

Annual Holidays Act 1944 No 31

[1944-31]



New South Wales

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Annual Holidays Act 1944 No 31



New South Wales

An Act to provide for annual holidays for workers; to amend the *Industrial Arbitration Act 1940* and certain other Acts; and for purposes connected therewith.

1 Name of Act, commencement and construction

- (1) This Act may be cited as the *Annual Holidays Act 1944*.
- (2) This Act shall commence upon a day to be appointed by the Governor and notified by proclamation published in the Gazette.
- (3) 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.

2 Interpretation

- (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 remuneration for the worker's normal weekly number of hours of work calculated at the ordinary time rate of pay; and, where the worker is provided with board or lodging by his or her employer, includes the cash value of that board or lodging.

Week, in relation to any worker, means the worker's ordinary working week.

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 salesperson, 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.

(2) For the purposes of the definition of the term **ordinary pay** in subsection (1):

(a) the term **ordinary time rate of pay** in the case of a worker who is remunerated in relation to an ordinary time rate of pay fixed by the terms of the worker's employment means the time rate of pay so fixed for the worker's work under the terms of the worker's employment, including shift allowances relating to ordinary time and weekend penalties relating to ordinary time the worker would have worked on days other than public holidays if the worker had not been on annual holidays, but does not include any other amount payable to the worker in respect of shift work, overtime or penalty rates, and where two or more time rates of pay are so fixed means the higher or highest of those rates,

(a1) where a worker is remunerated otherwise than in relation to an ordinary time rate of pay so fixed, or partly in relation to an ordinary time rate of pay so fixed and partly in relation to any other manner, or where no ordinary time rate of pay is so fixed for a worker's work under the terms of the worker's employment, the worker's ordinary pay shall be deemed to be the average weekly wage earned by the worker during the period actually worked by the worker during the period of twelve months immediately preceding the annual holiday or, as the case may be, during the period of employment in respect of which a right to payment under section 4 (3) or under section 4A accrues.

For the purposes of this paragraph the average weekly wage earned by a worker shall be the average of the amounts received by the worker each week under the terms of the worker's employment including shift allowances relating to ordinary time and weekend penalties relating to ordinary time the worker would have worked on days other than public holidays if the worker had not been on annual holiday, and excluding any other amount payable to the worker in respect of shift work, overtime or penalty rates,

(a2) where during the period of twelve months immediately preceding the annual holiday or, as the case may be, during the period of employment in respect of which a right to payment under section 4 (3) or under section 4A accrues the worker has received under the terms of the worker's employment, any amount under any bonus, incentive or other similar scheme (other than any amount taken into consideration in assessing an average weekly wage in terms of paragraph (a1)) the worker's ordinary pay shall be increased by a further sum namely the sum which the worker would have received each week in respect of such bonus,

incentive or other similar scheme had such amount been paid by equal weekly payments throughout that period,

- (b) where no normal weekly number of hours is fixed for a worker under the terms of the worker's employment, the normal weekly number of hours of work shall be deemed to be the average weekly number of hours worked by the worker during the applicable period referred to in paragraph (a1),
- (c) 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 three dollars, or such greater sum as may be prescribed in lieu thereof, a week for board and one dollar, or such greater sum as may be prescribed in lieu thereof, a week for lodging.

(3) Notwithstanding anything contained in subsection (2) (a1) or (a2), for the purposes of the definition of the term **ordinary pay** in subsection (1), where a worker is remunerated partly in relation to an ordinary time rate of pay fixed by the terms of the worker's employment and partly in relation to a bonus, incentive or other similar scheme, the worker's ordinary pay shall be deemed to be the sum of:

- (a) the worker's weekly remuneration at the ordinary time rate of pay so fixed at the commencement of the annual holiday or, as the case may be, at the end of the period of employment in respect of which a right to payment under section 4 (3) or section 4A, accrues,
- (b) the average of the amounts received by the worker each week in respect of the bonus, incentive or other similar scheme:
 - (i) during the period actually worked by the worker during the twelve months immediately preceding the commencement of the worker's annual holiday, or
 - (ii) during the period of employment in respect of which a right to payment under section 4 (3) or section 4A accrues,

as the case may be, and

- (c) shift allowances relating to ordinary time and weekend penalties relating to ordinary time the worker would have worked on days other than public holidays if the worker had not been on annual holiday,

but excluding any other amounts paid to the worker in respect of shift work, overtime or penalty rates.

(4) For the purposes of subsections (2) (a1), (2) (b) and (3), in computing the period actually worked by a worker no regard shall be had to any period during which, on account of illness or injury, the worker was temporarily assigned to duties or work entitling the worker to payment of wages lower than the wages the worker would have

received had the worker not been assigned to those duties or that work on that account, unless the worker was assigned to those duties or that work during the whole of the period actually worked by the worker.

- (5) Notwithstanding the provisions of subsection (2) (a), (2) (a1) or (3), where by any award or agreement a worker is entitled to shift allowances relating to ordinary time or weekend penalties relating to ordinary time the worker would have worked on days other than public holidays if the worker had not been on annual holiday or to an annual holiday loading, whichever is the greater, the ordinary time rate of pay or the ordinary pay, as the case may be, of that worker shall not, in respect of any annual holiday to which the worker is entitled under this Act, include those allowances and penalties.
- (6) 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 Annual holidays with pay

- (1) Except as otherwise provided in this Act, every worker shall at the end of each year of the worker's employment by an employer become entitled to an annual holiday on ordinary pay.

Such annual holiday shall:

- (a) where any such year of employment ends upon or before 30 November 1974, be of three weeks,
 - (b) where any such year of employment ends after 30 November 1974, be of four weeks.
- (2) An annual holiday shall be given and taken either in one consecutive period or two periods which shall be of three weeks and one week respectively, or if the worker and the employer so agree, in either two, three or four separate periods and not otherwise.
 - (3) If the worker and the employer so agree, the annual holiday or any of such separate periods may be taken wholly or partly in advance before the worker has become entitled to the annual holiday.
 - (4) The annual holiday shall be given by the employer and shall be taken by the worker before the expiration of a period of six months after the date upon which the right to such holiday accrues: Provided that the giving and taking of the whole or any separate period of such annual holiday may, with the consent in writing of the Industrial Registrar, or Deputy Industrial Registrar appointed under the *Industrial Relations Act 1996*, be postponed for a period to be specified by such Registrar in any case where

he or she is of opinion that circumstances render such postponement necessary or desirable.

- (5) Except as provided in section 4 or section 4A, payment shall not be made by an employer to a worker in lieu of any annual holiday or part thereof to which the worker is entitled under this Act nor shall any such payment be accepted by the worker.
- (6)
 - (a) The employer shall give each worker at least one month's notice of the date from which the worker's annual holiday shall be taken.
 - (b) The employer shall pay each worker in advance before the commencement of the worker's annual holiday, the worker's ordinary pay for the holiday period.
- (7) Where the annual holiday or any part thereof has been taken before the right to the annual holiday has accrued the right to a further annual holiday shall not commence to accrue until after the expiration of the year of employment in respect of which the annual holiday or part has been so taken.
- (8) Where any special or public holiday for which the worker is entitled to payment under any Act, award or agreement or under the worker's contract of employment, occurs during any period of an annual holiday taken by a worker under this section, the period of the holiday shall be increased by one day in respect of that special or public holiday.

4 Holiday pay where holiday is not taken

- (1) Where the employment of a worker who has become entitled to one or more annual holidays provided by this Act is terminated, the employer shall be deemed to have given the holiday or holidays (except so much, if any, as has already been taken) to the worker as from the date of termination of the employment, and shall forthwith pay to the worker, in addition to all other amounts due to the worker, the worker's ordinary pay for the period of the holiday or holidays.
- (2) Subsection (1) applies to and in respect of an annual holiday (except so much, if any, as has already been taken) whether or not the worker concerned continues to be entitled (apart from this section) to take it, and so applies as if the worker's right to take it had accrued immediately before the date of the termination of the worker's employment.
- (2A) Nothing in subsection (1) or (2) affects the obligation of an employer to give, or a worker to take, annual holidays in accordance with section 3.
- (3)
 - (a) This subsection applies with respect to every period of employment of a worker by any employer which is less than one year, such period being computed from the

date of the commencement of the employment or (where the worker has during the employment become entitled to any annual holiday or holidays under section 3) computed from the date upon which the worker became entitled to that annual holiday, or to the last annual holiday, as the case may be.

(b) Where the employment of any worker by any employer is terminated at the end of a period of employment to which this subsection applies, the employer shall forthwith pay to the worker, in addition to all other amounts due to the worker, an amount:

(i) where that period of employment ends upon or before 30 November 1974, equal to three forty-ninths of the worker's ordinary pay for that period of employment,

(ii) where that period of employment ends after 30 November 1974, equal to one twelfth of the worker's ordinary pay for that period of employment.

(4) Where the annual holiday under section 3 or any part thereof has been taken in advance by a worker pursuant to subsection (3) of that section, and

(a) the employment of the worker is terminated before the worker has completed the year of employment in respect of which such annual holiday or part was taken, and

(b) the sum paid by the employer to the worker as ordinary pay for the annual holiday or part so taken in advance exceeds the sum which the employer is required to pay to the worker under subsection (3) of this section,

the employer shall not be liable to make any payment to the worker under subsection (3) of this section, and shall be entitled to deduct the amount of such excess from any remuneration payable to the worker upon the termination of the employment.

4A Annual close-down

(1)

(a) In this section:

Period of employment means the period during which a worker is employed by an employer referred to in subsection (2), being a period computed:

(a) where the worker has not during the employment with that employer become entitled to any annual holiday under section 3, from the date of commencement of the employment with that employer, or

(b) where the worker has during the employment with that employer become entitled to any annual holiday or holidays under section 3, from the date upon which the worker last became entitled to an annual holiday,

up to the commencement of the specified period affecting that worker.

Specified period means the period specified by an employer pursuant to subsection (2).

- (b) This section, subsections (2) and (3) excepted, shall apply only to a worker to whom notice has been given pursuant to this section.
 - (c) Subsections (2) and (3) of section 3 shall not apply to a worker to whom notice has been given pursuant to this section.
- (2) Subject to subsection (3), an employer may give notice to a worker employed in any part of the employer's establishment that, during a period specified when giving that notice, that establishment or part will be temporarily closed (or reduced to a nucleus) for the purposes of giving an annual holiday or leave without pay to the workers to whom such notice has been given.
- (3) Notice pursuant to subsection (2):
- (a) shall be given to a worker not less than one month before the commencement of the specified period or, in the case of a worker who commences employment less than one month before the commencement of the specified period, on the day the worker commences employment, and
 - (b) shall not be given by an employer more than once in any calendar year.
- (4) Where, immediately before the commencement of the specified period, a worker is not entitled under section 3 to any holiday:
- (a) the worker shall be given and shall take leave without pay for the specified period, and
 - (b) the worker shall, in addition, be paid:
 - (i) three forty-ninths of the worker's ordinary pay for the worker's period of employment where the specified period commences upon or before 30 November 1974, and one twelfth of the worker's ordinary pay where the specified period commences after that date, and
 - (ii) the worker's ordinary pay for any special or public holiday, during the period of the worker's leave without pay, for which the worker would be entitled to payment under any Act, award or agreement or under the worker's contract of employment.
- (5) Where, immediately before the commencement of the specified period, a worker is under section 3 entitled to a holiday of a duration less than that of the specified period:

- (a) the worker shall be given and shall take the whole of that holiday during the specified period,
 - (b) the worker shall be given and shall take leave without pay for the balance of the specified period, and
 - (c) the worker shall, in addition, be paid the amounts referred to in subsection (4) (b).
- (6) Where, immediately before the commencement of the specified period, a worker is under section 3 entitled to a holiday of a duration not less than that of the specified period:
- (a) the worker shall, on and from the commencement of the specified period, be given and shall take the whole of that holiday, or
 - (b) where the worker and the employer so agree, the worker shall, on and from the commencement of the specified period, be given and shall take part of his or her holiday for a period not less than the specified period and postpone the taking of the balance of his or her holiday until a time to be agreed upon between the worker and the employer.
- (7) Where payment has been made to a worker pursuant to subsection (4) or (5) the worker shall be deemed:
- (a) to have completed a year of employment for the purposes of this Act immediately before the commencement of the specified period, and
 - (b) to have been given the whole of the annual holiday to which the worker would be entitled for that year of employment.

4B Protection of annual holiday entitlements on transfer of business

Part 8 of Chapter 2 of the *Industrial Relations Act 1996* applies for the purposes of determining a worker's entitlements under this Act when the worker is employed by an employer as a result of the transfer of business (within the meaning of that Part) to that employer from another employer on or after the commencement of this section.

5 Special provisions—annual holidays otherwise than under this Act

- (1) The following provisions shall apply in every case where provision is made by an award, agreement or contract of employment for annual holidays or annual leave for any worker:
- (a) where the worker is entitled under such provision to any benefit that is more favourable to the worker than the benefits provided by section 3, section 4 or section 4A, as the case may be, that section shall not apply to the worker,
 - (b) where the worker is entitled under any such provision to any benefit that is not

more favourable to the worker than the benefits provided by section 3, section 4 or section 4A, as the case may be, that section shall apply to the worker and no benefit shall be allowed to the worker under that provision in respect of any period of employment after the commencement of this Act in the case of a benefit not more favourable than that provided by section 3 or section 4 or, after the commencement of the *Annual Holidays (Amendment) Act 1967*, in the case of a benefit not more favourable than that provided by section 4A.

- (1A) Where provision is made by or under any Act, other than this Act or the *Industrial Relations Act 1996*, for annual holidays or annual leave for any worker, sections 3 and 4 shall not apply to such worker.
- (2) Where, under any award or agreement, provision is made for the granting to a worker who is a seven-day shift worker and is required to work regularly on Sundays and public holidays of a holiday in addition to that granted to other workers under such award or agreement or where, under any award or agreement, provision is made for the payment of a sum of money as an annual holiday loading:
- (a) such additional holiday or such payment, as the case may be, shall not be regarded as a benefit under that award or agreement for the purposes of subsection (1), and
 - (b) the right of the worker to such additional holiday or such payment, as the case may be, shall not be affected by anything contained in this Act.

6 Commencement of employment

The employment of a worker employed at the date of the commencement of this Act shall be deemed, for the purposes of this Act, to have commenced on that date.

7 Worker in employment at commencement of Act

- (1) Where provision is made by or under any Act, other than this Act, or by any award, agreement or contract of employment in force at the commencement of this Act, for an annual holiday for any worker who is in employment at such commencement, and the worker has not at such date completed the qualifying period of employment which would entitle the worker to such annual holiday, the worker shall be entitled to receive an annual holiday of a period which bears the same proportion to the period of annual holiday specified in that provision as the portion of such qualifying period during which the worker has been employed immediately before the commencement of this Act bears to the whole of such qualifying period.
- (2) Where provision is made by or under any Act, other than this Act, or by any award, agreement or contract of employment in force at the commencement of this Act for an annual holiday for any worker who is in employment at such commencement, and the worker has before such commencement become entitled under that provision to such annual holiday but has not taken the same, the worker's right to such annual holiday

shall not be affected by anything contained in this Act.

8 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.

9 Employers to keep holiday record

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

10 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 holiday 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 remuneration or 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 holiday record required to be kept under this Act, and
 - (b) such other information of a specified kind relating to that remuneration or 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).

10A 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 10 (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.

11 Penalty

- (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 10 penalty units.
- (2) Every person who:
 - (a) makes any false or misleading statement in, or any material omission from, any holiday 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 10 penalty units.
- (3) In this section, **inspector** includes a public servant authorised under section 10 (4).

12 Proceedings for recovery of penalties

- (1) Proceedings for the recovery of a penalty under this Act are to be taken before the Local Court or before the Supreme Court and may be taken by:
 - (a) an inspector, or
 - (b) the secretary of an industrial organisation whose members are engaged in the industry concerned, or
 - (c) a person whose rights are impaired.
- (2) In any such proceedings the Local Court or Supreme Court may, in addition to the imposition of any penalty, make such an order with respect to any remuneration or payment due to a worker under this Act as might have been made in proceedings taken under section 13. Such order may be made without motion and shall be a bar to further proceedings under section 13 in respect of such remuneration or payment.
- (3) In any proceedings under this section the Local Court or Supreme Court before which such proceedings are taken may award costs to either party and assess the amount of such costs.
- (4) (Repealed)
- (5) The prosecutor may conduct the case personally or by an Australian legal practitioner or an agent duly authorised by the prosecutor in writing.

13 Recovery of holiday pay

- (1) Any worker may apply to the Local Court, or to the Supreme Court, for an order directing the employer to pay to the worker the full amount of any remuneration or 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 18 months before the date of assent to the *Annual Holidays (Amendment) Act 1980*.

The Local Court or Supreme Court 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) A worker may take any such proceedings and may recover any such moneys due, and costs, notwithstanding the fact that the worker has not reached the age of twenty-one years.
- (3) 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 registered under the *Industrial Relations Act 1996*, concerned in the industry to which such 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 such secretary or other officer and the receipt of such secretary or other officer shall be a sufficient discharge to the employer for the amount mentioned in the receipt.

Any amount so paid to such secretary or other officer (less any costs properly incurred in connection with the proceedings and not paid by the employer) shall be held on trust for the worker on whose behalf the proceedings were taken.

14 Provisions as to enforcement of orders, appeals etc

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

- (a) recovery of a penalty, and
- (b) the making of an order for the payment of interest on an amount of money, and
- (c) an application for, and enforcement of, an order for the payment of money or interest on an amount of money, and
- (d) an appeal from, or the stating of a case by, the Local Court to the Supreme Court,

apply to proceedings under this Act for the recovery of a penalty or the payment of money or interest on an amount 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 0.5 penalty unit for any breach thereof.
- (3) (Repealed)