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SOUTH AUSTRALIA

LONG SERVICE LEAVE ACT 1987

*This Act is reprinted pursuant to the Acts Republication Act 1967 and incorporates all amendments in force as at **21 August 1997**.*

It should be noted that the Act was not revised (for obsolete references, etc.) by the Commissioner of Statute Revision prior to the publication of this reprint.

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*Repeal of Long Service Leave Act 1967
and Transitional Provisions*

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LEGISLATIVE HISTORY

LONG SERVICE LEAVE ACT 1987

being

Long Service Leave Act 1987 No. 73 of 1987
[Assented to 5 November 1987]¹

as amended by

Industrial Relations (Miscellaneous Provisions) Amendment Act 1992 No. 93 of 1992 [Assented to 17 December 1992]²
Long Service Leave (Miscellaneous) Amendment Act 1997 No. 50 of 1997 [Assented to 31 July 1997]³

¹ Came into operation 1 January 1988: *Gaz.* 23 December 1987, p. 1916.

² Came into operation 1 February 1993: *Gaz.* 23 December 1992, p. 2260.

³ **Came into operation 21 August 1997: *Gaz.* 21 August 1997, p. 408.**

NOTE:

- *Asterisks indicate repeal or deletion of text.*
- *Entries appearing in bold type indicate the amendments incorporated since the last reprint.*
- *For the legislative history of the Act see Appendix.*

An Act to provide for the granting of long service leave to workers; to repeal the Long Service Leave Act 1967; and for other purposes.

The Parliament of South Australia enacts as follows:

Short title

1. This Act may be cited as the *Long Service Leave Act 1987*.

Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

Interpretation

3. (1) In this Act, unless the contrary intention appears—

"**agreement**" means—

- (a) an enterprise agreement; or
- (b) a certified agreement, enterprise flexibility agreement or Australian workplace agreement within the meaning of the *Workplace Relations Act 1996* of the Commonwealth, as in force from time to time;

"**award**" includes—

- (a) an award or order of the Industrial Relations Commission;
- (b) an award or order of the Australian Industrial Relations Commission;

"**corresponding law**" means a law—

- (a) of the Commonwealth; or
- (b) of a State (other than this State) or a Territory of the Commonwealth; or
- (c) of another country,

that confers long service leave entitlements;

"**employer**" means a person by whom a worker is employed;

"**enterprise agreement**" means an enterprise agreement within the meaning of the *Industrial and Employee Relations Act 1994*;

"**individual agreement**", in relation to an employer and a worker, means an agreement (other than an enterprise agreement) individually negotiated between the employer and the worker;

"**the Industrial Relations Commission**" means the Industrial Relations Commission of South Australia;

"**the Industrial Relations Court**" means the Industrial Relations Court of South Australia;

"**inspector**" means an inspector under the *Industrial and Employee Relations Act 1994*;

"**long service leave entitlement**" means an entitlement to long service leave or payment in lieu of long service leave;

"**registered association**" means—

- (a) an association registered under the *Industrial and Employee Relations Act 1994*;
- (b) an organisation registered under the *Workplace Relations Act 1996* of the Commonwealth, as in force from time to time;

"**related corporations**" means corporations—

- (a) that are related to each other for the purposes of the *Corporations Law*; or
- (b) that have substantially the same directors or are under substantially the same management;

"**the relevant date**" means the day on which long service leave is commenced or an entitlement to payment in lieu of long service leave arises;

"**service**" means continuous service with the same employer or with related employers under a contract of service or a series of contracts of service;

"**worker**" means a person employed under a contract of service.

(2) A reference in this Act to a worker's ordinary weekly rate of pay is a reference to the worker's weekly rate of pay as at the relevant date exclusive of overtime, shift premiums and penalty rates but this definition is subject to the following qualifications—

- (a) if the worker is employed on commission or on any other system of payment by result, the worker's ordinary weekly rate of pay will be ascertained by averaging the worker's weekly earnings over the 12 months immediately preceding the relevant date; and
- (b) if at some time during the period of three years immediately preceding the relevant date—
 - (i) the worker was employed on an hourly basis at an hourly rate of pay; or
 - (ii) the workers ordinary hours of work per week were varied and consequently the worker's weekly rate of pay was varied,

the worker's ordinary weekly rate of pay will be ascertained by averaging the number of hours worked per week in that period of three years (disregarding weeks when the worker was on paid leave) and multiplying that result by the worker's rate of pay per hour as at the relevant date, exclusive of overtime, shift premiums and penalty rates (and for the purposes of this paragraph a person who is employed on a casual basis is not to be regarded as being paid at a penalty rate); and

- (c) if the worker's employer provides accommodation during his or her employment but not while the worker is on leave, the worker's ordinary weekly rate of pay will be increased by an amount representing the weekly value of that accommodation (that value being determined, where possible, by reference to an award or agreement and, where there is no applicable award or agreement, by reference to the fair and reasonable monetary value of that accommodation).

(3) Employers are related for the purposes of this Act if—

- (a) one takes over or otherwise acquires the business or part of the business of the other; or

- (b) they are related corporations; or
- (c) a series of relationships can be traced between them under paragraph (a) or (b).

Territorial application of Act

4. (1) Subject to this section, a worker's long service leave entitlement accrues under this Act in respect of—

- (a) service in the State;
- (b) service outside the State where the worker is predominantly employed in the State;
- (c) service outside the State in pursuance of a contract of employment of which South Australia law is the proper law.

(2) Where a worker would, but for this subsection, have a long service leave entitlement both under this Act and a corresponding law, the worker may elect to take the entitlement under this Act or under the corresponding law, but not under both.

Long service leave entitlement

5. (1) Subject to this Act, a worker who has 10 years or more service is entitled to the following long service leave—

- (a) 13 weeks leave in respect of the first 10 years of service; and
- (b) 1.3 weeks leave in respect of each subsequent year of service.

(1a) A worker who is entitled to long service leave under subsection (1) becomes entitled to a payment in lieu of the long service leave or a part of the long service leave if an individual agreement to that effect is made and recorded in writing and signed by the employer and the worker after the entitlement to the leave accrues to the worker.

(2) Where the service of a worker who is entitled to long service leave is terminated, the worker is entitled to a payment in lieu of long service leave.

(3) Subject to subsection (4), a worker who has completed seven years service (but less than 10 years service) is, on termination of the worker's service, entitled to a payment equal to the monetary equivalent of 1.3 weeks leave in respect of each completed year of service.

(4) A worker is not entitled to a payment under subsection (3) if—

- (a) the worker's contract of service is terminated on the ground of serious and wilful misconduct on the part of the worker; or
- (b) the contract of service is unlawfully terminated by the worker.

(5) Where a worker's service is terminated by the worker's death, the worker's entitlement under this section vests in his or her personal representative.

(6) Where long service leave has been taken by a worker or a payment in lieu of long service leave has been made to a worker, the worker's long service leave entitlement is reduced accordingly.

(7) An entitlement under this section only arises in respect of completed years of service.

Continuity of service

6. (1) A worker's continuity of service is not affected by—

- (a) subject to an order of the Court or the Industrial Relations Commission to the contrary, a break in the worker's service brought about by the employer where the worker is re-employed pursuant to an order of a Court or the Industrial Relations Commission;
- (b) a break in the worker's service brought about by the employer in an attempt to avoid an obligation or liability imposed on the employer by this Act or by an award, agreement or scheme relating to long service leave;
- (c) absence of the worker from work in accordance with the contract of service;
- (d) absence of the worker from work on account of illness or injury;
- (e) absence of the worker from work on account of long service leave or annual leave;
- (f) absence of the worker from work on any other kind of leave;
- (g) the standing down of the worker by the employer on account of slackness in trade where the worker is subsequently re-employed by the employer;
- (h) a break in the worker's service arising directly or indirectly from an industrial dispute where the worker returns to work in accordance with the terms of settlement of the dispute or is re-employed by the employer when the dispute is settled;
- (i) any other break in the worker's service brought about by the employer where the worker returns to work or is re-employed by the employer within two months.

(2) Where a worker's continuity of service with an employer is preserved under subsection (1)(f), (g), (h) or (i), the period of absence or the duration of the break from work is not to be taken into account in calculating the period of the worker's service with the employer.

(3) Where a worker enters into a contract of service with an employer within 12 months after the completion of an apprenticeship with the employer, the period of apprenticeship will be taken into account for the purpose of calculating the worker's period of service.

(4) Where a worker enters into service as a member of the Armed Forces of the Commonwealth (not being service as a member of the Permanent Forces), that period of service will be regarded as service with the employer by whom the worker was last employed.

Taking of leave

7. (1) Long service leave should be granted by an employer to a worker as soon as practicable (taking into consideration the needs of the employer's business or undertaking) after the worker becomes entitled to the leave.

(2) Long service leave should be taken in one continuous period.

(3) The employer should give a worker at least 60 days notice of the date from which leave is to be taken.

(4) Despite the preceding provisions of this section, an employer and a worker may agree on—

- (a) the deferral of long service leave;

- (b) the taking of long service leave in separate periods;
- (c) the granting and taking of long service leave on less than 60 days notice;
- (d) the taking of long service leave in anticipation of the entitlement to the leave accruing to the worker.

* * * * *

(6) If—

- (a) a worker takes long service leave in anticipation of the entitlement to that leave accruing to the worker; and
- (b) before the entitlement to that leave accrues, the service of the worker is terminated (for any reason),

the employer may deduct from any remuneration payable to the worker on the termination of service the difference between the amount paid to the worker in respect of the long service leave taken and the amount of payment in lieu of long service leave (if any) to which the worker would have been entitled on the termination of service if the worker had not taken leave in anticipation of the entitlement accruing.

(7) Every day occurring after the commencement of a period of long service leave (including public holidays and days on which the worker would not normally have been required to work) will be counted as a day of that leave.

Payment in respect of long service leave

8. (1) Subject to this section, a worker who is on long service leave is entitled to be paid at his or her ordinary weekly rate of pay.

(2) Payment for a period of long service leave must be made in one of the following ways—

- (a) in advance for the whole period of leave; or
- (b) on the same days as payment of wages would have been made if the worker remained at work (in which case payment must, at the written request of the worker, be made by cheque posted to an address specified by the worker); or
- (c) in some other way agreed between the employer and the worker.

(3) If a variation in a worker's rate of pay occurs while the worker is on leave, that variation must be reflected in the payment for the leave and if payment has been made in advance, the employer must, on the worker's return to work, make any adjustment necessary to give effect to the variation.

(3a) A payment in lieu of long service leave made under this Act by agreement with a worker—

- (a) will be calculated at the worker's ordinary weekly rate of pay applicable immediately before the payment is made (but not so as to include any amount representing the value of accommodation provided to the worker); and

- (b) must, if a variation in the worker's rate of pay occurs during the period from the date of the payment of a duration equal to the period of leave in lieu of which the payment is made, be followed by a further payment to the worker that reflects the variation in the rate of pay.

(4) A payment in lieu of long service leave made under this Act on the termination of a worker's service—

- (a) will be calculated at the worker's ordinary weekly rate of pay applicable immediately before the termination; and
- (b) must be made to the worker immediately on the termination or, if the worker has died, to the personal representative of the worker on request.

Exemptions

9. (1) Subject to this section, the Industrial Relations Commission may on the application of—

- (a) an employer; or
- (b) a party to an award, agreement or scheme relating to long service leave; or
- (c) a registered association that has a proper interest in the matter,

determine that the long service leave entitlements of a particular class of workers will be determined by reference to a particular award, agreement or scheme rather than by reference to this Act.

(2) An application may be made under subsection (1) in anticipation of the making of an award, agreement or scheme.

(3) A determination under subsection (1) has effect in accordance with its terms.

(4) A determination will not be made under this section if the determination would disadvantage any class of present or future workers.

(5) Long service leave entitlements arising under an award, agreement or scheme to which a determination under this section relates are enforceable as if they had arisen under this Act.

(6) The Industrial Relations Commission may revoke a determination under this section if it is satisfied—

- (a) that the employer has failed to grant long service leave or make payments in accordance with the award, agreement or scheme to which the determination relates; or
- (b) that it is for some other reason inappropriate that the determination should continue to have effect.

Records

10. (1) An employer must, in respect of each worker, keep a record of—

- (a) the worker's—
 - (i) date of commencement of service;
 - (ii) occupation or duties;

- (iii) rate of pay;
- (iv) number of hours worked per week (insofar as may be relevant to the worker's entitlement under this Act);
- (v) entitlement to long service leave; and
- (b) any long service leave taken by the worker; and
- (ba) any payment made to the worker by agreement in lieu of long service leave; and
- (c) when the service of the worker is terminated—
 - (i) the manner of termination; and
 - (ii) any payment made to the worker in lieu of long service leave.

Penalty: \$1 000.

- (2) The record required to be kept under subsection (1)—
 - (a) must be in a form that complies with the regulations; and
 - (b) must contain any additional particulars required by the regulations; and
 - (c) must be kept throughout the period of the worker's service and for at least three years after the termination of that service.
- (2a) An employer who agrees to make a payment to a worker in lieu of long service leave must—
 - (a) cause the agreement to be recorded in writing and signed by the employer and the worker; and
 - (b) give a copy of the signed written record of the agreement to the worker; and
 - (c) keep the signed written record of the agreement for the period referred to in subsection (2)(c).

Penalty: \$1 000.

- (3) An employer must in respect of each worker, at intervals of 12 months, determine the average number of hours per week worked by the worker over the preceding period of 12 months.
- (4) Where there is a change in a worker's employment from one related employer to another—
 - (a) the former employer must transmit to the other employer all records kept under this section relating to that worker; and
 - (b) the other employer must retain those records in accordance with this Act (but otherwise is not responsible for any deficiency in a record that relates to a period of service before the change in employment).

Penalty: \$1 000.

(5) A worker is entitled during normal office hours to inspect any record relating to the worker kept by his or her employer under this section.

(6) Where a worker has been granted long service leave, the employer must, before the leave is taken, give to the worker a statement in the prescribed form setting out the number of days of leave to be taken and the number of days of leave (if any) that will remain due to the worker at the conclusion of the leave.

Penalty: \$200.

(7) When a payment is made to a worker by agreement in lieu of long service leave, the employer must give to the worker a statement in the prescribed form setting out the period of leave in lieu of which the payment is made and the number of days (if any) that will remain due to the worker after the payment is made.

Penalty: \$200.

Powers of inspection

11. (1) For the purposes of this Act, an inspector may at any reasonable time—

- (a) enter any premises where the inspector has reasonable cause to believe that a worker is employed;
- (b) require an employer to produce any records relating to long service leave;
- (c) examine and copy or take extracts from such records or require an employer to provide a copy of any such records;
- (d) require any person to answer, to the best of that person's knowledge, information and belief, any question relevant to the administration or enforcement of this Act.

(2) An inspector may, in the exercise of powers under this section—

- (a) be accompanied by such assistants as may be necessary or desirable in the circumstances;
- (b) ask any question through an interpreter.

(3) A person must not—

- (a) hinder or obstruct an inspector or a person assisting an inspector in the exercise of a power under this section; or
- (b) refuse or fail, without lawful excuse, to comply with a requirement under this section.

Penalty: \$5 000.

(4) A person is not required to answer a question under this section if the answer would tend to incriminate him or her.

Inspector may direct employer to grant leave or pay amount due

12. (1) If it appears to an inspector that an employer has improperly refused to grant a worker long service leave or to make a payment in lieu of long service leave to which the worker is entitled under this Act, the inspector may, by notice in writing, direct the employer to grant the long service leave or to make the payment within a period (not being less than 14 days) stated in the notice.

(2) An employer who receives a notice under subsection (1) may apply to the Industrial

Relations Court for a review of the notice.

(3) An application under subsection (2) must be made within 14 days of the receipt of the notice by the employer.

(4) Pending the determination of an application for review, the operation of the notice to which the application relates is suspended.

(5) The Industrial Relations Court may, on an application for review—

- (a) confirm the notice to which the review relates; or
- (b) confirm the notice with such modifications as it thinks fit; or
- (c) cancel the notice.

(6) If an employer—

- (a) fails to comply with a notice under subsection (1) (the employer not having made an application for review under subsection (2)); or
- (b) having made an application for review under subsection (2), fails to comply with a notice confirmed by the Industrial Relations Court within a period specified by the Court,

the employer is guilty of an offence.

Penalty: \$5 000.

(7) It is a defence to a charge of an offence under subsection (6)(a) to prove that the worker is not entitled to the long service leave or the payment to which the notice relates.

Failure to grant leave

13. (1) Subject to this section, where—

- (a) a worker is not granted long service leave in accordance with this Act; or
- (b) a worker, or the personal representative of a deceased worker, does not receive a payment to which he or she is entitled under this Act,

the Industrial Relations Court may, on application under this section, order the employer (or former employer) of the worker to grant the leave or make the payment.

(2) An application under subsection (1) may be made by—

- (a) the worker; or
- (b) if the worker is dead—the worker's personal representative; or
- (c) with the consent of the worker—a registered association of which the worker is a member; or

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(d) if the employer has been found guilty of failing to comply with the notice of an inspector directing that leave be granted or a payment be made—the complainant in those proceedings or a person appearing on behalf of the complainant.

(3) If in proceedings under this section it appears that the employer has not kept proper records relating to long service leave as required by this Act and—

(a) the period of the worker's service is in issue; or

(b) the average number of hours worked per week by the worker over any period is in issue,

the Court may, if it considers that in fairness to the worker it should do so, rule that an allegation made by or on behalf of the worker as to the period of the worker's service or the average number of hours worked per week over a particular period will be accepted as proved in the absence of proof to the contrary.

(4) An order cannot be made under this section if the service of the worker was terminated more than three years before the date of the application.

(5) The *Industrial and Employee Relations Act 1994* applies in relation to an application under this section in the same way as to any monetary claim to the Industrial Relations Court under that Act.

Employment during leave

14. (1) A worker must not, while on long service leave, engage in any other employment in place of the employment in relation to which the right to leave accrued.

Penalty: \$1 000.

(2) An employer must not, knowing that a worker is on long service leave, engage a worker in employment so that the worker commits a breach of subsection (1).

Penalty: \$1 000.

Offences and proceedings

15. (1) Offences against this Act are summary offences.

(2) A prosecution for an offence against this Act must be commenced within three years after the date on which the offence is alleged to have been committed.

Act not to apply to certain workers

16. This Act does not apply in relation to workers who have a long service leave entitlement—

(a) under some other Act; or

(b) under an award or agreement under the *Workplace Relations Act 1996* of the Commonwealth, as in force from time to time.

Regulations

17. (1) The Governor may make such regulations as are contemplated by this Act or as are necessary or expedient for the purposes of this Act.

(2) The regulations may prescribe penalties not exceeding \$500 for contravention of, or non-compliance with, a regulation.

SCHEDULE

*Repeal of Long Service Leave Act 1967 and
Transitional Provisions*

Repeal of Long Service Leave Act 1967

1. The *Long Service Leave Act 1967* is repealed.

Transitional provisions

2. (1) Subject to this clause, this Act applies in respect of service before the commencement of this Act if the service continues after the commencement of this Act.

(2) If a worker's service commenced before 1 January 1972, a date falling after that date on which an entitlement to 13 weeks or a multiple of 13 weeks long service leave accrued to the worker will be taken to be the date on which the worker completed 10 years or a corresponding multiple of 10 years service and the length of the worker's service will be calculated accordingly.

(3) This Act does not increase or diminish a long service leave entitlement that accrued before the repeal of the *Long Service Leave Act 1967*.

(4) Long service leave granted, or a payment made in lieu of long service leave, before the commencement of this Act will, in respect of the period or entitlement to which it related, be presumed to have been granted or made under this Act.

(5) An exemption in force under the repealed Act immediately before the commencement of this Act continues in force as if it were a determination under section 9.

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APPENDIX

LEGISLATIVE HISTORY

(entries in bold type indicate amendments incorporated since the last reprint)

Section 3(1):	definition of "agreement" substituted by 93, 1992, s. 39(a); 50, 1997, s. 3(a) definition of "award" substituted by 93, 1992, s. 39(b); amended by 50, 1997, s. 3(b) definition of "enterprise agreement" inserted by 50, 1997, s. 3(c) definition of "individual agreement" inserted by 50, 1997, s. 3(c) definitions of "the Industrial Commission" and "the Industrial Court" repealed by 50, 1997, s. 3(c) definition of "the Industrial Relations Commission" inserted by 50, 1997, s. 3(c) definition of "the Industrial Relations Court" inserted by 50, 1997, s. 3(c) definition of "inspector" substituted by 93, 1992, s. 39(c); amended by 50, 1997 s. 3(d) definition of "registered association" substituted by 93, 1992, s. 39(d); amended by 50, 1997 s. 3(e), (f) definition of "related corporations" substituted by 93, 1992, s. 39(e)
Section 5(1a):	inserted by 50, 1997, s. 4
Section 6(1):	amended by 50, 1997, s. 5
Section 7(4):	substituted by 50, 1997, s. 6
Section 7(5):	repealed by 50, 1997, s. 6
Section 8(3a):	inserted by 50, 1997, s. 7
Section 9(1):	amended by 50, 1997, s. 8(a)
Section 9(6):	amended by 50, 1997, s. 8(b)
Section 10(1):	amended by 50, 1997, s. 9(a)
Section 10(2a):	inserted by 50, 1997, s. 9(b)
Section 10(4):	amended by 50, 1997, s. 9(c)
Section 10(7):	inserted by 50, 1997, s. 9(d)
Section 12(2):	amended by 50, 1997, s. 10(a)
Section 12(5):	amended by 50, 1997, s. 10(b)
Section 12(6):	amended by 50, 1997, s. 10(c)
Section 13(1):	amended by 50, 1997, s. 11(a)
Section 13(5):	amended by 93, 1992, s. 39(f); substituted by 50, 1997, s. 11(b)
Section 16:	amended by 93, 1992, s. 39(g); 50, 1997, s. 12