

EXPLANATORY STATEMENT

LONG SERVICE LEAVE (BUILDING AND CONSTRUCTION INDUSTRY) (AMENDMENT) ORDINANCE (NO 2) 1987

ORDINANCE NO. 74 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. The scheme has been operating since 1981 and now provides reciprocal rights with similar schemes operating in nearby States.

The Long Service Leave (Building and Construction Industry) (Amendment) Ordinance (No. 2) 1987 makes a number of miscellaneous amendments to the Principal Ordinance which have been identified as desirable during the course of administering the Principal Ordinance. In brief, the amending Ordinance:

- . extends the long service leave scheme to include landscapers
- . allows delegation of the Board's powers
- . gives the Registrar power to appoint inspectors
- . increases the value of contracts which the Board may enter without the Minister's approval
- . removes the requirement for employees to register within 3 months of joining the industry. However, when an employee joins after this time he or she only receives credits for work with his or her employer at the time of joining the scheme
- . allows the Registrar to make decisions about whether extra time for payment should be allowed (previously the Board made this type of decision)
- . requires payment of additional contributions by employers who fail to pay contributions when due

- allows employees to gain credits in some cases when his or her employer has not made contributions for that employee's service
- requires notification of decisions and of the right of appeal
- allows evidentiary certificates to prove non-payment of contribution offences under sections 37 and 38 of the Principal Ordinance

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

LONG SERVICE LEAVE (BUILDING AND CONSTRUCTION INDUSTRY)
(AMENDMENT) ORDINANCE (NO. 2) 1987

Sections 1 and 2 deal with citation and interpretation.

Section 3 amends section 3 of the Principal Ordinance in the following manner:

- the definition of "ordinary remuneration" is amended to expressly exclude from that term payments which are made as overtime, travelling allowances or recreation leave bonuses. The Principal Ordinance previously did not state whether these payments are part of ordinary remuneration or not.
- the definition of "prescribed retiring age" is replaced. The new provision states that the prescribed retiring age is:
 - if the employee or contractor has been granted a Veteran's pension, the age at which that pension is first paid; or
 - in other cases, the age of 65 years.

The prescribed retiring age is a term used in section 54 of the Principal Ordinance to determine whether a person is entitled to payment in lieu of long service leave on retirement. A person who retires from the industry after reaching the prescribed retiring age is entitled to receive payment in lieu of long service leave if he or she has more than 55 days service in the industry. In contrast, a person who leaves the industry before the prescribed retiring age must have more than 5 years service in the industry (1 year in the case of a contractor) before being entitled to payment in lieu. The Principal Ordinance does not require a person to retire at the prescribed retiring age or provide any penalty if a person retires after the prescribed retiring age.

- subsection (1A) of the Ordinance is replaced. New subsection (1A) deems the planning, sewing or laying of floor coverings and landscaping work to be work in the building and construction industry.

The effect of the amendment is to include landscaping work into the building and construction industry. Hence, persons employed in the landscaping industry are to be covered by the scheme.

Section 4 inserts a new section 7A into the Principal Ordinance which enables the Board to delegate its powers to an officer or employee of the Public Service. The delegation must be in writing (under the Board's common seal) and may be of all the Board's powers or of specified powers. The power of delegation enables the Board to delegate its routine and administrative functions to the Registrar and other officers of the Board (who must be public servants).

Section 5 amends section 18 of the Principal Ordinance by replacing references to the "Secretary" by reference to the "Registrar". The effect of the amendment is to enable the Registrar to appoint inspectors under the Ordinance and to determine the duties of inspectors. Previously these functions were performed by the Secretary to the Department of the Arts, Sport, the Environment, Tourism and Territories.

Section 6 amends section 19 of the Ordinance to enable an inspector to require an employer to produce to the Board any information within the employer's knowledge concerning rights and duties under the Ordinance. The notice must specify which information, records, books, documents or copies are required to be presented and must specify that the documents must be produced within 14 days after the service of the notice. Under new subsection (4) the notice may be served on an employer by:

- leaving the notice at the registered office (in the case of a company) or
- leaving the notice with the employer personally or at the last known residence or place of business of the employer with a person who is reasonably believed to be over the age of 16 years and residing or employed (as the case may be) at that place.

New subsection (5) provides that it is an offence not to comply with a requirement of an inspector under section 19 of the Principal Ordinance. A maximum penalty of \$1000 or six months imprisonment or both is provided.

In addition, a number of drafting amendments are made to the existing provisions of section 19. A new interpretative provision (subsection (6)) has been added so that a reference to "records, books or documents" in section 19 is limited to records, books or documents which an employer must keep under the Principal Ordinance.

As a consequence of the new subsection (6) the words "which are required by this Ordinance to be kept by an employer" in paragraph (1)(a) are no longer required and are omitted (see section 19(a) of the amending Ordinance). Further,

paragraph 19(1)(b) has been redrafted. The revised paragraph now separately deals with the requirement to produce information and the requirement to produce records, books or documents.

Section 7 amends section 23 of the Principal Ordinance by replacing the reference in that section to \$100,000 by reference to \$50,000. The effect of the amendment is to allow the Board to enter into contracts for amounts less than \$100,000 without the approval of the Minister. Previously, contracts involving \$50,000 or more required the approval of the Minister.

Section 8 amends section 32 of the Principal Ordinance by repealing paragraph 32(2)(c). The effect of the repeal is to remove the requirement for applications by employees or contractors to be registered under the Ordinance to be made within 3 months after that person started service in the industry. This amendment should be read in conjunction with new section 42(8) (see below, section 14).

Section 9 amends section 34 of the Principal Ordinance by replacing paragraph 34(1)(b). The amendment is a necessary consequence of the repeal of paragraph 32(2)(c) and section 35. The effect of the amendment is to allow an employer to apply on behalf an employee if that employee has not applied for registration within 3 months of starting in the industry. Previously, the paragraph referred to the time allowed under repealed paragraph 32(2)(c) or such further time as allowed under repealed section 35 (see below, section 10).

Section 10 repeals section 35 of the Principal Ordinance. This section is no longer required because of the repeal of paragraph 32(2)(c) (see above, section 8). Previously, paragraph 32(2)(c) required applications to be lodged within 3 months of starting in the industry. Section 35 allowed the extension of this period in certain circumstances. Since applications do not need to be lodged within this time, there is no need for any extension of time.

Section 11 amends section 37 of the Principal Ordinance to require an employer who fails to make contributions on time to pay an additional amount when the employer fails to pay contributions on time.

New subsection 37(6) provides that an employer who fails to pay contributions on time (or within any extension allowed by the Registrar) is required to pay an additional amount (by way of interest) to the Board calculated at the rate of 2.5% per month (or part thereof) on the amount outstanding and computed from the date when the amount was due to be paid. A minimum payment of \$50 is applicable.

New subsection 37(7) allows the Registrar to remit all or part of an additional payment required under subsection (6) if the Registrar is satisfied:

- (a) that the late payment was not due to the actions of the employer; or

- (b) that the special circumstances of the case make it fair and reasonable for the remission.

This discretion is appealable (see below, section 16).

New subsection (8) assists with the collection of additional payments required under new subsection (6). The subsection enables a Court which convicts a person of an offence of not paying the contributions on time, to make, in addition imposing to a penalty, an order for the payment of the additional amount under subsection (6). Such an order may, after being incorporated into a certificate by an appropriate Court officer, be enforced as a civil judgment debt.

In addition, the section substitutes the reference in subsection (1) to the "Board" with a reference to "Registrar". The effect of this amendment is to allow the Registrar (and not the Board as was previously the case) to allow an extended time for persons to make contributions. The change has been made because of the minor administrative nature of the decision.

Further, the section reduces the penalty for failing to pay contributions on time from \$10,000 to \$500. The penalty of \$10,000 is no longer considered appropriate because:

- . section 33B of the Interpretation Ordinance 1967 now provides that a person commits a separate offence for each day that the payment is not made;
- . an offence against this section now has a civil "penalty" under new subsection (6).

Section 12 amends section 38 of the Principal Ordinance by replacing the reference to the "Board" (first time) with the word "Registrar". The effect of the amendment is to allow the Registrar (instead of the Board) to extend the time during which a registered contractor must lodge monthly reports and pay contribution to the Board.

Section 13 amends section 41 of the Principal Ordinance to correct a typographical error. The word "renumeration" is replaced by the word "remuneration".

Section 14 inserts new subsections (6), (7) and (8) into section 42 of the Principal Ordinance.

New subsection (6) provides, as a general rule, that an employee does not receive long service leave credits unless his or her employer has made a monthly report covering that time for that employee and made the required contributions to the Board.

New subsection (7) provides an exception to the general rule under subsection (6) when:

- (i) a registered employee has ceased to employ a person;

- (ii) the employer does not make the required contributions to the Board; and
- (iii) the Registrar is satisfied that the employee would have been entitled to receive long service leave credits had the employer paid the contributions. The section confers a discretion on the Registrar to grant the credits. This discretion is reviewable to the Administrative Appeals Tribunal (see section 16, below).

New subsection (8) limits the credits which an employee is entitled to if that employee became registered more than 3 months after starting work in the industry. Previously, employees were required to register within 3 months of starting work in the industry. However, the amendments to section 32 (see section 8, above) now allow an employee to become registered at any time. The limitation means that such an employee can only receive credits for work with his or her present employer. The limitation is required because of the administrative impossibility of tracing employees who are not registered through successive employers.

Section 15 amends section 45 of the Principal Ordinance to correct a typographical error. The words "less that" are replaced by the words "less than".

Section 16 replaces section 59 of the Principal Ordinance, which concerns the review of decisions under the Ordinance. In addition, new sections 59A and 59B are inserted by the Section.

New subsection 59(1) provides that an appeal may be made to the Administrative Appeals Tribunal for a review of a decision of the Board:

- (a) confirming a decision of the Registrar to refuse an application for registration;
- (b) refusing to grant an exemption under section 37(4). The exemption under this section allows an employer not to pay contributions for an employee when the Board is satisfied that the employer had made contributions for the employee in a reciprocating State. One of the effects of the decision to exempt an employer is that the employee cannot count that service towards service in the industry;
- (c) deciding, under section 41, that the amount of ordinary remuneration claimed for an employee or contractor is excessive. The effect of the determination is to treat a

lesser payment as being the salary or wages received by the employee or contractor. This affects the amount payable to the employee or contractor under the Ordinance;

- (d) deciding, under section 48(2), an objection against a statement set out in an annual report about accumulated contributions;
- (e) arbitrating on when accrued long service leave should be taken by an employee under section 52(1)(a);
- (f) refusing to authorise a reciprocating authority to make a payment of long service leave on behalf of the Board under section 56B;
- (g) refusing to make a payment in lieu of long service leave under sections 55(3) [payment for leave], 56(6) [payment in lieu of leave] or 63(5) [payment to employer who has paid for long service leave under the Long Service Leave Ordinance 1976].

New subsection 59(2) provides that an appeal may be made to the Administrative Appeals Tribunal for a review of the decision of the Registrar:

- (a) about whether an employer should have extra time to lodge monthly notices and pay contributions under section 37(1);
- (b) refusing to remit part or all of amount of additional contributions payable by an employer because he, she or it failed to pay the required contributions on time (see new subsections 37(6) and (7), above);
- (c) about whether a contractor should have additional time to pay contributions under section 38(1); or
- (d) refusing to credit an employee with long service leave credits under new section 42(7).

New section 59 remains substantially the same as the section which it replaces. The changes are:

- (i) a number of decisions previously made by the Board are now to be made by the Registrar. Accordingly, appeals to the Tribunal are now made against the Registrar and not the Board (see sub-paragraphs (2)(a) and (c) above).

- (ii) an additional right of appeal now exists against the decision of the Registrar refusing to remit amounts of additional contributions payable by an employer (see sub-paragraph (2)(b)).

New section 59A requires the Board or the Registrar to give notice of any of the decisions set out in section 59 within 28 days of the decision. The notice must be in writing and must be given to each person whose interests are affected by the decision. In addition, the notice must advise the person that an appeal exists to the Administrative Appeals Tribunal and that a person may request a statement of reasons concerning that decision under section 28 of the Administrative Appeals Tribunal Act 1975. However, the validity of the decision would not be affected if the notice does not include these statements.

New section 59B provides for the use of evidentiary certificates for the purposes of proving offences against sections 37 and 38 of the Principal Ordinance. Sections 37 and 38 require employers and contractors to provide to the Board monthly notices and make payments of contributions for employees. Section 37 deals with employers and section 38 deals with contractors.

The certificates provide for evidence to be given of:

- (a) the need for an employer to give a particular monthly notice to the Board;
- (b) the requirement of an employer to pay contributions to the Board for a period set out in a certificate;
- (c) whether the Registrar extended the time for an employer to lodge a particular monthly notice or to pay a particular monthly contribution;
- (d) whether the Registrar allowed an employer an extension to lodge a monthly notice or make a monthly contribution;
- (e) the date that an employer lodged a particular monthly notice (or that the employer had not, by a stated date, lodged a particular monthly notice); or
- (f) whether an employer had paid a particular monthly contribution and if so the date of that payment.

The certificates are evidence only of the matters which they state. However, in the absence of evidence to the contrary, a Court would be able to base a conviction on the strength of that certificate evidence and no other evidence.