

Long Service Leave Act 1955 No 38

[1955-38]



New South Wales

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Provisions in force

The provisions displayed in this version of the legislation have all commenced.

Notes—

- **Does not include amendments by**
 - Industrial Relations Amendment (Jurisdiction of Industrial Relations Commission) Act 2009 No 32* (amended by *Industrial Relations Further Amendment (Jurisdiction of Industrial Relations Commission) Act 2009 No 87*) (not commenced)
 - Industrial Relations Amendment (Industrial Court) Act 2016 No 48* (not commenced — to commence on 8.12.2016)

Authorisation

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Long Service Leave Act 1955 No 38



New South Wales

An Act to make provisions entitling workers to long service leave; to amend the *Industrial Arbitration Act 1940*; and for purposes connected therewith.

1 Name of Act

This Act may be cited as the *Long Service Leave Act 1955*.

2 Construction

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 circumstances is held invalid, the remainder of this Act, and the application of such provision to other persons or circumstances shall not be affected.

3 Definitions

(1) In this Act, unless the context otherwise indicates or requires:

Agreement means an enterprise agreement within the meaning of the *Industrial Relations Act 1996*.

Award means an award within the meaning of the *Industrial Relations Act 1996*.

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

Inspector means an inspector appointed under the *Industrial Relations Act 1996*.

Ordinary pay, in relation to any worker, means the sum of:

- (a) where the worker is, on the prescribed date, remunerated wholly in relation to an ordinary time rate of pay fixed by the terms of the worker's employment:
 - (i) the amount of the ordinary remuneration of the worker, as on the prescribed date, or
 - (ii) the average weekly amount of the ordinary remuneration which was earned by the worker as a worker during that part of the period of 5 years ending on the

- prescribed date during which the worker was so remunerated,
whichever is the greater,
- (b) where the worker is, on the prescribed date, remunerated otherwise than wholly in relation to an ordinary time rate of pay so fixed—the amount of the average weekly wage which was earned by the worker as a worker (being the average of the amounts received by the worker each week under those terms after excluding any amount payable to the worker in respect of shift work, overtime or other penalty rates) during the period actually worked by the worker during:
- (i) the period of 12 months, or
 - (ii) the period of 5 years,
- ending on the prescribed date, whichever amount of average weekly wage is the greater,
- (c) the average weekly amount of bonuses received by the worker as a worker employed by the person who is the worker's employer on the prescribed date during:
- (i) where paragraph (a) (i) or (b) (i) applies for the purpose of calculating the worker's ordinary pay, the period of 12 months, or
 - (ii) where paragraph (a) (ii) or (b) (ii) applies for that purpose, the period of 5 years,
- ending on the prescribed date, and
- (d) where the worker was, immediately before the prescribed date, provided with board or lodging by the person who is the worker's employer on the prescribed date—the cash value of that board or lodging.

Worker means person employed, whether on salary or wages or piecework rates, or as a member of a buttygang, 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 the person is paid wholly or partly by commission shall not in itself prevent such person being held to be a worker but does not include a person who is a worker within the meaning of the [Long Service Leave \(Metalliferous Mining Industry\) Act 1963](#).

(2) For the purposes of:

- (a) the definition of **ordinary pay** in subsection (1) and of subsection (2A), **prescribed date**, in relation to a worker:

- (i) means, except as provided in subparagraph (ii), the date immediately preceding the date on which that worker enters, or is deemed to have entered upon long service leave or the date of that worker's death, as the case may require, or
 - (ii) where the worker has, in relation to any period of long service leave, entered into an agreement authorised by subsection (2B), means, in relation to that period of long service leave, the date of that agreement,
- (b) paragraph (a) of that definition, **ordinary remuneration**, in relation to a worker, means the remuneration for that worker's normal weekly number of hours of work calculated at the time rate of pay fixed by the terms of that worker's employment for his or her work under the terms of that worker's employment reduced by any amount payable to that worker in respect of shift work, overtime or other penalty rates or, where 2 or more time rates of pay are so fixed, the amount of remuneration for that worker's normal weekly number of hours of work calculated at the higher or highest of those rates and so reduced,
- (c) paragraph (c) of that definition, **bonus**, in relation to a worker, means any amount received by that worker under the terms of that worker's employment under any bonus, incentive or other similar scheme, not being an amount taken into consideration in determining the amount of the average weekly wage of that worker referred to in paragraph (b) of that definition, and
- (d) paragraph (d) of that definition, the cash value of any board or 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, shall be computed at the rate of \$15, or such greater sum as may be prescribed instead, a week for board and \$5, or such greater sum as may be prescribed instead, a week for lodging.
- (2A) For the purpose of subsection (2) (b), where no normal weekly number of hours of work is fixed for a worker under the terms of that worker's employment, the normal weekly number of hours of work shall be deemed to be the average weekly number of hours worked by that worker during the period of 12 months, or 5 years, as the case may require, ending on the prescribed date.
- (2B) Where long service leave has accrued to a worker and the employer of that worker and that worker have agreed that the taking of the long service leave due to that worker or any part thereof shall be postponed that employer and that worker may agree that, for the purposes of the definition of **ordinary pay** in subsection (1), the prescribed date shall, in relation to that long service leave or part, as the case may be, be the date the agreement was entered into.
- (2C) Despite anything to the contrary in this section, the ordinary pay of a worker is not to include or be increased by the amounts paid under any bonus, incentive or other similar scheme if the annual amount of the worker's ordinary pay (excluding any

amounts so paid) exceeds the amount prescribed by the regulations for the purposes of this subsection.

- (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 lastmentioned 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 Relations Act 1996* 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 Long service leave

- (1) Except as otherwise provided in this Act, every worker shall be entitled to long service leave on ordinary pay in respect of the service of the worker with an employer. Service 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) Subject to paragraph (a2) and subsection (13) 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 10 years service with an employer be:
 - (A) in respect of 10 years service so completed, 2 months, and
 - (B) in respect of each 5 years service with the employer completed since the worker last became entitled to long service leave, 1 month, and
 - (C) on the termination of the worker's services after the completion of 15 years service, in respect of the number of years service with the employer completed since the worker last became entitled to an amount of long

service leave, a proportionate amount on the basis of 2 months for 10 years service, and

- (ii) in the case of a worker who has completed at least 10 years service but less than 15 years with an employer and whose services with the employer are terminated or cease for any reason, be a proportionate amount on the basis of 3 months for 15 years service, and
- (iii) in the case of a worker who has completed with an employer at least five years service, and whose services are terminated by the employer for any reason other than the worker's serious and wilful misconduct, or by the worker on account of illness, incapacity or domestic or other pressing necessity, or by reason of the death of the worker, be a proportionate amount on the basis of 2 months for 10 years service.

(a1) (Repealed)

(a2) In the case of a worker, whose service with an employer began before the commencement of the *Long Service Leave (Amendment) Act 1963* and whose service would entitle the worker to long service leave under this section, the amount of long service leave to which such worker shall be entitled shall be the sum of the following amounts:

- (i) an amount calculated on the basis of three months for twenty years service in respect of the period of service of the worker before such commencement, and
- (ii) an amount calculated on the basis of 2 months for 10 years service in respect of the period of service of the worker as from such commencement.

(a3) For the purposes of subsections (2), (3) and (3A), **month** means 4 and one-third weeks.

(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 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.

(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 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), 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 (5), where a worker has become entitled to long service leave in respect of the service of the worker 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 2 months, in two separate periods,
 - (ii) where the amount of the leave exceeds 2 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:

Provided that where any leave has been given to and taken by the worker pursuant to subsection (3A), this subsection shall apply to and in respect of so much only of the leave to which the worker has become entitled as has not been so given and taken.

- (3A) If the employer and the worker so agree, a period of long service leave of not less than one month may be given by the employer, and taken by the worker, wholly or partly in advance before the worker has become entitled to any long service leave or to the amount so agreed to be given and taken. No such agreement shall, for the purposes of subsection (2) (A) (i) (B) or (C), be deemed to confer on the worker an entitlement to long service leave.
- (4) The long service leave provided by this section is exclusive of annual holidays occurring during the taking of any period of long service leave.
- (4A) Where:
- (a) any day appointed by the Governor as a public holiday to be observed generally throughout New South Wales occurs during any period of long service leave taken by a worker under this section, and

(b) the worker is entitled to payment in respect of that day under any Act, award or industrial agreement or under the contract of employment of the worker,

the period of the long service leave shall be increased by one day in respect of that public holiday.

(5)

(a) Where the services of a worker are terminated otherwise than by the worker's 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 and has not been taken,

the worker shall, subject to subsection (13), 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 the worker's 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) accrued upon termination of the services of the worker by reason of the worker's death and has not been taken,

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.

(c) On the termination of the services of a worker who had taken any leave pursuant to subsection (3A) the worker's employer may, subject to this paragraph and subsection (13), deduct from any remuneration payable on such termination in respect of the worker's services:

(i) if the worker had not become entitled to any long service leave in the course of or upon the termination of the worker's services—the amount paid to the worker as ordinary pay for the leave so taken, or

(ii) if the worker had become so entitled—the amount paid to the worker as ordinary pay for the excess, if any, over the worker's total entitlement of the period or total of the periods of long service leave on ordinary pay given pursuant to this Act by that employer to and taken by the worker.

(5AA) Notwithstanding subsection (5) (c), the deduction to be made pursuant to subsection (5) (c) shall not exceed the amount of ordinary pay that would have been

payable for the period of leave or excess leave, as the case may be, had it been taken on the termination of the services of the worker.

- (5A) An employer shall not give to a person who is a registered worker under the *Building and Construction Industry Long Service Payments Act 1974* any long service leave or pay to any such person any payment in respect of long service leave unless that person applies to the employer for the leave or payment.
- (5B) An employer must not give to a person who is a registered worker under the *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010* any long service leave or pay to any such person any payment in respect of long service leave unless that person applies to the employer for the leave or payment.
- (6) (Repealed)
- (7) Subject to subsection (5), 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 the worker's 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 (5), 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 12.
- (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:
- (a) service of a worker with an employer means continuous service, whether on a

permanent, casual, part-time or any other basis, under one or more contracts of employment,

(a1) the service of a worker with an employer shall be deemed to be continuous notwithstanding that the service has been broken by reason only of an interruption or determination thereof:

- (i) caused by the absence of the worker under the terms of the worker's employment,
- (ii) caused by the absence of the worker on account of illness or injury,
- (iii) made by the employer with the intention of avoiding any obligation imposed on the employer by this Act or by any obligation in relation to sick leave imposed on the employer by a State industrial instrument,
- (iv) arising directly or indirectly from an industrial dispute,
- (v) made by the employer by reason of slackness of trade,
- (vi) arising from the absence of the worker for any cause by leave of the employer, or
- (vii) caused by the employer for any reason other than those referred to in subparagraphs (iii)-(v) where the worker returns to the service of, or is re-employed by, the employer within 2 months of the date on which the service was interrupted or determined,

but the period during which the service is so interrupted or determined shall not in the circumstances referred to in subparagraphs (iii)-(vii), 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 twelve months after the completion of an apprenticeship with the employer the period of the worker's apprenticeship shall be taken into account for the purpose of ascertaining the period of service of the worker 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) to another employer (in this paragraph called the transferee) 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 transferee:

- (i) the continuity of the period of service 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 transmitter or any prior transmitter 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, subject to subsection (12), 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 that person commenced to serve as such member.

(12)

- (a) Subsection (11) (d) shall not, where the period during which a person served as a member of the naval, military or air forces of the Commonwealth commenced by enlistment or appointment in any such force after the second day of September one thousand nine hundred and forty-five apply to and in respect of that period unless, pursuant to an Act of the Parliament of the Commonwealth of Australia enacted before or after the commencement of the *Long Service Leave (Amendment) Act 1967*, that person was entitled to apply to be reinstated in that person's former civil employment on the termination of that person's period of service as such a member and that person did not, at the expiration of the period during which that right subsisted, continue as a member of such a force.
- (b) For the purposes of this subsection, the former employer to whom application for reinstatement is required to be made pursuant to an Act of the Parliament of the Commonwealth of Australia referred to in paragraph (a) shall, notwithstanding anything contained in any such Act, be deemed to be and always to have been the employer by whom the member of the naval, military or air forces of the Commonwealth was last employed before the commencement of the service, as such a member, entitling the person to apply to be reinstated in civil employment.

(13)

- (a) In this subsection:

Award includes:

- (a) an agreement, and
- (b) a modern award in force under the *Fair Work Act 2009* of the Commonwealth, and

(c) a Division 2B State award under Schedule 3A to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* of the Commonwealth.

Corporation means any body corporate formed or incorporated in or outside New South Wales.

Holding company and **subsidiary** have the same meanings as they have in the *Corporations Act 2001* of the Commonwealth.

Termination means termination by any person or by any cause.

(b) For the purposes of this subsection:

(i) where a corporation is:

(A) the holding company, or

(B) a subsidiary, or

(C) a subsidiary of the holding company,

of another corporation, the first mentioned corporation and that other corporation shall, and no two corporations shall in any other case, be deemed to be related to each other,

(ii) a worker shall be deemed to have transferred from the service of an employer to the service of another employer, only if before, concurrently with or within a period of two months after the termination of the worker's services with the first mentioned employer the worker entered into a contract of employment with that other employer, and the transfer shall be deemed to have occurred at the time of that termination.

(c) Where before or after the commencement of the *Long Service Leave (Amendment) Act 1967* a worker has transferred from the service of an employer (in this paragraph called the first employer) being a corporation to the service of another employer being a corporation related to the first employer at the time of that transfer, then for the purposes of this section:

(i) the continuity of the period of service of the worker shall be deemed not to have been broken by reason of the transfer, and

(ii) the period of service which the worker has had with the first employer before the commencement of the service of the worker with that other employer (including any service which by reason of a prior transfer or prior transfers or for any other reason the worker is deemed by this section or, for the purposes of long service leave for such service, the worker is deemed by any Act or award to have had with the first employer) shall be deemed to be service of the worker with that other employer.

- (d) Where before or after the commencement of the *Long Service Leave (Amendment) Act 1967* a worker has entered into a contract of employment with an employer, being a corporation, within a period of twelve months after the completion of an apprenticeship with another employer, being a corporation which at the time of such entry into employment was related to the first mentioned employer, the period of the worker's apprenticeship shall be taken into account for the purpose of ascertaining the period of service of the worker with the first mentioned employer under that contract of employment.
- (e) Where the services of a worker with an employer are terminated and that employer is a corporation to which any other corporation is related at the time of that termination, the services of the worker shall not, for the purposes of subsections (2) and (5), be deemed to have been so terminated if the worker transfers to the employment of any such related corporation.
- (f) A worker or the worker's personal representative shall not be entitled by virtue of this subsection to long service leave or payment therefor in respect of any period of service if in respect of that period of service an employer was required by any other provisions of this Act, or by any other Act or any award, to give to the worker any long service leave and to pay wages or other remuneration therefor, or to pay wages or other remuneration for long service leave deemed to have been given to the worker, and if the obligations of that employer in that behalf have been fully satisfied and discharged.

Note—

An offence against this Act arising under this section committed by a corporation is an executive liability offence attracting executive liability for a director or other person involved in the management of the corporation—see section 10A.

4A Payments to building and construction workers to be notified

An employer who intends to make any payment by way of a benefit under this Act to or in respect of an employee employed (or who was employed) in building and construction work (within the meaning of the *Building and Construction Industry Long Service Payments Act 1986*) must notify the Long Service Corporation of its intention before making the payment.

4B Payments to contract cleaning industry workers to be notified

An employer who intends to make any payment by way of a benefit under this Act to or in respect of an employee employed (or who was employed) in cleaning work (within the meaning of the *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010*) must notify the Long Service Corporation of its intention before making the payment.

4C Benefits under this Act and Contract Cleaning Industry (Portable Long Service Leave

Scheme) Act 2010

- (1) This section applies to an employee who:
 - (a) is registered under the *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010*, and
 - (b) has elected under that Act to take long service leave benefits under that Act for a period stated by the employee.
- (2) The employee's election does not prevent the employee from receiving benefits under this Act.
- (3) However, the employee is not entitled to a benefit under this Act for a period for which the employee received a benefit under the *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010*.

5 Exemptions

- (1) Section 4 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 (whether immediately or upon the fulfilment of certain conditions) to leave in the nature of long service leave are made:
 - (a) by an award or agreement, whether made before or after the commencement of this Act, and such provisions are more favourable to the worker than those of section 4, or
 - (b) by or under any Act, other than this Act or the *Industrial Relations Act 1996*.

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 the worker's employer the service of the worker as a member of such class shall not be service for the purposes of section 4.

- (2)
 - (a) Subject to section 5A, the Industrial Relations Commission 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 section 88C (4) of the *Industrial Arbitration Act 1940* and in force immediately before the commencement of this Act shall be deemed to have been granted

pursuant to paragraph (a).

(c)

- (i) Any exemption granted pursuant to paragraph (a) 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 effect, or the date of commencement of the worker's 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) to have been granted pursuant to paragraph (a) 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 section 88C (4A) of the *Industrial Arbitration Act 1940* 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 the worker's 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 the worker would have been entitled to make an election had that subsection (4A) not been amended by section 13 (1).
- (iii) Notwithstanding any provision of any scheme referred to in subparagraph (i) or (ii) 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 the worker would have been entitled to receive had the worker 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 the worker's employment shall cease and determine.

(d) The Industrial Relations Commission may vary the terms of any exemption granted or deemed by paragraph (b) to have been granted pursuant to paragraph (a) or any condition subject to which the exemption was or was deemed to have been granted, and may revoke the exemption.

(3) As from the date of commencement of the *Long Service Leave (Amendment) Act 1963* no exemption shall be granted pursuant to subsection (2) (a) to any employer, in respect of any scheme conducted by or on behalf of the employer, which does not provide for the granting of long service leave, as such, to the workers covered by such scheme.

- (4) The Industrial Relations Commission may, of its own motion, and on application by an industrial organisation within the meaning of the *Industrial Relations Act 1996*, or an employer, concerned, shall review the terms of any exemption granted, or deemed by subsection (2) (b) to have been granted, pursuant to subsection (2) (a) before the commencement of the *Long Service Leave (Amendment) Act 1963*.

Where after such a review the Commission is of the opinion that the benefits under a scheme, the subject of the exemption, are not as favourable as those specified in this Act, or that it is no longer in the best interests of the workers concerned that the exemption should continue to operate, the Commission may vary the terms of such exemption or any condition subject to which the exemption was or was deemed to have been granted, or may revoke the exemption.

5A Review of exemptions

- (1) In this section, **exemption** means an exemption granted under section 5 (2) (a).
- (2) Unless sooner revoked, an exemption granted after the commencement of this section remains in force for the period of 3 years from the date on which it is granted or for such shorter period as the Industrial Relations Commission specifies when granting it, but it may be extended by the Commission from time to time for a further period or further periods of 3 years or such shorter period or periods as the Commission specifies when extending it.
- (3) The Industrial Relations Commission may review any exemption:
- (a) of its own motion, after causing a notice to be served on such persons as appear to be appropriate in the circumstances stating that the Commission requires them to show cause why the exemption should not be varied or revoked on the ground that the benefits provided by this Act are more favourable than those then applying,
 - (b) on application by an industrial organisation within the meaning of the *Industrial Relations Act 1996*, or by an employer, affected by the exemption, or
 - (c) at the request of the Minister or following a report by the Industrial Registrar.
- (4) After reviewing an exemption, the Industrial Relations Commission may confirm the exemption, vary the terms of the exemption or any condition subject to which the exemption was granted, or revoke the exemption.

6 Savings as to powers etc

Nothing contained in this Act shall limit or in any way affect the powers, authorities, duties and functions conferred and imposed on the Industrial Relations Commission by or under the *Industrial Relations Act 1996* in respect of long service leave:

Provided that in the exercise and performance of such powers, authorities, duties and

functions, the Commission shall not in any award 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 4 or are applicable to persons who are not workers entitled to the long service leave provided by section 4.

7 Contracting out prohibited

- (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.
- (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 Records to be kept by employers

Every employer shall keep or cause to be kept a long service leave record in a form approved by the Minister for a period of at least 6 years after the last entry therein.

Note—

An offence against this Act arising under this section committed by a corporation is an executive liability offence attracting executive liability for a director or other person involved in the management of the corporation—see section 10A.

9 Powers of inspectors

- (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 the inspector 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.
- (3) Where a worker claims that an employer has not paid the full amount of any payment which has become due to the worker under this Act, an inspector may, by notice in writing served personally or by post, require the employer to deliver or to send by post to the inspector, within such time and to such place as are specified in the notice:

- (a) a copy of such specified part of the long service leave record required to be kept under this Act, and
 - (b) such other information of a specified kind relating to that payment,
- as the inspector considers necessary in order to investigate the claim.
- (4) A public servant authorised in that behalf by the Under Secretary of the Department of Industrial Relations may exercise the power conferred on an inspector by subsection (3).

9A Disclosure of information

- (1) Subject to subsection (2), a person who is, or was at any time, an inspector or a public servant authorised under section 9 (4) shall not disclose any information relating to any manufacturing or commercial secrets or working processes and obtained by the person in connection with the administration or execution of this Act or the regulations made thereunder.
- (2) Subsection (1) does not operate to prevent the disclosure of information where that disclosure is:
- (a) made in connection with the administration or execution of this Act or the regulations made thereunder,
 - (b) made with the prior permission of the Minister, or
 - (c) ordered by a court, or by any other body or person authorised by law to examine witnesses, in the course of, and for the purpose of, the hearing and determination by that court, body or person of any matter or thing.
- (3) The Minister may grant the permission referred to in subsection (2) (b) only if the Minister is satisfied that to do so would be in the public interest.

10 Penalties and offences

- (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 20 penalty units.
- (2) Every person who:
- (a) makes any false or misleading statement in, or any material omission from, any long service leave record which the person is required to keep, or
 - (b) obstructs any inspector in the exercise of the inspector's 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 20 penalty units.

- (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 the employer 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 20 penalty units.
- (4) (Repealed)
- (5) In this section, **inspector** includes a public servant authorised under section 9 (4).

10A Liability of directors etc for offences by corporation—offences attracting executive liability

- (1) For the purposes of this section, an **executive liability offence** is an offence against this Act arising under any of the following provisions of this Act that is committed by a corporation:
- (a) section 4,
 - (b) section 8.
- (2) A person commits an offence against this section if:
- (a) a corporation commits an executive liability offence, and
 - (b) the person is:
 - (i) a director of the corporation, or
 - (ii) an individual who is involved in the management of the corporation and who is in a position to influence the conduct of the corporation in relation to the commission of the executive liability offence, and
 - (c) the person:
 - (i) knows or ought reasonably to know that the executive liability offence (or an offence of the same type) would be or is being committed, and
 - (ii) fails to take all reasonable steps to prevent or stop the commission of that offence.

Maximum penalty: The maximum penalty for the executive liability offence if committed by an individual.

- (3) The prosecution bears the legal burden of proving the elements of the offence against this section.

- (4) The offence against this section can only be prosecuted by a person who can bring a prosecution for the executive liability offence.
- (5) This section does not affect the liability of the corporation for the executive liability offence, and applies whether or not the corporation is prosecuted for, or convicted of, the executive liability offence.
- (6) This section does not affect the application of any other law relating to the criminal liability of any persons (whether or not directors or other managers of the corporation) who are accessories to the commission of the executive liability offence or are otherwise concerned in, or party to, the commission of the executive liability offence.
- (7) In this section:

director has the same meaning it has in the [Corporations Act 2001](#) of the Commonwealth.

reasonable steps, in relation to the commission of an executive liability offence, includes, but is not limited to, such action (if any) of the following kinds as is reasonable in all the circumstances:

- (a) action towards:
 - (i) assessing the corporation's compliance with the provision creating the executive liability offence, and
 - (ii) ensuring that the corporation arranged regular professional assessments of its compliance with the provision,
- (b) action towards ensuring that the corporation's employees, agents and contractors are provided with information, training, instruction and supervision appropriate to them to enable them to comply with the provision creating the executive liability offence so far as the provision is relevant to them,
- (c) action towards ensuring that:
 - (i) the plant, equipment and other resources, and
 - (ii) the structures, work systems and other processes,relevant to compliance with the provision creating the executive liability offence are appropriate in all the circumstances,
- (d) action towards creating and maintaining a corporate culture that does not direct, encourage, tolerate or lead to non-compliance with the provision creating the executive liability offence.

10B Liability of directors etc for offences by corporation—accessory to the commission of

the offences

- (1) For the purposes of this section, a **corporate offence** is an offence against this Act or the regulations that is capable of being committed by a corporation, whether or not it is an executive liability offence referred to in section 10A.
- (2) A person commits an offence against this section if:
 - (a) a corporation commits a corporate offence, and
 - (b) the person is:
 - (i) a director of the corporation, or
 - (ii) an individual who is involved in the management of the corporation and who is in a position to influence the conduct of the corporation in relation to the commission of the corporate offence, and
 - (c) the person:
 - (i) aids, abets, counsels or procures the commission of the corporate offence, or
 - (ii) induces, whether by threats or promises or otherwise, the commission of the corporate offence, or
 - (iii) conspires with others to effect the commission of the corporate offence, or
 - (iv) is in any other way, whether by act or omission, knowingly concerned in, or party to, the commission of the corporate offence.

Maximum penalty: The maximum penalty for the corporate offence if committed by an individual.

- (3) The prosecution bears the legal burden of proving the elements of the offence against this section.
- (4) The offence against this section can only be prosecuted by a person who can bring a prosecution for the corporate offence.
- (5) This section does not affect the liability of the corporation for the corporate offence, and applies whether or not the corporation is prosecuted for, or convicted of, the corporate offence.
- (6) This section does not affect the application of any other law relating to the criminal liability of any persons (whether or not directors or other managers of the corporation) who are concerned in, or party to, the commission of the corporate offence.

11 Recovery of penalties

- (1) Proceedings for the recovery of a penalty under this Act are to be taken before the

Local Court and may be taken by:

- (a) an inspector, or
- (b) the secretary of an industrial organisation within the meaning of the *Industrial Relations Act 1996* whose members are engaged in the industry concerned, or
- (c) a person whose rights are impaired.

- (2) In any such proceedings the Local Court 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 12. Such order may be made without motion and shall be a bar to further proceedings under section 12 in respect of such payment.
- (3) In any proceedings under this section the Local Court before whom such proceedings are taken may award costs to either party and assess the amount of such costs.
- (4) The prosecutor may conduct his or her case personally or by the prosecutor's Australian legal practitioner or an agent duly authorised by the prosecutor in writing.

12 Recovery of long service leave pay

- (1) Any worker may apply to the Local Court, or to the Industrial Relations Commission in Court Session, 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 the period of 6 years immediately preceding the date of the application but not earlier than 2 years before the date of assent to the *Long Service Leave (Amendment) Act 1980*.

The Local Court or Industrial Relations Commission in Court Session may make any order it thinks just in the matter and may award costs to either party, and assess the amount of such costs.

(1A) (Repealed)

- (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 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 organisation of employees within the meaning of the *Industrial Relations Act 1996* concerned in the industry to which the award or 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 charge to the employer for the amount mentioned in the receipt.

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 the secretary or other officer on trust for the worker on whose behalf the proceedings were taken.

13 Amendment of Act No 2, 1940 and savings

- (1) (Repealed)
- (2) Where the provisions of an award or industrial agreement in force immediately before the commencement of the *Long Service Leave (Amendment) Act 1985* entitling workers to long service leave are not more favourable to the workers than the provisions of section 4 the first-mentioned provisions shall, as from the commencement of the *Long Service Leave (Amendment) Act 1985*, 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 4, 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 4 the first-mentioned provisions shall not cease to have force or effect by reason only of the amendments to the *Industrial Arbitration Act 1940* made by subsection (1).
- (4) Where pursuant to any provision of an award or industrial agreement to which subsection (2) applies:
 - (a) any person before the commencement of the *Long Service Leave (Amendment) Act 1985* 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 (2) shall take away or affect the right of that person or of that person's 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 subsection (2) not been enacted.

14 Provisions as to enforcement of orders, appeals etc

The provisions of the *Industrial Relations Act 1996*, and of the regulations made under that Act, relating to:

- (a) recovery of a penalty, and

- (b) an application for, and enforcement of, an order for the payment of money, and
- (c) an appeal from, or the stating of a case by, the Local Court to the Industrial Relations Commission in Court Session,

apply to proceedings under this Act for the recovery of a penalty or the payment of money.

15 Regulations

- (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.
- (2) Such regulations may impose a penalty not exceeding 1 penalty unit for any breach thereof.
- (3) (Repealed)

16 Savings and transitional provisions

Schedule 1 has effect.

Schedule 1 Savings and transitional provisions

(Section 16)

1 Provision consequent on enactment of [Long Service Leave \(Amendment\) Act 1985](#)

- (1) For the purposes of:
 - (a) the application of section 4 (11) in respect of a period of service before 9 May 1985, and
 - (b) without affecting the generality of paragraph (a), any proceedings instituted before or after that date in relation to the long service leave entitlement of a worker in respect of a period of service before that date,section 4 (11) is to be construed as if it had not been amended by the amending Act.
- (2) Section 13 (2) and (4), as in force immediately before 4 May 1995, continues to apply to and in respect of any award or industrial agreement or right of a person to payment in respect of long service leave, as the case may be, to which those subsections applied immediately before that date and to which those subsections, as amended by the amending Act, do not apply.
- (3) This clause is taken to have commenced on 9 May 1985 (the date of assent to the amending Act).
- (4) Subclauses (1) and (2) re-enact (with minor modifications) clauses 3 and 4 of

Schedule 3 to the amending Act. Subclauses (1) and (2) are transferred provisions to which section 30A of the *Interpretation Act 1987* applies.

(5) In this clause:

amending Act means the *Long Service Leave (Amendment) Act 1985*.

2 Provision consequent on enactment of Long Service Leave Legislation Amendment Act 2001

(1) An amendment made by the *Long Service Leave Legislation Amendment Act 2001* applies to any termination of employment after the commencement of the amendment, and in respect of any such termination applies to periods of service before or after the commencement of the amendment.

(2) This clause has effect for the purposes of this Act and also for the purposes of the other Acts amended by that Act.

3 Provision consequent on appointment of APEC public holiday

(1) Section 4 (4A) applies in relation to the APEC public holiday as if that holiday were appointed under section 4 (4A) (a), but only in respect of employment in the local government areas in which the APEC public holiday is to be observed.

(2) In this clause, **the APEC public holiday** means 7 September 2007, being the day appointed by the notice published under section 19 (3) of the *Banks and Bank Holidays Act 1912* in Gazette No 36 of 2 March 2007 as the day to be observed as a public holiday in the local government areas specified in the Schedule to the notice.