



AUSTRALIAN CAPITAL TERRITORY

## **Annual Leave (Amendment) Act 1997**

**No. 67 of 1997**

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### **An Act to amend the *Annual Holidays Act 1973***

*[Notified in ACT Gazette S300: 9 October 1997]*

The Legislative Assembly for the Australian Capital Territory enacts as follows:

#### **Short title**

1. This Act may be cited as the *Annual Leave (Amendment) Act 1997*.

#### **Commencement**

2. (1) Sections 1, 2 and 3 commence on the day on which this Act is notified in the *Gazette*.

- (2) The remaining provisions commence on a day, or respective days, fixed by the Minister by notice in the *Gazette*.

- (3) If a provision referred to in subsection (2) has not commenced before the end of the period of 6 months commencing on the day on which this Act is notified in the *Gazette*, that provision, by force of this subsection, commences on the first day after the end of that period.

#### **Principal Act**

3. In this Act, “Principal Act” means the *Annual Holidays Act 1973*.<sup>1</sup>

### **Long title**

4. The long title of the Principal Act is repealed and the following long title substituted:

“An Act relating to annual leave of employees”.

### **Short title**

5. Section 1 of the Principal Act is amended by omitting “*Holidays*” and substituting “*Leave*”.

### **Interpretation**

6. Section 2 of the Principal Act is amended—

- (a) by omitting from the definition of “agreement” in subsection (1) “includes” and substituting “means”;
- (b) by omitting from the definition of “agreement” in subsection (1) “*Industrial Relations Act 1988*” and substituting “*Workplace Relations and Other Legislation Amendment Act 1996*”;
- (c) by omitting from the definition of “award” in subsection (1) “*Industrial Relations Act 1988*” and substituting “*Workplace Relations and Other Legislation Amendment Act 1996*”;
- (d) by omitting from the definition of “award” in subsection (1) “or a determination”;
- (e) by omitting the definition of “authorised officer” in subsection (1) and substituting the following definition:
  - “ ‘authorised officer’ means a person who is an authorised officer by virtue of section 14B;
- (f) by omitting the definition of “determination” in subsection (1);
- (g) by inserting in subsection (1) the following definitions:
  - “ ‘approved training agreement’ means a training agreement approved by the Vocational Education and Training Authority under paragraph 30 (2) (a) of the *Vocational Education and Training Act 1995*;
  - ‘trainee’ means the person who is obliged under a training agreement to undertake training;

‘training agreement’ means a written agreement between a trainee and his or her employer, the terms of which are in accordance with the terms determined by the Vocational Education and Training Authority under section 33 of the *Vocational Education and Training Act 1995*.’; and

- (h) by omitting paragraphs (2) (a) and (b) and substituting the following paragraphs:
- “(a) he or she performs work the remuneration for which is paid by that person and consists, either in whole or in part, of salary, wages or commission;
  - (b) he or she is a bound apprentice to that person or an employee of that person; or
  - (c) he or she is a trainee with that person or an employee of that person.”.

### **Annual leave**

7. Section 4 of the Principal Act is amended by omitting subsection (3) and substituting the following subsection:

“(3) Without prejudice to any rights a person may have under an award or agreement, a person is entitled under this Act to annual leave at the end of a year of employment if, during the year—

- (a) the average number of hours worked by that person in a week exceeded 22.8; or
- (b) the person did not receive, under an award or agreement, a pay loading in excess of the base rate of pay in substitution for annual leave for that year and the payment is identifiable from leave records kept by the employer under section 13.”.

### **Substitution**

8. Section 6 of the Principal Act is repealed and the following section substituted:

### **Annual leave pay**

“6. (1) An employee who takes leave to which he or she is entitled under subsection 4 (1) is entitled to payment from his or her employer of an amount equal to the ordinary remuneration the employee would have received in respect of the period of leave if the employee had not taken leave.

- “(2) If, under an award or agreement, an employee is entitled to—
- (a) less annual leave than the annual leave to which he or she is entitled under this Act; and
  - (b) payment of an amount (not being salary or wages) in respect of the taking by the employee of that annual leave;

there is payable to that employee, in addition to the amount payable under subsection (1), an amount calculated in accordance with the following formula:

$$AP \times \frac{ALACT}{ALAWAG}$$

where—

- AP** is the amount payable under the award or agreement (not being salary or wages) in respect of the taking of the annual leave;
- ALACT** is the amount of annual leave to which the employee is entitled under this Act;
- ALAWAG** is the amount of annual leave to which the employee is entitled under the award or agreement.

“(3) In this section—  
‘ordinary remuneration’, in relation to an employee, means the sum of—

- (a) the salary or wages payable to the employee;
- (b) any allowances payable to the employee in respect of skill, qualifications, board and lodging;
- (c) any amounts payable to the employee under a bonus, performance pay or incentive scheme, being amounts that are usually paid to the employee with his or her salary or wages; and
- (d) where the employee is provided with board and lodging by his or her employer, an amount equal to the value of that board and lodging;

‘salary or wages’ does not include—

- (a) payments in respect of overtime;
- (b) payments at penalty rates of pay; or

- (c) allowances which, by virtue of an award or agreement, are not to be taken into account in determining a rate of remuneration in respect of overtime.

“(4) In respect of a year during which an employee has been remunerated partly by salary or wages and partly by commission, subsection (2) applies as if—

- (a) the employee were remunerated wholly by salary or wages throughout that year; and
  - (b) the amount payable for salary or wages to the employee in respect of a week in that year were the amount calculated by dividing the total amount payable to the employee during that year in respect of—
    - (i) salary, wages or commission; or
    - (ii) a combination of salary, wages or commission;
- by 52.

“(5) Where, during the whole or part of a year, an employee has been employed on terms providing for remuneration at a specified rate per hour, the employee shall, for the purposes of this section, be deemed to have worked during each week of that year the number of hours calculated by dividing the total number of hours worked by the employee during the year by 52.”.

#### **Leave to be taken within 6 months**

**9.** Section 7 of the Principal Act is amended—

- (a) by omitting from subsections (2) “prescribed” and substituting “authorised”;
  - (b) by omitting from subsection (2) “by instrument”;
  - (c) by omitting from subsections (3) and (4) “prescribed” and substituting “authorised”;
  - (d) by inserting at the foot of subsection (5) the following penalty provision:
    - “Penalty:
    - (a) if the offender is a natural person—50 penalty units;
    - (b) if the offender is a body corporate—250 penalty units.”;
- and

(e) by adding at the end the following subsection:

“(6) Subsection (2) does not apply to an employee if his or her employer fails to give notice to the employee in accordance with subsection (5).”.

### Close-down

**10.** Section 12 of the Principal Act is amended by omitting subsection (5) and substituting the following subsection:

“(5) Where, on the date specified in a notice under subsection (1), the employee to whom the notice was given is not entitled to annual leave under this Act or is entitled to part of an annual leave, the employee—

- (a) shall absent himself or herself from his or her employment during the period specified in the notice;
- (b) is entitled to payment from his or her employer of an amount equal to the ordinary remuneration the employee would have received in respect of that part of the period referred to in paragraph (a) that is equal to the sum of—

- (i) the part of an annual leave (if any) to which the employee is entitled;

- (ii) a period equal to—

- (A)  $\frac{1}{12}$ ; or

- (B) in the case of a shift-worker— $\frac{5}{47}$ ;

- of the period of the employment of the employee during the current year of employment; and

- (iii) any public or award holidays that are observed during the period referred to in paragraph (a); and

- (c) is entitled to receive from his or her employer an amount calculated in accordance with the formula—

$$\frac{\mathbf{AP} \times \mathbf{SP}}{\mathbf{AL}}$$

where—

**AP** is the amount payable to the employee under subsection 6 (2) if the employee had been entitled to annual leave;

- SP** is the period equal to the sum of the periods referred to in subparagraphs (b) (i) and (ii);
- AL** is the period of the annual leave to which the employee would have been entitled if, immediately before the date specified in the notice, the employee had completed a year of employment.”.

### **Annual leave records**

**11.** Section 13 of the Principal Act is amended—

- (a) by omitting subsection (1) and substituting the following subsection:

“(1) An employer shall, in respect of each person he or she employs, keep a record specifying—

- (a) the name, occupation and classification of the employee;
- (b) whether the employee is full-time, part-time or casual;
- (c) the employee’s ordinary remuneration (including the gross and net amounts paid), the base rate of pay and any loading payable to the employee, and the purpose of the loading;
- (d) the number of hours worked each week by the employee;
- (e) the date on which the employee commenced service;
- (f) the period of any annual leave taken by the employee;
- (g) each other occasion on which the person has been absent from his or her employment;
- (h) where the person has ceased to be employed by the employer—the date on which, and manner in which, he or she so ceased to be employed;
- (j) the date of birth of the employee as provided by the employee;
- (k) the name of each award or agreement under which the employee has entitlements; and
- (m) if overtime may be paid under the award to the employee—
  - (i) the number of hours worked by the employee during each day; and

- (ii) when the employee started and ceased work.

Penalty:

- (a) if the offender is a natural person—20 penalty units;
- (b) if the offender is a body corporate—100 penalty units.”;

- (b) by inserting at the foot of subsection (2) the following penalty provision:

Penalty:

- (a) if the offender is a natural person—20 penalty units;
- (b) if the offender is a body corporate—100 penalty units.”;

- (c) by inserting at the foot of subsection (3) the following penalty provision:

Penalty:

- (a) if the offender is a natural person—50 penalty units;
- (b) if the offender is a body corporate—250 penalty units.”.

### **Insertion**

12. After section 14 of the Principal Act the following sections are inserted:

#### **Registrar of Long Service Leave**

“14A. (1) There shall be a Registrar of Annual Leave.

“(2) In addition to performing the functions of the Registrar under this Act and the regulations, the Registrar shall perform such other functions as the Minister directs.

“(3) The Chief Executive shall create and maintain an office in the Public Service the duties of which include performing the functions of the Registrar of Annual Leave.

“(4) The Registrar shall be the public servant for the time being performing the duties of the Public Service office referred to in subsection (3).

#### **Authorised officers**

“14B. (1) There shall be 1 or more authorised officers for the purposes of this Act.

“(2) The Chief Executive may create and maintain 1 or more offices in the Public Service the duties of which include performing the functions of an authorised officer.

- “(3) The following persons shall be authorised officers:
- (a) any public servant for the time being performing the duties of a Public Service office referred to in subsection (2);
  - (b) any other person (including an officer of the Australian Public Service constituted under the *Public Service Act 1922* of the Commonwealth) appointed, in writing, by the Chief Executive for the purpose.

### **Identity cards**

“14C. (1) The Chief Executive shall issue to the Registrar an identity card that specifies the Registrar’s name and office, and on which appears a recent photograph of the Registrar.

“(2) The Chief Executive shall issue to a delegate of the Registrar with any delegated powers of an authorised officer an identity card that specifies the delegate’s name and delegated office, and on which appears a recent photograph of the delegate.

“(3) The Chief Executive shall issue to an authorised officer an identity card that specifies the authorised officer’s name and office, and on which appears a recent photograph of the authorised officer.

“(4) On ceasing—

- (a) to occupy, or to act in, the office of the Registrar;
- (b) to be a delegate of the Registrar with any delegated powers of an authorised officer; or
- (c) to occupy, or to act in, an office of authorised officer;

a person shall not, without reasonable excuse, fail to return his or her identity card to the Chief Executive.

Penalty: 1 penalty unit.

### **Powers of entry of authorised officers**

“14D. (1) Subject to subsection (2), if an authorised officer has reasonable grounds for believing that it is necessary to do so for the purposes of this Act an authorised officer may, at any time, enter premises of an employer and exercise the powers referred to in subsection (4).

“(2) An authorised officer shall not enter premises under subsection (1) without the consent of the employer.

“(3) An authorised officer who enters premises under subsection (1) is not authorised to remain on the premises, and a person is not required to comply with a requirement made by an authorised officer under subsection (4), if, on request by the employer, or the person in charge of the premises, the authorised officer does not produce his or her identity card.

“(4) An authorised officer who enters premises under subsection (1) may—

- (a) require the employer to make available for inspection records required to be kept under this Act; and
- (b) make copies of, or take extracts from records referred to in paragraph (a).

### **Complaints**

“14E. (1) Where a complaint is made to the Registrar by an employee, the Registrar shall refer the complaint to an authorised officer.

“(2) Where a complaint made by an employee—

- (a) is made to an authorised officer; or
- (b) is referred to an authorised officer under subsection (1);

the authorised officer may, by notice in writing, require the complainant and the employer to whom the complaint relates, to attend a conference at a place, date and time specified in the notice to endeavour to resolve the complaint.

“(3) A complaint shall be in writing in accordance with a form approved by the Registrar.

“(4) A conference shall be conducted in such a manner as the authorised officer thinks fit.

“(5) Except with the consent of the authorised officer—

- (a) a natural person is not entitled to be represented at a conference by another person; and
- (b) a body of persons (whether incorporated or unincorporated) is not entitled to be represented at a conference by a person other than a member, officer or employee of the body.

“(6) In this section—

‘complaint’ means a complaint by an employee concerning his or her entitlements under this Act.

**Notice to comply with Act**

“14F. An authorised officer may, if satisfied having regard to the relevant circumstances of a particular case that it is necessary to do so, by notice in writing, require an employer, within 28 days after the date of the notice, to comply with the Act.

**Review of directions by Registrar**

“14G. (1) An employer may apply to the Registrar for a review of a requirement made of him or her under section 14F.

“(2) An application shall be in writing.

“(3) The Registrar may uphold, revoke or vary the terms of, the requirement.

“(4) Where the Registrar makes a decision under subsection (3), the Registrar shall give notice in writing of his or her decision to the applicant.

**Review of decisions**

“14H. (1) Application may be made to the Administrative Appeals Tribunal for a review of—

- (a) a decision of an authorised officer under subsection 7 (2); or
- (b) a decision of the Registrar under section 14G.

“(2) A notice under subsection 14G (4) shall be in accordance with the requirements of the Code of Practice in force under subsection 25 (1) of the *Administrative Appeals Tribunal Act 1989*.

**Obstructing etc. authorised officers**

“14J. (1) A person shall not, without reasonable excuse, obstruct or hinder an authorised officer in the exercise of his or her powers under this Act.

Penalty:

- (a) if the offender is a natural person—50 penalty units or imprisonment for 6 months, or both;
- (b) if the offender is a body corporate—250 penalty units.

“(2) A person shall not, without reasonable excuse, contravene a requirement made under section 14F.

Penalty:

- (a) if the offender is a natural person—50 penalty units;
- (b) if the offender is a body corporate—250 penalty units.

### **Liability**

“14K. An action or other proceeding, civil or criminal, does not lie against the Registrar or an authorised officer for or in relation to any act done, or omission made, in good faith in connection with his or her powers under this Act or the regulations.

### **Delegation by Registrar**

“14L. The Registrar may delegate to any person any of the Registrar’s powers under this Act or the regulations, other than the Registrar’s powers under section 14G.”.

### **Offences**

**13.** Section 15 of the Principal Act is amended—

(a) by inserting at the foot of subsection (1) the following penalty provision:

“Penalty:

(a) if the offender is a natural person—50 penalty units;

(b) if the offender is a body corporate—250 penalty units.”;

and

(b) by omitting subsection (2).

### **Substitution**

**14.** Section 16 of the Principal Act is repealed and the following section substituted:

### **Regulations**

“16. The Executive may make regulations for the purposes of this Act.”.

### **Formal amendments**

**15.** The Principal Act is amended as set out in the Schedule.

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**SCHEDULE**

Section 15

**FORMAL AMENDMENTS OF PRINCIPAL ACT**

**Subsection 4 (1)—**

Omit “an annual holiday”, substitute “annual leave”.

**Subsections 5 (1) and (2)—**

Omit “holiday”, substitute “leave”.

**Subsection 7 (1)—**

Omit “An annual holiday”, substitute “Annual leave”.

**Subsection 7 (2)—**

(a) Omit “an annual holiday”, substitute “annual leave”.

(b) Omit “holiday” (last occurring), substitute “leave”.

**Subsection 7 (3)—**

Omit “holiday”, substitute “leave”.

**Subsection 7 (5)—**

Omit “an annual holiday”, substitute “annual leave”.

**Paragraph 7 (5) (a)—**

Omit “annual holiday”, substitute “annual leave”.

**Section 8—**

Omit “annual holiday”, substitute “annual leave”.

**Section 9—**

(a) Omit “an annual holiday”, substitute “annual leave”.

(b) Omit “annual holiday”, substitute “annual leave”.

**Paragraph 10 (1) (a)—**

Omit “an annual holiday”, substitute “annual leave”.

**Paragraph 10 (1) (b)—**

Omit “annual holiday”, substitute “annual leave”.

**Subsection 10 (1)—**

Omit “annual holiday” (last occurring), substitute “annual leave”.

**SCHEDULE**—continued

**Paragraphs 10 (2) (a) and (b)**—

Omit “annual holiday”, substitute “annual leave”.

**Subsection 10 (2)**—

Omit “an annual holiday” (last occurring), substitute “annual leave”.

**Subsection 11 (1)**—

Omit “an annual holiday”, substitute “annual leave”.

**Subsection 11 (2)**—

(a) Omit “an annual holiday”, substitute “annual leave”.

(b) Omit “annual holiday” (last occurring), substitute “annual leave”.

**Subsection 12 (1)**—

Omit “annual holiday”, substitute “annual leave”.

**Subsection 12 (2)**—

Omit “an annual holiday”, substitute “annual leave”.

**Subsection 12 (4)**—

(a) Omit “an annual holiday”, substitute “annual leave”.

(b) Omit “annual holiday” (last occurring), substitute “annual leave”.

## NOTES

### Principal Act

1. Reprinted as at 31 January 1997.

### Penalty units

See section 33AA of the *Interpretation Act 1967*.

### Section headings

On the day on which the *Annual Holidays Act 1973* is amended by this Act, in addition to any alteration of section headings indicated in the text of this Act, headings to sections of the Principal Act are altered as set out in the following table:

Section	Alteration
5	Omit from the heading “ <b>holiday</b> ”, and substitute “ <b>leave</b> ”.
8	Omit from the heading “ <b>holiday</b> ” and substitute “ <b>leave</b> ”.
10	Omit from the heading “ <b>holiday</b> ” and substitute “ <b>annual leave</b> ”.
11	Omit from the heading “ <b>holidays</b> ” and substitute “ <b>leave</b> ”.

*[Presentation speech made in Assembly on 4 September 1997]*