

2011

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

LONG SERVICE LEAVE (PORTABLE SCHEMES) AMENDMENT BILL 2011

REVISED EXPLANATORY STATEMENT

**Presented by
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Long Service Leave (Portable Schemes) Amendment Bill 2011

Overview

The Long Service Leave (Portable Schemes) Amendment Bill 2011 (the Bill) implements recommendations made by the Long Service Leave Authority Board (the Board) through its review of the *Long Service Leave (Portable Schemes) Act 2009* (the Act). This review was undertaken earlier in the year in response to a commitment made in the Authority's 2011-12 Statement of Intent.

The review was administrative in nature and focused on streamlining and aligning requirements and entitlements under the various schemes and ensuring transparency around administrative procedures and processes.

The Board made a number of recommendations to improve the Act and associated portable long service leave schemes. This includes adjustments to long service leave entitlements for workers in the construction and cleaning industries, adjustment to entitlements on retirement, incapacity and death under all schemes and a range of technical amendments to the overall administration of the Act.

The adjustments to worker entitlements provided for in this Bill do not have retrospective application. Workers currently in the portable long service leave schemes will not have their entitlements affected because of these amendments.

Consultation

Stakeholder consultation has resulted in agreement by the Board and as a consequence, employer and employee representatives, including all relevant unions that the amendments proposed by this Bill are in the best interests of the long service leave schemes.

Financial implications

As an independent ACT Statutory Authority, the Authority is self-funding and does not rely on the ACT Budget for support. However, the Authority has confirmed that these proposals will have positive financial implications for scheme funds, particularly the building and construction industry scheme.

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Detail on clauses

Clause 1 - Name of Act

This is a technical clause that names the Act. The name of the Act is the *Long Service Leave (Portable Schemes) Amendment Act 2011*.

Clause 2 - Commencement

This Act commences on a day fixed by the Minister by written notice.

Clause 3 - Legislation amended

This Act amends the *Long Service Leave (Portable Schemes) Act 2009*.

Clause 4 - Who is an *employer*?

Section 7 (3) (e)

This clause clarifies that an employer is an entity.

Clause 5 - Who is a *contractor*?

New section 10 (2)

This clause ensures that working directors who can set their own wages and conditions of employment are classified as contractors rather than employees. Contractors, who by definition do not have any employees, are subject to different requirements and entitlement provisions under the legislation.

Clause 6 - Declarations by Minister—coverage of Act

New section 11 (1A)

This clause expands/clarifies the power of the Minister in relation to who are employees, employers and contractors for a covered industry.

Clause 7 - Delegation by authority

Section 19

This clause is a technical amendment.

Clause 8 - Employers registration

New section 30 (2) to (4)

These sections enable the registrar to make appropriate corrections to the register, which is in the form of an electronic database.

Clause 9 - Dealing with applications after end of 1-month period

Section 33

This clause removes an unnecessary administrative process. In practice the Authority registers employers as soon as they identified as being eligible to register in the appropriate scheme. The Authority also backdates employees' service accruals and the associated employer levy contribution payments, in accordance with the legislative provisions, as required.

Clause 10 - Workers register

New section 39 (2) to (4)

This clause clarifies the nature of the workers register and the registrar's powers and enables the registrar to make appropriate corrections to the register, which is in the form of an electronic database.

Clause 11 - Application by employers for registration of employee

Section 41 (2)

This clause clarifies and simplifies the process of registration of employees by the employer and enables employees to be automatically registered by the Authority's database system (Leave Track) once they appear on an employer's return.

Clause 12 - Sections 47 and 48

Section 47 Service credit—employee's prior service

This clause substitutes a new Section 47 to clarify the administrative processes of backdating employees' prior service (after the commencement of a scheme) and ensure that service prior to the start of a new scheme cannot be claimed through the scheme. If an employee's service is declared and fully funded by an employer, back dating of prior service can apply for up to four years. The employer's contribution levy for that service is calculated on the employee's current or highest rate of pay. If for whatever reason, such as company liquidation, the employer cannot declare or fully fund all service, the registrar may credit the affected employee with up to 1 year of prior service.

Section 48 Service credit—contractor’s prior service

This clause substitutes a new to also clarify the administrative process of backdating contractors’ prior service (after the commencement of a scheme) and ensure that service prior to the start of a new scheme cannot be claimed through the scheme.

Clause 13 - Quarterly returns by employers

Section 49 (2) (a)

By omitting Section 49 (2) (a) this clause ensures that new workers, who have not been previously registered in the scheme, are required to be included on an employer’s quarterly return.

Clause 14 - Section 51

Section 51 Determination of levy—employers

These clauses clarify the processes associated with levy payment and the determination of the contribution levy rate payable by employers on employees’ wages. They also clarify that employees are not required to pay a contribution levy for apprentices. School-based apprentices should not be registered with the Authority.

Clause 15 - Civil penalty—fail to give quarterly returns etc

Section 52 (2)

This amendment ensures that a reasonable cap of three months only is placed on the accumulation of penalties.

Clause 16 - Exemption from levy payments—working directors

Section 53

In accordance with Section 10 (2) working directors are considered as contractors and not employees.

Clause 17 - Quarterly returns by contractors

Section 54 (2)

This amendment increases the timeframe for a registered contractor to provide the Authority with a return.

Clause 18 - New section 54 (2A)

It is not compulsory for contractors, who by definition do not have any employees, to be a part of the scheme. However, if they register for the scheme they must comply with the requirements of the legislation in relation to the submission of returns and payment of the associated levies. New section 54 (2A) empowers the registrar to deregister a contractor if a return is not received by the Authority within three months after the end of the quarter.

Clause 19 - Review of ordinary remuneration by governing board

Section 60 (3) and (4)

This clause removes the right of a person, who is appealing a review of their ordinary remuneration by the governing board, to appear before the governing board. The right of appearance before the board is not considered necessary in an administrative matter of this nature. The appellant retains the right to provide a written submission to the board as well as rights to appeal a board decision to ACAT.

Clause 20 - Notice of governing board decisions on review of ordinary remuneration

Section 61 (1)

This clause allows the governing board more reasonable time of 14 days to give written notice to appellants of their decision.

Clause 21 - Removing people from workers register

Section 65 (4) (c)

Working directors are now classified as contractors rather than employees/workers.

Clause 22 - Part 7 heading

Part 7 Access to long service leave register information

This clause substitutes a new heading for Part 7 to more accurately reflect the contents of the Part.

Clause 23 - Sections 67 to 69

This clause provides for new sections **Section 67 Information for registered workers**, **Section 68 Information for employers**, **Section 69 Certified copies of long service leave registers**. These sections outline the new procedures for registered workers and employers to access relevant information in the long service leave register. They replace the requirement for the Authority to issue paper-based annual certificates. The impact of these changes will be to:

- a. save the schemes considerable expenses associated with the preparation, data transfer, printing and posting of paper certificates to employees and employers; and
- b. enable workers and employers to access and download the relevant information from a website at any point in time.

The information outlined in new section 68 is essentially an aggregation (or annual summary) of the information supplied to the Authority by employers in their Quarterly Returns – it remains their information. Individual employers can view only their own information and not that of other employers. As such, it represents a service to individual employers and should not compromise any privacy issues.

The changes will also have a positive impact on the environment through the reduction of paper usage.

Section 69 also provides workers and employers with the option of receiving a certified copy of any part of the register that relates to them. Objections to the accuracy and completeness of the information can still be made in writing to the Authority.

Clause 24 - Appointment of inspectors

Section 71

This amendment empowers the registrar of the Authority to appoint inspectors rather than the Director General of the Chief Minister's and Cabinet Directorate. It is considered that this power of appointment is more appropriately placed with the registrar of the Authority.

Clause 25 - Identity cards

Section 72

This amendment empowers the registrar of the Authority to issue identity cards rather than the Director General of the Chief Ministers and Cabinet Directorate. It is considered that this administrative task is more appropriately placed with the registrar of the Authority.

Clause 26 - Definitions—pt 9

Section 80, new definition of *internally reviewable decision*

This clause is a technical amendment.

Clause 27 - New sections 80A to 80C

This clause inserts new **Section 80A Internal review of certain decisions, Section 80B Applications for internal review and Section 80C Internal review**

These sections introduce and formalise the new process of internal review of various decisions made by the registrar. While a number of the amendments to the act devolve administrative decision making power from the governing board to the registrar, these sections enable a person whose interests are affected by such decisions to seek an internal review by the board.

Clause 28 - Section 82

This clause provides a new substituted section 82 that outlines the procedures for an external review of decisions made by the registrar or governing board through ACAT.

Clause 29 Inspection of register

Section 85

This clause omits section 85 as the issue is now addressed at Section 69 of the amended Act.

Clause 30 - Benefits under other laws—reimbursement of employer

Section 89 (2) (b)

This amendment devolves the decision making power under this section to the registrar.

Clause 31 - New section 90A

Section 90A Authority reimbursement of certain payments

This new section enables the registrar to reimburse employers who have made long service leave payments directly to the employee as long as the registrar is satisfied that the employee has an entitlement under this act and the amount requested/payable is equivalent to that which the Authority would have paid the employee directly.

Clause 32 - New section 97A

Section 97A Transitional—entitlement to payment instead of leave

This clause inserts new section 97A to clarify that the conditions and entitlements in force immediately before the commencement of this section continue to apply in relation to currently registered workers.

Clause 33 - Long service leave formula—building and construction industry

Schedule 1, section 1.5, formula

substitute

$$W = 0.13 \times RS/220$$

This amendment corrects an error in the previous version of the legislation in relation to the formula for calculating the entitlement benefit for a worker in the building and construction industry scheme.

W = the number of weeks of long service leave held by the worker

RS = the registered worker's number of days of recognised service

Clause 34 - Amount of leave—building and construction industry

Schedule 1, section 1.6 (2)

This amendment clarifies the period of service for an employee's entitlement benefit.

Clause 35 - Entitlement to payment instead of leave—building and construction industry

Schedule 1, section 1.8 (1)

This amendment changes the period from 5 years to 7 years of recognised service in relation to workers who elect to permanently leave the building and construction industry. It is considered that 5 years is too short a timeframe in which to qualify for a long service leave benefit in the building and construction industry, particularly as most workers undertake an apprenticeship of several years during which time no levy is collected for their service.

Clause 36 - Schedule 1, section 1.8 (2)

This amendment changes the period from 55 days to 5 years of recognised service to accrue a benefit for workers who leave the building and construction industry because of total incapacity, reaching prescribed retiring age (55 years) or who have died. It is considered that 55 days is too short a timeframe in which to qualify for a long service leave benefit under any circumstance.

Clause 37 - Schedule 1, section 1.8 (3)

This clause omits section 1.8 (3) of Schedule 1. This amendment removes the right of a worker to be paid a long service leave entitlement benefit payment while continuing to work, instead of actually taking the leave. It is considered that, as the scheme is a long service leave scheme (rather than a payment scheme), leave should be taken for the time benefit is paid. Further, it is considered that in the interests of work place health and safety, workers in the building and construction industry should use their long service leave to take a break from work that is physically demanding.

Clause 38 - Payment for leave—building and construction industry

Schedule 1, section 1.9 (2)

This section clarifies the conditions under which a long service leave entitlement payment can be made, including the requirement for the worker to be granted leave by the employer.

Clause 39 - Schedule 1, section 1.9 (3)

This amendment clarifies the time frame for the payment of an entitlement benefit and allows the Authority an extra 7 days in which to process and pay the claim once it has been verified. The extended timeframe is a reflection of the increased workload of the Authority in administering new schemes.

Clause 40 - Leave payments for service as registered contractor—building and construction industry

Schedule 1, section 1.13 (3)

This amendment simplifies the formula for the determined rate of interest associated with the calculation of leave payments to registered contractors. Unlike employees the entitlement for contractors is based on a return of their contributions plus the determined rate of interest on those contributions for the time in which they have been in the scheme. The previous formula was extremely complicated and did not allow for negative returns.

Clause 41 - Amount of leave—contract cleaning industry **Schedule 2, section 2.6 (1)**

This amendment enables workers in the contract cleaning industry to be eligible for a pro-rata entitlement after 7 years of recognised service and is consistent with the pro-rata provisions of the *Long Service Leave Act 1976*.

Clause 42 - Entitlement to payment instead of leave—contract cleaning industry **Schedule 2, section 2.8 (2)**

This amendment changes the period from 55 days to 5 years of recognised service to accrue a benefit for workers who leave the contract cleaning industry because of total incapacity, reaching prescribed retiring age (55 years) or who have died. It is considered that 55 days is too short a timeframe in which to qualify for a long service leave benefit in any circumstance.

Clause 43 - Payments for leave—contract cleaning industry

Schedule 2, section 2.9 (2)

This section clarifies the conditions under which a long service leave entitlement payment can be made, including the requirement for the worker to be granted leave by the employer.

Clause 44 - Schedule 2, section 2.9 (3)

This amendment clarifies the time frame for the payment of an entitlement benefit and allows the Authority an extra 7 days in which to process and pay the claim once it has been verified. The extended timeframe is a reflection of the increased workload of the Authority in administering new schemes.

Clause 45 - Leave payments for service as registered contractor—contract cleaning industry

Schedule 2, section 2.13 (3)

This amendment simplifies the formula for the determined rate of interest associated with leave payments to registered contractors. Unlike employees the entitlement for contractors is based on a return of their contributions plus the determined rate of interest on those contributions for the time in which they have been in the scheme. The previous formula was extremely complicated and did not allow for negative returns.

Clause 46 - Court or tribunal—not employer

Schedule 3, section 3.4, note

This note clarifies that an employer is an entity.

Clause 47 - Entitlement to payment instead of leave—community sector industry

Schedule 3, section 3.9 (1)

This amendment changes the period from 55 days to 5 years of recognised service to accrue a benefit for workers who leave the community sector industry because of total incapacity, reaching prescribed retiring age (55 years) or who have died. It is considered that 55 days is too short a timeframe in which to qualify for a long service leave benefit in any circumstance.

Clause 48 - Payments for leave—community sector industry

Schedule 3, section 3.10 (2)

This section clarifies the conditions under which a long service leave entitlement payment can be made, including the requirement for the worker to be granted leave by the employer.

Clause 49 - Schedule 3, section 3.10 (3)

This amendment clarifies the time frame for the payment of an entitlement benefit and allows the Authority an extra 7 days in which to process and pay the claim once it has been verified. The extended timeframe is a reflection of the increased workload of the Authority in administering new schemes.

Clause 50 - Leave payments for service as registered contractor—community sector industry

Schedule 3, section 3.14 (3)

This amendment simplifies the formula for the determined rate of interest associated with leave payments to registered contractors. Unlike employees the entitlement for contractors is based on a return of their contributions plus the determined rate of interest on those contributions for the time in which they have been in the scheme. The previous formula was extremely complicated and did not allow for negative returns.

Clauses 51, 52 and 53 - Reviewable decisions

These clauses together set out in a table the decisions made by the relevant decision-maker (either the registrar or the governing board), the persons who may apply to ACAT for a review of the decision by the relevant decision-maker.

Clause 54 - Dictionary, new definitions

This clause provides new definitions for *apprentice* and *school-based apprentice*.

Clause 55 - Dictionary, definition of *working director*, new note

This clause inserts a new note providing that a working director is taken to be a contractor (see s 10).