

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

**LONG SERVICE LEAVE (BUILDING AND CONSTRUCTION INDUSTRY)
(AMENDMENT) BILL 1993**

EXPLANATORY MEMORANDUM

**Circulated by the Authority of the Minister for Industrial Relations
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Explanatory Memorandum

The Long Service Leave (Building and Construction Industry) Act 1981 ("the Act") provides for long service leave for employees and contractors in the building and construction industry. The Act recognises the mobility of persons within the industry and provides for portability of benefits by the registration of employees and by requiring employers to pay a levy of a stated percentage of the total remuneration paid to employees from which long service leave benefits are funded.

The Long Service Leave (Building and Construction Industry) (Amendment) Bill 1993 ('the Bill') amends the Act to effect a range of amendments following a review of the Act by the Building and Construction Industry Long Service Leave Board established under section 4 of the Act.

The more significant amendments made by the Bill -

- remove the requirement for an employer to pay a levy in respect of an apprentice and allow the service of a person as an apprentice to be included in the calculation of long service leave benefits when less than 10 years of service has accumulated;
- ensure that the proportion of an employers' contributions which are paid into the ACT Building Industry Training Fund will be considered to be part of the employer's obligation to training under the Commonwealth Training Guarantee (Administration) Act 1990;
- extend the scheme to part-time employees; and
- remove sexist language.

Financial Considerations

There are no direct costs associated with the amendments. The removal of the levy on apprentices will reduce costs to employers in the industry. Such costs as may be incurred by the Board arising from the proposals will be met from the Board's revenues - this is not considered to be significant.

MAIN AMENDMENTS

Removal of the requirement on employers to make payments to the Board for apprentices (Clauses 18 and 32)

Under section 37 of the Act an employer is required to make payments to the Board of a stated percentage of the ordinary remuneration of all of his or her employees for long service leave purposes and, by virtue of the definition of an employee, these payments include amounts in respect of apprentices. Clause 18(b) amends subsection 37(3) of the Act to specifically exclude apprentices from this requirement.

The intention of the amendment is to reduce industry costs and, as a consequence, to encourage the employment of persons as apprentices in the industry.

The effect of clause 32 is to enable refunds to be made to employers for payments made in respect of apprentices since 1 May 1992, thereby allowing for the benefits of reduced costs to cover all of the current financial year.

Service as an apprentice (Clause 25)

By virtue of paragraph 53(1)(a) of the Act the period of an apprenticeship is excluded when calculating the period of recognised service for which a person may be entitled to a payment in lieu of leave. The removal by clause 25(a) of this impediment to persons seeking a payment in lieu of leave will place such persons in the same position as a person who is granted a period of long service leave the calculation of which under section 51 does not exclude the period of an apprenticeship.

Payments to the Training Fund (Clauses 10 and 11)

Because the requirement on the Board to transfer 10% of the amounts paid to the Board under section 37 of the Act to the Training Fund under section 19C of the Act and the obligation upon the Minister to apply the moneys to training under section 19D of the Act are merely discretionary there is doubt that such amounts can be claimed by employers as eligible training expenditure in meeting their obligations to training under the commonwealth Training Guarantee (Administration) Act 1990.

The Bill clarifies the matter by making the requirement on the Board and the Minister mandatory and also ensures that employers are entirely covered under the Commonwealth Act for payments made by them by backdating the amendment to 1 July 1990, the date on which that Act commenced operation.

Inclusion of part-time employees (Clause 4)

The effect of the definition of an employee in subsection 3(1) of the Act is to exclude part-time employees from the long service leave scheme. The removal of this exclusion by the amendment effected by clause 4(b) brings the ACT into line with other jurisdictions which have recognised the service of part-time employees in the industry.

Removal of gender specific terms (Clause 31 and the Schedule)

The Bill and the Schedule remove sexist language from the Act and make various other changes to reflect current drafting policy.

Details of the provisions of the Bill are included in the Attachment.

ATTACHMENT

LONG SERVICE LEAVE (BUILDING AND CONSTRUCTION INDUSTRY)
(AMENDMENT) BILL 1993**Formal provisions**

Clauses 1, 2 and 3 are formal provisions dealing with the short title, commencement arrangements and references in the Bill to the "Principal Act", respectively.

Interpretation

Clause 4 amends section 3 (an interpretation provision) of the Act by modifying the definition of various terms used in the Act. The changes to definitions of some terms are consequential upon the amendments made by other provisions of the Bill and in other cases are consequential upon amendments effected by other legislation.

Paragraph 4(a) amends the definition of the term "Board" by removing the words "Building and" from the title of the Board so that it becomes known as the Construction Industry Long Service Leave Board. The variation to the title makes it less cumbersome and reflects changes made in certain other jurisdictions. Similar amendments are made by *clauses 5, 6, 7, 8 and 9* to remove these words from other references to the Board and to the title of the Training Fund established under section 19B of the Act.

Paragraphs 4(b) and (c) are consequential upon the enactment of the *University of Canberra Act 1989* of the Commonwealth.

Paragraph 4(f) inserts a definition of a working director as a consequence of the amendments effected by *clause 19* and *paragraphs 4(d) and (e)* amend existing terms also as a consequence of the working director provisions.

Powers of the Board

Clause 10 amends section 19C of the Act dealing with the transfer of amounts to the Construction Industry Training Fund by the Board so that the provision is no longer discretionary but requires that the Board must transfer the amount referred to in subsection 19C(1) to the Fund at the specified intervals.

Subclause 10(2) deems this amendment to have commenced on 1 July 1990.

Application of Fund money

Similarly, *clause 11* amends section 19D of the Act to replace the Minister's discretion to apply Fund money for the purposes of training in the building and construction industry with a requirement that the Minister must apply the money for that purpose.

Contracts

Clause 12 amends section 23 of the Act, which limits the maximum value of a contract into which the Board may enter where the Minister's approval has not been given, by increasing the maximum value of such a contract from \$100,000 to \$250,000.

Repeal and substitution

Clause 13 repeals section 25B of the Act which is a spent provision and inserts a new provision enabling the Board to write-off -

- . irrecoverable amounts of revenue;
- . irrecoverable debts and overpayments;
- . amounts of revenue, debts or overpayments, the recovery of which would, in the opinion of the Board, be uneconomical; and
- . the value of lost, deficient, condemned, unserviceable or obsolete stores.

Application for registration

Clause 14 amends section 27 of the Act, subsection (2) of which sets out the particulars to be included in an application from an employer for registration, by inserting a new sub paragraph 27(2)(b)(i) requiring the employer to provide details of the address of his or her principal place of business and if the employer is a body corporate, of the address of its registered office.

Application for registration by employee or contractor

Clause 15 amends section 32 of the Act which enables employees and contractors to register with the Long Service Leave Registrar.

Paragraphs 15(a) and (b) amend subsection 32(2) of the Act to require that the address required to be provided by an applicant for registration be his or her residential address and that an applicant must also provide details of his or her date of birth.

Paragraph 15(c) is a technical amendment.

Paragraph 15(d) inserts a new subparagraph 32(2)(b)(iii) which requires an applicant to provide details of his or her employer and the employer's principal place of business or, if the employer is a corporation, the address of its registered office.

Paragraph 15(e) omits subparagraph 32(2)(b)(iv) as it is no longer required.

Paragraph 15(f) amends subparagraph 32(2)(b)(v) so that instead of an applicant being required to provide details of any period of service for which the applicant is credited under the law of another State or Territory, he or she must provide details of the State or Territory under a law of which he or she has been credited with a period of service.

Paragraph 15(g) amends subparagraph 32(2)(b)(vi) so that instead of being required to provide details of a period of apprenticeship served by the applicant in the industry, the applicant is required to provide details of the

date on which the period of apprenticeship, if any, commenced but only if the period of apprenticeship is still being served by the applicant.

Paragraph 15(h) inserts new subsection 32(3) which defines an "employee" for the purposes of subsection 32(1) to include a person who was an employee at any time during the period of 12 months before the date of lodging the application. This provision is intended to enable persons who may, out of ignorance or oversight, fail to apply for registration prior to the termination of their employment, to lodge an application for registration up to 12 months after their employment in the industry has ceased.

Application by employer for registration of employee

Clause 16 amends section 34 of the Act which permits an employer to apply for the registration of an employee.

Paragraphs 16(a) omits the requirement for the applicant's address to be provided as a consequence of the amendment made by *paragraph 16(b)* and *paragraph 16(c)* amends the existing provisions relating to the details of the employee which must be supplied by requiring that the application include details of the employee's date of birth.

Paragraph 16(b) inserts new paragraph 34(2)(ab) to require that the applicant also provide details of the address of his or her principal place of business or registered office where the applicant is a body corporate.

Registration

Clause 17 amends section 36 of the Act which provides for the registration of employees and contractors.

Subsection 36(2), which sets out the particulars which must be entered in the Employees and Contractors Register, is amended consequentially so that details of the type required to be provided as a result of the amendments effected by *clause 16* must be entered in the Register.

Periodic notices and payments by employers

Clause 18 amends section 37 of the Act which requires an employer to lodge periodic notices with, and make periodic payments to, the Board in relation to his or her employees.

Paragraphs 18(a) and (e) of the Bill amend section 37 so that an employer is not required to lodge a notice or make a periodic payment in respect of a person who is not registered as an employee and is employed by the employer for less than five consecutive days during a reporting period. Reporting periods are of two months duration and an employer's liability to lodge returns is determined in accordance with subsection 37(1).

Paragraph 18(b) amends subsection 37(3) of the Act which sets out the method for determining the prescribed amount required to be paid by an employer to the Board in relation to a reporting period. The amount is expressed to be an amount equal to 2.5% of the total of the amounts of ordinary remuneration paid or payable by the employer to his or her employees during the reporting period or another percentage as determined by the Minister for the purposes of the section.

The effect of the amendment is that the "... 2.5% of ordinary remuneration paid or payable to employees..." to which subsection 37(3) refers does not include ordinary remuneration paid or payable to apprentices.

Paragraph 18(c) amends subsection 37(4) to ensure that where payments are made by an ACT employer to a reciprocal authority regarding an employee who works in the industry in the ACT for not more than 12 months, the employer is exempt from the requirement to make payments to the Board but only where the employee in respect of whom the payments are made is registered with that authority.

Paragraph 18(d) replaces subsection 37(6) of the Act, which provides for a penalty payment to be made by an employer who fails to make a long service leave payment to the Board within the specified time, in order to make it clear that the Board may recover \$50 for each month or part of a month during which the long service leave payment remains unpaid where the amount

owing for each month or part of a month as calculated under new paragraph 37(6)(c) is less than \$50.

Exemption from payments for working directors.

Clause 19 inserts a new section 37A into the Act the purpose of which is to enable a person who performs building and construction work, but only as a working director as defined in *paragraph 4(f)*, to elect whether or not to participate in the long service leave scheme.

The new section recognises that working directors are not dis-similar to self-employed contractors and confers on them a similar discretion to participate in the scheme or to decide otherwise.

New subsection 37A(1) requires the Board, after receiving a notice in an approved form as required by new subsection 37A(2) and on being satisfied that the person concerned is a working director, to exempt the person's employer from paying the long service leave levy under section 37.

New subsection 37A(3) provides that such an exemption continues until the person concerned ceases to be a working director by virtue of him or her no longer performing building and construction work or until that person changes his or her election.

New subsection 37A(4) makes it clear that a working director who is not participating in the scheme is not subject to the Act during the period of the exemption.

Employers to keep records

Clause 20 amends section 39 of the Act which requires employers to keep records in relation to employees and specifies the particulars to be kept in relation to each employee. Paragraph 39(1)(a) of the Act is amended to require that in addition to particulars of an employee's name an employer must also keep a record of the employee's date of birth.

Particulars in the Employees and Contractors Register

Clause 21 amends section 40 of the Act, which sets out the particulars required to be entered by the Board in the Employees and Contractors Register, by replacing paragraph 40(a), which requires that particulars of any period of apprenticeship served by the employee or contractor be entered in the register, with a new paragraph 40(a) requiring that details of the date on which any existing period of apprenticeship commenced be entered. This is consistent with the amendment effected by *paragraph 15(g)*.

Service credits

Clause 22 amends section 42 of the Act which sets out the means of establishing the entitlement of a registered employee or registered contractor to be credited for service in the industry.

Paragraphs 22(a), (b) and (c) amend subsection 42(5) of the Act which provides that where a registered employee or registered contractor is credited with less than 10 years of service and ceases to work in the industry for reasons other than total incapacity, with the intention of leaving the industry, and is paid in respect of a period of recognised service, the employee or contractor cannot be credited with any further period of service within 12 months of the date upon which the application for payment was made. The amendments recognise that a registered contractor may elect to withdraw from the scheme.

Paragraph 22(d) removes an anomaly in that an employee who does register within the 3 month period only obtains registration from that date whereas an employee who registers after that period, by virtue of existing subsection 42(8) obtains registration on the commencement of his or her employment. The removal of the reference to the 3 month period overcomes this.

Removing names from Employees and Contractors Register

Clause 23 amends section 45 of the Act to achieve 2 purposes -

to recognise that persons with registered service in the industry sometimes cease to perform building and construction work while

nevertheless remaining employed in the industry - for example, when an employee moves into a management or administrative position which is not building and construction work. In such circumstances the person is not to be removed from the Register but is to remain on the Register for a period up to 10 years or until one of the others stated circumstances occur; and

to acknowledge that registered persons sometimes are unaware of their entitlements and such persons who, but for ceasing to be registered, would be entitled to a payment in lieu of leave should not be prevented from applying for payment.

Paragraph 23(a) is a technical change. *Paragraph 23(b)* inserts 3 new subsections into section 45.

New subsection 45(2AAA) prevents the Board from removing a registered employee or contractor from the Register (under subsection 45(1)) where he or she has notified the Board that he or she has ceased building and construction work but is still employed in the industry until he or she applies for any entitlements which exist or his or her employer, having made a payment to the employee or contractor, seeks reimbursement under subsection 63(4); the employee or contractor requests removal of his or her name from the Register; or a period of 10 years have elapsed since the employee or contractor last performed building and construction work.

New subsection 45 (2AA) provides details that must be included in the employee's or contractor's notice to the Board.

New subsection 45(2AB) enables an employee or contractor to apply for a payment in lieu of leave to which he or she would have been entitled under section 53 but for being removed from the Register.

Annual certificates for employees and contractors

Clause 24 amends section 46 of the Act by correcting a gender specific reference and inserting a new subsection 46(2) which provides that the Registrar is not required to post the certificate of information to an employee or contractor where the Registrar believes his or her address as last recorded in the Register

is not his or her present address. This will overcome situations where registered persons have moved residence without notifying the Registrar.

Entitlement to payment in lieu of leave.

Clause 25 amends section 53 of the Act which provides for the calculation of entitlements to payments in lieu of long service leave.

Paragraph 25(a) amends paragraph 53(1)(a) the effect of which is that a period of apprenticeship is included in the calculation of a payment in lieu of leave.

Paragraph 25(b) omits subparagraph 53(1)(a)(ii) and inserts a new subparagraph which recognises that a person may have aggregated service as an employee and as a contractor. If the total period of aggregated service is less than 5 years only the period of service as a contractor is included in the calculation of the payment in lieu but if the total period of aggregated service is equal to or exceeds 5 years all the service is included.

This amendment reflects the fact that a contractor's contributions to the fund are made at his or her own discretion and he or she should be entitled to recover payments made into the fund on his or her own behalf. However, in order to receive benefits for which payments have been made by an employer the person must meet the same minimum service period of 5 years as is required of any employee.

Paragraph 25(c) omits paragraph 53(1)(b) of the Act and inserts 2 new paragraphs. New paragraph 53(1)(b) provides that an entitlement to a payment in lieu of leave only arises where the employee, other than a working director, ceases work in the industry (excluding certain stated reasons) with the intention of permanently leaving the industry and that not less than 20 weeks have elapsed since the employee ceased work and thus was not credited with any service.

This amendment recognises that a working director may opt out of the scheme at any time and it also includes a 20 week 'cooling-off' period to minimise instances where employees make a rash decision to cease work, receive and rapidly dissipate their payment in lieu and return to the industry having to recommence accruing entitlements.

New paragraph 53(1)(ba) provides that an entitlement to payment in lieu also arises where a person, being a contractor or working director, requests his or her removal from the Register.

Paragraph 25(d) inserts a new subsection 53(1A) which provides an exception to the cooling-off period provided for in new subparagraph 53(1)(b)(ii) where the Board is satisfied that the employee intends to reside permanently in another country.

Payment for service in reciprocating State or Territory

Clause 26 omits paragraph 56A(2)(b) of the Act and inserts a new paragraph which provides that an application to the Board for payment in lieu of leave in respect of service in a reciprocating State or Territory should include details of the State or Territory under which the applicant may be entitled.

Amount of Payment

Clause 27 amends section 57 of the Act, which provides by application of a formula for the method of calculation of a payment in lieu of leave, to vary the method of calculating the amount of payment in respect of a registered contractor. This will bring the method of calculation into line with that which is used in Victoria and will improve the general level of payments to contractors.

Paragraph 27(a) amends subsection 57(1) to make it clear that the method of calculation provided for in that subsection applies only to persons who have service credited as an employee.

Paragraph 27(b) inserts a new subsection 57(2A) which provides that in respect of an application by a person who has service credited as a contractor that payment shall be the sum of any amounts paid by the contractor to the Board and interest at a determined rate on those amounts.

Paragraph 27(b) also inserts a new subsection 57(2B) which enables the Board to determine an interim rate of interest pending the determination of the rate by the method provided for in *paragraph 27(e)* of the Bill.

Paragraphs 27(c) and (d) make technical changes to subsection 57(3) of the Act which relates to interpretation. *Paragraph 27(e)* further amends subsection 57(3) of the Act to include an interpretation of terms used in the section. In particular the 'determined rate' for the purposes of new subsection 57(2A) is expressed to be calculated, according to a formula, on or after 1 July each year for the preceding financial year.

The effect of the amendments is that a person who has aggregated service as an employee and a contractor will be entitled to apply for a payment under subsections 57(1) and 57(2A).

Review of decisions

Clause 28 amends section 59 of the Act which enables an application to be made to the Administrative Appeals Tribunal for a review of a decision made by the Board.

Paragraphs 28(a), (b) and (c) insert new paragraphs 59(1)(aa), (ba), (bb) and (ea) to provide a right of review of decisions made under section 28, paragraph 37(6)(b), subsection 37A(1) and subsection 53(1A), respectively.

Inspection of the register

Clause 29 amends section 60 of the Act, which enables specified persons to inspect and take a copy of an entry in the Register, to enable a person who is acting on behalf of an employee to utilise this facility.

Benefits under Long Service Leave Act

Clause 30 amends section 63 of the Act which relates to benefits to which an employee is entitled under both the Long Service Leave Act 1976 and the Act and enables the employee to make an election as to which benefits he or she will take.

Clause 30 amends subsection 63(5) to provide that where an employee has elected to take benefits under the Long Service Leave Act 1976 and, by virtue of section 63 his or her employer has made payments to the employee under that

Act and is entitled to a payment from the Board as a consequence, that payment will be reduced by any amount that the employer owes to the Board.

Further amendments

Clause 31 provides for further amendments to the Act as specified in the Schedule. These generally correct gender specific terms and make other changes to reflect current drafting policy.

Refund of certain payments in respect of apprentices

Clause 32 enables the Board to refund payments made by employers in respect of persons who were apprentices during the period from 1 May 1992.