

2009

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**LONG SERVICE LEAVE (COMMUNITY SECTOR) AMENDMENT
BILL 2009**

EXPLANATORY STATEMENT

**Presented by
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Long Service Leave (Community Sector) Amendment Bill 2009

Overview

As part of the 2008-2009 Budget, the Government agreed to the establishment of a portable long service leave scheme for the community sector industry in 2009-2010. The Government also agreed that the Long Service Leave Authorities would provide for the administrative arrangements for the new community sector scheme.

The Long Service Leave (Community Sector) Amendment Bill 2009 (the Bill) creates a new Schedule to the *Long Service Leave (Portable Schemes) Act 2009*. The Bill provides amendments and a schedule specific to the Community Sector to establish a mandatory portable long service leave scheme for its workers and employer organisations.

It is anticipated that the proposed Community Sector Portable Long Service Leave Scheme (the Scheme) will support community sector workers in a number of ways. The Scheme will protect the basic entitlement to long service leave for all community sector workers even where this is accrued by service to multiple organisations, similar to government workers' entitlements to Long Service Leave even if accrued by service to multiple government departments.

It is expected that the Scheme will assist in the development of more career options for workers, helping to facilitate movement between organisations and potentially providing more variety in work and greater prospects for promotion.

Administrative arrangements

The administration of the Long Service Leave (Community Sector) Amendment Bill 2009 will be the responsibility of the Chief Executive Officer/Registrar of Long Service Leave Authority (LSL Authority).

Financial arrangements

The LSL Authorities are currently required to maintain separate operations for the purposes of the Board's secretariats, financial and annual reporting and fund investment. These requirements are met by the same administrative unit.

Mirroring the arrangements of the Construction and Cleaning Industry Long Service Leave Schemes, the Bill quarantines the assets of each industry's long service leave fund. As a consequence the Community Sector industry scheme will maintain the requirement to produce a separate financial statement and reporting requirements.

Consultation

An ACT Community Sector Long Service Leave Scheme Steering Committee was established to oversee the development of the Community Sector Portable Long Service Leave (PLSL) Scheme, with representatives from the Office of Industrial Relations, the Department of Disability, Housing and Community Services (DHCS) and the Long Service Leave Authority. The Long Service

Leave Authority will be responsible for the implementation and administration of the Scheme.

Community consultation was undertaken in two stages, with employers, employees, peak organisations and unions by an independent consultant.

Financial implications

As an independent ACT Statutory Authority, the LSL Authorities' are self-funding and do not rely on the ACT Budget for support. The ACT Government has committed to providing the LSL Authority with initial establishment costs of the Scheme. The Scheme will be self funded on an ongoing basis by the levy contributed from each employee's wages.

Strict liability offences

Where clauses in the Bill may cross reference to clauses in the *Long Service Leave (Portable Schemes) Act 2009* these refer to offences incorporating strict liability. The offences incorporating strict liability elements have been carefully considered during the Bill's development. The strict liability offences arise in a regulatory context where for reasons such as public safety, the public interest in ensuring that regulatory schemes are observed, requires the sanction of criminal penalties.

In particular, where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental, or fault, element can justifiably be excluded. The rationale is that people who owe a duty of care to workers, such as employers, as opposed to members of the general public, can be expected to be aware of their duties and obligations to their employees.

Unless some knowledge or intention ought to be required to commit a particular offence (in which case a specific defence is provided), the defendant's frame of mind at the time of committing the strict liability offences is irrelevant. The penalties for offences cast in these terms are lower than for those requiring proof of fault.

Long Service Leave (Community Sector) Amendment Bill 2009

Detail on clauses

Part 1 Preliminary

Clause 1 – Name of Act

This is a technical clause that names the Act. The name of the Act is the *Long Service Leave (Community Sector) Amendment Act 2009*.

Clause 2 - Commencement

This Act will commence on 1 July 2010.

Clause 3 – Legislation Amended

This clause establishes that the Long Service Leave (Community Sector) Bill 2009 amends the *Long Service Leave (Portable Schemes) Act 2009*.

Clause 4 - What is a *covered industry*?

This clause provides that a *covered industry*, for the purposes of establishing the portable long service leave scheme (community sector), is the community sector industry.

Clause 5 – Section 6, new note 3

This clause allows for the inclusion of the definition of community sector industry as at schedule 2A, 2A.3.

Clause 6 – When is work outside the ACT *work*?

This clause provides that work carried out by an employee, or by a contractor, outside the ACT is taken to work in a covered industry if the work would, if carried out in the ACT be work in the covered industry. The employer, or the contractor, must also give the authority a quarterly return in relation to the work and pays the authority the levy payable by the employer or the contractor for that quarter.

Clause 7 - Removing people from workers register

This clause allows the registrar to remove a person from the workers register if the person has not been credited under this Act or a corresponding law with at least 1 day's service for 4 consecutive years.

The date that the worker ceases to be registered is the date the worker is removed from the register. The worker is then unable to claim for payment for, or instead of, long service leave for any period prior to the cessation of registration except if they may be entitled to payment for the period under schedule 2A.9 (Entitlement to payment instead of leave—community sector industry).

The registrar cannot remove a person from the workers register if the person stops carrying out work to which this Act applies and tells the authority that the

person is otherwise employed or engaged in other work until whichever of the following first occurs:

- (a) the person applies to the authority for payment of the total amount for or instead of long service leave;
- (b) the person's employer makes an application under clause 89 (Benefits under other laws—reimbursement of employer) for payment of the total amount to which the employer is entitled;
- (c) if the person is a working director or contractor—the person asks the authority to remove the person from the register;
- (d) the period of 10 years, starting on the day when the person stops carrying out work to which this Act applies, ends.

A working director must state the date when the person became otherwise employed or engaged in work to which this Act applies and the name and address of the principal place of business of the person's employer (if any).

Clause 8 – Benefits under other laws – election Section 88 (1) (c)

This clause sets out the interaction of benefits under this Bill and those under the *Long Service Leave Act 1976* or any other prescribed law for service in a covered industry. A registered worker who is eligible under this Bill as well as another Act must elect which Act that person will take those benefits and notify the governing board in writing of that election and of the period of service covered.

If a registered worker nominates not to be covered under this Bill, the governing board must remove the employee's credits from the register for the period nominated.

However, the authority must keep a record of the deleted credits.

Clause 9 – New Schedule 2A

This clause sets out the New Schedule for the Long Service Leave (Community Sector) Amendment Bill 2009.

Clause 2A.1 – Long Service Leave Community Sector Industry

This clause establishes who is considered to be a worker in the community sector industry.

Clause 2A.2 – What is *community sector work*?

This clause sets out what type of work is considered to be included under the community sector industry and the ability for the Minister to declare work that will/will not be considered for the community sector industry.

Clause 2A.3 – What is the *community sector industry*?

This clause sets out that the following services are included in the community sector industry as they perform community sector activities: child care services; care; respite care; advocacy; information services; support services; employment placement; transport/community access and rehabilitation. This list is not exhaustive and the Minister may declare work not to be work in the community sector industry.

Clause 2A.4 – Court or tribunal – not employer

This clause sets out that a court or tribunal is not considered to be included in the community sector industry for the purposes of this Act.

Clause 2A.5 Years of recognised service – community sector industry

This clause sets out that an employee will be registered for having completed a year of service for each 365 days they have been registered and serving in the community sector industry.

Clause 2A.6 – Long service leave formula – community sector industry

This clause sets out the long service leave formula for calculating entitlements the community sector industry:

$$W = 0.8667 \times \frac{RS}{365}$$

RS means the registered worker's number of days of recognised service.

W means the number of weeks of long service leave held by the registered worker.

Clause 2A.7 – Amount of Leave – community sector industry

This clause provides that a registered worker who has 5 or more years recognised service is entitled to the number of days of workers long service leave worked out in accordance with the long service leave formula for the community sector industry.

Clause 2A.8 Grant of leave by employers – community sector industry

This clause provides that an employer commits an offence if the employee's long service leave accrues and the employer does not grant that employee the long service leave before the end of the prescribed period.

Maximum penalty: 50 penalty units.

Long service leave must not be granted for a period of less than 2 weeks.

An employer of a registered employee also commits an offence if the employer has granted the employee long service leave and the employer does not give the employee a written statement of the day when the long service leave starts and ends no later than 2 months after the day when the long service leave starts or, if the employer and employee agree on a shorter period, before the start of the period agreed.

Maximum penalty: 50 penalty units.

An offence against this clause is a strict liability offence.

Clause 2A.9 Entitlement to payment instead of leave – community sector industry

This clause applies to a registered worker for the community sector industry who has at least 5 years recognised service if:

(a) the worker has permanently left the industry; and

- (b) 20 weeks have passed since the day the worker permanently left the industry; and
- (c) the worker has not been credited with service in the workers register for any of the days in the 20-week period; or

This section applies also if a registered community sector worker for the community sector industry has 55 days recognised service and any of the following apply to the worker:

- (a) the worker has left the industry because of total incapacity;
- (b) the worker has reached the prescribed retiring age;
- (c) the worker has died.

If the governing board is satisfied that clause applies to the worker, the worker is entitled to payment instead of long service leave or the number of weeks long service leave worked out in accordance with the formula.

Clause 2A.10 – Payments for leave – community sector industry

This clause sets out that a registered employee who has been granted long service leave under clause 2A.8, or a registered contractor for the industry who is entitled to long service leave, may apply to the authority for payment for the leave. If the governing board is satisfied that the applicant is entitled to long service leave under this Bill, then the authority must pay to the applicant the amount payable under clause 2A.12 (How are leave payments worked out for the community sector industry?).

This clause also provides that the authority must pay an applicant any amount payable under this clause no later than 7 days after the applicant becomes entitled to the long service leave, provided that an application is made no later than 14 days before the applicant becomes entitled to long service leave under this Bill.

Clause 2A.11 Payments instead of leave – community sector industry

This clause provides that, if a registered worker for the community sector industry is entitled to payment instead of long service leave under this Act, the worker may apply to the authority for the payment.

However, an application on the ground that the employee has ceased work because of total incapacity must be accompanied by a certificate of a doctor certifying that the employee is totally incapacitated for employment in the industry. The governing board may also require an applicant to submit to a medical examination by a doctor chosen by the board.

If the governing board is satisfied that the applicant is entitled to payment instead of long service leave under this Act, the authority must pay to the applicant the amount payable under clause 2A.12 (How are leave payments worked out for the community sector industry?).

Clause 2A.12 How are leave payments worked out for the community sector industry?

For clause 2A.10 (Payment for leave—community sector industry) and clause 2A.11 (Payment instead of leave—community sector industry), the amount

payable to a registered worker for, or instead of, long service leave is, for an employee - in accordance with clause 2A.13 (Leave payments for service as registered employee—community sector industry) and, for a contractor - in accordance with clause 2A.14 (Leave payments for service as registered employee—community sector industry).

Long service leave must be taken in the reverse order in which it accrued and if payment instead of long service leave is being made, the payment is made in relation to the leave in the order in which it was accrued.

Clause 2A.13 Leave payment for service as registered employee – community sector industry

This clause sets out the amount payable to a registered worker for long service leave for service accrued as a registered employee for the community sector industry under clause 2A.12, as the amount worked out as follows:

$$0.8667 \times \frac{D}{365} \times R$$

In this formula:

D means the number of days of service credited to the registered worker in the workers register to which the payment relates.

designated day means—

- (a) if the registered worker is taking long service leave—the day the leave begins; and
- (b) if the registered worker is being paid instead of taking long service leave—the day the payment is made.

R is the highest of the weekly averages of the ordinary remuneration received by the registered worker during each of the following periods that applies to the worker:

- (a) the most recent 2 quarters of service as a registered worker before the designated day;
- (b) the most recent 4 quarters of service as a registered worker before the designated day;
- (c) the most recent 20 quarters of service as a registered worker before the designated day.

Clause 2A.14 Leave payments for service as registered contractor – community sector industry

This clause provides that for clause 2A.12 (How are leave payments worked out for the community sector industry?), the amount payable to a registered worker for the community sector industry for long service leave, for service accrued as a contractor, is the total of the following for the service:

- (a) any amounts paid by the worker to the authority under clause 56 (Determination of levy—contractors);
- (b) interest at the determined rate worked out from the date of receipt of each amount paid under clause 56 until the designated day for the leave.

The governing board must determine an interim rate of interest prior to the determination of the rate above.

The determined rate of interest must—

- (a) be worked out after the end of each financial year for the previous financial year; and
- (b) take into account the expenses incurred in administering the authority; and
- (c) be at least 75% of the rate of interest, expressed as a percentage, earned by the authority worked out in accordance with the following formula:

$$\frac{2I}{(FB + FE) - I} \times 100$$

In this clause:

designated day means:

- (a) if the registered worker is taking long service leave—the day the leave begins; and
- (b) if the registered worker is being paid instead of taking long service leave—the day the payment is made.

FB means the amount of the total equity of the authority at the end of the financial year immediately before the financial year for which the rate is being determined.

FE means the amount of the total equity of the authority at the end of the financial year for which the rate is being determined.

I is the income derived from the investment of the authority's money in the financial year for which the rate is being determined.

total equity, in relation to the authority, means the total assets less the total liabilities of the authority worked out from the audited balance sheet of the authority for the relevant financial year.

Clause 2A.15 Payments by authority on reciprocal authority's behalf – community sector industry

This clause applies to a registered worker for the community sector industry who has a long service leave entitlement under this Act and under a corresponding law.

The worker may apply to the authority for payment of a long service leave entitlement worked out in accordance with the corresponding law and the authority must make the payment if authorised to do so by the reciprocal authority.

Clause 2A.16 Payments by reciprocal authority on authority's behalf – community sector industry

This clause applies if, under a corresponding law, a reciprocal authority pays to a person an amount that, that would have been payable under this Act for work done in the community sector industry.

When the authority is notified about the payment and is satisfied the payment was properly made, the authority must reimburse the reciprocal authority the amount to be worked out as follows:

$$0.8667 \times \frac{D}{365} \times R$$

For the formula:

D means the number of days service credited to the registered employee in the workers register and to which the payment relates.

R is the amount decided by the reciprocal authority as the weekly amount payable to the worker for the service credited to the worker in the State.

Clause 2A.17 – Service credit – community sector industry – s64

This clause provides that the prescribed service amount for the contract cleaning industry is 365 days annually.

Clause 2A.18 – Records of payments and service – community sector industry

This clause provides that if the authority pays an amount to a registered worker for leave, in-lieu of leave or reimburses a reciprocal authority, the authority may delete from the workers register the details relating to the period of service for which the worker has been paid.

However, the authority must keep another record of the period of service, the amount paid to the worker for long service leave or in-lieu of long service leave and the period of long service leave (if any) granted to or taken by the worker.

Clause 2A.19 – Public Holidays etc not to count as leave – community sector industry

This clause applies if a public holiday falls during a period of long service leave taken by a registered employee for the community sector industry. If that is the case, the period of long service leave is increased by 1 day for each public holiday.

Clauses 10 - 13

These four clauses allow for parts of Schedule 3 to substitute sections of this Schedule as listed. This Schedule sets out in a table the decisions made by the relevant decision maker (either the registrar or the governing board) as well as the persons who may apply to the ACAT for a review of the decision by the relevant decision maker.

Clause 14 – Schedules 2A and 3

This clause allows for the community sector schedule to be renamed from Schedule 2A to Schedule 3.

Clause 15 – Dictionary, new definition of *community sector industry* and *community sector work*.

This clause allows for the inclusion of the new definition of *community sector industry* and *community sector work*.

Clause 16 – Dictionary, definition of *covered industry schedule*

This clause sets out the covered industry schedule –

- (a) for the building and construction industry – schedule 1; and
- (b) for the contract cleaning industry – schedule 2; and
- (c) for the community sector industry – schedule 2A.

Clause 17 – Dictionary, definition of long service leave formula

This clause sets out where to locate the long service leave formula for each industry in the appropriate schedule:

- (a) for the building and construction industry – see schedule 1, section 1.5;
and
- (b) for the contract cleaning industry – see schedule 2, section 2.5; and
- (c) for the community sector industry – see schedule 2A, section 2A.6.