the Commission

26. The Commission has—

- (a) jurisdiction to approve enterprise agreements regulating remuneration and other industrial matters; and
- (b) jurisdiction to make awards regulating remuneration and other industrial matters; and
- (c) jurisdiction to resolve industrial disputes; and
- (d) jurisdiction to hear and determine any matter or thing arising from or relating to an industrial matter; and
- (e) other jurisdiction conferred by this Act.

Advisory jurisdiction of the Commission

27. The Commission has jurisdiction to inquire into, and report and make recommendations to the Minister on, a question related to an industrial or other matter that is referred to the Commission for inquiry by the Minister.

DIVISION 4—COMPOSITION OF THE COMMISSION

Composition of the Commission

28. The Commission consists of—

- (a) the President of the Commission; and
- (b) the Deputy Presidents of the Commission; and

- (c) the Commissioners.

The President

29. (1) The President of the Commission is a person appointed by the Governor to be the President of the Commission.

(2) Before a person is appointed (or reappointed) as the President of the Commission, the Minister must consult confidentially about the proposed appointment with a panel consisting of—

- (a) a nominee of the United Trades and Labor Council; and
- (b) a nominee of the South Australian Employers' Chamber of Commerce and Industry; and
- (c) a nominee of the House of Assembly appointed by resolution of that House; and
- (d) a nominee of the Legislative Council appointed by resolution of the Council; and
- (e) the Commissioner of Public Employment,

(and for the purposes of the consultation must inform the members of the panel all persons short-listed for appointment).

(3) The Senior Judge of the Court may (but need not) be appointed as the President of the Commission.

(4) The President is responsible for the administration of the Commission.

(5) If the President is absent from official duties, responsibility for administration of the Commission devolves on a Deputy President appointed by the Governor to act in the President's absence or, if no such appointment has been made, on the most senior of the Deputy Presidents who is available to undertake the responsibility.

The Deputy Presidents

30. (1) A Deputy President of the Commission is a person appointed by the Governor to be a Deputy President of the Commission.

(2) Before a person is appointed (or reappointed) as the Deputy President of the Commission, the Minister must consult confidentially about the proposed appointment with a panel consisting of—

- (a) a nominee of the United Trades and Labor Council; and
- (b) a nominee of the South Australian Employers' Chamber of Commerce and Industry; and
- (c) a nominee of the House of Assembly appointed by resolution of that House; and
- (d) a nominee of the Legislative Council appointed by resolution of the Council; and
- (e) the Commissioner of Public Employment,

(and for the purposes of the consultation must inform the members of the panel all persons short-listed for appointment).

(3) A Judge of the Court may (but need not) be appointed as a Deputy President of the Commission.

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Eligibility for appointment

31. A person is eligible for appointment as the President or a Deputy President of the Commission if—

- (a) the person is the Senior Judge or another Judge of the Court; or
- (b) the person's qualifications, experience and standing in the community are of a high order and appropriate to the office to which the appointment is to be made.

Term of appointment

32. (1) An appointment as the President or a Deputy President of the Commission will be for a term of 6 years which may be renewed for one further term of 6 years.

(2) However, a term of appointment cannot extend beyond the time when the appointee reaches 65 years of age and, if that time is less than 6 years from the date the appointment is made or renewed, the appointment will be made or renewed for a term ending when the person reaches 65 years of age.

Remuneration and conditions of office

33. (1) The remuneration of the President of the Commission is determined by the Remuneration Tribunal.

(2) The remuneration of a Deputy President of the Commission is determined by the Remuneration Tribunal.

(3) The conditions of office of the President and the Deputy Presidents of the Commission are as determined by the Governor.

(4) The Governor may remove a Presidential Member of the Commission from office if both Houses of Parliament present a petition for the Member's removal.

(5) The office of a Presidential Member of the Commission becomes vacant if the Member—

- (a) dies; or
- (b) completes a term of appointment and is not reappointed; or
- (c) resigns by written notice to the Governor; or
- (d) is removed from office under subsection (4).

DIVISION 5—THE COMMISSIONERS

The Commissioners

34. (1) The Commissioners are the persons appointed by the Governor as Commissioners.

(2) Before a person is appointed (or reappointed) as a Commissioner, the Minister must consult confidentially about the proposed appointment with a panel consisting of—

- (a) a nominee of the United Trades and Labor Council; and
- (b) a nominee of the South Australian Employers' Chamber of Commerce and Industry; and
- (c) a nominee of the House of Assembly appointed by resolution of that House; and

- (d) a nominee of the Legislative Council appointed by resolution of the Council; and
- (e) the Commissioner of Public Employment,

(and for the purposes of the consultation must inform the members of the panel all persons short-listed for appointment).

(3) A Commissioner must be appointed as an Industrial Relations Commissioner or as an Enterprise Agreement Commissioner or both as an Industrial Relations Commissioner and an Enterprise Agreement Commissioner.

(4) An Enterprise Agreement Commissioner must be a person of standing in the community with experience in industrial affairs nominated by the Minister after consultation with associations representing the interests of employers and associations representing the interests of employees.

(5) An Industrial Relations Commissioner must be a person of standing in the community with experience in industrial affairs either through association with the interests of employees or through association with the interests of employers and the number of Industrial Relations Commissioners of the former class must be equal to, or differ by no more than one from, the number of Industrial Relations Commissioners of the latter class (part-time Commissioners being counted for the purposes of this subsection by reference to the proportion of full-time work undertaken).

Term of appointment

35. (1) An appointment as an Industrial Relations Commissioner or an Enterprise Agreement Commissioner will be for a term (which may be renewed from time to time) specified in the instrument of appointment.

(2) An appointment as a Commissioner will be for a term of 6 years which may be renewed for one further term of 6 years.

(3) However—

- (a) a Commissioner may be appointed on an acting basis and, in that case, the term of appointment will be for a term of not more than six months; and
- (b) a term of appointment cannot extend beyond the time when the appointee reaches 65 years of age and, if that time is less than 6 years from the date the appointment is made or renewed, the appointment will be made or renewed for a term ending when the person reaches 65 years of age.

Remuneration and conditions of office

36. (1) A Commissioner—

- (a) is entitled to the salary and allowances determined by the Remuneration Tribunal; and
- (b) is subject to an extent determined by the Governor to Part 3 of the *Government Management and Employment Act 1985* (which applies subject to modifications determined by the Governor); and
- (c) is an employee for the purposes of the *Superannuation Act 1988*.

(2) A Commissioner—

- (a) must not, without the consent of the Minister, engage in remunerative work apart from the Commissioner's official duties; and

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- (b) must not, while in office, be an officer of an association representing the interests of employers or employees.
- (3) The Governor may remove a Commissioner from office if—
 - (a) both Houses of Parliament present a petition for removal of the Commissioner on the ground of misconduct; or
 - (b) the Commissioner becomes mentally or physically incapable of carrying out official duties satisfactorily; or
 - (c) the Commissioner contravenes subsection (2); or
 - (d) the Commissioner is absent from duty, without leave, for 14 consecutive days or for 28 days in a period of twelve months.
- (4) The office of a Commissioner becomes vacant if the Commissioner—
 - (a) dies; or
 - (b) completes a term of appointment and is not reappointed; or
 - (c) resigns by written notice to the Minister; or
 - (d) is removed from office under subsection (3).

President may act ex officio as Commissioner

36A. The President may exercise any of the powers of a Commissioner.

DIVISION 6—CONCURRENT APPOINTMENTS

Concurrent appointments

37. (1) A member of the Commission may, with the Minister's approval, be appointed also as a member of an industrial authority under the law of the Commonwealth or another State.

(2) If the Minister revokes an approval under subsection (1), the member must resign from office either as a member of the Commission or as a member of the other industrial authority.

(3) A member of an industrial authority constituted under the law of the Commonwealth or another State may be appointed also as a member of the Commission and, if such an appointment is made, this Act applies with the following qualifications—

- (a) the appointment terminates if the member ceases for any reason to hold office as a member of the relevant industrial authority;
 - (b) the member is not entitled to be remunerated as a member of the Commission but is entitled, in circumstances determined by the Governor, to allowances for expenses at rates fixed by the Governor.
- (4) If a member holds concurrent appointments, then—
- (a) if the member was appointed first to the Commission and subsequently to the other industrial authority, the extent the member performs the duties of a member of that other industrial authority will be determined by agreement between the President and the head of that other industrial authority;

- (b) if the member was appointed first to the other industrial authority and subsequently to the Commission, the extent the member performs the duties of a member of the Commission will be determined by agreement between the President and the head of that other industrial authority.

Powers of member holding concurrent appointments

38. A member who holds concurrent appointments under this Division may, in an appropriate case, simultaneously exercise powers deriving from both or all appointments.

DIVISION 7—CONSTITUTION OF COMMISSION

Constitution of Full Commission

39. (1) The Full Commission consists of—

- (a) three members; or
- (b) the number of members directed by the President under subsection (2).

(2) If a matter of general principle is to be decided by the Full Commission, the President may direct that the Full Commission should consist of more than 3 members.

(3) The members of the Full Commission are to consist of one or more Presidential Members and one or more Commissioners.

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

(5) A decision in which a majority of the members constituting the Full Commission concur is a decision of the Full Commission.

Constitution of the Commission

40. (1) The Commission, when not sitting as the Full Commission, will, at the direction of the President, be constituted of a Presidential Member or a Commissioner.

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

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**PART 4
PROVISIONS OF COMMON APPLICATION TO THE COURT AND THE
COMMISSION**

DIVISION 1—THE INDUSTRIAL REGISTRAR AND OTHER OFFICERS

Industrial Registrar

41. (1) There must be an Industrial Registrar.

(2) There must be the Deputy Industrial Registrars, and the other officers of the Court and the Commission necessary for the proper administration of the Court and the Commission.

(3) The Industrial Registrar, a Deputy Industrial Registrar or other officer of the Court or the Commission must be—

- (a) a person appointed to the relevant office on a basis determined by the Minister; or
- (b) a person appointed under the Commonwealth Act who, under an arrangement between the Minister and the Minister responsible for the administration of the Commonwealth Act, is to carry out the duties of the relevant office.

(4) An arrangement of the kind mentioned in subsection (3)(b) may impose limitations and conditions on the exercise of powers under this Act by a person appointed under the Commonwealth Act.

Powers of Industrial Registrar and other officers

42. The Industrial Registrar, a Deputy Industrial Registrar or other officer of the Court or the Commission, may exercise the jurisdiction of the Court or the Commission to the extent authorised by this Act or the rules.

DIVISION 2—DISCLOSURE OF INTEREST

Disclosure of interest by members of the Court and Commission

43. If the Court or the Commission is constituted of, or includes, a member who has a pecuniary or other interest that could conflict with the proper performance of the member's official functions in proceedings before the Court or Commission, the member—

- (a) must disclose the interest to the parties to the proceedings; and
- (b) must not take part in the proceedings or exercise powers affecting the proceedings—
 - (i) if the Senior Judge of the Court or the President of the Commission (as the case requires) directs the member to withdraw from the proceedings; or
 - (ii) if a party to the proceedings does not consent to the member hearing and determining, or participating in the hearing and determination of, the proceeding.

DIVISION 3—PROTECTION FOR OFFICERS

Protection for officers

44. The members of the Court's judiciary, the members of the Commission, and a Registrar or other person who exercises the jurisdiction of the Court or the Commission, has the same privileges and immunities as a Judge of the Supreme Court.

DIVISION 4—ANNUAL REPORT

Annual report

45. (1) The Senior Judge of the Court must, before 30 September in each year, prepare and forward to the Minister a report—

- (a) on the work of the Court; and
- (b) generally on the operation of this Act,

during the financial year that ended on the preceding 30 June.

(2) The President of the Commission must, before 30 September in each year, prepare and forward to the Minister a report—

- (a) on the work of the Commission; and
- (b) generally on the operation of this Act,

during the financial year that ended on the preceding 30 June.

(3) The annual report prepared by the President of the Commission must deal specifically with the exercise of the Commission's jurisdiction in enterprise agreement matters and any reforms to the law that may be desirable to encourage the use of enterprise agreements for regulating industrial matters.

(4) The Minister must, as soon as practicable after receiving a report under this section, have copies of the report laid before both Houses of Parliament.

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PART 5

INDUSTRIAL RELATIONS ADVISORY COMMITTEE

DIVISION 1—THE COMMITTEE AND ITS FUNCTIONS

Establishment of the Committee

46. The *Industrial Relations Advisory Committee* is established.

Functions of the Committee

47. The functions of the Committee are—

- (a) to assist the Minister in formulating, and advise the Minister on implementing, policies affecting industrial relations and employment in the State; and
- (b) to advise the Minister on legislative proposals of industrial significance; and
- (c) to consider matters referred to the Committee by the Minister or members of the Committee.

Principles on which Committee is to act

48. (1) The Committee must act on a non-political basis.

(2) The Committee must seek to achieve, as far as possible, consensus on all questions arising before it.

(3) The Committee must not interfere with the proper performance of functions by industrial authorities and tribunals.

Sub-committees

49. (1) The Committee may, with the Minister's consent, appoint sub-committees to inquire into and advise the Committee on matters on which the Committee requires advice.

(2) A sub-committee may consist of, or include, persons who are not members of the Committee.

Annual report

50. (1) The Committee must, before 30 September in each year, prepare and forward to the Minister a report on its work during the financial year that ended on the preceding 30 June.

(2) The Minister must, as soon as practicable after receiving a report under this section, have copies of the report laid before both Houses of Parliament.

DIVISION 2—COMPOSITION OF THE COMMITTEE

Membership of Committee

51. (1) The Committee consists of 14 members of whom—

- (a) one is the Minister; and
- (b) one is the chief executive of the department that is, under the Minister, responsible for administering this Part; and

- (c) 12 are persons appointed by the Governor—
- (i) six being persons nominated by the Minister after consultation with the United Trades and Labor Council and associations representing employees; and
 - (ii) six being persons nominated by the Minister after consultation with associations representing employers.

(2) A member of the Committee may, with the Minister's approval, appoint a suitable person to act as an alternate member of the Committee and a person so appointed may, in the member's absence, act as a member of the Committee.

Terms of office

52. (1) A member of the Committee is to be appointed for a term (not exceeding two years) specified in the instrument of appointment and, at the end of a term of appointment, is eligible for re-appointment.

(2) The Governor may remove a member from office if the member—

- (a) becomes mentally or physically incapable of carrying out duties of office satisfactorily; or
- (b) is guilty of dishonourable conduct or neglect of duty; or
- (c) ceases to be a suitable representative of the interests of employees or employers (as the case requires).

(3) A member's office becomes vacant if the member—

- (a) dies; or
- (b) completes a term of office and is not re-appointed; or
- (c) resigns by written notice to the Minister; or
- (d) is removed from office under subsection (2).

(4) When a member's office becomes vacant, a person must be appointed to the vacancy.

(5) This section does not apply to the Minister or the chief executive of the department (who are members of the Committee *ex officio*).

Remuneration and expenses

53. A member of the Committee (other than the Minister and the chief executive of the department) is entitled to allowances and expenses on a basis decided by the Governor.

DIVISION 3—PROCEEDINGS OF COMMITTEE

Meetings

54. (1) The Committee must meet at times appointed by the Minister.

(2) There must be at least one meeting of the Committee in each quarter.

(3) The Minister must convene a meeting of the Committee if requested to do so by four or more of its members.

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Proceedings

55. (1) The Minister must chair meetings of the Committee.

(2) A quorum of the Committee consists of eight members of whom—

(a) one must be the Minister; and

(b) at least three must be representatives of employees and at least three must be representatives of employers.

(3) The chief executive of the department is not entitled to vote on questions arising before the Committee.

(4) The Committee may, subject to this Act, decide its own procedures.

(5) The Committee must keep minutes of its proceedings.

Confidentiality

56. (1) The views expressed by individual members of the Committee (as distinct from the views or decisions of the Committee as a whole) must be kept confidential.

(2) However, this section does not prevent a person who is a member or officer of an association from reporting to the association on views expressed at a meeting.

(3) There must be no public announcement of a view or decision reached by the Committee unless the committee resolves that the announcement should be made.

**PART 6
ADMINISTRATIVE AUTHORITIES**

DIVISION 1—THE OFFICE OF THE EMPLOYEE OMBUDSMAN

Constitution of the Office

57. The office of the Employee Ombudsman consists of—

- (a) the Employee Ombudsman; and
- (b) the other staff appointed to assist the Employee Ombudsman to carry out functions under this Act.

Appointment and conditions of office of Employee Ombudsman

58. (1) The Employee Ombudsman is appointed by the Governor for a term of 6 years which may be renewed for one further term of 6 years.

(2) Before a person is appointed (or reappointed) as the Employee Ombudsman, the Minister must consult confidentially about the proposed appointment with a panel consisting of—

- (a) a nominee of the United Trades and Labor Council; and
- (b) a nominee of the South Australian Employers' Chamber of Commerce and Industry; and
- (c) a nominee of the House of Assembly appointed by resolution of that House; and
- (d) a nominee of the Legislative Council appointed by resolution of the Council; and
- (e) the Commissioner of Public Employment,

(and for the purposes of the consultation must inform the members of the panel all persons short-listed for appointment).

(3) The office of Employee Ombudsman becomes vacant if the Employee Ombudsman—

- (a) dies; or
- (b) reaches 65 years of age; or
- (c) completes a term of appointment and is not reappointed; or
- (d) resigns by written notice given to the Minister; or
- (e) becomes mentally or physically incapable of carrying out official duties and is removed from office by the Governor on that ground; or
- (f) is removed from office by the Governor on presentation of an address from both Houses of Parliament asking for the removal of the Employee Ombudsman from office.

(4) Except as provided by this section, the Employee Ombudsman cannot be removed from office.

Remuneration and conditions of office

59. (1) The Employee Ombudsman is entitled to the remuneration determined by the Remuneration Tribunal.

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(2) The other conditions of office are to be as determined by the Governor.

Independence of the office

60. The Employee Ombudsman is not subject to control or direction by the Minister.

Employee Ombudsman's access to Legislative Review Committee

61. The Employee Ombudsman may consult with the Legislative Review Committee of the Parliament on questions affecting the administration of the Employee Ombudsman's office.

General functions of Employee Ombudsman

62. (1) The Employee Ombudsman's functions are—

- (a) to advise employees on their rights and obligations under awards and enterprise agreements; and
- (b) to advise employees on available avenues of enforcing their rights under awards and enterprise agreements; and
- (c) to investigate claims by employees or associations representing employees of coercion in the negotiation of enterprise agreements; and
- (d) to scrutinise enterprise agreements lodged for approval under this Act and to intervene in the proceedings for approval if the Employee Ombudsman considers there is sufficient reason to do so; and
- (e) to represent employees in proceedings (other than proceedings for unfair dismissal) if—
 - (i) the employee is not otherwise represented; and
 - (ii) it is in the interests of justice that such representation be provided; and
- (f) to advise individual home-based workers who are not covered by awards or enterprise agreements on the negotiation of individual contracts; and
- (g) to investigate the conditions under which work is carried out in the community under contractual arrangements with outworkers and other examinable arrangements; and
- (h) to provide an advisory service on the rights of employees in the workplace on occupational health and safety issues.

(2) The Employee Ombudsman may delegate functions and powers.

(3) A delegation under this section—

- (a) is revocable at will; and
- (b) does not derogate from the Employee Ombudsman's power to act personally.

Annual report

63. (1) The Employee Ombudsman must, before 30 September in each year, prepare a report on the work of the Employee Ombudsman's office during the financial year that ended on the preceding 30 June and forward copies of the report to the Presiding Members of both Houses of Parliament to be laid before their respective Houses at the earliest opportunity.

(2) The report must contain particular reference to any investigation made by the Employee Ombudsman into the conditions under which work is carried out by outworkers (or others) under examinable arrangements.

DIVISION 2—INSPECTORS

Who are inspectors

64. (1) The following are inspectors for the purposes of this Act—

- (a) the Employee Ombudsman; and
- (b) persons appointed by the Minister to be inspectors; and
- (c) persons appointed under the Commonwealth Act who are, under an arrangement between the Minister and the Minister responsible for administering the Commonwealth Act, authorised to exercise the powers of an inspector under this Act.

(2) Each inspector must be furnished by the Minister with an identity card.

(3) An inspector must produce the identity card for inspection by a person who questions the inspector's authority to exercise powers under this Act.

General functions of the inspectors

65. The functions of the inspectors are—

- (a) to investigate complaints of non-compliance with the Act, enterprise agreements and awards; and
- (b) to encourage compliance and, if appropriate, take action to enforce compliance.

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**CHAPTER 3
EMPLOYMENT**

**PART 1
GENERAL CONDITIONS OF EMPLOYMENT**

Basis of contract of employment

66. A contract of employment may be for a fixed term, or on a monthly, fortnightly, weekly, daily, hourly or other basis.

Accrual of wages

67. (1) Wages accrue under a contract of employment from week to week.

(2) However—

- (a) if an employee is employed on an hourly basis, wages accrue from hour to hour; and
- (b) if an employee is employed on a daily basis, wages accrue from day to day; and
- (c) if a person is employed on neither an hourly nor a daily basis, but the period of employment is less than a week, wages accrue at the end of the period of employment.

Form of payment to employee

68. (1) If an employee does work for which the remuneration is fixed by an award or enterprise agreement, the employer must pay the employee in full, and without deduction, the remuneration so fixed.

(2) The payment must be made—

- (a) in cash; or
- (b) if authorised in writing by the employee or in an award or enterprise agreement by an employee association whose membership includes the employee or employees who do the same kind of work—
 - (i) by cheque (which must be duly met on presentation at the bank on which it is drawn) payable to the employee; or
 - (ii) by postal order or money order payable to the employee; or
 - (iii) by payment into a specified account with a financial institution.

(3) However, the employer may deduct from the remuneration—

- (a) an amount the employer is authorised, in writing, by the employee to deduct and pay on behalf of the employee; and
- (b) an amount the employer is authorised to deduct and pay on behalf of the employee under an award or enterprise agreement; and
- (c) an amount the employer is authorised or required to deduct by order of a court, or under a law of the State or the Commonwealth.

(4) An employee may, by giving written notice to the employer, withdraw an authorisation under this section.

(5) Despite the other provisions of this section, remuneration may be paid by the Crown to an employee by cheque or by payment into an account with a financial institution specified by the employee, but, if payment is by cheque, there must be no deduction from the amount payable because the payment is made by cheque.

Remuneration

69. (1) A contract of employment is to be construed as if it provided for remuneration at in accordance with the relevant minimum standard under Schedule 2 unless—

- (a) a rate that is more favourable to the employee is fixed by the contract of employment; or
- (b) the rate of remuneration is fixed in accordance with an award or enterprise agreement.

(2) A rate of remuneration fixed by a contract of employment, or an award or enterprise agreement, must be consistent with the Equal Remuneration Convention.

Sick leave

70. (1) A contract of employment is to be construed as if it provided for sick leave in terms of the minimum standard for sick leave in force under this section unless—

- (a) the provisions of the contract are more favourable to the employee; or
- (b) the provisions of the contract are in accordance with an award or enterprise agreement.

(2) The minimum standard for sick leave in force under this section is—

- (a) the standard set out in Schedule 3; or
- (b) a standard substituted for that standard on review by the Full Commission under subsection (3).

(3) The Full Commission may, on application by the Minister, the United Trades and Labor Council or the South Australian Employers' Chamber of Commerce and Industry Incorporated—

- (a) review the minimum standard for sick leave in force under this section; and
- (b) if satisfied that a variation of the minimum standard is necessary or desirable to give effect to the objects of this Act—substitute a fresh minimum standard.

Annual leave

71. (1) A contract of employment is to be construed as if it provided for annual leave in terms of the minimum standard for annual leave in force under this section unless—

- (a) the provisions of the contract are more favourable to the employee; or
- (b) the provisions of the contract are in accordance with an award or enterprise agreement.

(2) The minimum standard for annual leave in force under this section is—

- (a) the standard set out in Schedule 4; or
- (b) a standard substituted for that standard on review by the Full Commission under subsection (3).

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(3) The Full Commission may, on application by the Minister, the United Trades and Labor Council or the South Australian Employers' Chamber of Commerce and Industry Incorporated—

- (a) review the minimum standard for annual leave in force under this section; and
- (b) if satisfied that a variation of the minimum standard is necessary or desirable to give effect to the objects of this Act—substitute a fresh minimum standard.

Parental leave

72. (1) A contract of employment is to be construed as if it provided for maternity, paternity and adoption leave (and associated part-time work) in terms of the minimum standard for parental leave in force under this section unless—

- (a) the provisions of the contract are more favourable to the employee; or
- (b) the provisions of the contract are in accordance with an award or enterprise agreement.

(2) The minimum standard in force under this section is—

- (a) the standard set out in Schedule 5; or
- (b) a standard substituted for that standard on review by the Full Commission under subsection (3).

(3) The Full Commission may, on application by the Minister, the United Trades and Labor Council or the South Australian Employers' Chamber of Commerce and Industry Incorporated—

- (a) review the minimum standard for parental leave in force under this section; and
- (b) if satisfied that a variation of the minimum standard is necessary or desirable to give effect to the objects of this Act—substitute a fresh minimum standard.

PART 2

REGULATION OF INDUSTRIAL MATTERS BY ENTERPRISE AGREEMENTS

Objects of this Part

73. The objects of this Part are—

- (a) to encourage and facilitate the making of agreements governing remuneration, conditions of employment and other industrial matters at the enterprise or workplace level; and
- (b) to provide a framework for fair and effective negotiation and bargaining between employers and employees with a view to the making of such agreements and to provide for the participation of associations in the process of negotiation and bargaining; and
- (c) to ensure that award remuneration and conditions of employment operate as a safety net underpinning the negotiated agreements at the enterprise or workplace level; and
- (d) to provide for improved flexibility in conditions of employment at the enterprise and workplace level with consequent increases in efficiency and productivity.

Nature of enterprise agreement

74. An enterprise agreement may be made about remuneration and other industrial matters.

Who may make enterprise agreement

75. (1) An enterprise agreement may be made between—

- (a) an employer (or two or more employers who together carry on a single business); and
- (b) a group of employees.

(2) An association may enter into an enterprise agreement on behalf of a group of employees if the association is authorised, after notice has been given as required by regulation, by a majority of the employees constituting the group to negotiate the enterprise agreement on behalf of the group.

(3) A member of an association is taken to have given the association an authorisation for the purposes of subsection (2) for as long as the member remains a member of the association unless the member, by written notice given to the association, withdraws the authorisation.

(4) An authorisation given to an association by an employee who is not a member of the association—

- (a) cannot be given generally but must be specifically related to a particular proposal for an enterprise agreement; and
- (b) remains in force (subject to revocation by written notice given to the association) until the relevant enterprise agreement is rescinded or superseded.

(5) If—

(a) an employer proposes to have an enterprise agreement with a group of employees who are yet to be employed by the employer; and

(b) the employees—

- (i) are of a class not currently, or formerly, employed by the employer or a related employer in South Australia; or

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- (ii) are to be engaged in operations of a kind that are not currently, and have not been formerly, carried on by the employer or a related employer in South Australia,

the employer may enter, on a provisional basis, into an enterprise agreement binding on the employees who become members of the group (a "**provisional enterprise agreement**") with the Employee Ombudsman or a registered association of employees (or both).

(6) If the Employee Ombudsman intends to enter into negotiations for a provisional enterprise agreement and no registered association of employees is to be a party to the agreement, the Employee Ombudsman must give the United Trades and Labor Council at least 14 days written notice of the intention to enter into those negotiations.

(7) A notice under subsection (6) must include details of the group of employees to which the agreement is to apply.

(8) The Employee Ombudsman enters into a provisional enterprise agreement under this section only in a representative capacity and the agreement may not impose obligations on the Employee Ombudsman personally.

(9) A person who becomes, or ceases to be, a member of a group of employees defined in an enterprise agreement as the group bound by the agreement, becomes or ceases to be bound by the enterprise agreement (without further formality).

Negotiation of enterprise agreement

76. (1) An employer must, before beginning negotiations on the terms of an enterprise agreement give the employees who may be bound by the agreement at least 14 days' notice, in accordance with procedures prescribed by regulation, that negotiations are about to begin (but notice is not required if the agreement is negotiated to settle an industrial dispute, or the Commission determines that there is good reason in the circumstances of the case to exempt the employer from this requirement).

(2) The employer must, before beginning negotiations on the terms of an enterprise agreement, inform the employees of their right to representation in the negotiation, and proceedings for approval, of the agreement and, in particular, that an employee may be represented by the Employee Ombudsman, an agent of an employee's choice, or an association of employees.

(3) If an employer is aware that an employee is a member of an association, the employer must, before beginning negotiations on the terms of an enterprise agreement, take reasonable steps to inform the association that the negotiations are about to begin.

(4) An employer who negotiates an enterprise agreement with employees who are subject to an award must ensure that the employees have reasonable access to the award.

(5) A person involved in negotiations for an enterprise agreement must comply with procedures and formalities applicable to that person that are required by regulation.

(6) This section does not prevent employees or an association of employees from initiating negotiations on a proposed enterprise agreement, but in that case, the employer must, before entering into the negotiations, give the notice and information required by this section to ensure that the interests of all employees who may be affected by the proposed agreement are properly protected.

(7) This section does not apply to negotiations on the terms of an enterprise agreement that is to be entered into on a provisional basis.

Form and content of enterprise agreement

77. (1) An enterprise agreement—

- (a) must be in writing; and
- (b) must—
 - (i) specify the employer to be bound by the agreement; and
 - (ii) define the group of employees to be bound by the agreement; and
- (c) must include procedures for preventing and settling industrial disputes between the employer and employees bound by the agreement; and
- (d) if a majority of at least two-thirds of the total number of employees to be covered by the agreement agree—may include a provision giving an association of employees that is able to represent the industrial interests of the employees' rights to represent the industrial interests of those employees to the exclusion of another association of employees³; and
- (e) must provide that sick leave is available, subject to limitations and conditions prescribed in the agreement, to an employee if the leave becomes necessary because of the sickness of a child, spouse, parent or grandparent (unless the agreement specifically excludes the extension of sick leave to such circumstances); and
- (f) must make provision for the renegotiation of the agreement at the end of its term; and
- (g) must be signed as required by regulation by or on behalf of the employer, and on behalf of the group of employees, to be bound by the agreement.

(2) An enterprise agreement should be submitted to the Commission for approval within 21 days after the agreement is signed by or on behalf of the persons who are to be bound by it.

Enterprise agreement has no force or effect without approval

78. An enterprise agreement has no force or effect unless approved by the Commission.

Approval of enterprise agreement

79. (1) Except as otherwise provided, the Commission must approve an enterprise agreement if, and must not approve an enterprise agreement unless, it is satisfied that—

- (a) before the application for approval was made, reasonable steps were taken—
 - (i) to inform the employees who are covered by the agreement about the terms of the agreement and the intention to apply to the Commission for approval of the agreement; and
 - (ii) to explain to those employees, the effect the agreement will have if approved and, in particular—
 - to identify the terms of an industrial instrument (if any) that currently apply to the employees and will, if the agreement is approved, be excluded by the agreement; and

³ However, the provision must be consistent with section 115(1).

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- if the agreement supersedes an earlier enterprise agreement, to identify the differences in the terms of the agreements; and
 - to explain the procedures for preventing and settling industrial disputes as prescribed by the agreement; and
 - to inform the employees of their right to representation in the negotiation, and proceedings for approval, of the agreement and, in particular, that an employee may be represented by the Employee Ombudsman, an agent of an employee's choice, or an association of employees; and
- (b) the agreement has been negotiated without coercion and a majority of the employees covered by the agreement have genuinely agreed to be bound by it; and
- (c) if the agreement is entered into by an association as representative of the group of employees bound by the agreement—an appropriate officer of the association has lodged a statutory declaration with the Commission verifying that a majority of the employees currently constituting the group have authorised the association to act on their behalf and, if the Commission requires further evidence of the authorisation, the further evidence has been provided; and
- (d) the agreement provides for consultation between the employer and the employees bound by the agreement about changes to the organisation and performance of work or the parties have agreed that it is not appropriate for the agreement to contain provision for such consultation; and
- (e) the agreement—
- (i) is, on balance, in the best interests of the employees covered by the agreement (taking into account the interests of all employees); and
 - (ii) does not provide for remuneration or other conditions of employment that are inferior to the scheduled standards; and
 - (iii) does not provide for remuneration or conditions of employment that are (considered as a whole) inferior to remuneration or conditions of employment (considered as a whole) prescribed by an award under this Act or the Commonwealth Act that applies to the employees at the time of the application for approval; and
- (f) the agreement is consistent with the objects of this Part; and
- (g) the agreement complies with the other requirements of this Act.
- (1a) The agreement of employees to be bound by a proposed enterprise agreement may be indicated by ballot or in some other way.
- (1b) If a ballot of employees is taken—
- (a) the Commission must be satisfied that—
- (i) all employees were given a reasonable opportunity to participate in the ballot; and
 - (ii) the ballot was conducted in accordance with the rules for the conduct of ballots (if any) laid down by regulation; and

(iii) a majority of the employees casting valid votes at the ballot voted in favour of the proposal; and

(b) if the Commission is so satisfied, it will be presumed that a majority of the total number of the employees (including those who did not vote at the ballot) is in favour of the proposal.

(2) The Commission must refuse to approve an enterprise agreement if a provision of the agreement discriminates against an employee because of, or for reasons including, race, colour, sex, sexual preference, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

(3) The Commission must not approve an enterprise agreement if the agreement applies to part of a single business or a distinct operational or organisational part of a business and the Commission considers that—

(a) the agreement does not cover employees who should be covered having regard to—

(i) the nature of the work performed by the employees whom the agreement does cover; and

(ii) the relationship between that part of the business and the rest of the business; and

(b) it is unfair that the agreement does not cover those employees.

(4) In deciding whether to approve an enterprise agreement, the Commission must identify the employees (if any) who are covered by the agreement but whose interests may not have been sufficiently taken into account in the course of negotiations and must do whatever is necessary to ensure that those employees understand the effect of the agreement and their interests are properly taken into account.

(5) Despite subsection (1)(e)(ii) and (iii), the Full Commission may, on referral of an enterprise agreement by a member of the Commission who considered the agreement in the first instance, approve the agreement if the Full Commission is satisfied that—

(a) a majority of at least two-thirds of the total number of employees to be covered by the agreement is in favour of making the agreement; and

(b) the enterprise is suffering significant economic difficulties; and

(c) the agreement would make a material contribution to the alleviation of those difficulties; and

(d) there are reasonable prospects of the economic circumstances of the enterprise improving within the term of the agreement; and

(e) having regard to any relevant award under this Act or the Commonwealth Act (which should be considered as a whole) the agreement does not substantially disadvantage the employees covered by the agreement.

(6) An enterprise agreement must also be referred to the Full Commission for approval if the member of the Commission before whom the question of approval comes in the first instance is in serious doubt about whether the agreement should be approved.

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(7) If an enterprise agreement is to be entered into on a provisional basis—

(a) the prescribed provisions do not apply to its approval under this section; but

(b) the agreement may only be approved on condition that—

(i) the agreement is to be renegotiated between the employer and the group of employees within a period (not exceeding 6 months) the Commission considers appropriate in the circumstances and fixes on approving it; and

(ii) if, in the course of the renegotiation, the employer and the group¹ reach agreement (either in the same or on different terms), the agreement is, on its approval under this Part, to take the place of the provisional agreement and, if agreement is not reached, the provisional agreement lapses at the end of the period fixed for its renegotiation.

¹ The group may, if the appropriate authorisation exists, be represented in the negotiations by an association or associations of employees—See section 75.

Explanatory note—

The **prescribed provisions** are subsection (1)(a), (b), (c) and subsections (4) and (5).

(8) If—

(a) the Employee Ombudsman enters into a provisional enterprise agreement; and

(b) no registered association is a party to the agreement,

the United Trades and Labor Council may (despite any other provision of this Act) intervene in proceedings before the Commission relating to the approval of the agreement if the Commission is satisfied that the United Trades and Labor Council has a proper interest in the matter.

(9) If the Commission is of the opinion that grounds may exist for withholding approval of an enterprise agreement but—

(a) an undertaking is given to the Commission by one or more of the persons who are to be bound by the agreement (or by a duly authorised representative on their behalf) about how the agreement is to be interpreted or applied; and

(b) the Commission is satisfied that the undertaking adequately deals with the aspects of the agreement that might otherwise lead the Commission to withhold its approval,

the Commission may incorporate the undertaking as part of the agreement, or amend the agreement to conform with the undertaking, and approve the agreement in its modified form.

(10) Before the Commission rejects an application for approval for an enterprise agreement on the ground that its provisions do not meet the criteria for approval, it should identify the aspects of the agreement that are of concern to the Commission and allow a reasonable opportunity for the renegotiation of those aspects of the agreement.

Extent to which aspects of negotiations and terms of the agreement are to be kept confidential

80. (1) An association that enters into an enterprise agreement as representative of a group of employees, must not disclose to the employer which employees authorised the association to act on their behalf.

(2) However—

- (a) an association, if authorised in writing by an employee, may disclose to an employer that the association is authorised to act on behalf of the employee; and
- (b) an association may be authorised by the Commission to disclose to an employer the identity of employees who authorised the association to act on their behalf and may be required by the Commission to disclose the identity of those employees to the Commission.

(3) An enterprise agreement, once approved, must be lodged in the Registrar's office and must, subject to an order under subsection (4), be available for public inspection.

(4) The Commission may, if satisfied that an order under this subsection is justified by the exceptional nature or circumstances of the case, declare that an enterprise agreement or a particular part of an enterprise agreement is to be kept confidential to the persons bound by it, and make an order suppressing public disclosure of the agreement or the relevant part of the agreement (but an order under this subsection cannot prevent disclosure of the agreement to the Employee Ombudsman).

(5) A person must not contravene an order of the Commission under subsection (4).

Maximum penalty: \$2 500.

Effect of enterprise agreement

81. (1) An enterprise agreement prevails over a contract of employment to the extent the agreement is inconsistent with the contract.

(2) However, if an employer and employee agree, at or after the time of entering into an enterprise agreement, that a term of a contract of employment that is more beneficial to an employee than the corresponding provision of the enterprise agreement is to prevail despite the enterprise agreement, the contractual term prevails over the corresponding provision of the enterprise agreement.

(3) An enterprise agreement operates to exclude the application of an award only to the extent of inconsistency with the award.

Commission's jurisdiction to intervene in industrial dispute between persons bound by enterprise agreement

82. (1) An enterprise agreement cannot limit—

- (a) the Commission's powers of conciliation; or
- (b) the Commission's powers to settle industrial disputes between the employer and the employees bound by the agreement.

(2) However—

(a) before the Commission intervenes in an industrial dispute between an employer and employees bound by an enterprise agreement, the Commission should ensure that the procedures laid down in the agreement for settling industrial disputes have been followed and have failed to resolve the dispute; and

(b) a determination made by the Commission in settlement of such a dispute—

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- (i) must not be made in relation to a condition of employment that is a subject matter of the agreement (unless the determination is to correct an ambiguity or uncertainty in the agreement); and
- (ii) must be consistent with the agreement.

Duration of enterprise agreement

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

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

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

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

Power of Commission to vary or rescind an enterprise agreement

84. (1) The Commission may vary an enterprise agreement—

- (a) to give effect to an amendment agreed between the employer and a majority of the employees currently bound by the agreement; or
- (b) to correct an ambiguity or uncertainty in the agreement.

(2) In deciding whether to vary an enterprise agreement, the Commission must (unless the variation is merely to correct an ambiguity or uncertainty) apply the same tests as apply to the approval of an enterprise agreement.

(3) The Commission may rescind an enterprise agreement during its term if satisfied that the employer and a majority of the employees currently bound by the agreement want it rescinded.

(4) The Commission must rescind an enterprise agreement after the end of its term if satisfied that the employer or a majority of the employees currently bound by the enterprise agreement want it rescinded.

(5) If the Commission is satisfied, after giving persons bound by an enterprise agreement an opportunity to be heard, that there has been a breach of an undertaking on the basis of which the agreement was approved, the Commission may—

- (a) vary the agreement so that it conforms with the undertaking; or
- (b) rescind the agreement.

Commission may release party from obligation to comply with enterprise agreement

85. (1) If an employer or employee bound by an enterprise agreement engages in industrial action in relation to a matter dealt with in the agreement, the Commission may, on application by another person bound by the agreement who is affected by the industrial action, order that the applicant be released from the agreement or that the terms of the agreement be varied in a specified way.

(2) Subject to the terms of an enterprise agreement, the Commission may, on application by a person bound by the agreement, include, omit or vary a term authorising the employer to stand down an employee.

(3) The Commission may only make an order under this section if satisfied it is fair and reasonable to do so.

Limitation on Commission's powers

86. The Commission has no power to vary or rescind an enterprise agreement apart from the powers expressly conferred on the Commission by this Part.

Representation

87. An association of employers or employees may, subject to the provisions of any relevant enterprise agreement⁴, represent members of the association in negotiations and proceedings under this Part.

Confidentiality

88. (1) If an enterprise agreement prohibits the disclosure of information of a confidential nature, a person who discloses the information contrary to the agreement is guilty of an offence.

Maximum penalty: \$750.

(2) However, an enterprise agreement cannot prohibit the disclosure of information of a statistical nature to the Minister.

Special function of Enterprise Agreement Commissioner

89. An Enterprise Agreement Commissioner must, as far as the Commissioner's other responsibilities allow, promote an awareness in the community of the provisions of this Part and of the objects of this Act in regard to enterprise agreements.

⁴ See section 77(1)(d).

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**PART 3
REGULATION OF INDUSTRIAL MATTERS BY AWARD**

DIVISION 1—AWARDS GENERALLY

Power to regulate industrial matters by award

90. (1) The Commission may make an award about remuneration and other industrial matters⁵.

(2) However—

(a) the Commission cannot regulate the composition of an employer's workforce except in relation to the employment of juniors and apprentices; and

(b) if there is an inconsistency between an award and an enterprise agreement, then, while the agreement continues in force, the agreement prevails to the extent of the inconsistency.

(3) The Commission may provide in an award for annual leave, sick leave or parental leave on terms that are more favourable to employees than the scheduled standards.

(4) The Commission may refrain from hearing, further hearing, or determining an application for an award binding only one employer or two or more employers who together carry on a single business or for variation of such an award for so long as the Commission—

(a) considers that, in all the circumstances, the parties concerned should try to negotiate an enterprise agreement to deal with the subject matter of the application; and

(b) is not satisfied that there is no reasonable prospect of the parties making such an agreement.

(5) An award may be made on a provisional or interim basis.

(6) In making an award, the Commission is not restricted to the specific relief claimed by the parties, but may include in the award provisions the Commission considers necessary or appropriate.

(7) Before the Commission makes an award, it must take reasonable steps to ensure that all persons who are to be bound by the award have been given a reasonable opportunity to appear and be heard before the Commission.

Who is bound by award

91. An award of the Commission is binding on all persons expressed to be bound by the award.

Retrospectivity

92. (1) An award of the Commission has, if it so provides, retrospective operation.

(2) However, an award cannot operate retrospectively from a day antecedent to the day on which the application for the award was lodged with the Commission unless—

(a) the date of operation is fixed by consent of all parties to the proceedings; or

(b) there is a nexus between the award and—

(i) another award of the Commission; or

⁵ Any of the bodies or persons mentioned in section 194 may bring an application for the making of an award.

(ii) an award or agreement under the Commonwealth Act,

and, in view of the nexus, it is imperative that there should be common dates of operation;
or

(c) the award gives effect, in whole or part and with or without modification, to principles, guidelines or conditions relating to remuneration enunciated or laid down in, or attached to, a relevant decision or declaration of the Commonwealth Commission and there are reasons of exceptional cogency for giving it a retrospective operation.

Form of awards

93. (1) An award must be expressed in plain English and must avoid unnecessary technicality and excessive detail.

(2) An award must be settled and sealed by the Registrar.

Effect of awards on contracts

94. An award prevails over a contract of employment to the extent the award is more beneficial to the employee than the contract.

Effect of multiple award provisions on remuneration

95. (1) If—

(a) an employee is engaged in work of different classes; and

(b) an award or awards fix different rates of remuneration for the different classes of work,

the remuneration of the employee is to be calculated by reference to the time spent in, and the rate of remuneration for, each class of work.

(2) However, an award may fix a special rate of remuneration for an employee engaged in work of different classes.

Duration of award

96. An award continues in operation, subject to its terms, and subject to amendment or revocation, until superseded by a later award.

Effect of amendment or rescission of award

97. The variation or rescission of an award does not affect—

(a) legal proceedings previously commenced under or in relation to the award; or

(b) rights existing at the time of the variation or rescission.

Consolidation of awards on amendment

98. (1) If an award has been amended by other awards or orders, the Registrar may, on the Registrar's own initiative, or, if so directed by the Commission, must, consolidate the text of the award to include the amendments.

(2) The Registrar may, in the course of consolidating the award, correct clerical or other errors in the award.

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DIVISION 2—REVIEW OF AWARDS

Triennial review of awards

99. (1) The Commission must review each award at least once in every three years.

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

(2) At least 21 days before it begins a review under this section, the Commission must give notice of the review—

(a) to associations and other persons that appeared in the proceedings in which the award was made; and

(b) by notice in a newspaper circulating generally throughout the State.

(3) On a review under this section, the Commission may vary an award to ensure that the award—

(a) is consistent with the objects of this Act; and

(b) affects only to the minimum extent necessary the way work is carried out; and

(c) leaves the practical application of its provisions to be worked out in the workplace; and

(d) is consistent with industrial, technological, commercial and economic developments applicable to the relevant industry; and

(e) complies with other requirements prescribed by regulation.

(4) If, on review of an award it appears that the award is obsolete, the Commission should rescind the award.

(5) Before it varies or rescinds an award under this section, the Commission must give the parties to the award a reasonable opportunity to make submissions on the proposed action, and take any submissions made by the parties into consideration.

**PART 4
GENERAL PRINCIPLES AFFECTING DETERMINATION
OF WORKING CONDITIONS**

Adoption of principles affecting determination of remuneration and working conditions

100. (1) The Full Commission may, on its own initiative, or on the application of—

- (a) the Minister; or
- (b) the United Trades and Labor Council; or
- (c) the South Australian Employers' Chamber of Commerce and Industry Incorporated,

make a declaration adopting in whole or in part, and with or without modification, principles, guidelines, conditions, practices or procedures enunciated or laid down in, or attached to, a decision or declaration of the Commonwealth Commission.

(2) However, a declaration may only be made if the terms of the declaration are consistent with the objects of this Act.

State industrial authorities to apply principles

101. (1) In arriving at a determination affecting remuneration or working conditions, a State industrial authority must have due regard to and may apply and give effect to principles, guidelines, conditions, practices or procedures adopted by the Full Commission under this Part.

(2) However, principles adopted under this Part are not applicable to enterprise agreements.

(3) In this section—

"**State industrial authority**" means—

- (a) the Commission; or
- (b) the Remuneration Tribunal; or
- (c) the Commissioner for Public Employment; or
- (d) another person or body declared by regulation to be a State industrial authority.

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**PART 5
ENFORCEMENT OF OBLIGATIONS ARISING FROM EMPLOYMENT**

DIVISION 1—RECORDS TO BE KEPT BY EMPLOYERS

Records to be kept

102. (1) An employer who is bound by an award or enterprise agreement must, subject to subsection (6), keep for employees to whom the award or agreement applies—

- (a) a record of the names and addresses of the employees; and
- (b) a record (a "**time book**") in which are entered as far as practicable—
 - (i) each employee's times of beginning and ending work on each day (including a note of time allowed for meals and other breaks); and
 - (ii) the wages paid to each employee and the date of each payment of wages; and
- (c) a record of annual leave, sick leave, parental leave and long service leave granted to each employee; and
- (d) a record of the date of birth of employees under 21 years of age; and
- (e) other records prescribed by regulation.

Maximum penalty: \$2 500.

Expiation fee: \$160.

(2) The time book must, if practicable, be verified by signature of the employee on, or as soon as possible after, each pay day, and the record, as verified, constitutes evidence of the correctness of the entries made in it.

(3) An employer must retain a record kept under this section for six years after the date of the last entry made in it.

Maximum penalty: \$2 500.

Expiation fee: \$160.

- (4) An employer must—
- (a) at the reasonable request of an employee, produce a record relating to the employee kept under this section and permit the employee to make copies of, or take extracts from, the record; or
 - (b) at the reasonable request of an inspector, produce a record relating to a specified employee kept under this section and permit the inspector to make copies of, or take extracts from, the record.

Maximum penalty: \$2 500.

Expiation fee: \$160.

(5) When a business, or part of a business, is transferred or assigned, the transferor or assignor must transmit to the transferee or assignee all records referred to in this section relating to employees who become employees of the transferee or assignee.

Maximum penalty: \$1 250.

Expiation fee: \$105.

(6) An award or enterprise agreement may direct that, in relation to some or all of the persons bound by the award or agreement—

- (a) a time book need not be kept; or
- (b) specified information need not be included in the time book.

(7) Subject to an award or enterprise agreement—

- (a) if an employee is paid on an hourly basis, or on a basis where the rate of pay varies according to the time worked, the employer must, when the employer makes a payment of wages, provide the employee with a written record showing—
 - (i) the number of hours worked by the employee during the period to which the payment relates (distinguishing between ordinary time and overtime); and
 - (ii) the rate of pay on which the payment is based; and
- (b) if the employer makes a contribution to a superannuation fund for the benefit of an employee under this Act, an award or enterprise agreement, the employer must on the next occasion a payment of wages is made to the employee, provide the employee with a written record of the amount of the contribution.

Maximum penalty: \$750.

Employer to provide copy of award or enterprise agreement

103. (1) An employer who is bound by an award or enterprise agreement must, at the request of an employee bound by the award or enterprise agreement, produce a copy of the award or enterprise agreement as soon as practicable after the request and allow the employee a reasonable opportunity to examine it.

Maximum penalty: \$750.

Expiation fee: \$80.

(2) If an employee bound by an award or enterprise agreement asks the employer for a copy of the award or agreement, the employer must give the employee a copy of the award or agreement within 14 days after the date of the request.

Maximum penalty: \$750.

Expiation fee: \$80.

- (3) However, an employer is not obliged to comply with a request under subsection (2) if—
- (a) the employer has previously given the employee a copy of the award or agreement within the preceding 12 months; or
 - (b) the Commission has, on the application of the employer, relieved the employer from the obligation to comply with the request.

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(4) An employer must ensure that a copy of an award or enterprise agreement is exhibited at a place that is reasonably accessible to the employees bound by the award or agreement.

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

(5) However, an enterprise agreement, or a part of an enterprise agreement, that the Commission has suppressed from public disclosure under this Act⁶ need not be exhibited under subsection (4).

DIVISION 2—POWERS OF INSPECTORS

Powers of inspectors

104. (1) An inspector may at any time, with any assistance the inspector considers necessary, without any warrant other than this section—

- (a) enter a place in which a person is or has been employed; and
- (b) inspect and view any work, process or thing in the place; and
- (c) question a person in the place on a subject relevant to employment or an industrial matter.

(2) Before, or as soon as practicable after, entering a place under this section, an inspector must produce his or her identity card for inspection by the occupier or person in charge of the place.

(3) An inspector may require the production of a time book, paysheet, notice, record, list, indenture of apprenticeship or other document required to be kept by this Act or any other Act and may inspect, examine and copy it.

(4) A document produced under subsection (3) may be taken away by the Inspector for examination and copying, and the inspector may retain possession of it for not more than 7 days.

(5) However—

- (a) the inspector may not take away a document if the employer supplies a copy of it to the inspector for the inspector's own use; and
- (b) the inspector may not take away the original of a document that is required for the day-to-day operations of the employer.

(6) It is the duty of an employer at all reasonable times to facilitate, as far as practicable, the exercise by an inspector of powers under this section.

(7) If an inspector puts a question to a person through an interpreter, the question will, for the purposes of this Act, be taken to have been put to the person by the inspector and an answer to the question given by the person to the interpreter will be taken to have been given to the inspector (and in any legal proceedings it will be presumed that the interpreter's translation of the answer is the person's answer to the question as put by the inspector unless it is shown that the interpreter mistranslated the question or the answer).

⁶ See section 80.

(8) A person must not—

- (a) hinder or obstruct an inspector in the exercise of a power conferred by or under this section; or
- (b) refuse an inspector entrance to a place the inspector is authorised to enter under subsection (1); or
- (c) refuse or fail to answer truthfully a question put under subsection (1); or
- (d) fail, without lawful excuse, to comply with a requirement of an inspector acting under this section.

Maximum penalty: \$1 250.

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**PART 6
UNFAIR DISMISSAL**

DIVISION 1—PRELIMINARY

Interpretation

105. In this Part—

"**adjudicating authority**" means—

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

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

Application of this Part

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

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

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

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

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

DIVISION 2—APPLICATION FOR RELIEF

Application for relief

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

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

(a) is taken to have elected to pursue that remedy to the exclusion of other remedies that may be available on the same facts either under this Part or under other laws; and

(b) is estopped from taking proceedings for other remedies based on the same facts,

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

Example—

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

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

Example—

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

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

DIVISION 3—CONCILIATION CONFERENCE

Conference of parties

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

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

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

DIVISION 4—DETERMINATION OF APPLICATION**Question to be determined at hearing**

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

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

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

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

Remedies for unfair dismissal from employment

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

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

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

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

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

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

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

DIVISION 5—MISCELLANEOUS

Costs

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

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

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

Decisions to be given expeditiously

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

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

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**PART 7
EXEMPTION FROM EMPLOYMENT CONDITIONS**

Slow, inexperienced or infirm workers

112. (1) The Commission may, on application by a slow, inexperienced or infirm employee, grant the employee a licence to work at a wage less than the minimum that would otherwise apply to the employee under this Act, an award or an enterprise agreement.

(2) If it appears to the Commission that an association may have an interest in an application under this section, it will give the association at least seven days notice of the time and place at which it intends to hear the application, and the association is then entitled to appear and be heard on the application.

(3) The Commission will not grant a licence until satisfied that the employee is, because of slowness, inexperience or infirmity, unable to obtain employment at the minimum wage fixed under this Act, an award or enterprise agreement.

(4) A licence—

(a) must specify the wage at which the worker is licensed to work; and

(b) continues in force for 12 months but may be renewed from time to time for successive terms of 12 months.

(5) An employer must not, without the consent of the Commission, employ a number of licensed employees exceeding one-fifth of the total number of persons employed by the employer in the same class of work (but if the employer employs fewer than five employees in the relevant class of work, the employer may employ one licensed employee).

Maximum penalty: \$2 500.

(6) A person must not pay or offer to pay a slow, inexperienced or infirm employee a wage lower than specified in the licence.

Maximum penalty: \$2 500.

Non-application of awards

113. (1) This section applies to a person (an "**assisted person**")—

(a) who has an intellectual, psychiatric, sensory or physical impairment or a combination of such impairments; and

(b) who is unlikely to obtain employment at ordinary rates of pay and needs substantial ongoing support to obtain or retain paid employment; and

(c) who is being assisted or trained by an organisation or body—

(i) that provides employment services to disabled workers; and

(ii) that is declared by regulation to be a recognised organisation for the purposes of this section.

(2) No award applies to work performed by an assisted person unless the award makes specific provision for assisted persons.

(3) The regulations may exclude certain industrial matters affecting assisted persons from regulation by award.

Exemption for charitable organisations

114. (1) If the Minister is satisfied that—

- (a) the objects of an organisation are charitable, religious or non-profit making; and
- (b) it is in the public interest to grant an exemption under this subsection,

the Minister may, by notice in the *Gazette*, exempt all activities of the organisation, or specified activities of the organisation, from the operation of awards.

(2) The Minister may, by notice in the *Gazette*, vary or revoke an exemption under subsection (1).

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**CHAPTER 4
ASSOCIATIONS**

**PART 1
FREEDOM OF ASSOCIATION**

DIVISION 1—PRELIMINARY

Prohibited reason

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

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

- (l) because an association is seeking better industrial conditions for the other person;
- (m) because the other person (being an employee) has absented himself or herself from work without leave if—
 - (i) the absence was for the purpose of carrying out duties or exercising rights as an officer of an association; and
 - (ii) the person applied for leave before absenting himself or herself and leave was unreasonably refused or withheld;
- (n) because the other person, as an officer or member of an association, has done, or proposes to do, a lawful act within the officer's or member's authority under the rules of the association, for the purpose of furthering or protecting the industrial interests of the association.

DIVISION 2—PROTECTION OF FREEDOM OF ASSOCIATION

Freedom of association

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

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

General offences against the principle of freedom of association

116A. A person must not—

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

Maximum penalty: \$20 000.

Dismissal etc. for prohibited reason

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

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

Maximum penalty: \$20 000.

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

- (a) award compensation to the applicant for loss resulting from the commission of the offence; and
- (b) if the applicant was dismissed from employment—order the employer to re-employ the applicant on conditions determined by the court.

Prohibition of discrimination in supply or purchase of goods or services

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

Maximum penalty: \$20 000.

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

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

Maximum penalty: \$20 000.

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

Conscientious objection

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

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

**PART 2
LOCALLY BASED ASSOCIATIONS**

DIVISION 1—APPLICATION FOR REGISTRATION

Eligibility for registration

119. (1) The following associations are eligible for registration under this Part—

- (a) an association formed to represent, protect or further the interests of employers and consisting of two or more employers who employ, in aggregate, not less than 100 employees (whether or not the membership of the association includes persons who are not employers);
- (b) an association formed to represent, protect or further the interests of employees and consisting of not less than 100 employees (whether or not the membership includes persons who are not employees).

(2) An organisation, or a branch, section or part of an organisation, registered under the Commonwealth Act is not eligible for registration under this Part.

Application for registration

120. (1) An association eligible for registration under this Part may apply to the Commission for registration.

(2) If an application for registration is made, the Registrar must—

- (a) publish notice of the application in a newspaper circulating generally throughout the State;
- (b) give notice of the application to any registered association the Registrar considers to have a proper interest in the subject matter of the application.

(3) The notice must contain a statement of the right of interested persons to lodge objections to the registration of the applicant association.

Objections

121. A person may, within the time allowed by the Rules, object to the registration of the association.

DIVISION 2—REGISTRATION AND INCORPORATION

Registration of associations

122. (1) The Commission may, after considering objections to registration duly made in accordance with the Rules, register an association under this Part if satisfied—

- (a) that the association is eligible for registration under this Part; and
- (b) that the rules of the association conform with the requirements of this Part; and
- (c) that the prescribed conditions have been complied with; and
- (d) that the registration of the association would be consistent with the provisions and objects of this Act; and

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- (e) that—
 - (i) the association is entirely comprised of employees employed in a single business; or
 - (ii) if the association is not an association of that kind—there is no other registered association to which the members of the association might conveniently belong; and
- (f) that the name of the applicant association would not cause confusion with the name of another registered association or with the name of an organisation registered under the Commonwealth Act; and
- (g) in the case of an association of employees—that the association is not dependent for financial or other resources on an employer, employers, or an association of employers and is, in other respects, independent of control or significant influence by an employer, employers or an association of employers.

(2) The Commission may, in an appropriate case, waive compliance with any of the prescribed conditions referred to in paragraph (c) above.

Registration confers incorporation

123. On registration of an association under this Part, the association becomes a body corporate—

- (a) with the name stated in its rules; and
- (b) with power to acquire, hold, deal with and dispose of real and personal property; and
- (c) with the other powers stated in its rules.

DIVISION 3—RULES

Rules

124. The rules of an association registered under this Part—

- (a) must state the association's name; and
- (b) must conform with the prescribed conditions; and
- (c) must prescribe a procedure for resolution of disputes between the association and its members; and
- (d) must not impose on applicants for membership, or members, of the association conditions, obligations or restrictions that are oppressive, unreasonable or unjust.

Alteration of rules of registered association

125. (1) An association registered under this Part may resolve to alter its rules.

(2) The resolution must be passed in accordance with the relevant rules of the association unless the purpose of the proposed alteration is only to change the name of the association in which case a resolution passed by a majority of the members present and voting at an ordinary meeting of the association is sufficient provided that at least 14 days' notice of the time and place of the meeting was given to the members in accordance with the association's rules and the notice of meeting contained the proposed resolution for the change of name.

(3) An alteration of the rules of a registered association does not take effect unless and until registered by the Commission.

(4) If an alteration of the rules of a registered association is of a kind that would or could affect the composition of the membership of the association, notice of an application for registration must be given, and objections may be made, in the same way, and on the same or similar grounds, as if the application were for registration of a new association.

(5) The Commission may register an alteration of rules if satisfied that—

(a) the alteration would be consistent with the provisions and objects of this Act; and

(b) in the case of a change of name—would not cause confusion with the name of another registered association or the name of an organisation registered under the Commonwealth Act.

Model rules

126. (1) To the extent the rules of an association conform with model rules published by regulation, no objection can be taken to the rules.

(2) To the extent a proposed alteration of rules brings the rules into conformity with model rules published by regulation, no objection can be taken to the proposed alteration.

Orders to secure compliance with rules, etc.

127. (1) The Commission may, on the application of a member of an association registered under this Part or a person who has been expelled from membership of such an association, order the association or specified officers of the association—

(a) to carry out an obligation imposed by the rules of the association;

(b) to make good any contravention of, or failure to comply with, the rules of the association;

(c) to carry out consequential or related directions the Commission thinks necessary or desirable in the circumstance.

(2) An association or other person who fails to comply with an order of the Commission under this section is guilty of an offence.

Maximum penalty: \$1 250.

(3) The Commission may, on application by a member of an association registered under this Part or a person who has applied for membership of such an association, declare a rule of the association to be invalid on the ground that the rule is inconsistent with this Act.

(4) The Commission may adjourn proceedings on an application under subsection (3) for a period, and on terms and conditions, the Commission considers appropriate, to give the association an opportunity to alter its rules.

DIVISION 4—FINANCIAL RECORDS

Financial records

128. (1) An association registered under this Part must keep proper accounting records of all its financial transactions.

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(2) An association registered under this Part must prepare annually the following accounts—

- (a) a balance sheet giving a true and fair view of the assets and liabilities of the association as at the end of the relevant accounting period; and
- (b) a statement of receipts and payments over the relevant accounting period.

(3) The association must have the accounts prepared under subsection (2) audited by a registered company auditor.

(4) The accounts and accounting records to be kept and prepared under this section must conform with the requirements of the Rules.

(5) An association that fails to comply with a requirement of this section is guilty of an offence.

Maximum penalty: \$750.

DIVISION 5—AMALGAMATION

Amalgamation

129. (1) An association registered under this Part may resolve to amalgamate with another association or other associations registered under this Part.

(2) A resolution to amalgamate—

(a) must be passed—

- (i) by the executive committee, or committee of management, of the association; or
- (ii) by the members of the association in the same way as a resolution for alteration of the rules of the association; or
- (iii) in some other way provided by the rules; and

(b) must approve the rules of the association to be formed by the amalgamation.

(3) If a resolution to amalgamate is passed by the executive committee, or committee of management, of an association (and authority to pass the resolution is not conferred on the executive committee or committee of management by the rules), notice of the resolution must be given by post to all members of the association.

(4) If, within six weeks of the posting of the notices under subsection (3), the Registrar is requested by 20 members of the association or 10% of the total membership (whichever is the lesser) to conduct a ballot—

- (a) the Registrar will conduct (at the expense of the association, which may be recovered as a debt from the association) a ballot of the members of the association; and
- (b) unless the resolution is supported by a majority of the members voting on the ballot, the resolution will lapse.

(5) The rules of the association to be formed by the amalgamation may provide for persons holding office in the amalgamating associations to hold office in the new association for up to four years before an election is held for the relevant offices.

(6) A registered association may use its financial and other resources in support of a proposed amalgamation if at least 14 days' notice of its intention to do so has been given to its members (but this section does not limit any other power that the association may have under its rules to support a proposed amalgamation).

(7) If two or more associations resolve to amalgamate, an application for registration of the association to be formed by the amalgamation must be made and dealt with under this Division.

(8) On registration of the new association—

(a) the amalgamating associations are dissolved; and

(b) all property, rights and liabilities of the amalgamating associations are vested in the new association.

DIVISION 6—DE-REGISTRATION

De-registration of associations

130. (1) The Commission may de-register an association registered under this Part if—

(a) the association applies for de-registration; or

(b) the association contravenes or fails to comply with a provision of this Act or its rules about the way its affairs are to be conducted; or

(c) the association acts oppressively towards any member or class of members; or

(d) the association, or a substantial number of the members of the association, has wilfully contravened, or failed to comply with, a determination of the Commission; or

(e) there is some other substantial reason for de-registration of the association.

(2) An application for de-registration of an association may be made by—

(a) the association itself; or

(b) a member or former member of the association; or

(c) the Minister; or

(d) the Registrar.

(3) The Commission may, on making an order for de-registering an association, suspend the order and direct that, if a stated requirement is complied with to the Commission's satisfaction within a stated period, the order will lapse but otherwise will take effect at the end of the stated period.

(4) If the Commission finds that grounds for de-registering an association exist and that those grounds arise wholly or mainly from the conduct of a particular class or section of the members of the association, the Commission may, instead of de-registering the association, alter the rules of the association to exclude persons belonging to the relevant class or section from membership of the association.

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**PART 3
FEDERALLY BASED ASSOCIATIONS**

DIVISION 1—APPLICATION FOR REGISTRATION

Eligibility for registration

131. (1) An association that is an organisation registered under the Commonwealth Act is eligible for registration under this Part.

(2) However, if the rules of the organisation provide for a South Australian branch, the organisation is not eligible for registration under this Part unless the rules confer on the branch a reasonable degree of autonomy in the administration and control of South Australian assets and in the determination of questions affecting solely or principally members resident in this State.

(3) A branch of an organisation is eligible for registration under this Part if the rules of the organisation confer on the branch a reasonable degree of autonomy in the administration and control of South Australian assets and in the determination of questions affecting solely or principally members resident in this State.

Application for registration

132. (1) An association eligible for registration under this Part may apply to the Commission for registration.

(2) If an application for registration is made, the Registrar must—

- (a) publish notice of the application in a newspaper circulating generally throughout the State;
- (b) give notice of the application to any registered association the Registrar considers to have a proper interest in the subject matter of the application.

(3) The notice must contain a statement of the right of interested persons to lodge objections to the registration of the applicant association.

Objections

133. A person may, within the time allowed by the Rules, object to the registration of the association.

DIVISION 2—REGISTRATION AND DE-REGISTRATION

Registration

134. The Commission may, after considering objections to registration duly made in accordance with the rules, register an organisation, or a branch of an organisation, under this Division if satisfied—

- (a) that the organisation or branch is eligible for registration under this Division; and
- (b) that the registration of the organisation or branch would be consistent with the provisions and objects of this Act; and
- (c) that there is no other association registered under this Act to which members of the applicant organisation or branch might conveniently belong.

De-registration

135. (1) The Commission may de-register an organisation or branch registered under this Division if—

- (a) the organisation or branch applies for de-registration; or
- (b) the organisation or branch contravenes or fails to comply with a provision of this Act or its rules about the way its affairs are to be conducted; or
- (c) the organisation or branch wilfully contravenes or fails to comply with a determination of the Commission; or
- (d) the organisation or branch is being administered in a way that is oppressive or unfair to members resident in this State; or
- (e) the organisation abolishes its South Australian branch or its rules cease to confer on the South Australian branch a reasonable degree of autonomy in the administration and control of South Australian assets or in the determination of questions affecting solely or principally the members resident in this State; or
- (f) there is some other substantial reason for de-registering the organisation or branch.

(2) An application for de-registration of an organisation or branch may be made by—

- (a) the organisation or branch itself; or
- (b) a member or former member of the organisation or branch; or
- (c) the Minister; or
- (d) the Registrar.

(3) The Commission may, on making an order for de-registration of an organisation or branch, suspend the order and direct that, if a stated requirement is complied with to the Commission's satisfaction within a stated period, the order will lapse but otherwise will take effect at the end of the stated period.

(4) If an organisation registered under this Division ceases to be an organisation registered under the Commonwealth Act, its registration under this Division automatically terminates.

(5) If a branch of an organisation is registered under this Division, and the organisation ceases to be an organisation registered under the Commonwealth Act, registration of the branch under this Division automatically terminates.

DIVISION 3—FEDERATIONS

Federation

136. (1) If a federation of organisations is recognised under the Commonwealth Act, and one or more of its constituent members are registered under this Part, the federation may, subject to the regulations, act under this Act as the representative of the registered constituent members.

(2) However, this section does not limit the right of a constituent member of a federation to represent itself or its members.

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**PART 4
PROVISIONS GENERALLY APPLICABLE TO ASSOCIATIONS**

DIVISION 1—PURPOSE OF ASSOCIATION

Restraint of trade

137. (1) Even though an association (whether registered or not) has purposes in restraint of trade, its purposes will not, for that reason, be regarded as unlawful.

(2) It follows that an association is not to be regarded as an unlawful association because it has purposes in restraint of trade, nor are its members liable to prosecution for conspiracy or any other criminal offence for that reason, nor is any agreement or trust rendered void by the restraint of trade.

Limitations of actions in tort

138. (1) Subject to this section, no action in tort lies in respect of an act or omission done or made in contemplation or furtherance of an industrial dispute.

(2) This section does not prevent—

- (a) an action for the recovery of damages for death or personal injury; or
- (b) an action for the recovery of damages for damage to property (not being economic damage); or
- (c) an action for conversion or detinue; or
- (d) an action for defamation.

(3) If an industrial dispute has been resolved by conciliation or arbitration and the Full Commission determines on application under this section that, in the circumstances of the case, the industrial dispute arose or was prolonged by unreasonable conduct on the part of a particular person, then the applicant may bring an action in tort against that person despite subsection (1).

(4) If the Full Commission determines, on application under this section, that—

- (a) all means provided under this Act for resolving an industrial dispute by conciliation or arbitration have failed or there is no immediate prospect of resolving the dispute; and
- (b) having regard to the nature of the dispute and the gravity of its consequences, it is in the public interest to allow the action,

then the applicant may bring an action in tort despite subsection (1).

(5) The Full Commission must, in hearing and determining an application under subsection (4)(b), act as expeditiously as possible.

Industrial services not to be provided to non-members

139. An association, or an officer or employee of an association, must not, except at the request of the person, represent a person who is not a member of the association, and has not made an application to become a member of the association, in proceedings before the Commission.

Maximum penalty: \$2 500.

DIVISION 2—POWERS OF ENTRY AND INSPECTION

Powers of officials of employee associations

140. (1) An official of an association of employees may, if authorised to do so by an award or enterprise agreement, enter an employer's premises at which one or more members of the association are employed and—

- (a) inspect time books and wage records, at the premises; and
- (b) inspect the work carried out by employees who are members of the association and note the conditions under which the work is carried out; and
- (c) if specific complaints of non-compliance with the award or enterprise agreement have been made—interview employees who are members of the association about the complaints.

(2) Before an official exercises powers under subsection (1), the official must give reasonable notice to the employer and comply with any other requirements imposed by the award or enterprise agreement.

(3) A person exercising powers under this section must not—

- (a) harass an employer or employee; or
- (b) hinder or obstruct an employee in carrying out a duty of employment.

Maximum penalty: \$5 000.

(4) If the Commission is of the opinion that a person has abused powers under this section, the Commission may withdraw the relevant powers.

DIVISION 3—RECORDS

Register of members and officers of associations

141. (1) A registered association must keep—

- (a) a register of its officers; and
- (b) a register of its members.

(2) The registers must be kept available for inspection by the members of the association or the Registrar at the association's registered office.

(3) A registered association must in the month of July in each year furnish the Registrar with—

- (a) a list of the association's officers; and
- (b) notice of changes in the officers of the association that have occurred since a list was last furnished under this section.

(4) A registered association must, at the request of the Registrar, furnish the Registrar with an up-to-date list of the members or officers of the association.

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(5) If a registered association fails to comply with this section, or a requirement made under this section, the association is guilty of an offence.

Maximum penalty: \$750.

(6) A person employed in duties connected with the administration of this Act who divulges information about the membership of a registered association except in the performance of official duties or as may be authorised by the association or the President is guilty of an offence.

Maximum penalty: \$750.

(7) If a registered association is an organisation registered under the Commonwealth Act, a reference to the members of the association in this section will be construed as a reference to members resident in this State.

Rules

142. (1) A registered association must, at the request of any person, furnish the person with a printed or typewritten copy of its rules as in force for the time being.

Maximum penalty: \$750.

(2) The association may charge a fee (not exceeding a limit fixed by regulation) for supplying a copy of its rules under this section.

(3) A document apparently certified by the secretary or some other officer of a registered association to be a copy of the rules of the association will be accepted in any legal proceedings as evidence of the rules and of their validity.

DIVISION 4—MISCELLANEOUS

Certificate of registration

143. (1) On registration of an association, the Registrar will issue a certificate of registration to the association.

(2) The registration of an association may be proved, in the absence of evidence that the association has ceased to be registered, by production of a certificate of registration issued under this Act or a corresponding previous enactment for the association.

Service

144. Service of any process, notice or other document may be effected on a registered association—

- (a) by leaving it at the registered office of the association; or
- (b) by sending it by certified mail addressed to the association at its registered address; or
- (c) in any other manner directed by the Court or the Commission.

Saving of obligations

145. The de-registration of an association does not relieve the association, or any member of the association, from a penalty, liability or obligation imposed or arising before the de-registration.

Sequestration orders

146. (1) If a registered association does not satisfy a judgment for the payment of money on demand by the judgment creditor, the Court may, on application by the judgment creditor, make an order for sequestration of the association's property to the extent necessary to ensure the judgment is satisfied.

(2) The order must—

- (a) provide for appointment of a sequestrator; and
- (b) confer on the sequestrator the powers necessary to take possession of the property to which the order relates and realise it; and
- (c) provide for the payment of the costs of the sequestration and realisation of the property.

Exercise of powers of the Commission

147. (1) Subject to any contrary direction by the President, the powers of the Commission under this Chapter will be exercised by the Registrar.

(2) If the President so directs, the powers of the Commission under this Chapter will be exercised by—

- (a) a Presidential Member or Industrial Magistrate nominated by the President; or
- (b) the Full Commission.

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**CHAPTER 5
THE COURT AND THE COMMISSION—PROCEDURES AND POWERS**

**PART 1
PROVISIONS COMMON TO THE COURT AND THE COMMISSION**

DIVISION 1—CONDUCT OF PROCEEDINGS

Time and place of sitting

- 148.** (1) The Court or the Commission may sit at any time (including a Sunday).
- (2) The Court or the Commission may sit at any place (either within or outside the State).
- (3) The Court will sit at the times and places directed by the Senior Judge and the Commission will sit at the times and places directed by the President.
- (4) Registries of the Court and the Commission will be established at such places as the Minister may direct.

Adjournment from time to time and from place to place

- 149.** (1) The Court or the Commission may—
- (a) adjourn proceedings from time to time and from place to place; or
- (b) adjourn proceedings to a time, or a time and place, to be fixed; or
- (c) order the transfer of proceedings from place to place.
- (2) The power to adjourn proceedings may be exercised on behalf of the Court or Commission by the Industrial Registrar.

Proceedings to be in public

- 150.** (1) Subject to any Act or rule to the contrary, the proceedings of the Court or the Commission must be open to the public.
- (2) However the Court or the Commission may, at any stage of the proceedings, on its own initiative or on the application of a party, direct that the proceedings be conducted in private.
- (3) If the Court or the Commission directs that the proceedings be conducted in private, all persons (other than the parties, their representatives, the Employee Ombudsman, the officers of the Court or the Commission and any witness under examination) must withdraw.

DIVISION 2—REPRESENTATION

Representation

- 151.** (1) A party or intervener may be represented in proceedings before the Court or the Commission by—
- (a) a legal practitioner or a registered agent; or
- (b) an officer or employee of an association of which the party or intervener is a member; or
- (c) a person who provides the representation gratuitously.

(2) However—

- (a) the right of representation is qualified by the provisions restricting representation at a conference under this Act; and
- (b) a party or intervener may not be represented in proceedings before the Court or the Commission by a person—
 - (i) whose name has been struck off the roll of legal practitioners; or
 - (ii) who, although a legal practitioner, is not entitled to practise the profession of the law because of disciplinary action taken against him or her; or
 - (iii) who is disqualified by regulation from registration as an agent.

Registered agents

152. (1) The Registrar must maintain a register of registered agents.

(2) A person who applies for registration is entitled to have his or her name entered in the register as a registered agent if the person—

- (a) has the qualifications or experience required by regulation for registration; and
- (b) satisfies the Registrar that the person is in a position to comply with the code of conduct for registered agents; and
- (c) is not a person—
 - (i) whose name has been struck off the roll of legal practitioners; or
 - (ii) who, although a legal practitioner, is not entitled to practise the profession of law because of disciplinary action taken against him or her; or
 - (iii) who is disqualified by regulation from registration.

(3) The regulations may set scales of fees that may be charged by registered agents who represent parties to proceedings under this Act.

(4) The Governor may, by regulation, establish a code of conduct that must be observed by registered agents.

(5) The Court may, in accordance with procedures prescribed by regulation, disqualify a person from obtaining registration, or take steps to remove a person's name from the register.

DIVISION 3—INTERVENTION

Intervention

153. (1) The Minister, if of the opinion that the public interest is likely to be affected by the determination of the Court or Commission in proceedings, may intervene in the proceedings to make representations or tender evidence (or both).

(2) Any other person who can show an interest may, with the leave of the Court or Commission, intervene in proceedings.

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(3) However, only the Minister or the Employee Ombudsman (apart from the persons who are bound or to be bound by the enterprise agreement or their representatives) may be heard in proceedings related to an enterprise agreement matter.

DIVISION 4—GENERAL PRINCIPLES ABOUT EXERCISE OF JURISDICTION

General principles affecting exercise of jurisdiction

154. (1) In exercising its jurisdiction, the Court or the Commission—

- (a) is governed in matters of procedure and substance by equity, good conscience, and the substantial merits of the case, without regard to technicalities, legal forms or the practice of courts; and
- (b) is not bound by evidentiary rules and practices but may, subject to subsection (2), inform itself as it thinks appropriate.

(2) The Court and the Commission must observe the rules of natural justice.

Nature of relief

155. (1) The Court or the Commission has a discretion to give any form of relief authorised by this Act irrespective of the form of relief sought by the parties.

(2) The Court or Commission may exercise its jurisdiction on terms and conditions it considers appropriate.

(3) Any relief granted by the Court or the Commission must be consistent with the provisions of this Act.

DIVISION 5—EVIDENTIARY POWERS

Power to require attendance of witnesses and production of evidentiary material

156. (1) The Court or the Commission may, on the application of a party to proceedings or on its own initiative, issue a summons requiring a person to appear before the Court or Commission at a specified time and place to give evidence or to produce evidentiary material (or both).

(2) A summons to produce evidentiary material may, instead of providing for production of the material before the Court or the Commission, provide for production of the material to an officer of the Court or Commission nominated in the summons.

(3) A party to the proceedings before the Court or the Commission is competent and may be compelled to give evidence as a witness.

Power to compel the giving of evidence

157. (1) A person who is called to give evidence or to produce evidentiary material before the Court or the Commission and—

- (a) refuses or fails to make an oath or affirmation when required to do so; or
- (b) refuses or fails to give evidence on a subject on which that person is compellable to give evidence; or
- (c) refuses or fails without reasonable excuse to produce evidentiary material that that person is required by the Court or Commission to produce,

commits a contempt of the Court or the Commission.

(2) This section applies whether the person was summoned before the Court or Commission, brought before the Court or Commission on a warrant, or came to the Court or Commission of his or her own volition.

Issue of evidentiary summonses

158. (1) A summons under this Division may be issued on behalf of the Court by—

- (a) the Senior Judge or another Judge; or
- (b) the Industrial Registrar; or
- (c) any other officer authorised by the rules to issue such summonses.

(2) A summons under this Division may be issued on behalf of the Commission by—

- (a) the President or a Deputy President; or
- (b) a Commissioner; or
- (c) the Industrial Registrar; or
- (d) any other officer authorised by the rules to issue such summonses.

(3) A summons under this Division may be addressed to more than one person.

(4) The time and place at which a person is to appear in obedience to a summons under this Division must be stated in the summons.

Inspection and confidentiality

159. (1) Evidentiary material produced before the Court or the Commission may be inspected by such of the parties as the Court or the Commission allows, but information obtained from the inspection must not be made public without the permission of the Court or the Commission.

(2) Evidentiary material produced before the Court or the Commission relating to any trade secret or to the profits or financial position of a person must not, without the consent of the person, be inspected except by the Court or the Commission and any part of the evidentiary material that does not, in the opinion of the Court or Commission, relate to a matter in issue before the Court or Commission may be sealed up.

(3) Evidence relating to a trade secret or the profits or financial position of a witness or party must not be disclosed or published without the consent of the person entitled to the benefit of the trade secret or non-disclosure unless there are reasonable grounds to suspect the commission of an offence by the person.

Form in which evidence may be taken

160. (1) The Court or the Commission may take evidence on oath, affirmation or declaration.

(2) The Court or the Commission may take evidence orally or in the form of a written deposition.

Orders to take evidence

161. (1) The Court or the Commission may, with the consent of the parties, issue an order appointing a person to take evidence on its behalf on any matter over which it has jurisdiction.

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(2) The person so appointed has all the powers of the Court or the Commission (as the case requires) in relation to the summoning of witnesses, the production of evidentiary material, and the taking of evidence.

Witness fees

162. A person who duly attends as a witness on a summons, or who gives evidence at the request of a party, is entitled to be paid by the party who called him or her an allowance—

- (a) if no allowance is prescribed—in accordance with the scale for the time being in force for witnesses in civil actions in the Supreme Court; or
- (b) if some other allowance is prescribed—in accordance with the prescribed scale.

Power to dispense with evidence

163. The Court or the Commission may dispense with evidence on a particular subject if—

- (a) all parties agree; and
- (b) the Court or the Commission considers evidence on the subject unnecessary.

Powers of entry and inspection, etc.

164. (1) The Court or the Commission, a member of the Court or the Commission, or a person authorised by the Court or the Commission may at any time during working hours—

- (a) enter a place (including a building, structure, vehicle, ship or vessel) for a purpose relevant to a proceeding before the Court or the Commission; and
- (b) inspect and view any work, material, machinery, appliances, article, matter, or thing, in the place; and
- (c) question any person who may be in the place on a subject relevant to the proceeding.

(2) A person who—

- (a) hinders or obstructs the exercise of a power under subsection (1); or
- (b) refuses entry to a place to which entry is authorised; or
- (c) does not answer a question put under subsection (1) to the best of the person's knowledge, information and belief,

commits a contempt of the Court or the Commission.

DIVISION 6—MISCELLANEOUS PROCEDURAL RULES

Joinder of parties, etc.

165. (1) The Court or Commission may order that a person who is not a party to proceedings be joined as a party to the proceedings.

(2) The Court or Commission may order that a party to proceedings who has in the opinion of the Court or Commission no proper interest in the proceedings be removed as a party to the proceedings.

(3) The Court or Commission may order that notice of proceedings be given to specified persons or in a specified way.

Amendment or rectification of proceedings

166. (1) The Court or Commission may—

(a) allow the amendment of an application, notice, submission, report or other document associated with proceedings; or

(b) correct an error, defect or irregularity (even though the error, defect or irregularity may be such as to render the proceedings void).

(2) If the Court or Commission exercises its power to correct an error, defect or irregularity under subsection (1)(b), the proceedings are as valid and effective as if the error, defect or irregularity had never happened.

Extension of time

167. (1) The Court or the Commission may extend a limitation of time.

(2) However, this power may not be exercised—

(a) to extend the time within which a monetary claim must be made; or

(b) to extend the time within which a prosecution for an offence must be commenced.

Power to desist from hearing

168. The Court or the Commission may desist from hearing proceedings if—

(a) the proceedings are frivolous or vexatious; or

(b) further hearing of the proceedings is not, in the opinion of the Court or the Commission, in the public interest.

Ex parte hearings

169. (1) The Court or the Commission may hear and determine proceedings in the absence of a party if the party fails to appear after being given reasonable notice of the proceedings under this Act.

(2) The Court or the Commission may hear and determine proceedings in the absence of a party in other cases prescribed by the rules.

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Power to refer matters for expert report

170. The Court or the Commission may refer a matter requiring scientific or technical expertise to an appropriate expert for report.

Service

171. (1) If it appears to the Court or the Commission that service of an application, summons, notice or other document cannot be promptly effected as authorised or required by or under this Act, it may—

- (a) order substituted service of the application, summons, notice or other document on a person, and in a way, prescribed by the order; or
- (b) order that notice of the application, summons, notice or other document be given as prescribed by the order.

(2) Compliance with an order under subsection (1) constitutes service of the application, summons, notice or other document to which the order relates.

(3) Service of an application, summons, notice or other document may, by leave of the Court or the Commission, be effected outside the State.

Reservation of decision

172. (1) The Court or Commission may reserve its decision in proceedings.

(2) If a decision is reserved—

- (a) it may be delivered at a subsequent sitting of the Court or Commission (constituted of one or more of the members who participated in the decision, but not necessarily of all members who did so); or
- (b) it may be delivered on behalf of the Court or the Commission by the Registrar.

Costs

173. The Court or the Commission may only make orders for costs where specifically authorised to do so.

Power to re-open questions

174. The Court or the Commission may re-open a question previously decided and amend or quash an earlier determination.

General power of direction and waiver

175. (1) The Court or the Commission may give directions about any question of evidence or procedure arising in proceedings.

(2) The Court or the Commission may, on conditions it considers appropriate, waive compliance with a procedural requirement of this Act or the rules.

DIVISION 7—CONTEMPTS

Contempts of Court or Commission

176. (1) A person who—

- (a) wilfully insults a member or officer of the Court or the Commission, during a sitting of the Court or the Commission or in going to or returning from the Court or the Commission; or
- (b) wilfully disturbs or interrupts proceedings of the Court or the Commission; or
- (c) misbehaves in any other way before the Court or the Commission; or
- (d) wilfully disobeys an order or direction of the Court or the Commission,

commits a contempt of the Court or the Commission.

(2) If a party to proceedings before the Court or the Commission—

- (a) contravenes or fails to comply with an order in the nature of an interlocutory order or an order (other than an order for payment of money) to do, or refrain from, a particular act; and
- (b) makes no reasonable and adequate excuse to the Court or the Commission for the contravention or non-compliance,

the Court or Commission may (without limiting its powers to deal with the matter in any other way) order that the party be not heard, or further heard, in the proceedings, or impose another procedural disability or civil penalty the Court or Commission considers appropriate to the circumstances of the case.

(3) Before acting under subsection (2), the Court or the Commission must give the relevant party an opportunity to be heard on the question.

Punishment of contempts

177. (1) A contempt of the Court or the Commission is a summary offence punishable by a maximum fine of \$2 500.

(2) If a contempt is committed in the face of the Court or the Commission, it may proceed immediately (without the necessity of laying a charge or other formality) to convict and fine the offender.

DIVISION 8—RULES

Rules

178. (1) The Senior Judge of the Court may make rules of the Court.

(2) The President of the Commission may make rules of the Commission.

(3) The Senior Judge of the Court, and the President of the Commission, may jointly make rules applicable both to the Court and the Commission and, as far as practicable, should do so.

(4) Rules made under this section may—

- (a) regulate practice and procedure; and

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- (b) provide for the enforcement of judgments or determinations; and
 - (c) provide for the publication of the judgments and determinations and the effect of publication; and
 - (d) provide for the payment of witness fees and expenses; and
 - (e) provide for the payment of fees in respect of proceedings; and
 - (f) prescribe the powers and duties of the Registrar and other officers; and
 - (g) make any other provision necessary or convenient for the full and effective exercise of the jurisdiction or functions of the Court, the Commission and the President.
- (5) Subject to this Act and the relevant rules—
- (a) the practice and procedure of the Court will be as directed by the Senior Judge; and
 - (b) the practice and procedure of the Commission will be as directed by the President of the Commission.

PART 2
PROVISIONS OF SPECIAL APPLICATION TO THE COURT

DIVISION 1—MONETARY CLAIMS

Limitation of action

179. A monetary claim must be made within 6 years after the sum claimed became payable, but no time limitation applies to a claim for non-payment of superannuation contributions.

Who may make claim

180. (1) A monetary claim may be made on behalf of a claimant by an association.

(2) A monetary claim may be made by a minor as if he or she had attained the age of majority.

(3) A claim relating to money that should have been paid to or for the benefit of a person who is now dead may be made by the personal representative of the deceased person or a beneficiary of the deceased person's estate.

Simultaneous proceedings not permitted

181. The Court will not hear a monetary claim if it appears that proceedings based on the same claim have begun in another court and the proceedings have not been withdrawn or struck out.

Joinder of additional defendant

182. (1) If in proceedings based on a monetary claim, the Court is of the opinion that the defendant was, at the relevant time, the agent, or under the effective control, of some other person, the Court may order the joinder of the other person as a defendant.

(2) If a person is joined as a defendant under subsection (1), judgment may be given against either or both defendants.

Award to include interest

183. (1) Unless there is good reason for not doing so, the Court must, on the application of a person to whom it makes an award on a monetary claim, include in the judgment an award of interest or a lump sum instead of interest.

(2) However—

(a) the Court may not authorise the award of interest on interest; and

(b) if interest is payable because of an antecedent right, the award may reflect the antecedent right but may not create a right to additional interest; and

(c) the Court may not award interest on an amount for which judgment is given by consent except by consent of the parties.

Monetary judgment

184. (1) The Court may authorise or direct that a monetary amount awarded be paid in instalments.

(2) The Court may direct that compensation for non-payment of contributions that should have been, but were not, made to a superannuation fund be paid to a superannuation fund on the claimant's behalf.

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Costs

185. The Court may only award costs in proceedings based on a monetary claim as follows—

- (a) the Court may award costs on a claim for non-payment of superannuation contributions to cover reasonable expenses incurred by the claimant to establish the present value of the loss; and
- (b) the Court may award costs on an appeal.

Decisions to be given expeditiously

186. (1) The Court must hand down its judgment, and its reasons for the judgment, on a monetary claim within three months after the parties finish making their final submissions on the claim.

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

DIVISION 2—APPEALS TO THE COURT

Appeals from Industrial Magistrate

187. An appeal lies from a judgment, order or decision of the Court constituted of an Industrial Magistrate to the Court constituted of a single Judge.

Appeals to Full Court

188. An appeal lies from an order or decision of the Court constituted of a single Judge to the Full Court.

How to begin appeal

189. (1) An appeal under this Division is commenced by a notice of appeal setting out in detail the grounds of appeal.

(2) An appeal must be commenced within 14 days of the day on which the order or decision appealed against was made or given.

Powers of appellate court

190. (1) The Court may stay the operation of a judgment, order or decision against which an appeal has been commenced or is proposed.

- (2) The Court may, if it thinks fit, take fresh evidence on an appeal.
- (3) After hearing of an appeal the Court may—
 - (a) confirm, quash or vary the judgment, order or decision appealed against; or
 - (b) refer the judgment, order or decision to the Court, constituted of a single Judge or a magistrate, with directions the Full Court considers appropriate.

DIVISION 3—APPEAL TO SUPREME COURT

Appeal to Supreme Court

191. (1) An appeal lies to the Supreme Court from a judgment, order or decision of the Full Court if—

(a) the appeal is based on an alleged excess or deficiency of jurisdiction; or

(b) the Supreme Court grants leave to bring the appeal.

(2) The appeal must be heard by the Full Court of the Supreme Court.

(3) On the hearing of an appeal under this section, the Full Court of the Supreme Court may—

(a) confirm, quash or vary the judgment, order or decision appealed against; or

(b) refer the judgment, order or decision back to the Court with directions the Full Court of the Supreme Court considers appropriate.

(4) An application for leave to appeal under this section must be made within 14 days of the date of the judgment, order or decision against which the leave to appeal is sought.

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**PART 3
PROVISIONS OF SPECIAL APPLICATION TO THE COMMISSION**

DIVISION 1—GENERAL PRINCIPLES

Commission to conciliate where possible

192. In exercising its jurisdiction, the Commission must make every practicable attempt to conciliate, to prevent impending industrial disputes and to settle existing disputes and claims by amicable agreement.

Determinations to be consistent with object of Act

193. The Commission's determinations must be consistent with the objects of this Act.

DIVISION 2—BEGINNING PROCEEDINGS

Applications to the Commission

194. Proceedings before the Commission are commenced by an application made to the Commission—

- (a) if, in the Minister's opinion, it is in the public interest that the matter be dealt with by the Commission—by the Minister; or
- (b) by an employer, or group of employers; or
- (c) by an employee, or group of employees; or
- (d) by a registered association of employers; or
- (e) by a registered association of employees; or
- (f) by the United Trades and Labor Council.

Advertisement of applications

195. (1) Before the Commission deals with the subject matter of an application, the Commission must satisfy itself that reasonable notice of the substance of the application and the day and time it is to be heard has been given.

- (2) The substance of an application and the day and time it is to be heard must be—
 - (a) advertised in the manner prescribed in the rules; or
 - (b) communicated to all persons who are likely to be affected by a determination in the proceedings or their representatives.

Commission may act on application or on own initiative

196. The Commission may exercise its powers on its own initiative or on application by a party or a person with a proper interest in the matter.

DIVISION 3—SETTLEMENT OF INDUSTRIAL DISPUTES

Commission's power of mediation

197. (1) The Commission may mediate between the parties to an industrial dispute for the purpose of resolving the dispute.

(2) The Commission may mediate between persons who may become involved in an industrial dispute for the purpose of preventing an industrial dispute.

Assignment of Commissioner to deal with dispute resolution

198. (1) The President of the Commission may assign a Commissioner, for a term of assignment (not exceeding one year) specified in the instrument of assignment, to deal with the prevention and resolution of industrial disputes of a class specified in the instrument of assignment.

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

(3) The President may from time to time renew a term of assignment under this section.

(4) The President may not assign a Commissioner, or renew a term of assignment, under this section without first consulting with registered associations that have, in the opinion of the President, a proper interest in the matter.

(5) The President may at any time vary or revoke an assignment under this section.

Provisions of award, etc., relevant to how Commission intervenes in dispute

199. If the parties to an industrial dispute are bound by an award or an enterprise agreement that provides procedures for preventing or settling industrial disputes between them, the Commission must, in considering whether, when or how it will exercise its powers in relation to the industrial dispute have regard to—

- (a) the procedures contemplated by the parties for preventing or settling industrial disputes; and
- (b) the extent the procedures (if applicable to the industrial dispute) have been complied with by the parties and the circumstances of any compliance or non-compliance with the procedures.

Voluntary conferences

200. (1) The Commission may, if it appears desirable, call a voluntary conference of the parties involved in an industrial dispute.

(2) A person who attends a voluntary conference called under this section is, on application to the Registrar, entitled to be paid an amount certified by the person presiding at the conference to be reasonable, having regard to the conduct of the person both before and at the conference and to the expenses and loss of time incurred by the person.

(3) The amount certified under subsection (2) will be paid out of money appropriated by Parliament for the purpose.

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Compulsory conference

201. (1) The Commission may, if it appears desirable, call a compulsory conference of the parties involved in an industrial dispute.

(2) The Commission may summon the parties to the dispute and any other person who may be able to assist in resolving the dispute to appear at the conference.

(3) A compulsory conference may, at the discretion of the Commission, be held in public or in private or partly in public and partly in private.

(4) A person who fails to attend a compulsory conference as required by the Commission's summons or who, having attended, fails to participate in the conference as required by the person presiding at the conference commits a contempt of the Commission.

(5) A person who attends a conference as directed by the person presiding at the conference will, on application to the Registrar, be entitled to be paid an amount certified by the person presiding at the conference to be reasonable, having regard to the conduct of the person both before and at the conference and to the expenses and loss of time incurred by the person.

(6) The amount certified under subsection (5) will be paid out of money appropriated by Parliament for the purpose.

Reference of questions for determination by the Commission

202. (1) The person presiding at a compulsory conference may, after giving reasonable notice to the persons attending at the conference, refer the subject matter of the conference for determination by the Commission (which may, where the person presiding is a Presidential Member or a Commissioner, be constituted of him/herself).

(2) A matter may be referred for determination by the Commission under subsection (1) orally and without formality.

(3) An order of the Commission on a reference under subsection (1)—

- (a) is binding only on persons represented before the Commission or summoned to appear at the conference; and
- (b) if parties to the industrial dispute are bound by an enterprise agreement may not affect the terms of the agreement.

Representation at voluntary or compulsory conference

203. (1) A party or intervener may be represented at a voluntary or compulsory conference by a legal practitioner or a registered agent by leave of the person presiding at the conference.

(2) However—

- (a) leave is not required if the legal practitioner or registered agent is an officer or employee of—
 - (i) an employer who is a party to the proceedings; or
 - (ii) the United Trades and Labor Council; or
 - (iii) a registered association of which a member is a party to the industrial dispute; and
- (b) leave is not required for the Minister to be represented by a legal practitioner; and

(c) leave is not required for representation at a compulsory conference by a legal practitioner or registered agent if the matter has already been referred to the Commission.

(3) Leave will be granted if (and only if)—

(a) all of the parties consent to the application for leave; or

(b) another party is represented by a legal practitioner or registered agent; or

(c) another party is a legal practitioner or is legally qualified; or

(d) the person presiding at the conference is satisfied—

(i) the party or intervener would, if leave were not granted, be unfairly disadvantaged; or

(ii) leave is appropriate in the circumstances of the particular case.

(4) The costs incurred by a party for representation at a voluntary or compulsory conference under this Division by a legal practitioner or registered agent will not be included in any order for costs under this Act.

Experience gained in settlement of dispute

204. After the settlement of an industrial dispute, the Commission may invite the parties to the dispute to take part in discussions with a view to—

(a) improving the process of conciliation and arbitration in accordance with the objects of this Act; and

(b) encouraging the parties to agree on procedures for preventing or settling further disputes by discussion and agreement; and

(c) deciding whether it would be appropriate for the parties to regulate their relationship by making an enterprise agreement or amending the terms of an existing enterprise agreement to provide more adequate means of dispute prevention or resolution.

Presidential conference to discuss means of preventing and resolving disputes

205. The President of the Commission may at any time, and must at least once in each year, convene a conference of all members of the Commission to discuss means of—

(a) preventing, and ensuring the fair and expeditious resolution of, industrial disputes; and

(b) ensuring that determinations made in settlement of industrial disputes are consistent with the objects of this Act.

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DIVISION 4—APPEALS AND REFERENCES

Finality of decisions

206. (1) A determination of the Commission is final and may only be challenged, appealed against or reviewed as provided by this Act.

(2) However, a determination of the Commission may be challenged before the Full Supreme Court on the ground of an excess or want of jurisdiction.

Right of appeal

207. (1) An appeal lies to the Full Commission against—

- (a) a determination of the Commission constituted of a single member; or
- (b) a determination of the Commission made by the Registrar in exercising the Commission's powers.

(2) However—

- (a) an appeal lies against a determination in the nature of an interlocutory order or direction only by leave of the Full Commission; and
- (b) an appeal lies against a determination of the Registrar only by leave of the Full Commission; and
- (c) an appeal may only be brought against the approval, variation or rescission of an enterprise agreement by a person bound by the agreement or a representative of such a person.

(3) The Full Commission may direct—

- (a) that two or more appeals be joined and heard together; or
- (b) that an appeal be heard by the Commission jointly with appellate proceedings under the Commonwealth Act,

(but a party to proceedings to be heard jointly with other proceedings is not entitled to be heard in relation to the other proceedings unless the Full Commission gives leave).

(4) An appeal against a determination of the Commission may be commenced by—

- (a) a party to the proceedings in which the determination is made or a registered association acting on the instructions of such a party; or
- (b) a person who has a proper interest in the subject matter of the determination and obtains leave from the Full Commission to appeal against the determination.

Procedure on appeal

208. (1) An appeal is commenced by lodging a notice of appeal within 14 days after the date of the determination subject to appeal.

(2) The notice of appeal must specify—

- (a) the part of the determination subject to the appeal; and
- (b) the grounds of the appeal; and
- (c) the relief sought.

(3) On the hearing of an appeal, the Full Commission may—

- (a) take fresh evidence;
- (b) confirm, quash or vary the whole or part of the determination under appeal;
- (c) direct a Commissioner to furnish a report on a specified matter (and the Commissioner to whom the direction is given must, after making the necessary investigation, furnish a report accordingly);
- (d) refer the subject matter of the appeal, or any matter arising in the course of the appeal, back to the Commission constituted of a single member, with directions or suggestions the Full Commission considers appropriate;
- (e) make a determination dealing with the matters under appeal (but no such determination can include any provision that would be outside the powers of the Commission constituted of a single member);
- (f) subject to this Act, fix a date as from which a determination or variation of a determination made by the Commission constituted of a single member is to come, or will be taken to have come, into operation;
- (g) dismiss the appeal or any part of the appeal.

(4) Until the Full Commission gives its decision on an appeal, the part of the determination under appeal cannot be altered or rescinded.

Stay of operation of determination

209. (1) When an appeal is brought against a determination or part of a determination, the Full Commission may, on terms and conditions it considers appropriate, stay the operation of the whole or any specified part or parts of the determination until the appeal is decided or until further order of the Commission.

(2) If a determination or enterprise agreement was in existence before the determination under appeal was made, the Full Commission may, on staying the operation of the latter determination, restore the comparable provisions of the earlier determination or enterprise agreement and may, if necessary, modify any of the provisions until the appeal has been decided, and if the appeal is dismissed, the provisions of the determination under appeal operate retrospectively from when they would have operated but for the stay.

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(3) If no determination or enterprise agreement existed before the determination under appeal was made, or no comparable provisions appeared in a determination or enterprise agreement that was in existence before the determination under appeal, the Full Commission may, as well as granting a stay, make an interim determination dealing with the matters under appeal, and, if the appeal is dismissed, the provisions of the determination under appeal operate retrospectively from when they would have operated but for the stay.

(4) The above powers of the Full Commission may be exercised on behalf of the Full Commission by any of its members.

Powers on appeal

210. (1) On deciding an appeal, the Full Commission may make consequential or ancillary orders and directions.

(2) On deciding an appeal in proceedings for unfair dismissal, the Full Commission may make an order for costs.

Review on application by Minister

211. (1) If it appears to the Minister that a determination of the Commission—

- (a) is contrary to the public interest; or
- (b) does not adequately give effect to the objects of this Act,

the Minister may apply to the Full Commission for a review of the determination.

(2) The following are parties to a review under this section and entitled to notice of the hearing—

- (a) the Minister; and
- (b) the parties who appeared at the original proceedings in which the determination was made; and
- (c) registered associations whose members are bound by the determination.

(3) On a review under this section, the Full Commission may confirm, vary or revoke the determination.

(4) The Full Commission may, on a review under this section, exercise any powers that the Commission has on an appeal.

Reference of matters to the Full Commission

212. (1) If the Commission, constituted of a single member, is exercising a jurisdiction under this Act (other than the jurisdiction to approve, vary or rescind an enterprise agreement), the Commission may, on its own initiative, and must, if requested by a party, or the Minister, consult with the President of the Commission about whether the matter should be dealt with by the Full Commission, and the President will determine whether or not the matter should be dealt with by the Full Commission and direct accordingly.

(2) If the Commission is constituted of the President, the President may make a determination and give directions under subsection (1) either on the President's own initiative or on receipt of a request from a party to the proceedings or the Minister.

(3) Before giving a direction, the President should consult with the parties appearing before the Commission to ascertain their views on whether the matter should be dealt with by the Full Commission.

Powers of Full Commission on reference

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

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

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

(2) If an industrial matter referred to the Full Commission was previously before a member of the Commission, the Full Commission may order the member of the Commission to deal with it in accordance with directions or suggestions the Full Commission considers appropriate.

Reference of question of law to the Court

214. (1) The Commission may, in its discretion, refer a question of law arising in proceedings before the Commission to the Court for determination.

(2) The Court will determine the question of law referred under subsection (1) and return the matter to the Commission with its opinion or direction.

(3) The Commission must give effect to that opinion or direction of the Court.

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**PART 4
CO-OPERATIVE ARRANGEMENTS**

Co-operation between industrial authorities

215. (1) If it appears to the President of the Commission desirable that a conference on an industrial matter should be held with an industrial authority of the Commonwealth or of another State or Territory of the Commonwealth, the President may, if the authority is willing, confer with the authority, or arrange for a Deputy President of the Commission to confer with the authority, with a view to securing co-ordination between awards made, or to be made, under this Act and orders, awards, decisions or determinations made or given, or to be made or given, by the authority.

(2) If it appears to the President of the Commission desirable that proceedings on an industrial matter before an industrial authority of the State should be heard in joint session with an industrial authority of the Commonwealth or of another State or Territory of the Commonwealth, the President may, with the consent of the authority, authorise the industrial authority of the State to hear the proceedings in joint session with that authority and to confer with the authority about the proceedings and the order, award, decision or determination to be made or given in the proceedings.

(3) The President of the Commission must participate in, or nominate a representative to participate in, a meeting called by the President of the Commonwealth Commission, to encourage co-operation between industrial authorities, and the co-ordination of the various industrial relations systems, in Australia.

(4) The Registrar must participate in, or nominate a representative to participate in, a meeting called by the Registrar of the Commonwealth Commission, to encourage co-operation between the Registrars of industrial authorities, and the co-ordination of the various industrial relations systems, in Australia.

(5) The disclosure of information at a meeting of the kind referred to in subsection (3) or (4) is not a breach of a duty of confidence.

Reference of industrial matters to Commonwealth Commission

216. (1) The President of the Commission may, on his or her own initiative, request the President of the Commonwealth Commission to nominate a member of the Commonwealth Commission to deal with the whole or part of an industrial matter.

(2) If, in response to a request under subsection (1), the President of the Commonwealth Commission nominates a member, the President of the Commission may refer the whole or part of the industrial matter to the member to be dealt with by the member in accordance with this Act.

(3) For the purposes of dealing with a matter that is referred under subsection (2), the member of the Commonwealth Commission may exercise all the powers of the Commission under this Act and will, in the exercise of those powers, be taken to be the Commission.

(4) An award made by a member of the Commonwealth Commission on an industrial matter referred to the member under subsection (2) will, for the purposes of this Act, be taken to be an award under this Act.

(5) The reference of an industrial matter to a member of the Commonwealth Commission under subsection (2) is revocable by the President of the Commission at will and does not derogate from the power of the Commission to act itself in the matter.

Commission may exercise powers vested by certain other Acts

217. The Commission may exercise powers conferred on it under the Commonwealth Act or an Act of another State.

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**CHAPTER 6
MISCELLANEOUS**

Protection for officers, etc.

218. (1) A person employed in an office or position under this Act incurs no civil or criminal liability for an act or omission in good faith and in the exercise or performance or the purported exercise or performance of his or her powers, functions or duties under this Act.

(2) A liability that would, but for subsection (1), have attached to a person employed in an office or position under this Act attaches instead to the Crown.

Confidentiality

219. (1) A person employed or formerly employed in an office or position under this Act, or authorised under this Act to enter a workplace or inspect an employer's records, must not divulge—

- (a) information acquired through the employment, or the exercise of the authorised powers, about the contents of records kept by an employer under this Act; or
- (b) information of a confidential nature acquired through the employment, or the exercise of the authorised powers, about the conduct of an employer's business; or
- (c) information acquired through the employment, or the exercise of the authorised powers, about the persons bound by enterprise agreements.

Maximum penalty: \$5 000.

(2) However, this section does not prevent—

- (a) the disclosure of information in the ordinary course of employment; or
- (b) the disclosure of information to the Court, the Commission or the Employee Ombudsman; or
- (c) the disclosure of information required by law; or
- (d) the use of information for the purpose of compiling statistical records; or
- (e) a disclosure of information required by the Minister.

Notice of determinations of the Commission

220. (1) Notice of a determination of the Commission (unless of an interlocutory nature or affecting only parties who are represented before the Commission) must be published, in accordance with the Rules, in a newspaper circulating generally throughout the State.

(2) Copies of all determinations of the Commission must be kept available for public inspection at the office of the Registrar unless—

- (a) the determination is of an interlocutory nature; or

- (b) the determination relates to an enterprise agreement or part of an enterprise agreement that has been suppressed from public disclosure under this Act⁷.

Industry consultative councils

221. (1) A Commissioner may, with the President's consent, assist in the formation or operation of a consultative council for a particular industry.

(2) Before granting consent under subsection (1), the President must be satisfied that the consultative council is properly representative of employers and employees in the industry.

Secondary boycotts

222. The provisions of Part 6, Division 7 of the Commonwealth Act (Secondary Boycotts) apply as laws of the State with the following modifications:

- (a) references to the Commonwealth Court and the Commonwealth Commission are to be read as references to the Court and the Commission; and
- (b) any further modifications and exclusions necessary for the operation of the provisions as laws of the State.

Discrimination against employee for taking part in industrial proceedings, etc.

223. (1) An employer must not discriminate against an employee by dismissing or threatening to dismiss the employee from, or prejudicing or threatening to prejudice the employee in, employment for any of the following reasons—

- (a) because of the employee's participation in proceedings before the Court or the Commission; or
- (b) because of anything said or done, or omitted to be said or done, by the employee in proceedings before the Court or the Commission; or
- (c) because of the employee's participation in an industrial dispute; or
- (d) because the employee is entitled to the benefit of an award or enterprise agreement, or has participated, or declined to participate, in negotiations or proceedings intended to lead to the formation of an award or enterprise agreement; or
- (e) because the employee asks the Employee Ombudsman to take action on the employee's behalf.

Maximum penalty: \$20 000.

(2) However, discrimination against an employee on the ground that the employee has contravened a determination of the Commission or has committed an offence is not made unlawful by subsection (1).

(3) A prosecution for an offence against this section may be commenced by the employee against whom the offence is alleged to have been committed, or an inspector.

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

⁷ See section 80.

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- (a) award compensation to the applicant for loss resulting from the commission of the offence; and
- (b) if the applicant was dismissed from employment—order the employer to re-employ the applicant on conditions determined by the court.

Non-compliance with awards and enterprise agreements

224. If a person who is bound by an award or enterprise agreement contravenes or fails to comply with a provision of the award or agreement, the person is guilty of an offence.

Maximum penalty: \$2 500.

Improper pressure, etc., related to enterprise agreements

225. (1) A person must not harass an employer or employee, or apply improper pressure to an employer or employee—

- (a) to prevent, or discourage the employer or employee, from supporting or entering into an enterprise agreement; or
- (b) to induce the employer or employee to seek variation or rescission of an enterprise agreement.

Maximum penalty: \$20 000.

(2) The provision of advice in a reasonable manner to an employee about issues surrounding an enterprise agreement (or potential enterprise agreement) cannot be regarded as improper pressure under subsection (1).

(3) A person must not coerce an employee to enter into an enterprise agreement.

Maximum penalty: \$20 000.

(4) A person must not state that an employee has voluntarily supported or entered into an enterprise agreement knowing the statement to be false.

Maximum penalty: \$5 000.

False entries

226. A person must not—

- (a) wilfully make a false entry in a time book, notice, certificate, list or document required by this Act to be kept, served or sent; or
- (b) wilfully make or sign a false declaration under this Act; or
- (c) make use of any such entry or declaration, knowing it to be false.

Maximum penalty: \$2 500.

Experience of apprenticeship, etc., how calculated

227. For the purposes of an award or enterprise agreement under which wages are to vary in accordance with experience in an industry, a period of employment as an apprentice or junior in the industry will be brought into account.

No premium to be demanded for apprentices or juniors

228. (1) A person must not ask for, or receive, any consideration, premium or bonus for engaging or employing a person as an apprentice or junior.

Maximum penalty: \$2 500.

(2) However, this section does not prevent the payment or receipt of a consideration, premium or bonus under an arrangement approved by the Minister.

(3) A person who gives a consideration, premium or bonus to a person who is, because of this section, not entitled to receive it may recover it as a debt.

Illegal guarantees

229. (1) A person must not require or permit another—

(a) to pay a sum of money; or

(b) to enter into or make a guarantee or promise to pay a sum of money,

in the event of the conduct of an apprentice, junior or employee not being satisfactory to the employer.

Maximum penalty: \$1 250.

(2) However, this section does not invalidate, or render unlawful, a guarantee entered into on terms approved by the Minister.

(3) A sum paid in contravention of this section is recoverable as a debt.

Orders for payment of money

230. (1) If the Court or the Commission makes an order for the payment of a monetary sum, the Registrar may issue a certificate under the seal of the Court or the Commission, certifying the amount payable and the persons by whom and to whom it is to be paid.

(2) The certificate may be filed in a court that has civil jurisdiction up to, or exceeding, the amount of the certificate and it will then be enforceable as a judgment of that court.

Recovery of penalty from members of association

231. (1) If an association is ordered to pay a penalty or other monetary sum under this Act and the penalty or other sum is not fully paid within one month after the date of the order—

(a) the persons who were members of the association when the order was made are jointly and severally liable to pay the penalty or other sum as if the order had been made against them personally; and

(b) proceedings to enforce the order may be taken against them, or any of them, accordingly.

(2) However, a person's liability on an order to which this section applies is limited to \$20.

General defence

232. (1) In proceedings against an employer for an offence against this Act, it is a defence to show—

(a) that another person was responsible for the act or omission constituting the offence; and

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- (b) that the defendant employer used all due diligence to prevent the commission of the offence; and
- (c) that the offence was committed without the knowledge of the defendant employer and in contravention of the employer's orders.

(2) If a defence is made out by an employer under subsection (1), the person responsible for the act or omission alleged to constitute the offence may be prosecuted and convicted of the offence as if that person were the employer.

(3) In proceedings against an employee for an offence against this Act, it is a defence to show that the defendant used all due diligence to prevent the commission of the offence.

Order for payment against convicted person

233. (1) If an employer is convicted of an offence against this Act, the court may, on application by an employee in respect of whom the offence was committed, order the convicted person to pay to the applicant an amount due from the convicted person to the applicant.

(2) On an applicant under subsection (1), an inspector's certificate will be accepted, in the absence of proof to the contrary, as proof of an amount due from the convicted person to the applicant.

(3) An amount that a convicted person is ordered to pay under this section may be recovered in the same way as a fine.

Proof of awards, etc.

234. (1) A copy of a determination under the seal of the Court, or the Commission and certified under the Registrar's signature, is admissible in all courts and tribunals and before all persons as evidence of the determination.

(2) A copy of an enterprise agreement certified under the Registrar's signature to be an enterprise agreement approved by the Commission, is admissible in all courts and tribunals and before all persons as evidence of the existence of the enterprise agreement and its terms.

(3) It is not necessary to prove the seal of the Court or the Commission or of the signature of the Registrar.

Proceedings for offences

235. (1) A prosecution for an offence against this Act must (unless otherwise provided) be heard and determined summarily by an Industrial Magistrate.

(2) A prosecution for an offence against this Act must be commenced within 12 months after the date on which the offence is alleged to have been committed.

Conduct by officers, etc., of body corporate

236. (1) If it is necessary to establish, for the purposes of this Act, the state of mind of a body corporate in relation to particular conduct, it is sufficient to show—

- (a) that an officer, director, employee or agent of the body corporate engaged in the conduct within the scope of his or her actual or apparent authority; and
- (b) that the officer, director, employee or agent had the state of mind.

(2) Any conduct in which—

- (a) an officer, director, employee or agent of the body corporate engages within the scope of his or her actual or apparent authority; or
- (b) another person engages at the direction or with the consent or agreement (express or implied) of an officer, director, employee or agent of the body corporate, who gives the direction, consent or agreement within the scope of the actual or apparent authority,

is, for the purposes of this Act, conduct of the body corporate.

(3) A reference in this section to the state of mind of a person extends to the knowledge, intent, opinion, belief or purpose of the person and the person's reasons for the intent, opinion, belief or purpose.

Regulations

237. (1) The Governor may make regulations for the purposes of this Act.

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

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SCHEDULE 1

Repeal and Transitional Provisions

Repeal of Industrial Relations Act (S.A.) 1972

1. The *Industrial Relations Act (S.A.) 1972* is repealed.

Repeal of the Industrial Relations Advisory Council Act 1983

2. The *Industrial Relations Advisory Council Act 1983* is repealed.

Amendment of Courts Administration Act 1993

3. The *Courts Administration Act 1993* is amended by inserting after paragraph (ba) of the definition of "participating courts" in section 4 the following paragraph:

(bb) the Industrial Relations Court of South Australia;

Definitions

4. In this Schedule—

"former Act" means the *Industrial Relations Act (S.A.) 1972*;

"former Commission" means the Industrial Commission of South Australia established under the former Act;

"former Court" means the Industrial Court of South Australia established under the former Act.

References to former Court or Commission

5. A reference in an Act or other instrument to the former Court or the former Commission must, where the context admits, be read as a reference to the Court or the Commission under this Act.

Awards and other determinations of the former Commission

6. (1) An award in force under the former Act immediately before the commencement of this Act continues in force, subject to this Act, as if it were an award of the Commission under this Act even though the award makes provisions for conditions of employment that cannot be made by award under this Act.

(2) However—

(a) a provision of an award that continues in force under subsection (1) providing for preference to members of an association lapses on the commencement of this Act; and

(b) a right of entry and inspection conferred by an award that continues in force under subsection (1) must be read down so as to be consistent with this Act.

(3) All other determinations of the former Commission in force immediately before the commencement of this Act continue in force subject to this Act as if they were determinations of the Commission under this Act.

(4) If a recommendation was made before the commencement of this Act by the Commission or a member of the Commission for the prevention or settlement of an industrial dispute, the recommendation continues in effect as if it had been made by the Commission or a member of the Commission under this Act.

Industrial agreements

7. (1) An industrial agreement in force under the former Act immediately before the commencement of this Act continues in force under this Act, unless earlier superseded by an enterprise agreement, until 31 December 1996.

(2) However—

- (a) a provision of an industrial agreement that continues in force under subsection (1) providing for preference to members of an association lapses on the commencement of this Act; and
- (b) a right of entry and inspection conferred by an industrial agreement that continues in force under subsection (1) must be read down so as to be consistent with this Act.

(3) The Commission—

- (a) must take reasonable steps to ensure that the parties to industrial agreements are aware that the agreements will lapse on 31 December 1996; and
- (b) must, as far as practicable and appropriate, encourage the renegotiation of the agreements as enterprise agreements.

(4) The provisions of the former Act apply, with adaptations and modifications prescribed by regulation, to an industrial agreement that continues in force under this section.

References to industrial agreements

7A. (1) A reference to an industrial agreement in an Act or statutory instrument extends to an enterprise agreement under this Act.

(2) However, this section does not apply to references to an industrial agreement in the *Long Service Leave Act 1987* or a statutory instrument under that Act.

Continuation of part-heard proceedings etc.

8. (1) The jurisdiction of the Court and the Commission under this Act extends to causes of action that arose before the commencement of this Act.

(2) Any proceedings that had been commenced before the former Court or the former Commission may be continued and completed by the Court or the Commission under this Act.

(3) The Court or Commission will apply the substantive law in force when the cause of action arose, or if proceedings relate to the making or variation of an award, when the application was made.

(4) However, if an application for an award or variation of an award is made after 14 May 1994, the application is to be determined in accordance with this Act.

Certificates and licences

9. (1) A certificate under section 144 of the former Act (a "section 144 certificate") continues in force (unless cancelled by the Registrar at the request of the person for whom the certificate was issued) as a certificate of conscientious objection under this Act and a reference in an award or agreement to a section 144 certificate will be construed as a reference to a certificate of conscientious objection under this Act.

(2) A certificate under section 167 of the former Act continues in force as if it were a certificate under section 230 of this Act.

(3) A licence in force under section 88 of the former Act immediately before the commencement of this Act continues in force, subject to this Act, as if it were a licence under section 112 of this Act.

The President of the former Court

10. (1) The person holding office as President of the former Court immediately before the commencement of this Act—

- (a) becomes on the commencement of this Act the Senior Judge of the Court (and is entitled while continuing in the office to the title of President of the Court); and
- (b) continues, while holding that office, to have the same rank, status and precedence as a Judge of the Supreme Court and to be entitled to be styled "The Honourable Justice . . .".

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(2) The person to whom subsection (1) applies is, while continuing to hold office as the Senior Judge of the Court under this section, a member of the principal judiciary of the Court.

(3) The provisions of the former Act about salary, tenure and conditions of office relating to the office of President of the former Court apply (with the necessary modifications) to the office of Senior Judge of the Court for as long as the person to whom subsection (1) applies continues to hold that office.

(4) Other provisions of this Act that are inconsistent with this section must be read subject to this section.

Deputy Presidents of the Court

11. (1) Each person who held office as a Deputy President of the former Court immediately before the commencement of this Act becomes, on that commencement, a judge of the Court.

(2) A person to whom subsection (1) applies is, while continuing to hold office as a Judge of the Court under this section, a member of the principal judiciary of the Court.

(3) The provisions of the former Act about salary, tenure and conditions of office relating to the office of Deputy President of the former Court apply (with necessary modifications) to the office of a judge to whom subsection (1) applies for as long as the judge continues to hold office in accordance with those provisions as a judge of the Court.

(4) Other provisions of this Act that are inconsistent with this section must be read subject to this section.

Industrial magistrates

12. (1) Each person who held office under the former Act as an industrial magistrate immediately before the commencement of this Act becomes, on the commencement of this Act, a magistrate under the *Magistrates Act 1983*.

(2) A magistrate to whom subsection (1) applies will, for so long as he or she continues to hold office under the *Magistrates Act 1983*, continue to be an industrial magistrate and a member of the principal judiciary of the Court unless he or she resigns the office of industrial magistrate.

(3) A person may resign the office of industrial magistrate under this section without resigning as a magistrate under the *Magistrates Act 1983*.

(4) The accrued and accruing rights in respect of employment of a magistrate to whom this section applies are unaffected by this section.

(5) Other provisions of this Act that are inconsistent with this section must be read subject to this section.

Other officers of former Court and Commission

13. (1) A person who held office as a commissioner under the former Act immediately before the commencement of this Act becomes, on the commencement of this Act, unless the Governor otherwise determines, a commissioner under this Act as if appointed on the commencement of this Act as a commissioner under this Act.

(2) The commissioner will be taken to have been appointed for a term of six years (which may be renewed once for a further term of six years) but if the commissioner is over 60 at the time of the appointment or renewal, the term will end when the commissioner reaches 65 years of age.

(3) The Registrar and other staff of the former Court and the former Commission (other than those specifically mentioned above) are, on the commencement of this Act, transferred to corresponding positions on the staff of the Court or the Commission (or both) under this Act.

(4) The salary and accrued and accruing rights to annual leave, sick leave, family leave and long service leave of persons who are transferred by this section to offices and positions under this Act are not to be prejudiced by the transfer.

(5) However, a salary difference that exists between a transferee and another person in the same office or position, and in favour of the transferee, is not preserved beyond the point when the salary of the other person reaches or exceeds the level of the transferee's salary at the time of transfer.

Inspectors

14. A person who was an inspector under the former Act continues, subject to this Act, as an inspector under this Act.

Members of Industrial Relations Advisory Council

15. A person who held office as a member of the Industrial Relations Advisory Council immediately before the commencement of this Act continues in office, subject to this Act, as a member of the Committee.

Registered associations

16. (1) An association that was, immediately before the commencement of this Act, a registered association under the former Act continues as a registered association under this Act.

(2) No objection of a kind that was prevented by section 133(1) of the former Act immediately before the re-enactment of Part IX of that Act pursuant to section 41 of the *Industrial Conciliation and Arbitration (Commonwealth Provisions) Amendment Act 1991* (and then prevented by section 55 of that Amendment Act) may be taken in relation to an association registered under this Act immediately before the commencement of the *Industrial and Employee Relations (Registered Associations) Amendment Act 1997*.¹

¹Section 133(1) of the former Act provided as follows:

133. (1) *The legal existence or registration of an association, the membership of any member or any person claiming to be a member of an association, the validity of the appointment or election of any officer of an association or of any action or decision of such an officer, or the validity of any resolution passed or decision made at any meeting of an association or of any committee of the association, cannot be challenged, impugned or in any way affected, nor can the compliance of any rule or rules of an association with the prescribed conditions, or the observance or validity of any such rule or rules or the operation of any award or order made under this Act, be challenged, impugned or in any way affected by reason only that—*

- (a) *the association is also registered as an organization pursuant to the Commonwealth Act, or is a branch or forms part of an organization so registered;*
- (b) *members of the association are also members of an organization registered under the Commonwealth Act, and no register of members separate and distinct from the register kept by the organization registered under the Commonwealth Act is kept by the association, or no application for membership or membership fee separate from the application or fee made and paid to the organization registered under that Commonwealth Act has been made or paid to the association by any member;*
- (c) *the association keeps and maintains no or insufficient books, accounts, records or rules which are separate and distinct from any books, accounts, records or rules kept and maintained by an organization registered under the Commonwealth Act, of which some or all of its members are members;*
- (d) *officers or the association have been elected or appointed by or are also officers of an organization registered under the Commonwealth Act; or*
- (e) *any matter consequential upon or arising out of the matters referred to in paragraphs (a) to (d).*

* * * * *

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SCHEDULE 2

Minimum Standard for Remuneration

Minimum rate of remuneration

1. (1) The minimum rate of remuneration for an employee for whom there is an award and an award classification is the hourly rate prescribed by the award applicable to ordinary hours of employment (not including payments in the nature of allowances, penalties, loadings or overtime).

(2) If there is no applicable award and award classification, the minimum rate of remuneration is a rate fixed by the Full Commission under this section.

(3) The Full Commission may, on its own initiative, or on application by the Minister, the United Trades and Labor Council, or the South Australian Employers' Chamber of Commerce and Industry—

- (a) fix a minimum rate of remuneration for a class of employees for whom there is no applicable minimum rate under subsection (1); or
- (b) vary a minimum rate previously fixed.

SCHEDULE 3

Minimum Standard for Sick Leave

Definitions

1. In this Schedule—

"**continuous service**" means continuous service under a contract of employment and includes a period of paid leave taken under this Act or under an award or enterprise agreement;

"**full pay**" means remuneration for ordinary hours of work (not including payments in the nature of penalty rates, overtime, allowances or loadings).

Application of standard

2. This Schedule does not apply to a person who is engaged and paid as a casual employee.

Accrual of sick leave entitlement

3. (1) An employee's entitlement to sick leave accrues as follows—

(a) for the first year of continuous service—entitlement to sick leave accrues at the rate of $\frac{5}{26}$ of one day for each completed week; and

(b) for each later year of continuous service—an entitlement to 10 days' sick leave accrues at the beginning of each year.

(2) An employee's sick leave credit is worked out by adding any unexpended sick leave entitlement that had accrued to the employee before the employee became subject to this Schedule and any unexpended entitlement that accrues under this Schedule.

(3) Any sick leave taken by the employee is deducted from the employee's sick leave credit.

Taking sick leave

4. (1) An employee who has a sick leave credit is entitled to take sick leave if the employee is too sick to work.

(2) An employee who has a sick leave credit, and who is on annual leave, is entitled to take sick leave instead of annual leave if the person is too sick to work for a period of at least three days.

(3) However, the employee is not entitled to take sick leave unless—

(a) the employee gives the employer notice of the sickness, its nature and estimated duration before the period for which sick leave is sought begins (but if the nature or sudden onset of the sickness makes it impracticable to give the notice before the period begins, the notice is validly given if given as soon as practicable and not later than 24 hours after the period begins); and

(b) the employee, at the request of the employer, provides a medical certificate or other reasonable evidence of the sickness.

(4) Sick leave taken during a period of annual leave does not count as annual leave.

Sick leave to be on full pay

5. (1) A full-time employee is entitled to full pay for a period of sick leave.

(2) A part-time employee is entitled to pro-rata pay for a period of sick leave.

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SCHEDULE 4

Minimum Standard for Annual Leave

Definitions

1. In this Schedule—

"**continuous service**" means continuous service under a contract of employment and includes a period of paid leave taken under this Act or under an award or enterprise agreement;

"**full pay**" means remuneration for ordinary hours of work (not including payments in the nature of penalty rates, overtime, allowances or loadings).

Application of standard

2. This Schedule does not apply to a person who is engaged and paid as a casual employee;

Accrual of annual leave entitlement

3. An employee's entitlement to annual leave accrues as follows—

- (a) an employee is entitled to 4 weeks' annual leave for each completed year of continuous service; and
- (b) if an employee's employment comes to an end and the period of service is not exactly divisible into complete years—the employee is entitled to $\frac{1}{3}$ of one week's annual leave for each completed month of the remainder.

Taking annual leave

4. (1) Annual leave is to be taken at a time agreed between the employer and the employee.

(2) However, an employer may require an employee to take annual leave by giving the employee notice of the requirement at least 2 weeks before the period of annual leave is to begin if—

- (a) the employer and the employee fail to agree on the time for taking the annual leave; or
- (b) the taking of the leave is necessary to facilitate a temporary shut-down of part or all of the employer's business operations.

(3) If an employer determines the time for taking annual leave under subsection (2)(a), the leave must begin within 12 months after the entitlement to the leave accrues.

Annual leave to be on full pay

5. (1) A full-time employee is entitled to full pay for a period of annual leave.

(2) A part-time employee is entitled to pro-rata pay for a period of annual leave.

SCHEDULE 5

Minimum Standard for Parental Leave

Definitions

1. In this Schedule—

"**adoption**" means the adoption of a child who is not the natural child of the employee or the employee's spouse, who is less than five years of age, and who has not lived continuously with the employee for six months or longer;

"**continuous service**" means continuous service under a contract of employment and includes a period of paid leave or absence taken under this Act or under an award or enterprise agreement;

"**expected date of birth**" means a day certified by a medical practitioner as the expected date of birth;

"**employee**" does not include a person engaged and paid as a casual employee;

"**parental leave**" means unpaid leave under this Schedule;

"**spouse**" includes a *de facto* spouse.

Entitlement to parental leave

2. (1) Subject to this Schedule, an employee is entitled to take parental leave for a period of up to 52 weeks for—

(a) the birth of a child to the employee or the employee's spouse; or

(b) the placement of a child with the employee with a view to the adoption of the child by the employee.

(2) An employee is not entitled to take parental leave unless the employee—

(a) has, before the expected date of birth or placement, completed at least 12 months' continuous service with the employer; and

(b) has given the employer at least ten weeks' written notice of intention to take the leave.

(3) An employee is not entitled to take parental leave at the same time as the employee's spouse apart from one week's parental leave taken by the employee and the employee's spouse immediately after the birth of the child or the placement of the child for adoption with the employee and the employee's spouse.

(4) Apart from the period of one week referred to above, an employee's entitlement to parental leave is reduced by a period of parental leave taken by the employee's spouse for the same child.

Maternity leave to start 6 weeks before birth

3. A female employee who has given notice of her intention to take parental leave for the birth of a child must start the leave 6 weeks before the expected date of birth unless a medical practitioner has certified that the employee is fit to work closer to the expected date of birth.

Medical certificate

4. An employee who has given notice of intention to take parental leave for the birth of a child must provide the employer with a certificate from a medical practitioner certifying that the employee or the employee's spouse is pregnant and the expected date of birth.

Notice of spouse's parental leave

5. (1) An employee who has given notice of intention to take parental leave or who is actually taking parental leave must give the employer notice of periods of parental leave taken or to be taken by the employee's spouse for the same child.

(2) A notice given under subsection (1) must, if the employer requires, be verified by statutory declaration.

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Starting and finishing dates of parental leave

6. (1) The starting and finishing dates for a period of parental leave must (subject to this Schedule) be agreed between the employer and the employee.

(2) However, parental leave may not extend more than one year after the date of the birth, or placement for adoption, of the child to whom the leave relates.

Return to work after parental leave

7. (1) On finishing parental leave, an employee is entitled to the position the employee held immediately before starting parental leave.

(2) However—

(a) if the employee was temporarily acting in, or performing the duties of, a position immediately before starting parental leave, the entitlement under this section relates to the employee's substantive position; and

(b) if the former position is no longer available, the employee is entitled to an available position for which the employee is qualified and suited nearest in status and remuneration to the former position.

Effect of parental leave on employment rights

8. Absence on parental leave does not break an employee's continuity of service, but is not to be taken into account in calculating the employee's period of service.

Part-time employment in lieu of parental leave

9. An employee who is entitled to parental leave may, by agreement with the employer, reduce the employee's hours of employment to an agreed extent in lieu of taking parental leave.

SCHEDULE 6

Equal Remuneration Convention

CONVENTION CONCERNING EQUAL REMUNERATION FOR MEN AND WOMEN WORKERS
FOR WORK OF EQUAL VALUE

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Thirty-fourth Session on 6 June 1951, and

Having decided upon the adoption of certain proposals with regard to the principle of equal remuneration for men and women workers for work of equal value, which is the seventh item on the agenda of the session, and

Having determined that these proposals shall take the form of an International Convention,

adopts this twenty-ninth day of June of the year one thousand nine hundred and fifty-one the following Convention, which may be cited as the Equal Remuneration Convention, 1951:

Article 1

For the purpose of this Convention—

- (a) the term "**remuneration**" includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment;
- (b) the term "**equal remuneration for men and women workers for work of equal value**" refers to rates of remuneration established without discrimination based on sex.

Article 2

1. Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.

2. This principle may be applied by means of—

- (a) national laws or regulations;
- (b) legally established or recognised machinery for wage determination;
- (c) collective agreements between employers and workers; or
- (d) a combination of these various means.

Article 3

1. Where such action will assist in giving effect to the provisions of this Convention measures shall be taken to promote objective appraisal of jobs on the basis of the work to be performed.

2. The methods to be followed in this appraisal may be decided upon by the authorities responsible for the determination of rates of remuneration, or, where such rates are determined by collective agreements, by the parties thereto.

3. Differential rates between workers which correspond, without regard to sex, to differences, as determined by such objective appraisal, in the work to be performed shall not be considered as being contrary to the principle of equal remuneration for men and women workers for work of equal value.

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Article 4

Each member shall co-operate as appropriate with the employers' and workers' organisations concerned for the purpose of giving effect to the provisions of this Convention.

Article 5

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 6

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.

2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 7

1. Declarations communicated to the Director-General of the International Labour Office in accordance with paragraph 2 of Article 35 of the Constitution of the International Labour Organisation shall indicate—

- (a) the territories in respect of which the Member concerned undertakes that the provisions of the Convention shall be applied without modification;
- (b) the territories in respect of which it undertakes that the provisions of the Convention shall be applied subject to modifications, together with details of the said modifications;
- (c) the territories in respect of which the Convention is inapplicable and in such cases the grounds on which it is inapplicable;
- (d) the territories in respect of which it reserves its decisions pending further consideration of the position.

2. The undertakings referred to in subparagraphs (a) and (b) of paragraph 1 of this Article shall be deemed to be an integral part of the ratification and shall have the force of ratification.

3. Any Member may at any time by a subsequent declaration cancel in whole or in part any reservation made in its original declaration in virtue of subparagraphs (b), (c) or (d) of paragraph 1 of this Article.

4. Any Member may, at any time at which the Convention is subject to denunciation in accordance with the provisions of Article 9, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of such territories as it may specify.

Article 8

1. Declarations communicated to the Director-General of the International Labour Office in accordance with paragraphs 4 or 5 of Article 35 of the Constitution of the International Labour Organisation shall indicate whether the provisions of the Convention will be applied in the territory concerned without modification or subject to modifications; when the declaration indicates that the provisions of the Convention will be applied subject to modifications, it shall give details of the said modifications.

2. The Member, Members or international authority concerned may at any time by a subsequent declaration renounce in whole or in part the right to have recourse to any modification indicated in any former declaration.

3. The Member, Members or international authority concerned may, at any time at which this Convention is subject to denunciation in accordance with the provisions of Article 9, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of the application of the Convention.

Article 9

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 10

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications, declarations and denunciations communicated to him by the Members of the Organisation.

2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 11

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications, declarations and acts of denunciation registered by him in accordance with the provisions of the preceding articles.

Article 12

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 13

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides—

- (a) the ratification by a Member of the new revising Convention shall *ipso jure* involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 9 above, if and when the new revising Convention shall have come into force;
- (b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

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Article 14

The English and French versions of the text of this Convention are equally authoritative.

The foregoing is the authentic text of the Convention duly adopted by the General Conference of the International Labour Organisation during its Thirty-fourth Session which was held at Geneva and declared closed the twenty-ninth day of June 1951.

IN FAITH WHEREOF we have appended our signatures this second day of August 1951.

SCHEDULE 7

Termination of Employment Convention

CONVENTION CONCERNING TERMINATION OF EMPLOYMENT AT
THE INITIATIVE OF THE EMPLOYER

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Sixty-eighth Session on 2 June 1982, and

Noting the Existing international standards contained in the Termination of Employment Recommendation, 1963, and

Noting that since the adoption of the Termination of Employment Recommendation, 1963, significant developments have occurred in the law and practice of many member States on the questions covered by that Recommendation, and

Considering that these developments have made it appropriate to adopt new international standards on the subject, particularly having regard to the serious problems in this field resulting from the economic difficulties and technological changes experienced in recent years in many countries,

Having decided upon the adoption of certain proposals with regard to termination of employment at the initiative of the employer, which is the fifth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention;

adopts this twenty-second day of June of the year one thousand nine hundred and eighty-two the following Convention, which may be cited as the Termination of Employment Convention, 1982.

PART I. METHODS OF IMPLEMENTATION, SCOPE AND DEFINITIONS

Article 1

The provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice, be given effect by laws or regulations.

Article 2

1. This Convention applies to all branches of economic activity and to all employed persons.
2. A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention:
 - (a) workers engaged under a contract of employment for a specified period of time or a specified task;
 - (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;
 - (c) workers engaged on a casual basis for a short period.
3. Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention.
4. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention.

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5. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them.

6. Each Member which ratifies this Convention shall list in the first report on the application of the Convention submitted under article 22 of the Constitution of the International Labour Organisation any categories which may have been excluded in pursuance of paragraphs 4 and 5 of this Article, giving the reasons for such exclusion, and shall state in subsequent reports the position of its law and practice regarding the categories excluded, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.

Article 3

For the purpose of this Convention the terms "**termination**" and "**termination of employment**" mean termination of employment at the initiative of the employer.

PART II. STANDARDS OF GENERAL APPLICATION

DIVISION A. JUSTIFICATION FOR TERMINATION

Article 4

The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

Article 5

The following, *inter alia*, shall not constitute valid reasons for termination:

- (a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;
- (b) seeking office as, or acting or having acted in the capacity of, a workers' representative;
- (c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
- (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- (e) absence from work during maternity leave.

Article 6

1. Temporary absence from work because of illness or injury shall not constitute a valid reason for termination.

2. The definition of what constitutes temporary absence from work, the extent to which medical certification shall be required and possible limitations to the application of paragraph 1 of this Article shall be determined in accordance with the methods of implementation referred to in Article 1 of this Convention.

DIVISION B. PROCEDURE PRIOR TO OR AT THE TIME OF TERMINATION

Article 7

The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.

DIVISION C. PROCEDURE OF APPEAL AGAINST TERMINATION

Article 8

1. A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.

2. Where termination has been authorised by a competent authority the application of paragraph 1 of this Article may be varied according to national law and practice.

3. A worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination.

Article 9

1. The bodies referred to in Article 8 of this Convention shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified.

2. In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation referred to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities:

- (a) the burden of proving the existence of a valid reason for the termination as defined in Article 4 of this Convention shall rest on the employer;
- (b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice.

3. In cases of termination stated to be for reasons based on the operational requirements of the undertaking, establishment or service, the bodies referred to in Article 8 of this Convention shall be empowered to determine whether the termination was indeed for these reasons, but the extent to which they shall also be empowered to decide whether these reasons are sufficient to justify that termination shall be determined by the methods of implementation referred to in Article 1 of this Convention.

Article 10

If the bodies referred to in Article 8 of this Convention find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate.

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DIVISION D. PERIOD OF NOTICE

Article 11

A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.

DIVISION E. SEVERANCE ALLOWANCE AND OTHER INCOME PROTECTION

Article 12

1. A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to—

- (a) a severance allowance or other separation benefits, the amount of which shall be based *inter alia* on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or
- (b) benefits from unemployment insurance or assistance or other forms of social security, such as old age or invalidity benefits, under the normal conditions to which such benefits are subject; or
- (c) a combination of such allowance and benefits.

2. A worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in paragraph 1, subparagraph (a), of this Article solely because he is not receiving an unemployment benefit under paragraph 1, subparagraph (b).

3. Provision may be made by the methods of implementation referred to in Article 1 of this Convention for loss of entitlement to the allowance or benefits referred to in paragraph 1, subparagraph (a), of this Article in the event of termination for serious misconduct.

**PART III. SUPPLEMENTARY PROVISIONS CONCERNING TERMINATIONS OF EMPLOYMENT
FOR ECONOMIC, TECHNOLOGICAL, STRUCTURAL OR SIMILAR REASONS**

DIVISION A. CONSULTATION OF WORKERS' REPRESENTATIVES

Article 13

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employee shall:

- (a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;
- (b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.

2. The applicability of paragraph 1 of this Article may be limited by the methods of implementation referred to in Article 1 of this Convention to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

3. For the purposes of this Article the term "**the workers' representatives concerned**" means the workers' representatives recognised as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.

DIVISION B. NOTIFICATION TO THE COMPETENT AUTHORITY

Article 14

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he shall notify, in accordance with national law and practice, the competent authority thereof as early as possible, giving relevant information, including a written statement of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.

2. National laws or regulations may limit the applicability of paragraph 1 of this Article to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

3. The employer shall notify the competent authority of the terminations referred to in paragraph 1 of this Article a minimum period of time before carrying out the terminations, such period to be specified by national laws or regulations.

PART IV. FINAL PROVISIONS

Article 15

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 16

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.

2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 17

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 18

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.

2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

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Article 19

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 20

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the conference the question of its revision in whole or in part.

Article 21

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides—

- (a) the ratification by a Member of the new revising Convention shall *ipso jure* involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 17 above, if and when the new revising Convention shall have come into force;
- (b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those members which have ratified it but have not ratified the revising Convention.

Article 22

The English and French versions of the text of this Convention are equally authoritative.

The foregoing is the authentic text of the Convention duly adopted by the General Conference of the International Labour Organisation during its Sixty-eighth Session which was held at Geneva and declared closed the twenty-third day of June 1982.

IN FAITH WHEREOF we have appended our signatures this twenty-third day of June 1982.

SCHEDULE 8

Rules for Terminating Employment

Employee to be given notice of termination

1. (1) An employer must not terminate an employee's employment unless—

- (a) the employee has been given either the period of notice required by subsection (2) or compensation instead of notice; or
- (b) the employee is guilty of serious misconduct, that is, misconduct of a kind that makes it unreasonable to require the employer to continue the employment during the notice period.

(2) The required period of notice is worked out as follows—

- (a) if the employee's period of continuous service with the employer is not more than 1 year—the period of notice is at least 1 week; and
- (b) if the employee's period of continuous service with the employer is more than 1 year but not more than 3 years—the period of notice is at least 2 weeks; and
- (c) if the employee's period of continuous service with the employer is more than 3 years but not more than 5 years—the period of notice is at least 3 weeks; and
- (d) if the employee's period of continuous service with the employer is more than 5 years—the period of notice is at least 4 weeks,

but if the employee is over 45 years old and has completed at least 2 years continuous service with the employer, the period of notice is increased by 1 week.

(3) The regulations may prescribe events or other matters that must be disregarded, or must in prescribed circumstances be disregarded, in ascertaining a period of continuous service for the purposes of subsection (2).

Employee to have opportunity to respond to allegations

2. An employer must not terminate an employee's employment for reasons related to the employee's conduct or performance unless—

- (a) the employee has been given the opportunity to defend himself or herself against the allegations made; or
- (b) the employer could not reasonably be expected to give the employee that opportunity.

Employer to comply with obligations imposed by regulation

3. (1) An employer must comply with the rules and procedures prescribed by regulation under subsection (2).

(2) Regulations may be made prescribing rules and procedures to be observed by employers in relation to the termination of employment for the purpose of giving full effect to the provisions and intendment of the *Termination of Employment Convention*.

Industrial and Employee Relations Act 1994**APPENDIX****LEGISLATIVE HISTORY****Transitional Provisions**

(Transitional provision from Industrial and Employee Relations (Miscellaneous) Amendment Act 1996, s. 4)

4. An assignment made under the principal Act before the commencement of this Act—

- (a) assigning a District Court Judge to be the Senior Judge, or a Judge, of the Court; or
- (b) assigning a magistrate to be an industrial magistrate,

continues in force, subject to the principal Act, as an assignment under the corresponding provision of the principal Act as amended by this Act.

(Transitional provision from Industrial and Employee Relations (President's powers) Amendment Act 1996, s. 3)

Cancellation of appointment

3. The purported appointment of the President of the Industrial Relations Commission of South Australia as a Commissioner is cancelled and is taken never to have been made.

Legislative History

(entries in bold type indicate amendments incorporated since the last reprint)

Section 3:	amended by 68, 1997, s. 3
Section 4(1):	definition of "Commonwealth Act" substituted by 68, 1997, s. 4(a) definition of "contract of employment" amended by 68, 1997, s. 4(b) definition of "employer" amended by 39, 1995, Sched. 5 definition of "enterprise agreement" amended by 67, 1995, s. 3(a) definition of "(indexed)" inserted by 67, 1995, s. 3(b) definition of "industrial instrument" inserted by 68, 1997, s. 4(c) definition of "taxi" inserted by 68, 1997, s. 4(d)
Section 4(4):	inserted by 67, 1995, s. 3(c)
	Division 4 of Part 2 of Chapter 2 comprising ss. 18 - 20 and heading amended by 84, 1995, ss. 10, 11; repealed and ss. 18 - 20 and heading inserted in its place by 57, 1996, s. 2
Section 36A:	inserted by 74, 1996, s. 2(1)
Section 39(4):	substituted by 68, 1997, s. 5
Section 40(2):	substituted by 68, 1997, s. 6
Section 75:	substituted by 67, 1995, s. 4
Section 76(6) and (7):	inserted by 67, 1995, s. 5
Section 79(1):	amended by 67, 1995, s. 6(a), (b); 68, 1997, s. 7(a)-(c)
Section 79(1a) and (1b):	inserted by 68, 1997, s. 7(d)
Section 79(5):	amended by 68, 1997, s. 7(e)
Section 79(7) - (10):	inserted by 67, 1995, s. 6(c)
Section 80(5):	amended by 68, 1997, Sched. cl. 1
Section 83:	substituted by 68, 1997, s. 8
Section 84(5):	inserted by 67, 1995, s. 7
Heading preceding section 99:	substituted by 67, 1995, s. 8
Section 88(1):	amended by 68, 1997, Sched. cl. 2
Section 99(1a):	inserted by 68, 1997, s. 9

Section 102(1):	amended by 68, 1997, Sched. cl. 3
Section 102(3):	amended by 68, 1997, Sched. cl. 4
Section 102(4):	amended by 68, 1997, Sched. cl. 5
Section 102(5):	amended by 68, 1997, Sched. cl. 6
Section 102(7):	amended by 68, 1997, Sched. cl. 7
Section 103(1):	amended by 68, 1997, Sched. cl. 8
Section 103(2):	amended by 68, 1997, Sched. cl. 9
Section 103(4):	amended by 68, 1997, Sched. cl. 10
Section 104(8):	amended by 68, 1997, Sched. cl. 11

Part 6 of Chapter 3 comprising ss. 105 - 111 and heading amended by 67, 1995, ss. 9, 10; **repealed and ss. 105 - 111 and headings inserted in its place by 68, 1997, s. 10**

Section 112(5):	amended by 68, 1997, Sched. cl. 12
Section 112(6):	amended by 68, 1997, Sched. cl. 13

Part 1 of Chapter 4 comprising ss. 115 - 118 and heading amended by 67, 1995, s. 11; **repealed and ss. 115 - 118 and headings inserted in its place by 68, 1997, s. 11**

Section 127(2):	amended by 68, 1997, Sched. cl. 14
Section 128(5):	amended by 68, 1997, Sched. cl. 15
Section 139:	amended by 68, 1997, Sched. cl. 16
Section 140(3):	amended by 68, 1997, Sched. cl. 17
Section 141(5):	amended by 68, 1997, Sched. cl. 18
Section 141(6):	amended by 68, 1997, Sched. cl. 19
Section 142(1):	amended by 68, 1997, Sched. cl. 20
Section 148(3):	substituted by 67, 1995, s. 12
Section 151:	substituted by 67, 1995, s. 13
Section 177(1):	amended by 68, 1997, Sched. cl. 21
Section 198(2):	amended by 67, 1995, s. 14; substituted by 68, 1997, s. 12
Section 213(1):	substituted by 68, 1997, s. 13
Section 213(1a) and (1b):	inserted by 68, 1997, s. 13
Section 219(1):	amended by 68, 1997, Sched. cl. 22
Section 223(1):	amended by 68, 1997, Sched. cl. 23
Section 224:	amended by 68, 1997, Sched. cl. 24
Section 225(1):	amended by 68, 1997, Sched. cl. 25
Section 225(3):	amended by 68, 1997, Sched. cl. 26
Section 225(4):	amended by 68, 1997, Sched. cl. 27
Section 226:	amended by 68, 1997, Sched. cl. 28
Section 228(1):	amended by 68, 1997, Sched. cl. 29
Section 229(1):	amended by 68, 1997, Sched. cl. 30
Section 237(2):	substituted by 68, 1997, Sched. cl. 31
Schedule 1	
Section 7(1):	substituted by 57, 1996, s. 3(a)
Section 7(3):	substituted by 57, 1996, s. 3(b)
Section 7A:	inserted by 67, 1995, s. 15
Section 16(2):	substituted by 86, 1996, s. 2; 48, 1997, s. 2
Section 16(3) and (4):	inserted by 86, 1996, s. 2; repealed by 48, 1997, s. 2