

THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY

LONG SERVICE LEAVE (CLEANING, BUILDING AND PROPERTY
SERVICES) BILL 1999

EXPLANATORY MEMORANDUM

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LONG SERVICE LEAVE (CLEANING, BUILDING AND PROPERTY SERVICES) BILL 1999

OUTLINE

Workers in the cleaning, building and property services industry do the same job for a number of years but often work for different employers and/or in different locations and under an array of contracts. This means that while they work continuously in the one industry they do not receive the benefits which come with recognised long service - particularly long service leave.

The purpose of this Bill is to recognise continuous service in the cleaning, building and property services industry and to provide for the accrual of long service leave.

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PART 1 - PRELIMINARY

Clause 1 and 2 are formal requirements. Clause 1 refers to the short title of the Bill and clause 2 sets out the commencement arrangements.

Clause 3 - defines terms, which are used in the Bill.

Clause 4 allows for work outside the Territory to be recognised if it fits the definitions in this Bill and the employer makes the relevant payments to the board.

PART 2 - ADMINISTRATION

Division 1 - The Board

Clause 5 establishes the Cleaning Industry Long Service Leave Board as a body corporate with a common seal.

Clause 6 states that the board is not an employee or agent of the Territory and that it is not to be taken to be.

Clause 7 describes the functions of the board. These include –

- administering the long service leave benefits scheme set up under the Bill;
- making recommendations to the Minister in relation to the rate of payments made by employers;
- making payments in accordance with this Bill; and
- establishing and maintaining the registers of employers and employees.

Clause 8 sets out the powers of the board. The board can take action to recover money and debts incurred against it; under certain circumstances borrow money; incur legal and other costs; and refund money.

Clause 9 allows the board to delegate (in writing) any of its powers to a public servant.

Clause 10 specifies that the board will consist of three members - a chairperson, an employer representative and an employee representative. These members will be

appointed for up to 5 years by the Minister. The period of the appointment is to be stated in the instrument of appointment and members will be eligible for reappointment.

The board will not be prevented from performing its duties by a vacancy in its membership.

Clause 11 allows the Minister to make acting appointments for up to 12 months if there is a vacancy or if a member is unable to perform the functions of the office. The Minister may at any time issue an instrument to terminate an acting appointment.

This clause also provides for the probity of any action taken by or in relation to an acting member if it was taken in good faith and in ignorance of any ground of invalidity.

Clause 12 provides for a member to resign by notice, in writing, signed by the member and delivered to the Minister. It sets the date of effect of a resignation as the date on which it is received by the Minister, or a later date if one is included in the notice.

Clause 13 sets out the conditions for the termination of the members appointed by the Minister. The Minister may end the appointment of a member on the grounds of misbehaviour or physical or mental injury. This clause also requires the Minister to terminate an appointment under certain circumstances, such as bankruptcy; conviction of an offence punishable by imprisonment for one year or longer; or absent without leave approved by the Minister from three consecutive board meetings.

Clause 14 specifies the processes and procedures for board meetings, including how meetings are convened; quorum provisions; chairing arrangements; and voting arrangements.

Clause 15 details the process to be followed if a member has a direct or indirect financial interest in a matter being considered or about to be considered by the board.

Clause 16 specifies that the board must provide any information in relation to the exercise of its powers and the performance of its functions as required by the Minister.

Clause 17 protects members against any civil or criminal actions or proceedings in carrying out their duties as long as he or she has carried out their duties in good faith.

Clause 18 empowers the chief executive to use the services of public servants in the administrative unit under their control. The *Public Sector Management Act 1994* is to apply to these public servants.

Division 2 - The Registrar and Inspectors

Clauses 19 and 20 create the positions of Long Service Leave Registrar and Deputy Long Service Leave registrar. They are to be public servants with functions identified

by this Bill or the board. An office for each to carry out their duties is to be created in the government service by the chief executive.

Clause 21 provides that the registrar may appoint the number of inspectors that he or she considers necessary. Inspectors must be public servants and carry out duties under this Bill as directed by the registrar.

Clause 22 requires the Minister to provide photographic identification cards to inspectors.

These cards must show the name and appointment of the inspector and include a recent photograph. They must be returned when an inspector ceases to be an inspector. Failure, without a reasonable excuse, to return the identification card incurs a fine of one penalty unit.

Clause 23 sets out provisions for entry by inspectors as well as the conditions attached to entry.

Failure to comply with this section incurs a fine of 50 penalty units for a natural person or 250 penalty units for a body corporate.

Division 3 - Finances

Clause 24 defines the money of the board as money received under section 39 (Periodic notices and payments by employers); income derived from investments; money borrowed by the board; and any other money paid to the board under this Bill.

Clause 25 sets out the purposes for which the money of the board can be used. These are to:

- meet the costs, expenses and other obligations of the board; and
- pay remuneration or allowances to any person appointed or employed under this Bill.

Clause 26 allows the board to borrow money in amounts, and on terms, approved by the Minister. The board may use part or all of its assets as security for the repayment of money borrowed and interest on that money. The board must not borrow money except under these conditions.

Clause 27 provides that the board gain Ministerial approval prior to entering into a contract for the payment or receipt of an amount greater than \$250,000 except if the contract is for an investment in accordance with section 56 (Investment) of the *Financial Management Act 1996*.

Clause 28 specifies that triennial investigations must be undertaken by an actuary appointed by the Treasurer.

The investigations are to examine the state and sufficiency of the money of the board. They are to be performed when requested by the board and, or within 3 years of the commencement of the legislation and at the end of each following period of 3 years.

The actuary must provide a report to the board and advise whether, in the actuary's opinion, any change in the rates of periodic payments by employers to the board is necessary.

The actuary must also provide a copy of the report to the Minister:

PART 3 - REGISTRATION OF EMPLOYERS

Clause 29 requires the board to establish and maintain the Long Service Leave (Cleaning, Building and Property Services) Register of Employers.

Clause 30 requires that an employer apply to the registrar for registration; outlines the details required in the application; and imposes a fine of 50 penalty units for failure to comply with this clause.

The application must be given to the registrar within 1 month after the applicant becomes an employer or within any additional time set by the registrar.

Clause 31 requires the registrar to enter in the register the name and address of the applicant; the date of registration and any other particulars required by the board; after the registrar is satisfied that an applicant under clause 30 (Application for registration by employer) is an employer. The registration takes effect from the date on which the application was given to the registrar.

Clause 32 requires the registrar to give the registered employer a signed certificate of registration. This certificate is proof that the person was a registered employer on the date stated in the certificate.

Clause 33 requires registered employers to notify the registrar, in writing, of any change of address within 1 month of any change.

PART 4 - REGISTRATION OF EMPLOYEES

Clause 34 requires the board to establish and maintain the Long Service Leave (Cleaning, Building and Property Services) Register of Employees.

Clause 35 allows an employee to apply to the registrar for registration and sets the format of that application.

Clause 36 provides that an employer may apply to the registrar for registration of an employee if the employee is not registered and has not applied for registration under clause 35 (Application for registration by employee) within 3 months after commencement of cleaning work.

The clause also sets out the details required in the application.

Clause 37 requires the registrar to enter in the register the following details:

- the name and address of the employee;
- his or her date of birth;
- the name of the employer;
- the address of the principal place of business of the employer, or, in the case of a body corporate, the address of the registered office;
- the date on which the registration takes effect; and
- any other particulars required by the board.

The registration takes effect from the date on which the application was given to the registrar.

Clause 38 requires the registrar to provide to an applicant written notice, within 7 days, of his or her decision to refuse registration and supporting reasons for the decision.

The applicant may apply to the board for a review the registrar's decision to refuse an application for registration.

After reviewing the decision the board may either confirm the registrar's decision or order that the applicant, or the person for whom the application is made, be registered.

The decision of the board and the supporting reasons must be notified, in writing, to the applicant within 7 days of the decision.

A notice of refusal to register and a notification of the board's decision and reasons may be posted to the applicant at the address set out in the application.

PART 5 - PERIODIC NOTICES AND PAYMENTS

Clause 39 sets out details for periodic notices and payments by employers. The clause sets the penalty for failure to comply with this clause; details required for the notice to be valid; possible court penalty for failure to comply with subsection 1; and processes for fines.

Clause 40 provides for extra payments to be made when an employer fails to make a payment to the board by the due date. This clause makes the employer liable to pay the board either 2.5% interest on the amount for each month after the due date or part thereof, or \$50 for each month or part thereof after the due date, whichever is the greater amount.

The clause also provides for the registrar to remit part or all of the extra amount payable if he or she is satisfied that the circumstances that gave rise to the

contravention were not caused by the employer or that to do so would be fair and reasonable.

Clause 41 provides that, following the receipt of a written application, the employer of a working director must be granted an exemption by the board from the payment of the 2% of total ordinary pay for that working director. The application must be in a form approved by the registrar.

The exemption expires if the working director ceases to be a working director without ceasing cleaning work or if the working director notifies the board that he or she no longer wants the exemption to apply.

While an exemption is in force the working director is not an employee under this Bill.

Clause 42 requires employers to keep record for each employee. The records must show particulars of:

- (a) name of employee and his or her date of birth; and
- (b) nature of the cleaning work carried out; and
- (c) the ordinary pay; and
- (d) the number of days worked in each 2 month period; and
- (e) the date of commencement; and
- (f) long service leave granted or payment in lieu; and
- (g) if the employee ceases to be employed, the date on which that occurred.

The clause provides a fine of 20 penalty units for failure to keep these records.

The employer must retain these records for 6 years after the employees ceases employment in the cleaning industry with the employer. The fine for failure to retain these records is 20 penalty units.

PART 6 - ENTRIES IN THE EMPLOYEES REGISTER

Clause 43 sets out the particulars to be entered and maintained by the board in the employees' register. They are:

- (a) the numbers of days accrued by the employee;
- (b) the employee's ordinary pay;
- (c) the entitlement of the employee to long service leave;
- (d) long service leave granted or taken as payment in lieu (under this Bill or the *Long Service Leave Act 1976*);
- (e) for an employee who has ceased to work, the date on which he or she ceased to work, or, for an employee who ceased to work in the cleaning industry, the date on which he or she left the industry;
- (f) any other matters considered appropriate by the board.

Clause 44 sets out the mechanisms where the board can question the amount of ordinary pay for an employee. The board must give written notice to the employer and the employee setting out their rights.

The employer or employee may write to the board within 1 month identifying matters that he or she wishes the board to take into consideration and appear before the board either in person or by a person appearing on his or her behalf to present his or her case.

The board may decide, after consideration of any statement or representations, that the amount of ordinary pay notified is either insufficient or excessive. It can set a different amount as the ordinary pay. The board must enter that new amount in the employees' register.

The amount set by the board becomes the ordinary pay of the employee and if it is greater than the amount in the notice supplied by the employer, the employer must pay the board the difference. If, on the other hand, the amount set by the board is less than the amount stated in the employer's notice the board must refund the difference to the employer.

Clause 45 provides that a registered employee earns service credits at the rate of 1 day for each whole or part day worked in the cleaning industry.

The clause sets a range of conditions under which a registered employee will still earn service credits while absent from work.

An employee cannot accrue more than 220 days in any one year other than annual leave.

The clause sets the limits to be credited when calculations made in response to work interrupted or ended by an employer avoiding the payment of long service leave.

When an employee with less than 10 years service leaves the industry permanently (other than for total incapacity) and receives payment for the relevant period of service that employee must not receive credits in the employees' register for 1 year after application was made for that payment.

An employee cannot be credited with a period of service unless his or her employer has made the required payments to the board for that service.

However, an exemption can be granted, where the employer is registered but has ceased to employ any person to carry out cleaning work and, although payment has not been made for the period of service, the registrar is satisfied that the employee would have otherwise been entitled to be credited with the period of service.

Clause 46 allows the board to remove an employee's name from the register if he or she has not been credited with any period of service in the register for 4 years or more.

The date that the employee ceases to be registered is the date his or her name is removed from the register. The employee is then unable to claim for payment for, or instead of, long service leave for any period prior to the cessation of registration except in certain circumstances.

The board cannot remove an employee's name from the register if the employee ceases cleaning work but has notified the board that he or she is otherwise employed or engaged in work in the industry until any one of the following conditions is met:

- (a) the employee seeks a pay out of the total amount due for or instead of long service leave;
- (b) the employee's employer seeks reimbursement for entitlements due under clause 64 (5) (Benefits under Long Service Leave Act) for payment made to the employee for long service leave;
- (c) in the case of a working director, the working director requests the board to remove his or her name from the register;
- (d) 10 years have lapsed since the employee ceased work in the cleaning industry.

A working director must notify the date on which he or she commenced work in the cleaning industry and the name and address of his or her employer (if any).

An employee can apply for and be granted payment instead of long service leave accrued prior to the cessation of their registration if he or she would have met the requirements for payments instead of leave under clause 54 (Entitlement to payment instead of leave) but for ceasing to be registered.

A person whose name has been removed from the register can apply to the board for reinstatement.

PART 7 - ANNUAL CERTIFICATES

Clause 47 requires the registrar to give each registered employee a certificate between 31 July and 1 November each year. The certificate must show the total number of days' service accrued up to the end of the previous financial year and the number of days accrued in the previous financial year.

Clause 48 requires the registrar to give each registered employer a certificate between 31 July and 1 November each year. The certificate must show each employee's total number of days' service and the number of days accrued up to the end of the previous financial year. The certificate must also show the total amount paid by the employer to the board during the previous financial year.

Clause 49 allows an employee or employer to challenge the accuracy of any matter in the certificate within 6 months of the date of the certificate. Any objection must be made in writing to the board.

If the board accepts the objection, it must correct the register and issue an amended certificate to the person who made the objection.

PART 8 - LONG SERVICE LEAVE AND PAYMENTS

Clause 50 declares that 220 days of service is to be recognised as a year of service.

Clause 51 sets the formula for calculating long service leave.

Clause 52 provides that an employee with 10 years or more of recognised service is entitled to the amount of leave calculated using the formula outlined in clause 51 (Long service leave formula). The clause also ensures that if an employee has more than 10 years service he or she is entitled to extra leave for the additional service in accordance with the formula.

Clause 53 requires that the employer grant long service leave for an employee within 6 months after it has accrued unless the board, on application, grants an additional period or unless the employer and employee agree on an additional period. Failure to meet these requirements incurs a fine of 50 penalty units.

At least 2 weeks long service leave must be granted at any one time. The employer must give the employee written notice of the start and end dates.

There must be at least two months notice to the employee unless he or she agrees otherwise. A breach of this condition attracts a fine of 50 penalty units.

Clause 54 provides for long service leave to be granted as a payment in lieu of leave and sets the conditions that apply to this provision.

Clause 55 provides that an employee granted leave under clause 53 (Grant of leave) may apply to the board for payment. The application must be in writing, signed by the employee, given to the board and accompanied by the employer's notice.

The board, satisfied that the applicant is entitled to the long service leave, must pay the appropriate amount calculated in accordance with clause 57 (Amount of payment). If the applicant requests early payment and the application is made at least 14 days before the entitlement is due, the board must pay the applicant at least 7 days before the entitlement is due.

Clause 56 sets out the requirements for payment in lieu of long service leave for employees.

If the board is satisfied that the applicant is entitled to payment in lieu of long service leave, the board must pay the appropriate amount calculated in accordance with clause 57 (Amount of payment).

Clause 57 sets the formula for payments under clauses 55 (Payment for leave) or 56 (Payment instead of leave).

Clause 58 sets out the requirements for recording payment and service under clauses 55 (Payment for leave) or 56 (Payment instead of leave).

Clause 59 specifies that public holidays falling within long service leave taken by an employee are taken as part of the long service leave and do not increase the period of leave.

PART 9 - MISCELLANEOUS

Clause 60 allows for certain decisions of the board to be reviewed on application to the Administrative Appeals Tribunal. These include:

- (a) refusing to register an employer under clause 31 (Employer registration); or
- (b) confirming a decision of the registrar to refuse an application under sub-clause 38 (4) (Appeal against refusal to register); or
- (c) refusing to allow an additional period under paragraph 39 (2) (b) (Periodic notices and payments by employers); or
- (d) refusing to accept that a person is a working director under sub-clause 41 (1) (Exemption from payment for working directors); or
- (e) that an amount of stated ordinary pay is insufficient or excessive under clause 44 (Decision of ordinary pay by the board); or
- (f) a decision to allow, or not allow, an objection to a matter stated in an annual certificate under sub-clause 49 (2) (Objection to matter stated in annual certificate); or
- (g) a decision to allow, or not allow, an additional period under paragraph 53 (1) (a) (Grant of leave); or
- (h) refusing to accept that an applicant is entitled to payment under sub-clause 54 (1) (Entitlement to payment instead of leave); or
- (i) refusing to make a payment under sub-clauses 55 (3) (Payment for leave), 56 (6) (Payment instead of leave) or 64 (5) (Benefits under Long Service Leave Act).

Certain decisions of the registrar may be reviewed on application to the Administrative Appeals Tribunal. These include:

- (a) a decision to allow, or not allow, an additional period under sub-clause 39 (1) (Periodic notices and payments by employers); or
- (b) refusing to remit part or all of a payment payable by the employer under sub-clause 40 (1) (Failure to make periodic payment); or
- (c) refusing to credit an employer with a period of service under sub-clause 45 (7) (Service credits).

Clause 61 requires that a decision made by the board or the registrar in relation to clause 60 (Review of decisions of board and registrar) must be notified in writing to the person whose interests are affected by the decision. Such notice must comply with the code of practice in force under subsection 25B (1) (Code of practice) of the *Administrative Appeals Tribunal Act 1989*.

Clause 62 sets out the valid evidence of an offence against clause 39 (1) to be supplied by the registrar. It is to be supplied as a certificate, signed by the registrar containing information specified in a range of paragraphs. The certificate has to comply with any of the paragraphs.

Clause 63 allows an employer, a registered employee or their representative, to inspect an entry in the register and gain a certified copy of an entry that relates to them.

Clause 64 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 the cleaning industry. A registered employee who is eligible under this Bill as well as another Act must elect which Act he or she will take those benefits and notify the board in writing of his or her election and the period of service to be covered.

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

An employer may apply to the board for reimbursement of an amount paid as, or in lieu of, long service leave to a registered employee who elects to take long service benefits under another Act. If the board is satisfied that any such application is valid, the board must pay the employer the relevant amount less any amount outstanding that is payable by the employer to the board. Sub-clause 64 (6) sets out the formula for calculating the relevant amount.

Clause 65 provides that the Executive may make regulations under this Bill.

PART 10 - TRANSITIONAL

Clause 66 sets up transitional arrangements for registration of employers - an employer must apply for registration within 3 months of the commencement of this clause. This clause expires 2 years after it commences.

Clause 67 provides that a person who was an employer before the commencement of clause 39 (Periodic notices and payments by employers) is deemed to have become an employer on the day that it commenced. This clause expires 2 years after it commences.

Clause 68 sets out the formula for calculating employee service credits in the first year of the Bill's operation. This clause expires 2 years after it commences.

PART 11 - CONSEQUENTIAL AMENDMENTS

This part of the Bill deals with other Acts which are affected by this Bill and amends those Acts to include reference to this Bill in the relevant sections.

Clause 69 amends the *Long Service Leave Act 1976*.

Clause 70 amends the *Workers Compensation Act 1951*.