

**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY**

LONG SERVICE LEAVE AMENDMENT BILL 2005

Explanatory Statement

**Circulated by authority of the
Minister for Industrial Relations
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Outline

This Bill contains amendments to the *Long Service Leave Act 1976* that will enable private sector workers in the ACT to have improved access to long service leave entitlements.

The *Long Service Leave Act 1976* already lists the circumstances in which temporary breaks in employment are disregarded for the purposes of determining whether there has been continuity of service with an employment. Proposed new **section 2G** of the *Long Service Leave Act 1976* consolidates and clarifies these circumstances, and include a new provision to ensure that temporary breaks in employment through the seasonal nature of the work are not regarded as affecting his or her continuity of service with an employer. Although these breaks in employment do not affect an employee's continuity of service, the time covered by the break itself is not included when working out whether a person has completed the necessary period of service to become entitled to take long service leave.

The amendments contained in the Bill will enable employees to access their long service leave entitlements after 7 years of continuous service, on a proportional basis. While the 10 year qualifying period for the full long service leave entitlement remains, this amendment has the effect of allowing an employee to take part of his or her long service leave entitlement after 7 years. When the 10 year service period is completed, the employee's long service leave is reduced proportionately by the amount of the long service leave already accessed by the employee under the new provision.

It should be noted that the *Long Service Leave Act 1976*, including as amended by this Bill, applies to private sector workers in the ACT only to the extent that it is not displaced by or inconsistent with other industrial instruments under the *Workplace Relations Act 1996* (Cwlth).

The Bill also contains several minor and technical amendments. Briefly, these provisions include:

- amendments to update and relocate definitions to the Dictionary at the back of the Act and to reflect modern legislative drafting conventions; and
- amendment of offence and related provisions as part of the Criminal Code harmonisation project, which is due to be completed by 2006.

Financial Implications

The amendments contained in this Bill will have no financial impact on the Territory.

Notes on Clauses

Clauses 1 and 2 are formal provisions dealing with the name of the proposed Act and its commencement.

Clause 3 explains that it amends the *Long Service Leave Act 1976*. In this Explanatory Statement, the *Long Service Leave Act 1976* is referred to as “the principal Act”.

Clause 4 Section 1

This clause omits existing section 1 and replaces it with a new **Part 1** heading and a new **section 1**. Like the provision that it replaces, new **section 1** deals with the name of the legislation. The amendments made by this clause reflect modern drafting practice.

Clause 5 Interpretation, Section 2 (1), definitions of associated company, award holiday, continuous service and minimum retirement age

This clause omits the definitions of associated company, award holiday, continuous service and minimum retirement age from section 2(1) of the principal Act. These terms are omitted because they will be recast in to reflect modern drafting practice when section 2(1) is relocated to the Dictionary under clause 6 of the Bill.

Clause 6 Section 2(1), definitions (as amended)

This clause relocates the amended section 2(1) to the new Dictionary to be inserted at the end of the Act. Clause 13 provides for the insertion of the Dictionary. This is a technical change to reflect modern drafting practice.

Clause 7 Section 2, remainder

This clause inserts replacement **section 2**, **new section 2A** and **new Part 2** into the principal Act.

Replacement **section 2** is a standard formal provision to explain that the Dictionary at the end of the Act is part of the Act. This amendment reflects modern drafting practice.

New **section 2A** is a standard formal provision to explain that notes are explanatory only and do not form part of the Act. (New **section 2B** will be inserted by Schedule 1 to the Bill, which contains the Criminal Code Harmonisation Amendments).

New **Part 2** is headed “Important Concepts”. It explains the terms that are essential to understanding the operation of the principal Act. With the exception of new **subsection 2G(3)**, which contains new elements, all the concepts contained in new **Part 2** are derived from current section 2 of the principal Act. The new provisions have been recast to reflect modern drafting practice.

New **section 2C** is based on subsection 2(2) of the principal Act and makes it clear that payment by commission does not prevent a person from being regarded as an employee for the purposes of the principal Act.

New **section 2D** is based on subsection 2(3) of the principal Act. It explains the interaction between the principal Act and the *Long Service Leave (Building and Construction Industry) Act 1981* and the effect of an election by an employee to take long service leave benefits under the *Long Service Leave (Building and Construction Industry) Act 1981* on his or her entitlements under the principal Act. It makes it clear that such an election does not preclude the employee from receiving benefits under the principal Act. However, that employee will not be entitled to receive benefits under the principal Act for any period for which he or she has received benefits under the *Long Service Leave (Building and Construction Industry) Act 1981*.

New **section 2E** is based on subsection 2(4) of the principal Act. As with new **section 2D**, it explains the interaction between the principal Act and the *Long Service Leave (Contract Cleaning Industry) Act 1999* and the effect of an election by an employee to take long service leave benefits under the *Long Service Leave (Contract Cleaning Industry) Act 1999* on his or her entitlements under the principal Act. It makes it clear that such an election does not preclude the employee from receiving benefits under the principal Act. However, the employee will not be entitled to receive benefits under the principal Act for any period for which he or she has received benefits under the *Long Service Leave (Contract Cleaning Industry) Act 1999*.

New **section 2F** is based on current subsection 2(5) and explains how to calculate the ordinary pay of an employee some or all of whose pay is received by way of commission. The total annual amount payable to the employee by any combination of commission, wages and salary is deemed to be completely wages or salary. That total figure is then divided by 52 to determine a deemed weekly wage or salary. It is necessary to calculate an employee's ordinary pay to determine the person's rate of pay while he or she is on leave or if long service leave entitlements are paid out in lieu of long service leave under section 11A of the principal Act.

New **section 2G** is based on current subsections 2(6), (7), (8) and (9) of the principal Act. It explains how a person's period of service is to be calculated. As a general rule, an employee's period of service means his or her period of continuous service for an employer. There are exceptions to this general rule, and these are set out in subsections **2G(2)** and **(3)**.

The concept of "period of service" is a distinct concept from "continuity of service". This distinction becomes clearer when viewed in light of new **section 2G(4)** – derived from current subsection 2(9) of the principal Act. New subsection **2G(4)** explains that the period of interruption in service listed in subsections **2G(2)** and **(3)** must not be taken into account when calculating the total period of service. This means that the duration of the break does not count as time served for an employer. By contrast, the breaks in service listed in the definition of "continuous service" in the Dictionary do not affect continuity and are included when calculating the period of service.

The interruptions of the period of service listed in new **subsection 2G(2)** are all taken from current subsection 2(9) of the principal Act. In brief, these breaks include:

- interruptions caused by industrial disputes, providing the employee returns to work in accordance with the terms of settlement of the dispute
- breaks due to slackness of trade, where the employee is re-engaged within 6 months
- breaks due to approved leave, other than leave which is covered by the definition of continuous service in the Dictionary
- periods where the employee is absent due to a workplace injury
- others breaks in service, if the employee returns within 2 months (it is not regarded as a break in service if the employer terminates the employment relationship with the intention of avoiding the provisions of the *Long Service Leave Act 1976*)
- service by the employee in the Defence Forces, other than full-time service in those forces
- temporary service outside the ACT.

New section **2G(3)** provides that a break in service of longer than 2 months does not affect continuity of service if the interruption is caused by the seasonal nature of the work. It is a new provision intended to ensure that workers in seasonal industries are not thereby precluded from access to the benefits of long service leave. The underlying policy of this new provision is consistent with the “slackness of trade” provision in current section 2(9) of the Act. That provision also recognises that employees’ access to long service leave benefits should not be prejudiced by the fluctuations in the demand for their services caused by external market factors beyond the control of both the employer and employee.

Clause 8 Sections 3 and 4

This clause replaces sections 3 and 4 of the principal Act with new provisions dealing with the entitlement to long service leave and the amount of long service leave, respectively.

Replacement **section 3** is based on current section 3. The basic entitlement to long service leave arises after 10 years service with an employee. New **section 3** differs from the existing provision in that new **subsection 3(2)** allows an employee who has served 7 years or longer with an employer to take long service leave. The amount of long service leave that may be taken is proportional to the employee's period of service. New subsection **3(3)** makes it clear that if an employee chooses to take leave under new subsection **3(2)**, his or her long service leave entitlement at 10 years of service is reduced by the amount of leave already taken.

New subsection **3(4)** is based on current section 3(2) of the principal Act. It explains that an employee becomes entitled to further long service leave for each five years of service completed after the first 10 years of service.

Replacement **section 4** explains that long service leave accrues at the rate of 1/5 of a month’s leave for each year of service. Although ‘month’ means a calendar month, it should be noted that award or public holidays falling within a period of long service leave taken by an employee do not count as leave under section 9 of the principal Act.

Employees with periods of service dating back before 11 May 1964 may receive a marginal benefit from **new section 4**. Any unused entitlements related to service prior to that date will increase by 1/20th of a month of leave per year served prior to the time under the new provision. In practice, it would be unlike that many persons would fall into this category, due to the significant elapse of time and the requirement for continuity of service with the same employer.

Clause 9 Sections 13 and 13A

This clause inserts replacement **sections 13** and **13A**. The provisions in replacement **section 13** and replacement **section 13A** dealing with the appointment of the registrar and authorised officers, respectively, have been updated to reflect modern public administrative practice that powers or functions are conferred on a public servant. Previously, the legislation required that an office was created and a person was then appointed to that office. For that reason, replacement **sections 13** and **13A** contains transitional provisions to accommodate the shift from “office” to direct appointment. These transitional provisions will be automatically removed from the legislation once they have taken effect, although their effect will be preserved by section 88 of the Legislation Act.

Clause 10 New part heading

This clause inserts a heading before section 14 of the current Act. The new heading reads, “**Part 4 Miscellaneous.**” This change reflects modern drafting practice.

Clause 11 Section 16

This clause inserts new **subsections (4)** and **(5)** into section 16 of the principal Act. That section dealt with the transitional arrangements, including deeming provisions, for the current Act when it came into force in 1976. The effect of these amendments is that these transitional provisions will be removed from the legislation, although their legal effect will be preserved by section 88 of the Legislation Act.

Clause 12 Schedule 1, Criminal Code harmonisation amendments

This clause explains schedule 1 also amends the principal Act. Those amendments are discussed in further detail later in this Explanatory Statement.

Clause 13 New dictionary

This clause inserts the Dictionary at the end of the principal Act, in accordance with modern drafting practice. As explained in the notes for clause 5, the Dictionary includes updated definitions of terms used in the principal Act.

Schedule 1 Criminal Code harmonisation amendments

1.1 New section 2B

This item inserts new section 2B into the principal Act, to explain that the Criminal Code applies to it.

1.2 Section 6

This item recasts the offences in section 6 of the principal Act in Code-friendly terms. The offence in new **subsection 6(1)** deals with the failure of an employer to grant long service leave to an employee once an entitlement to take leave arises. The elements of the offence are set out in new paragraphs **6(1)(a)** and **(b)**.

Under new subsection **6(2)**, it is also an offence for an employer to fail to give an employee 60 days written notice of the date on which long service leave is to be taken, unless the employee agrees otherwise.

Offences under new **section 6** are strict liability offences. The application of strict liability reflects the policy that employers should not be able to evade their responsibilities under the Act by claiming that they were unaware that their employees had become eligible to take long service leave.

1.3 Section 8(1)

This item inserts new subsections 8(1) and (1A). These amendments deal with the mode of payment for employees while they are on long service leave. As with new section 6, the offence in new subsection 8(1) is a strict liability offence. The application of strict liability is intended to ensure that employers cannot claim negligence, lack of intention etc as a defence for not paying workers while they are on long service leave.

1.4 Section 8

This item provides for the subsections in section 8 to be renumbered when the principal Act is republished.

1.5 Section 12

This item recasts current section 12 in Code-friendly terms. Like the provision it replaces, new **section 12** makes it a strictly liability offence for an employer to fail to keep records of employee details relevant to long service leave. The matters to be recorded are listed in **paragraphs 12(1)(a) to (l)**. These matters are relevant, for example, to calculating the period of service and the ordinary pay of the employee.

Subsection 12(2) explains for how long employee records are to be retained after an employee ceases to be employed, whether by reason of death or otherwise. It is a strict offence to fail to keep a record for the required period.

Subsection 12(3) explains that it is a strict liability offence for an employer to fail to provide a record to an authorised officer for inspection. The purpose of this offence is to provide a means of ensuring that employers are meeting their obligations to kept records under **subsections 12(1) and (2)**.

All the offences in **section 12** are strict liability offences, to reflect the public interest in ensuring that employers meet their obligations under the principal Act. Defences such as neglect, oversight or lack of intention will not be a sufficient excuse for an employer who fails to maintain proper employee records that are essential for determining employee entitlements to long service leave.

1.6 Section 13B

This item deals with identity cards for authorised officers. This provision is based on standard provisions dealing with identity cards for persons such as inspectors, authorised officers and so forth. It should be noted that under clause 9 of the Bill, there is a revised power to appoint authorised officers. For that reason, new section 13B includes transitional provisions dealing with identity cards for authorised officers. These transitional provisions will be removed from the Bill once they commence, although their legal effect will be preserved by operation of section 88 of the Legislation Act.

1.7 Section 13E

This item replaces section 13E of the principal Act, which deals with notices to comply with the Act. New **subsection 13E(1)** explains that an authorised office may give an employer a written notice to comply with the Act. The employer has 28 days to comply. New subsection **13E(2)** makes it an offence to fail to comply with the notice. The offence in this section is one of strict liability, again, to reflect the public interest in ensuring that employers take their obligations under the Act seriously and do not compromise the entitlements of their employees.

1.8 Section 13H

This item omits this section, which is no longer necessary as it has been subsumed within new **subsection 13E(2)**.