

EXPLANATORY STATEMENT

AUSTRALIAN CAPITAL TERRITORY LONG SERVICE LEAVE (BUILDING AND CONSTRUCTION INDUSTRY) (AMENDMENT) ORDINANCE 1987

No. 16 of 1987

The Long Service Leave (Building and Construction Industry) Ordinance 1981 ("the Principal Ordinance") establishes a scheme which enables employees or contractors in the Australian Capital Territory building and construction industry to accrue credits for periods worked in that industry. The credits entitle those employees or contractors to receive paid long service leave after 10 years continuous service in the industry. The scheme is funded by contributions from employers in the industry who are required to pay to a fund administered by the Building and Construction Industry Long Service Leave Board ("the Board") a proportion of the wages paid to those employees in the industry. Similar schemes operate in the States of New South Wales (under the Building and Construction Industry Long Service Payments Act 1986), Victoria (under the Construction Industry Long Service Leave Act 1983) and South Australia (under the Long Service Leave (Building Industry) Act 1975).

The Long Service Leave (Building and Construction Industry) (Amendment) Ordinance 1987 amends the Principal Ordinance to enable the Minister to enter into agreements with State or other Territory governments for the reciprocal recognition of employment in the building and construction industry for the purposes of long service leave entitlements.

Although the Principal Ordinance provided a mechanism for the recognition of service in other jurisdictions for long service leave purposes, the mechanism was considered inappropriate because it required uniform entitlements to be paid to employees or contractors under the law of each jurisdiction. In practice, the Australian Capital Territory and the State jurisdictions which are to be recognised for long service leave purposes do not have uniform entitlements.

In particular, the amendments provide for:

- . the recognition of the service of a registered employee or contractor in a reciprocally recognised building and construction industry for the purpose of determining whether that person is entitled to a benefit under the Principal Ordinance;
- . the payment of entitlements accrued by registered employees or contractors under schemes set up under corresponding laws in States and Territories ("reciprocal schemes") by the Board from its fund when the person also

has an entitlement under the Principal Ordinance. The amount of those payments would consist of:

- (1) a payment based on the amount of service which the person has accumulated in the Territory; and
 - (2) a payment based on the person's entitlement under the reciprocal law. The second part of the payment would be assessed by the reciprocal authority (ie. the body in the relevant reciprocal State or Territory having the same function as the Board);
- the exchange of information concerning the service of registered employees and contractors between the Board and reciprocal authorities; and
 - the payment of entitlements by a reciprocal authority on behalf of the Board when a person applies to that authority for payment of a Territory entitlement. The Board is required to advise the reciprocal authority of the person's entitlement under the Principal Ordinance and, if a payment is made, to re-imburse the authority for that payment.

Details of the amending Ordinance are set out in the Attachment.

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Sections 1, 2 and 3 deal with title, commencement and interpretation.

Section 4 amends a number of the definitions in section 3 of the Principal Ordinance, as a consequence of other changes to the Ordinance. In addition, sub-sections 3(3) and (4) of the Principal Ordinance are omitted. The substance of these provisions has been included in section 42 of the Principal Ordinance (see section 15 below).

Section 5 replaces a reference in paragraph 6(c) of the Principal Ordinance to the Minister approving a law of another State with a reference to the Minister declaring a law as a corresponding law. This is consequential upon the amendments to section 62 which deals with the recognition of equivalent legislation in reciprocal States or Territories (see section 29 below).

Section 6 amends section 7 of the Principal Ordinance to expand the powers of the Board. The Board is to be able to do all things which are necessary for it to give effect to any arrangement or agreement for the reciprocal recognition of long service leave entered between the Minister and a State or Territory government ("reciprocal agreement").

Section 7 amends paragraph 20(d) of the Principal Ordinance to make clear that any money paid to the Board under a reciprocal agreement forms part of the money administered by the Board.

Section 8 removes a surplus word from section 25 of the Principal Ordinance. The amendment does not alter the meaning of section 25.

Section 9 amends section 32 of the Principal Ordinance to remove a reference to the Minister approving a law of another State. In its place, a reference is inserted to a law declared by the Minister under section 62 as a corresponding law. This is consequential upon the amendments to section 62 which deals with the recognition of equivalent legislation in reciprocal States or Territories (see section 29 below).

Section 10 repeals section 33 of the Principal Ordinance because the operation of that section is exhausted.

Section 11 removes a reference to section 33 of the Principal Ordinance from Section 35 of that Ordinance. This amendment is consequential upon the repeal of section 33 (see section 10 above).

Section 12 repeals section 36(1)(b) of the Principal Ordinance. This amendment is consequential upon the repeal of section 33 (see section 10 above).

Section 13 amends section 37 of the Principal Ordinance to replace a reference to an authority set up under an approved law by a reference to a reciprocal authority. This amendment is consequential upon the amendments to section 62 which deals with the manner of recognising reciprocal laws (see section 29 below).

Section 14 amends section 40 of the Principal Ordinance to:

- . replace a reference to "days continuous service" with a reference to "days' service". This is consequential upon the amendments to section 42 of the Ordinance (see section 15 below).
- . make a drafting amendment to paragraph (c) required as a result of the amendments to the definition of "Building and Construction work" made by Ordinance No.12 of 1984. This amendment is not intended to alter the effect of paragraph (c).

Section 15 amends section 42 of the Principal Ordinance by substituting new sub-sections (1), (2), and (5). Sub-section (6) is also repealed. The new sub-sections (which substantially reproduce the provisions which they replace) implement the following changes:

- . The term "continuous service", which was defined by section 3 of the Principal Ordinance, has been simplified to "service". As a consequence, the definition of "continuous service" previously appearing in section 3 of the Ordinance is no longer required and has been repealed (in section 4 above). The definition of "service" only refers to work in the Australian Capital Territory building and construction industry. This is in contrast to the term "recognised service", inserted by section 4, which includes service in reciprocal jurisdictions. The effect of these amendments is to simplify the Principal Ordinance. In particular it removes implicit duplication of the definition of "continuous service" in section 42 which calculates how much continuous service a person has.
- . Sub-section 42(5) has been amended so that it prevents a person from obtaining service credits in the Territory if that person has ceased working the building and

construction industry of a reciprocal jurisdiction; with the intention of leaving the industry; within the previous 12 month period. This restriction previously applied only to persons ceasing work in the Territory industry.

Section 42 now provides that an employee or a contractor will be credited with one days' service in the building and construction industry for:

- (a) each day's work in the industry; and
- (b) each day the person is absent from work:
 - (i) on annual leave for more than 4 weeks in any year;
 - (ii) on long service leave;
 - (iii) attending jury service; or
 - (iv) attending court as a witness.

In addition, an employee or contractor would receive credit for each day:

- (a) the person receives paid leave (other than annual or sick leave);
- (b) the person is absent and entitled to workmen's compensation benefits for an injury caused by employment in the industry;
- (c) the person is on sick leave (up to 110 days in any year); or
- (d) the person was not employed in the industry to avoid long service leave payments (up to a maximum of 4 years).

Section 16 amends section 43 of the Principal Ordinance:

- to remove the reference to section 33 consequential upon the repeal of that section (see section 10 above); and
- consequential upon the replacement of the term "continuous service" with the term "service".

The effect of the amendment is to limit the entitlement to receive bonus credits to persons with service in the Territory building and construction industry at the commencement of the Principal Ordinance.

Section 17 amends section 44 of the Principal Ordinance to provide that an apprentice will only receive bonus credits if his or her period of apprenticeship is served in the Territory. In addition, section 44 of the Principal Ordinance is amended as a necessary consequence of the replacement of the term "continuous service" with the term "service". The effect of this consequential amendment is to limit the accrual of bonus credits by apprentices to work done in the Territory industry.

Section 18 amends section 45 of the Principal Ordinance to:

- . amend sub-section (1) as a necessary consequence of the replacement of the term "continuous service" with the term "service";
- . amend sub-section (1) to provide that a registered employee or contractor will be removed from the Employees and Contractors Register if that person has not served in the building and construction industry (in the Territory or a reciprocating State or Territory) within the previous four years. Previously, section 43 of the Principal Ordinance had provided that a person would be removed from the Register if that person had not been credited with any service in the Territory in the previous four year period;
- . delete the surplus words "or his legal representative" from paragraph 2(b). This amendment does not alter the effect of the provision; and
- . insert a new sub-section (2A) which provides for the replacement (if necessary) of a registered employee's or contractor's name on the Employees and Contractors Register if the Board is satisfied that the person has had his or her name removed and had served in the building and construction industry of a reciprocal State or Territory during the period of four years after the person ceased working in the Territory industry. If a person is re-registered, the Principal Ordinance applies to that person as if the name had never been removed from the Register (new sub-section (2B)).

Section 19 amends section 46 of the Principal Ordinance to replace references to "days continuous service in the building and construction industry" with references to "days service". This is consequential upon the replacement of the term "continuous service" with the term "service" (see section 15 above).

Section 20 amends section 47 of the Principal Ordinance to replace references to "days continuous service in the building and construction industry" with references to "days service". This is consequential upon the replacement of the term "continuous service" with the term "service" (see section 15 above).

Section 21 substitutes a new section 50 into the Principal Ordinance. The new Section 50 provides that a registered employee or a registered contractor is taken to have completed a year of:

service - for each 220 days service credited to that employee or contractor in the Employees and Contractors Register; and

recognised service - for each 220 days credited to the employee or contractor for service in the Territory or in a reciprocal State or Territory.

Section 22 amends section 51 of the Principal Ordinance to:

substitute a new sub-section (1) which provides that a registered employee or registered contractor who has a period of at least 10 years service in the building and construction industry of the Territory or a reciprocal State or Territory is entitled to receive a period of long service leave. The period of the leave is equivalent to 13/15 of a week's leave for each year of service with which that person has been credited in the Territory industry.

The effect of the amendment is to provide that a registered employee's or contractor's service in the building and construction industry of a reciprocating State or Territory is now used to determine whether that person is entitled to receive long service leave under the Principal Ordinance. If a person is entitled to receive a period of long service leave, the amount of that leave depends upon the amount of service with which that person has been credited within the Territory industry.

amend paragraph (2)(b) as a necessary consequence of the replacement of the term "continuous service" by the term "service" (see section 15 above).

provide a stylistic amendment to sub-section (2) by replacing a reference to "sub-section (1)" by a reference to "paragraphs (1)(a) and (b)". This amendment does not alter the substance of sub-section (2).

Section 23 substitutes new sections 53 and 54 into the Principal Ordinance.

The new section 53 provides that

- (1) a registered employee who has served in the building and construction industry of the Territory or a reciprocal State or Territory for between 5 and 10 years; or
- (2) a registered contractor who has served in the building and construction industry of the Territory or a reciprocal State or Territory for between 1 and 10 years,

is entitled to receive a payment in lieu of long service leave if he or she ceases working in the industry with the intention of leaving the industry permanently. The payment of long service leave is calculated at the rate of 13/15 of a week's leave for each year of service by the employee or contractor in the Territory industry. The effect of the amendment is:

- . to provide that service in the building and construction industry of a reciprocating State or Territory (as well as service in the Territory) is now used to determine whether a person is entitled to a payment under section 53 of the Principal Ordinance. The amount of the payment depends on the amount of service in the Territory building and construction industry.
- . to provide that a registered Contractor may receive a payment under section 53 after 1 year in the industry. Previously, contractors were required to serve 5 years in the industry before they were entitled to receive a payment under this section. This amendment was recommended by the Board because contractors contribute voluntarily to the scheme and the Board considered that they should not need to serve the same length of service as those who benefit because of payments made to the scheme by other persons.

Sub-section 53(2) provides that a person who has served in the building and construction industry of the Territory or a reciprocal State or Territory for between 55 days and 10 years is entitled to payment in lieu of long service leave if that person ceases work in the industry because of incapacity or death. The amount of the entitlement is calculated at the rate of 13/15 of a week's leave for each year of service in the Territory building and construction industry. The effect of the amendment is to provide that service in the building and construction industry in reciprocal States or Territories is used to determine an entitlement to payment under section 53. The amount of the payment depends on the person's service in the Territory industry.

The new section 54 provides that a person who has had a period of service in the building and construction industry of the Territory or a reciprocal State or Territory of between 55 days and 10 years is entitled to payment in lieu of long service leave if that person retires from working in the industry because he or she has reached the prescribed retiring age. The amount of the payment is calculated at the rate of 13/15 of a week's leave for each year of service in the Territory industry.

Section 24 omits sub-section 55(4) of the Principal Ordinance. This provision is replaced by new section 57A (see section 27 below).

Section 25 amends section 56 of the Principal Ordinance to:

- . remove the unnecessary reference to a legal representative being able to act on behalf of a deceased employee or contractor. This amendment does not affect the substance of the provision.
- . amend sub-section (3), which allows the Board to require a person retiring on the grounds of invalidity to be medically examined, by reducing the size of the panel which is used by the Board to select a medical practitioner from 5 to 3. This amendment has been prompted by the lack of qualified medical practitioners in the Territory in certain specialised fields.
- . by deleting sub-section (7). This provision is replaced by new section 57A (see section 27 below).

Section 26 inserts into the Principal Ordinance new sections 56A and 56B.

The new section 56A provides for the making of payments by the Board on behalf of a reciprocating authority when a registered employee or contractor is entitled to claim long service leave benefits under both the Principal Ordinance and the law of a reciprocating State or Territory (ie. a "corresponding law"). The section provides that a person may apply for payment for an entitlement accrued in a reciprocating State or Territory when the person's period of service in both the industry of the Territory or in reciprocal States or Territories entitles the person to payment in more than one jurisdiction.

The application must be in writing, must specify the period of service claimed for the purposes of the leave entitlement and, must if the person is intending to retire because of invalidity, be accompanied by a medical certificate. The Board is required to send the application together with details of the person's service in the Territory and, if the person is retiring because of invalidity - copies of the person's medical certificates, medical reports obtained from examinations made on behalf of the Board and any opinion held by the Board on the person's entitlement under the Principal Ordinance.

The new Section 56B concerns the payments by reciprocal authorities on behalf of the Board. Sub-section (1) provides that the Board should determine a person's entitlement under the Ordinance if that person has applied for the payment of an entitlement under the Ordinance by a reciprocating authority which passes on details of that application to the Board. When the Board is required to determine a person's entitlement under this provision, it may authorise the reciprocal authority to pay

the amount the Board has calculated is due to the person. That authority will be required, under the agreement between the Commonwealth and the government of that State, to make a payment on behalf of the Board.

The Board must reimburse the reciprocal authority for any payment made on its behalf (sub-section (5)). The Board, when determining the entitlement of an applicant under this section, may consider the particulars provided in the application made by the applicant to the reciprocal authority (sub-section (2)).

If the person is claiming for payment in lieu of long service leave because he or she is ceasing to work in the industry because of total incapacity, the Board may require the applicant to provide medical evidence (sub-section (2)). The Board may require a medical examination of an applicant for this purpose. However, it must pay for any medical examination which it may require (sub-section 3). The Board may refuse to authorise a payment if the applicant does not undergo a medical test when required to do so (sub-section (4)). These requirements for an application made through a reciprocating authority are similar to the requirements for an application made direct to the Board under section 56 of the Principal Ordinance.

Section 27 repeals section 57 of the Principal Ordinance and inserts in its place new sections 57 and 57A.

The new section 57 provides for the calculation of benefits paid by the Board (or on its behalf by a reciprocal authority) under the Principal Ordinance. The section provides that the payment will be equal to $13/15$ multiplied by the number of the days which the person has been credited with in the Employees and Contractors Register divided by 220 (the maximum number of days which may be served in any year) multiplied by the weekly rate of payment. The weekly rate of payment depends on whether the application is made direct to the Board or whether the application has been forwarded by a reciprocal authority pursuant to new section 56B (see section 26 above). The weekly rate of payment is as follows:

- (1) If the claim is made direct to the Board -
 - (a) the weekly average wage received by the applicant over the period of four months before the last day of service for which the claim has been made; or
 - (b) if because of illness or other circumstances reducing the applicant's weekly average wage in that four month period, an amount which the Board considers would otherwise have been that person's weekly average wage.
- (ii) if the claim is made in reciprocating State or Territory - the rate of weekly payment which is used by the reciprocal

authority receiving the application in calculating its payment to the applicant.

The new section 57A provides that the Board may delete from the Employees and Contractors Register details about a period of service for which an employee or contractor has been paid a long service leave entitlement either by the Board or by a reciprocal authority on behalf of the Board. The Board is required to keep a separate record of: (a) the service deleted; (b) the amount paid for that entitlement; and (c) the period of long service leave (if any) granted or taken by the employee or contractor.

Section 28 amends section 59 of the Principal Ordinance to provide a right of appeal against a refusal by the Board to authorise a reciprocal authority to make a payment on its behalf.

Section 29 amends section 62 of the Principal Ordinance to replace the mechanism for recognising reciprocal laws. The amendment provides that the Minister may declare a law to be a "corresponding law" for the purposes of the Ordinance. This replaces the existing mechanism for approval of a law of a State or Territory as an approved law. The section also deems laws of the States of New South Wales, South Australia and Victoria to have been "corresponding laws" before the date that the Minister entered agreements with the governments of those States.

Section 30 amends section 63 of the Principal Ordinance to allow an employee to elect whether to take benefits under the Principal Ordinance, the Long Service Leave Ordinance 1976 or a prescribed law. It is proposed that regulations will be made under sub-section 66 of the Principal Ordinance prescribing equivalent laws to the Long Service Leave Ordinance 1976 for the purposes of this provision (eg. the New South Wales Long Service Leave Act 1955).

The section also makes a number of amendments to section 63 consequential upon other changes implemented by the Ordinance. In particular,

- . the reference to "continuous service" in sub-section (2) is replaced by reference to "service" (see above section 15);
- . sub-sections (3), (4) and (5) are amended as a necessary consequence of the extension of the employees right to elect to take benefits available under prescribed laws;
- . a replacement sub-section (6) is inserted into the Principal Ordinance. The new section substantially re-enacts the existing section except that it (1) recognises the extended power of an employee to elect to take benefits under a prescribed law; and (2) clarifies the formula for calculation of a payment to an employer under

the section by providing that it depends on "working days". Previously, it was arguable that the formula was based on calendar days.

Section 31 amends section 64 of the Principal Ordinance as a necessary consequence of other amendments to the Ordinance. Paragraph (a) replaces a reference to a law "approved under section 62" and substitutes a reference to laws "declared under section 62". This is consequential upon the amendments made to section 62 (see above - section 29). Paragraph (b) expands the references to "reciprocal arrangements" so that they also include a "reciprocal agreement".

Section 32 repeals section 65 of the Principal Ordinance. The provisions previously contained in section 65 are now contained in section 56B (see above section 26).

Authorised by the Minister for Territories.