

## EXPLANATORY STATEMENT

### LONG SERVICE LEAVE (AMENDMENT) ORDINANCE 1987

#### ORDINANCE NO. 73 OF 1987

The Long Service Leave Ordinance ("the Principal Ordinance") requires private sector employers to grant long service leave their employees who have served a qualifying period of continuous service. Previously, the qualifying period of service was 15 years. However, employees were entitled to receive payment in lieu of long service leave if they ceased to be employed and had served a continuous period of 10 years with the same employer. The Principal Ordinance previously treated employment with:

- . companies in the same group;
- . a business which is "transmitted" to another employer;

as continuous service with the same employer.

The Long Service Leave (Amendment) Ordinance 1987 amends the Principal Ordinance to implement the report of a working party set up to review the operation of the Principal Ordinance. The working party consisted members from employer organisations, unions and government.

The major changes made by the amending Ordinance are:

- . An employee is now entitled to long service leave after 10 years continuous service. Previously, an employee was entitled to long service leave after 15 years service. However, the rate of accrual of long service leave remains unchanged.
- . An employee becomes entitled to additional amounts of long service leave for each additional period of 5 years service after the initial entitlement to long service leave.
- . An employee is entitled to payment in lieu of long service leave on a pro-rata basis for each completed year of service if the employee ceases employment for any reason after first qualifying for long service leave.
- . An employee is entitled to a pro-rata entitlement for payment in lieu of long service leave after serving 7 years if the employee ceases employment because:
  - (i) of illness, incapacity or a domestic or other pressing necessity;
  - (ii) the employee attains the minimum retiring age;

(iii) the employee dies; or

(iv) the employer ceases the employment for any reason other than the employee's serious and wilful misconduct.

- Service with other employers is recognised in certain cases when employment continues across contracts.

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

**LONG SERVICE LEAVE (AMENDMENT) ORDINANCE 1987**

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

Section 4 amends section 2 of the Principal Ordinance by inserting a definition of "minimum retiring age" and an interpretive provision concerning the meaning of continuous "service".

"Minimum retiring age" has been defined so that it is 65 years of age or, if an industrial award or agreement defines a different retiring age for a class of persons, that minimum retiring age. The definition of "minimum retiring age" is used in new section 11C of the Ordinance (see below, section 7). Section 11C, amongst other things, provides that an employee who ceases employment on or after attaining the minimum retiring age is entitled to payment in lieu of long service leave if the employee has completed more than 7 years service.

New subsection 2(3A) clarifies the meaning of references in the Principal Ordinance to a period of service. Previously, the Principal Ordinance did not state whether the service had to be with the one employer or within the one industry or otherwise. However, it was implicit in the use of the term throughout the Ordinance that it meant a period of service with a particular employer. New subsection (3A) simply states this and is not intended to alter the existing definition of that term.

Section 5 repeals sections 3, 4 and 5 of the Principal Ordinance and inserts new sections 3 and 4.

New section 3 provides that an employee is entitled to:

- (i) a period of long service leave after 10 years continuous service;
- (ii) an additional period of leave for each 5 years service after that.

The actual amount of long service leave is calculated under new section 4 (see below). The entitlement to additional periods of leave does not accrue until the full period of 5 years has been served (new subsection 3(3)).

For example:

- . An employee who has 12 years service will only be entitled to long service leave for a period of 10 years service.

- . However, an employee who has 15 years service will be entitled to a period of long service leave for the initial period of 10 years service and a further period of long service leave for the additional 5 years service.
- . An employee who has 21 years of service will be entitled to long service leave for the initial period of 10 years service and two further periods of long service leave for further periods of 5 years service.

New section 4 calculates the actual amount of long service leave which may be taken for a period of service. New section 4 does not alter the rate of accrual of long service leave from that in the section it replaces. However, the new section, unlike the section it replaces, does not fix the period of service for which an employee receives leave (see new section 3). The amount of long service leave depends on when the employee was employed, as follows:

- (a) for service before 11 May 1964 - at the rate of 3/20 of a months leave for each year; and
- (b) for service after 10 May 1964 - at the rate of 1/5 of a months leave for each year.

For example:

- . An employee who is entitled to long service leave for a period of 10 years service ending 20 December 1988 will receive an amount of 2 months leave.
- . An employee who is entitled to long service leave for a period of 30 years service ending 10 May 1989 will receive an amount of 5 3/4 months leave (3/20 x 5 years + 1/5 x 25 years).

Section 6 inserts new section 10A into the Principal Ordinance. New section 10A recognises a person's employment with a previous employer as employment with a subsequent employer when:

- (a) the employee was employed by the previous employer in a business of providing services under a contract for a principal;
- (b) that contract ended and the principal entered a contract with the new employer to replace the former contract;
- (c) the second contract requires the new employer to give preference to the employment of the previous employer's employees; and
- (d) the new employer does employ those employees.

For example: employee E works for employer A on a cleaning contract for P. A terminates E's employment when the contract expires. Employer B enters a contract with P to provide the same cleaning services and employs E on the contract. The contract requires B to employ A's old employees. Here, E will have her service with A recognised for the purposes of long service leave benefits from B.

Section 7 inserts into the Principal Ordinance new sections 11A, 11B, 11C and 11D. These sections deal with payment in lieu of long service leave when the employee has ceased employment.

New section 11A provides that an employee is entitled to payment in lieu of the balance of long service leave which has not been taken. The employee is entitled to the payment regardless of the reason for the termination of employment. The rate of payment is the rate payable to the employee at the time immediately before the termination of employment.

For example, an employee who:

- . resigns after 10 years service on 1 July 1988;
- . has an ordinary remuneration at the date of resignation of \$24,000 per annum;
- . has taken 1 month long service leave,

would be entitled to receive a payment in lieu of long service leave for one month (ie, 2 months accrued leave less 1 month already taken). The rate of payment would be \$24,000 per annum. Accordingly, the payment in lieu of long service leave would be \$2,000.

New section 11B provides that an employee is entitled to pro-rata payment in lieu of long service leave for each completed year of service after a period of service which entitles a person long service leave.

For example:

- . an employee who has 12 years service will be entitled to payment in lieu of long service leave under new section 11B for the period of 2 years service.
- . an employee who has 13 years and 11 months service will be entitled to a payment in lieu of long service leave under new section 11B for a period of 3 years.

New section 11B entitles a employee to a payment in lieu of long service leave regardless of the reason for the resignation. The rate of payment is the same as that under new section 11A.

A person who resigns after more than 11 years continuous service may be entitled to payment in lieu of long service leave under both sections 11A and 11B.

For example, an employee who:

- . resigns after 13 years continuous service; and
- . has taken only 1 month's long service leave,

would be entitled to a payment in lieu of long service leave:

- . [under section 11A] payment in lieu of 1 month's long service leave; and
- . [under section 11B] payment in lieu of long service leave for 3 years service. Under new section 4, the amount of this leave will be  $\frac{1}{5}$  (of a months service for each years service) x 3 (years service) =  $\frac{3}{5}$  of a months service.

New section 11C requires an employer to pay an employee a payment in lieu of long service leave when the employment is terminated for specified reasons (see below) and the employee has completed between 7 and 10 years of service. The payment is only for completed years of service and the amount of payment is calculated on a pro-rata basis comparing the period of completed years service to the period of ten years (ie, the period which entitles a person to take long service leave).

For example, an employee who ceases employment for a specified reason after 8 years service would be entitled to  $1 \frac{3}{5}$  months leave ( $\frac{8}{10}$  years x 2 months).

Payment in lieu of long service leave when the employment is terminated:

- (i) by the employee because of the employee's illness or incapacity or other domestic or other pressing necessity;
- (ii) by the employee on or after attaining the minimum retiring age. A new definition of "minimum retiring age" has been inserted into the Principal Ordinance by section 2 of the amending Ordinance (see above);
- (iii) by the employee's death;
- (iv) by the employer for any reason other than the employee's serious and wilful misconduct. "Serious" and "wilful misconduct" are conjunctive. Accordingly, an employee who is retrenched because of wilful misconduct which is not serious would be entitled to payment in lieu of long service leave under new section 11C. There is no definition of what amounts to "serious and wilful misconduct" so the phrase must be interpreted given its usual meaning.

The Ordinance does not define any of these reasons. Accordingly, whether a person is entitled to payment under this new section depends on whether the reason for the cessation of employment, viewed objectively by a reasonable person, is one of those specified in the section (see Computer Sciences of Australia Pty Ltd v Leslie (1983) 6 I.R.-188 where the equivalent NSW provision was considered).

For example, there may be a "pressing necessity" for an employee to resign to care for a relative of the employee who has been seriously injured. Also, there may be a "pressing necessity" for an employee to resign if the employee's spouse has been compulsory moved to another City or country.

New Section 11D specifies the manner for the calculation of the ordinary remuneration payable in lieu of long service leave under new sections 11A, 11B or 11C. The rate of payment is generally the rate payable to the employee at the time of cessation of employment. It is the amount which is normally payable to the employee and not the amount which the employee may have been paid for services on the last day of service. Accordingly, an employee who was on sick leave on the day of termination and was not paid for that day would be entitled to a payment in lieu of long service leave at the rate which would normally be payable to her or him.

Specific provision is made for the calculation of a rate for part-time employees. The rate of pay for part-time employees is to be calculated on the assumption that they should be paid at the rate they would have received had they worked their average number of hours during the period the payment in lieu of long service leave is to be based upon.