

## LONG SERVICE LEAVE ACT.

Act No. 38, 1955.

**Elizabeth II, No. 38, 1955.** An Act to make provisions entitling workers to long service leave; to amend the Industrial Arbitration Acts, 1940-1955; and for purposes connected therewith. [Assented to, 5th November, 1955.]

**B**E it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

**Short title.** 1. This Act may be cited as the "Long Service Leave Act, 1955."

2.

2. This Act shall be read and construed subject to the Commonwealth of Australia Constitution Act, and so as not to exceed the legislative power of the State to the intent that where any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act, and the application of such provision to other persons or circumstances shall not be affected.

No. 38, 1955.

Construc-  
tion.

3. (1) In this Act, unless the context otherwise indicates or requires—

Interpre-  
tation.

“Award” means an award for the time being in force under the Industrial Arbitration Act.

“Employer” means any person employing any worker or workers and includes the Crown.

“Industrial agreement” means an industrial agreement for the time being in force under the Industrial Arbitration Act and an agreement filed under section twelve of that Act.

“Industrial Arbitration Act” means the Industrial Arbitration Act, 1940, or any Act amending or replacing that Act.

“Inspector” means an inspector appointed under the Industrial Arbitration Act.

“Ordinary pay”, in relation to any worker, means remuneration for the worker’s normal weekly number of hours of work calculated at his ordinary time rate of pay; and where the worker is provided with board or lodging by his employer, includes the cash value of that board or lodging.

“Prescribed” means prescribed by this Act or by regulations made under this Act.

“Worker”

**No. 38, 1955.**

“Worker” means person employed, whether on salary or wages or piecework rates, or as a member of a butty-gang, and the fact that a person is working under a contract for labour only, or substantially for labour only, or as lessee of any tools or other implements of production, or as an outworker, or is working as a salesman, canvasser, collector, commercial traveller, insurance agent, or in any other capacity in which he is paid wholly or partly by commission shall not in itself prevent such person being held to be a worker.

(2) For the purposes of the definition of the term “ordinary pay” in subsection one of this section—

- (a) where no ordinary time rate of pay is fixed for a worker’s work under the terms of his employment, his ordinary time rate of pay shall be deemed to be the average weekly rate earned by him during the period of twelve months immediately preceding the date on which he enters, or is deemed to have entered, upon long service leave, or the date of his death, as the case may require;
- (b) where no normal weekly number of hours is fixed for a worker under the terms of his employment, the normal weekly number of hours shall be deemed to be the average weekly number of hours worked by him during the period of twelve months immediately preceding the date on which he enters, or is deemed to have entered, upon long service leave, or the date of his death, as the case may require;
- (c) the cash value of any board and lodging provided for a worker shall be deemed to be its cash value as fixed by or under the terms of the worker’s employment or, if it is not so fixed,

fixed, shall be computed at the rate of thirty shillings, or such greater sum as may be prescribed in lieu thereof, a week for board and ten shillings, or such greater sum as may be prescribed in lieu thereof, a week for lodging. No. 38, 1955.

(3) A person who is engaged in plying for hire or in the delivery of goods or in the transportation of passengers with any vehicle or vessel the use of which is obtained by that person under a contract of bailment (other than a hire purchase agreement) in consideration of the payment of a fixed sum or a share in the earnings or otherwise shall, where the work in which such person is so engaged is work for which, by an award or industrial agreement, a price or rate has been fixed for persons performing such work, be deemed, for the purposes of this Act, to be a worker employed by the person from whom the use of the vehicle or vessel is so obtained, and such last-mentioned person shall, for the purposes of this Act, be deemed to be the employer of such worker unless such persons or either of them establishes to the satisfaction of the tribunal in which proceedings under this Act are instituted that the contract of bailment was a bona fide contract and was not entered into for the purpose of avoiding the operation of this Act or of an award or industrial agreement.

(4) Where by any provision of the Industrial Arbitration Act, a person is deemed for the purposes of that Act to be an employee and any other person is deemed for such purposes to be the employer of that employee, then for the purposes of this Act the person so deemed to be an employee shall be deemed to be a worker and the person so deemed to be the employer shall be deemed to be the employer of that worker.

4. (1) Except as otherwise provided in this Act, every worker shall be entitled to long service leave on ordinary pay in respect of his service with an employer. Service with <sup>Long service leave.</sup>

**Long Service Leave Act.**

**No. 38, 1955.** with the employer before the commencement of this Act as well as service with the employer after such commencement shall be taken into account for the purposes of this section.

(2) (a) The amount of long service leave to which a worker shall be so entitled shall—

(i) in the case of a worker who has completed at least twenty years' service with an employer be—

(a) in respect of twenty years' service so completed, three months; and

(b) in respect of each ten years' service with the employer completed after such twenty years, six and one-half weeks; and

(c) on the termination of the worker's services, in respect of the number of years' service with the employer completed since he last became entitled to an amount of long service leave, a proportionate amount on the basis of six and one-half weeks for ten years' service; and

(ii) in the case of a worker who has completed at least ten years' service but less than twenty years' service with an employer and whose services with the employer are terminated by the employer for any cause other than serious misconduct or by the worker for any reason or by reason of the death of the worker, be a proportionate amount on the basis of three months for twenty years' service.

(b) (i) A worker entitled under this section to long service leave in respect of a period of service with an employer shall not, except in pursuance of an agreement between the worker and the employer entitling the worker to leave in the nature of long service leave in  
addition

addition to long service leave under this Act, be entitled otherwise than under the provisions of this Act to leave in the nature of long service leave in respect of that period of service with that employer. No. 38, 1955.

(ii) Where before or after the commencement of this Act—

- (a) a worker has otherwise than in pursuance of this section been granted by an employer and taken any leave in the nature of long service leave in respect of a period of service with the employer; or
- (b) payment of the monetary value of leave in the nature of long service leave has been made to the worker or other the person entitled thereto,

the leave so granted and taken or the leave in respect of which such payment has been made shall, except where such leave has been taken or payment therefor has been made pursuant to an agreement referred to in subparagraph (i) of this paragraph, be deducted from any amount of long service leave to which such worker is entitled pursuant to this section in respect of that period of service with that employer.

(3) Subject to subsection five of this section, where a worker has become entitled to long service leave in respect of his service with an employer, the employer shall give to the worker and the worker shall take the leave—

- (a) as soon as is practicable having regard to the needs of the employer's establishment, or, where the employer and the worker agree that the taking of the leave be postponed until an agreed date, as from that date;
- (b) in one continuous period or, if the worker and the employer so agree, in the following separate periods and not otherwise:—
  - (i) where the amount of the leave is three months, in two separate periods;
  - (ii)

No. 33, 1955.

(ii) where the amount of the leave exceeds three months and does not exceed nineteen and one-half weeks, in two or three separate periods;

(iii) where the amount of the leave exceeds nineteen and one-half weeks, in two, three or four separate periods.

(4) The long service leave provided by this section is exclusive of annual holidays but is inclusive of all other holidays occurring during the taking of any period of long service leave.

(5) (a) Where the services of a worker are terminated otherwise than by his death and any long service leave—

(i) to which the worker was entitled has not been taken, or

(ii) accrues to the worker upon such termination,

the worker shall be deemed to have entered upon the leave from the date of such termination and the employer shall forthwith pay to the worker in full his ordinary pay for the leave less any amount already paid to the worker in respect of that leave.

(b) Where a worker dies and any long service leave—

(i) to which the worker was entitled has not been taken, or

(ii) accrues upon termination of the services of the worker by reason of his death,

the employer shall upon request by the worker's personal representative pay to the worker's personal representative in full the ordinary pay that would have been payable to the worker in respect of long service leave less any amount already paid to the worker in respect of that leave.

(6)

(6) The ordinary pay to be paid to a worker or his personal representative in respect of any period of long service leave shall be—

- (a) in the case of a worker who enters, or is deemed to have entered, upon a period of long service leave, the ordinary pay payable to the worker at the time he enters, or is deemed to have entered, upon the period of long service leave;
- (b) where a worker dies and any long service leave—
  - (i) to which the worker was entitled under this section has not been taken, or
  - (ii) accrues under this section upon termination of the services of the worker by reason of his death,

the worker's ordinary pay at the date of his death:

Provided that where by agreement made after long service leave has accrued the taking of the long service leave due to the worker, or any portion of it, is postponed, and the employer and the worker as a condition of the postponement agree that the ordinary pay to be paid in respect of the leave shall be that which would have been payable had the leave been taken at the date the agreement was entered into—

- (a) the ordinary pay shall be as so agreed; and
- (b) paragraphs (a) and (b) of subsection two of section three of this Act shall have effect as if the words "the date on which he enters, or is deemed to have entered, upon long service leave, or the date of his death, as the case may require" were omitted therefrom and the words "the date on which the agreement referred to in subsection six of section four of this Act was entered into" were substituted therefor.

(7)



**Long Service Leave Act.**

No 38, 1955.

(7) Subject to subsection five of this section, where a worker enters upon a period of long service leave, the employer of the worker shall pay to the worker the ordinary pay to be paid to the worker in respect of the period of leave in one of the following ways:—

- (a) in full when the worker commences the period of leave; or
- (b) at the same time as his ordinary pay would have been paid if the worker had remained on duty, in which case payment shall, if the worker in writing so requires, be made by cheque posted to an address specified by the worker; or
- (c) in any other way agreed between the employer and the worker,

and the ordinary pay shall become due to the worker accordingly.

(8) Except as provided in subsection five of this section, payment shall not be made by an employer to a worker in lieu of any long service leave or part thereof to which the worker is entitled under this Act nor shall any such payment be accepted by the worker.

(9) Any amount payable under this section—

- (a) to the personal representative of a worker, shall be recoverable by the personal representative of the worker; or
- (b) to a worker who dies before being paid such amount, shall be recoverable by the personal representative of the worker as payment due to the worker,

in like manner as a worker may recover any amount under section twelve of this Act.

(10) The employer shall give to each worker at least one month's notice of the date from which it is proposed that the worker's long service leave shall be given and taken.

(11) For the purposes of this section—

No. 38, 1955.

- (a) the service of a worker with an employer means the period during which the worker has served his employer under an unbroken contract of employment: Provided that a contract of employment shall be deemed not to have been broken by reason only of any interruption or determination thereof, whether occurring before or after the commencement of this Act, if the interruption or determination—
- (i) has been made by the employer with the intention of avoiding any obligation imposed on him by this Act or by an award made pursuant to section 88c of the Industrial Arbitration Acts, 1940-1955; or
  - (ii) has arisen directly or indirectly from an industrial dispute; or
  - (iii) has been made by the employer by reason of slackness of trade:

Provided further that the period during which the contract has been so interrupted or determined shall not by reason only of this paragraph be taken into account in calculating the period of service;

- (b) where a worker has entered into a contract of employment with an employer within a period of six months after the completion of an apprenticeship with the employer the period of his apprenticeship shall be taken into account for the purpose of ascertaining the period of his service with that employer under that contract of employment;
- (c) where a business, undertaking or establishment or any part thereof has, whether before or after the commencement of this Act, been transmitted from an employer (in this paragraph called the **transmittor**)

No. 88, 1955.

transmittor) to another employer (in this paragraph called the transmittee) and a person who at the time of the transmission was a worker in the employ of the transmittor in that business, undertaking, establishment or part thereof becomes a worker in the employ of the transmittee—

- (i) the continuity of the contract of employment of the worker shall be deemed not to have been broken by reason of the transmission; and
- (ii) the period of service which the worker has had with the transmittor or any prior transmittor shall be deemed to be service of the worker with the transmittee.

In this paragraph “transmission”, without limiting its ordinary meaning, includes transfer, conveyance, assignment or succession, whether by agreement or operation of law, and “transmitted” has a corresponding meaning;

- (d) any period during which a person served as a member of the naval, military or air forces of the Commonwealth or of the Civil Construction Corps established under the National Security Act 1939, as amended by subsequent Acts, of the Parliament of the Commonwealth, shall be deemed to be service of that person as a worker in the employ of the employer by whom that person was last employed before he commenced to serve as such member.

**Exemptions.** 5. (1) Section four of this Act shall not apply to any worker who is employed by an employer as a member of a class of workers for whom provisions entitling the worker

worker (whether immediately or upon the fulfilment of certain conditions) to leave in the nature of long service leave are made—

No. 38, 1955.

- (a) by an award or industrial agreement, whether made before or after the commencement of this Act, and such provisions are more favourable to the worker than those of section four of this Act; or
- (b) by or under any Act, other than this Act or the Industrial Arbitration Act.

Where the worker ceases to be a member of a class of workers as aforesaid and at the same time ceases to be in the employment of his employer his service as a member of such class shall not be service for the purposes of section four of this Act.

(2) (a) The Industrial Commission of New South Wales may, subject to such conditions as it thinks fit to impose, exempt any employer from the operation of the provisions of this Act relating to long service leave in respect of any workers in any case where it is satisfied that the workers are entitled to benefits in the nature of long service leave under any scheme conducted by or on behalf of the employer which are not less favourable than those specified in this Act and that it is in the best interests of the workers that the exemption should be granted.

(b) Any exemption granted to an employer in relation to long service leave pursuant to subsection four of section 88c of the Industrial Arbitration Acts, 1940-1955, and in force immediately before the commencement of this Act shall be deemed to have been granted pursuant to paragraph (a) of this subsection.

(c) (i) Any exemption granted pursuant to paragraph (a) of this subsection shall not apply to an employer in respect of any worker who, within a period of three months after the date from which the exemption takes

No. 38, 1955. takes effect, or the date of commencement of his employment, as the case may require, has by notice in writing to the employer elected to be subject to the provisions of this Act relating to long service leave in lieu of those provided for in the scheme conducted by or on behalf of the employer.

(ii) Any exemption deemed by paragraph (b) of this subsection to have been granted pursuant to paragraph (a) of this subsection shall not apply to an employer in respect of a worker who has before the commencement of this Act by notice in writing given pursuant to subsection (4A) of section 88c of the Industrial Arbitration Acts, 1940-1955, elected to be subject to the provisions of an award or industrial agreement relating to long service leave in lieu of those provided for in the scheme conducted by or on behalf of his employer or who after such commencement has elected to be subject to the provisions of this Act relating to long service leave in lieu of those provided for in the scheme conducted by or on behalf of the employer within the time within which he would have been entitled to make an election had the said subsection (4A) not been amended by subsection one of section thirteen of this Act.

(iii) Notwithstanding any provision of any scheme referred to in subparagraph (i) or (ii) of this paragraph where a worker has given notice in writing as aforesaid, the worker shall be entitled to such benefits under the scheme, other than long service leave, as he would have been entitled to receive had he voluntarily left the service of the employer upon the date on which the notice was given: Except as aforesaid upon the notice being given the rights of the worker to any benefits under the scheme and the obligations under the scheme of the employer and any persons charged with the administration of the scheme in respect of that worker and any person claiming under the worker or in respect of his employment shall cease and determine.

(d)

(d) The Industrial Commission of New South Wales may vary the terms of any exemption granted or deemed by paragraph (b) of this subsection to have been granted pursuant to paragraph (a) of this subsection or any condition subject to which the exemption was or was deemed to have been granted, and may revoke the exemption. No. 38, 1955.

6. Nothing contained in this Act shall limit or in any way affect the powers, authorities, duties and functions conferred and imposed on the Industrial Commission of New South Wales, or any member thereof, or on a conciliation committee or a conciliation commissioner by or under the Industrial Arbitration Act in respect of long service leave: Savings as to powers, etc.

Provided that in the exercise and performance of such powers, authorities, duties and functions, the Commission or any member thereof or a conciliation committee or a conciliation commissioner shall not in any award or industrial agreement whether made before or after the commencement of this Act insert any provisions relating to long service leave unless those provisions are more favourable to workers than the provisions of section four of this Act or are applicable to persons who are not workers entitled to the long service leave provided by the said section.

7. (1) The provisions of this Act shall have effect notwithstanding any stipulation to the contrary whether made before or after the commencement of this Act. Contracting out prohibited.

(2) No contract or agreement made or entered into either before or after the commencement of this Act shall operate to annul or vary or exclude any of the provisions of this Act.

8. Every employer shall keep or cause to be kept a long service leave record in or to the effect of the form and containing the particulars prescribed. Records to be kept by employers.

9.

**Long Service Leave Act.**

No. 38, 1955.

Powers of  
inspectors.

**9.** (1) Every inspector shall have power at any reasonable times—

- (a) to enter, inspect and examine the premises of any employer or any premises in which he has reasonable cause to believe that any person is employed;
- (b) to require an employer to produce, at such time and place as the inspector may specify, the long service leave record required to be kept under this Act;
- (c) to make such examination and inquiry as may be necessary to ascertain whether the provisions of this Act have been complied with;
- (d) to exercise all other powers that may be necessary to ensure the carrying out of the provisions of this Act.

(2) No inspector shall have any authority under this Act to enter those portions of a building which are used exclusively for the purposes of a private dwelling.

Penalties  
and  
offences.

**10.** (1) Every person who contravenes or fails to comply in any respect with any provision of this Act shall be liable to a penalty not exceeding five hundred pounds.

(2) Every person who—

- (a) makes any false or misleading statement in, or any material omission from, any long service leave record which he is required to keep; or
- (b) obstructs any inspector in the exercise of his powers under this Act; or
- (c) fails to comply with any requirement or direction lawfully given by an inspector under this Act or to furnish any information lawfully demanded under this Act by an inspector,

shall be liable to a penalty not exceeding five hundred pounds.

(3)

(3) Any employer who does any act or thing for the purpose of or which has the effect of in any way whether directly or indirectly—

- (a) avoiding or evading any obligation imposed on him by this Act; or
- (b) defeating, evading, avoiding or preventing the operation of this Act in any respect,

shall be liable to a penalty not exceeding five hundred pounds.

(4) Where a person convicted of an offence against this Act is a body corporate, every person who at the time of the commission of the offence was a director or officer of the body corporate shall be deemed to have committed the like offence and be liable to the penalty provided by this Act for such offence accordingly, unless he proves that the offence was committed without his knowledge or that he used all due diligence to prevent the commission of the offence.

**11.** (1) All penalties imposed by this Act or the regulations made thereunder may be recovered summarily before a court of petty sessions holden before a stipendiary magistrate sitting alone or before an industrial magistrate appointed under the Industrial Arbitration Act.

Recovery  
of  
penalties.

Proceedings for such recovery may be taken by an inspector or by the secretary of an industrial union of employers or employees whose members are engaged in any industry concerned, or by any person whose rights are impaired.

(2) In any such proceedings the stipendiary magistrate or industrial magistrate may, in addition to the imposition of any penalty, make such an order with respect to any payment due to a worker under this Act as might have been made in proceedings taken under section twelve of this Act. Such order may be made without motion and shall be a bar to further proceedings under section twelve of this Act in respect of such payment.



**Long Service Leave Act.**

No. 38, 1955.

(3) In any proceedings under this section the magistrate before whom such proceedings are taken may award costs to either party and assess the amount of such costs. Such costs shall be according to a scale to be fixed by the Industrial Commission of New South Wales.

(4) The prosecutor may conduct his case personally or by his counsel, attorney or an agent duly authorised by him in writing.

**Recovery  
of long  
service  
leave pay.**

**12.** (1) Any worker may apply to a court of petty sessions holden before a stipendiary magistrate sitting alone, or to any industrial magistrate appointed under the Industrial Arbitration Act, for an order directing the employer to pay to the worker the full amount of any payment which has become due to the worker under this Act at any time during a period of two years immediately preceding the date of the application.

The magistrate may make any order he thinks just in the matter and may award costs to either party, and assess the amount of such costs.

Such costs shall be according to a scale to be fixed by the Industrial Commission of New South Wales.

(2) In any case where the worker is a person employed to do any work for which the price or rate has been fixed by an award or industrial agreement, proceedings under this section may, with the consent in writing of the worker, be taken by the secretary or other officer of an industrial union registered as such under the Industrial Arbitration Act concerned in the industry to which the award or industrial agreement relates, in the name and on behalf of the worker.

Any amount ordered to be paid in proceedings under this subsection may be paid to the secretary or other officer and the receipt of the secretary or other officer shall be a sufficient discharge to the employer for the amount mentioned in the receipt.

Any

Any amount so paid to the secretary or other officer (less any costs properly incurred in connection with the proceedings and not paid by the employer) shall be held by him on trust for the worker on whose behalf the proceedings were taken. No. 33, 1955.

**13.** (1) Section 88c of the Industrial Arbitration Acts, 1940-1955, is amended— Amendment  
of Act No. 2,  
1940.

- (a) by omitting subsections one and (1A); Sec. 88c.
- (b) (i) by omitting from subsection three the words “subsections one and two” and by inserting in lieu thereof the words “subsection two”; (Long  
service leave  
and  
sick leave.)
- (ii) by omitting from the same subsection the words “long service leave or”;
- (iii) by omitting paragraph (a) of the same subsection;
- (c) (i) by omitting from subsection four the words “long service leave or” wherever occurring;
- (ii) by omitting from the same subsection the words “, as the case may be,”;
- (d) (i) by omitting from subsection (4A) the words “long service leave or” wherever occurring;
- (ii) by omitting from the same subsection the words “, as the case may be,”;
- (e) (i) by omitting from subsection five the words “long service leave or” wherever occurring;
- (ii) by omitting from the same subsection the words “, as the case may be”;
- (f) by omitting subsections six, seven, eight and (8A);
- (g) by omitting from subsection nine the words “long service leave or” wherever occurring.

(2) Where the provisions of an award or industrial agreement in force immediately before the commencement of this Act entitling workers to long service leave are not more favourable to the workers than the

**388 Long Service Leave Act.**

**No. 38, 1955.** the provisions of section four of this Act the first-mentioned provisions shall, as from the commencement of this Act, be deemed to have been omitted from the award or industrial agreement.

This subsection shall not apply to the provisions of any award or industrial agreement entitling persons, who are not workers entitled to long service leave under section four of this Act, to long service leave.

(3) Where the provisions of an award or industrial agreement in force immediately before the commencement of this Act entitling workers to long service leave are more favourable to the workers than the provisions of section four of this Act the first-mentioned provisions shall not cease to have force or effect by reason only of the amendments to the Industrial Arbitration Acts, 1940-1955, made by subsection one of this section.

(4) Where pursuant to any provision of an award or industrial agreement to which subsection two of this section applies:—

- (a) any person before the commencement of this Act became entitled to long service leave in respect of a period of service with an employer and that person is not entitled under this Act to long service leave in respect of that period of service with that employer; or
- (b) long service leave has before such commencement accrued upon termination of the services of any person with an employer by reason of that person's death,

nothing in subsection one or subsection two of this section shall take away or affect the right of that person or of his personal representative to any payment in respect of such leave.

In relation to such payment all such proceedings may be taken or continued as might have been taken or continued had the said subsection one or two not been enacted.

**14.** The provisions of the Industrial Arbitration Act No. 38, 1955. and the regulations made thereunder relating to proceedings before an industrial magistrate, the recovery of any penalty and the enforcement of any order for the payment of money and to appeals from an industrial magistrate to the Industrial Commission of New South Wales shall apply mutatis mutandis to proceedings before a court of petty sessions or an industrial magistrate for the recovery of any penalty or of any payment under this Act.

Provisions  
as to  
enforcement  
of orders,  
etc.

**15.** (1) The Governor may make regulations not inconsistent with this Act prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Regulations.

(2) Such regulations may impose a penalty not exceeding fifty pounds for any breach thereof.

(3) The regulations shall—

- (a) be published in the Gazette;
- (b) take effect from the date of publication or from a later date to be specified in the regulations; and
- (c) be laid before both Houses of Parliament within fourteen sitting days after the publication thereof if Parliament is in session, and if not, then within fourteen sitting days after the commencement of the next session.

If either House of Parliament passes a resolution of which notice has been given at any time within fifteen sitting days after such regulations have been laid before such House disallowing any regulation or part thereof, such regulation or part shall thereupon cease to have effect.