

# LONG SERVICE LEAVE GUIDE

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**A Guide to the**  
*Long Service Leave Act 1976*



Department of Justice  
and Industrial Relations

Workplace Standards Tasmania



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## INTRODUCTION

Long service leave is a leave entitlement granted to employees for 'long service' to an employer. Entitlements are contained in either state legislation or in federal awards or agreements. In Tasmania, the main piece of legislation covering employees in the private sector is the *Long Service Leave Act 1976*.

The aim of this Guide is to provide an easy to read description of long service leave basics together with an explanation of certain terms used in the Act. It should not to be seen as a substitute for the Act.

A number of the issues covered in the Guide have been the cause of misunderstandings and in some cases, disputes. A number of these disputed matters have been sorted out in the Tasmanian Industrial Commission. For guidance, case examples determined by the Commission are included.

The Guide also contains a section dealing with frequently asked questions, such as:

- can long service leave be 'cashed in'?
- are casual employees entitled to long service leave?
- can an employee work for another employer while on long service leave?

The relevant sections of the Act are highlighted in brackets throughout the Guide. To enable you to link the commentary with the legislation, a copy of the *Long Service Leave Act 1976* is included.

Although a guide only, care has been taken to ensure that the information is accurate. However, legislation is subject to alteration so it is in your interests to keep up to date with those changes.

Workplace Standards Tasmania administers the *Long Service Leave Act 1976* and its officers are able to assist with any long service leave enquiry.

Information and assistance on long service leave is available from:

- Workplace Standards Tasmania on 1300 366 322 (in Tasmania) or (03) 6233 7657 (outside Tasmania)
- your employer organisation
- your union.

# THE *LONG SERVICE LEAVE ACT 1976*

[Section 3]

The *Long Service Leave Act 1976* **covers most employees in the private sector in Tasmania.** Some employees not covered by this Act include:

- employees covered by federal awards or agreements that contain long service leave provisions
- employees covered by other Tasmanian long service leave legislation, such as the *Long Service Leave (Construction Industry) Act 1971*.

It is important that you know the source of your long service leave obligations and entitlements.

The *Long Service Leave Act 1976* deals with the entitlement of employees to long service leave and contains separate provisions for mining employees which are discussed in the section — ‘**Mining Employees**’.

**It is an offence not to comply with the terms of the *Long Service Leave Act 1976*.** Proceedings for offences, which are dealt with in the Magistrates Court, can be both time-consuming and costly. It doesn't matter if the offence occurs by accident.

**Lack of awareness of your obligations is no defence.** Protect your interests by learning how this law affects you.

Remember, there are authorities available to provide advice and assistance if you are uncertain of the source of your long service leave obligations and entitlements. Importantly, if you are unsure, do not ignore the issue. Contact either:

- Workplace Standards Tasmania on 1300 366 322 (in Tasmania) or (03) 6233 7657 (outside Tasmania)
- your employer organisation
- your union.

# LONG SERVICE LEAVE

## ENTITLEMENT

[Section 8]

The long service leave entitlement is 13 weeks' paid leave after completing 15 years' 'continuous employment'. After each additional ten years' 'continuous employment' an employee's entitlement is eight and two thirds weeks' leave.

***An employee may have an entitlement to payment for pro rata long service leave on termination of employment after completing seven*** but less than 15 years' 'continuous employment'. For more information on pro rata long service leave, refer to the section — 'Pro Rata Long Service Leave'.

The calculation of leave accruals is different for employment prior to 17 December 1964. Check with Workplace Standards Tasmania, your employer organisation or union if you require more information.

## 'CONTINUOUS EMPLOYMENT'

[Section 5]

'Continuous employment' is the ***period of employment*** that must be completed to establish an entitlement to leave or payment of pro rata leave on termination of employment.

'Continuous employment' generally means unbroken employment with one employer. However, the Act contains provisions that ***deem employment to be continuous in circumstances*** where employment appears to have been broken. These circumstances relate to breaks in employment due to certain absences and interruptions or, in certain other circumstances, where work was performed for more than one employer. The circumstances are discussed separately.

## LONG SERVICE LEAVE (CONTINUED)

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### ABSENCES AND INTERRUPTIONS

The following absences and interruptions **do not break** 'continuous employment':

- (1) annual leave or long service leave
- (2) public holidays
- (3) any absence due to illness or injury that has been certified as necessary by a medical practitioner
- (4) any interruption or termination of employment by the employer, if done to avoid annual leave or long service leave obligations
- (5) any period of approved leave to attend meetings of either the Tasmanian State Training Authority or committees established under the *Vocational and Education Training Act 1994*
- (6) jury service or other prescribed attendance at court
- (7) maternity leave
- (8) any interruption arising from an industrial dispute
- (9) termination for any reason, except for slackness of trade, but only if the employee is re-employed by the employer within three months of the date of termination
- (10) stand down or termination due to slackness of trade, provided that the employee returns to work or is re-engaged within six months and within 14 days of an offer by the employer to return to work or be re-engaged
- (11) any other absence approved by the employer.

This may appear straightforward, but it's not. All of the absences and interruptions **do not break** 'continuous employment', but only **some** of the absences **count towards 'continuous employment'**; **some others don't**.

An absence or interruption due to reasons listed at items (1) to (6) **will count** as part of the period of 'continuous employment'. An absence or interruption due to reasons listed at items (7) to (11) **will not**.

## **LONG SERVICE LEAVE (CONTINUED)**

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If an employee has completed 15 years' 'continuous employment' with the employer, and absences were limited to reasons (1) to (6), then an entitlement to long service leave has been created.

However, if an employee was absent for a reason in (7) to (11), then the employee will **need to work for an additional period**, equal to the period of the absence, before becoming entitled to long service leave. This is shown in the following example.

### **Example**

An employee, who commenced work on 1 January 1984 and was absent on leave without pay for 12 months commencing 1 January 1987, would be entitled to long service leave on 1 January 2000.

That is, 1 January 1984 + 15 years + **1 additional year**.

### *Explanation:*

In this example, the one year absence on leave without pay in 1987, while not breaking 'continuous employment', **does not count** as part of the period of 'continuous employment'.

Had there been no such absence, the employee's entitlement to long service leave would be January 1999. But because the absence was for a reason that **does not count** as part of the period of 'continuous employment', then at 1 January 1999 the employee would have had only 14 years' 'continuous employment'. In this case the employee would need to work **one additional year** in order to complete 15 years' 'continuous employment'.

'Continuous employment' is broken if employment is terminated (except where the terms of items (4), (9) or (10) above apply) or an absence or interruption occurs for a reason that is not covered in matters (1) to (11). **This means all previous employment up to the date on which the interruption began is disregarded.**

## LONG SERVICE LEAVE (CONTINUED)

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### WORK PERFORMED FOR MORE THAN ONE EMPLOYER

Although an employee may have worked for more than one employer, the employee may be deemed to be ‘continuously employed’ and **have a long service leave entitlement**.

It is important for employers to be aware of these circumstances because it is possible to incur a potentially large financial liability.

There are at least three situations in which the *Long Service Leave Act 1976* deems an employee to have been continuously employed where the employee has worked for more than one employer.

[Section 5(5)]

**One situation** occurs when an employee transfers between ‘associated’ corporations. By the way, a corporation is considered to be ‘associated’ to another corporation if it is a subsidiary or a holding company of the corporation. This is explained in more detail in the relevant corporations legislation. When an employee transfers between ‘associated’ corporations, the employee’s previous employment counts towards the period of ‘continuous employment’. This situation is illustrated in the following example.

#### **Example**

Jim was employed by Company A for a period of six years and was then transferred to Company B, which is a subsidiary of Company A. The six years that Jim worked for Company A is to be counted as ‘continuous employment’ with Company B. Therefore, Jim needs to work a further nine years to be entitled to long service leave.

[Section 5(4)]

**Another situation** takes place when a ‘transmission of business’ occurs which means one employer taking over the business of another employer. The transmission of a business does not affect an employee’s long service leave entitlement. **All prior ‘continuous employment’ must be recognised by a new employer.** This is highlighted by the following case examples.

## LONG SERVICE LEAVE (CONTINUED)

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### **Case Example**

The applicant had been employed at a hotel from October 1977 until March 1991 when terminated for reasons of staff rationalisation and lack of work. Payment was sought for pro rata long service leave.

The applicant was employed from October 1977 until November 1982 when the **business changed hands**. The applicant was **retained in employment by the new employer** and continued until terminated in March 1991.

The Commission found the applicant had been **continuously employed** at the same establishment from October 1977 until March 1991 and that **the same or substantially the same business was transmitted from the former employer to the latter employer** in November 1982.

The Commission found that the final employer had responsibility for all long service leave entitlements accrued between October 1977 and March 1991. (*T3581 of 1992 — Sells and RJ & RD Stanley Trading as Empire Hotel*)

[Section 2(2)]

A **third situation** happens when an employee is terminated by one employer and re-engaged to work in the same place of business with another employer. If the re-engagement takes place within a period of two months from the date of termination from the former employer, the employee is deemed to be continuously employed.

### **Case Example**

The applicant was continuously employed as a cleaner from July 1978 until October 1987 when employment was terminated for reasons **other than** serious and wilful misconduct.

She was employed by a series of cleaning contractors for the following periods:

6 July 1978 — 30 June 1979

18 July 1979 — 30 November 1981

1 December 1981 — 31 January 1985

1 February 1985 — 30 October 1987

***Case Example (Continued)***

Employment from July 1978 to November 1981 was with one cleaning contractor, from December 1981 to January 1985 with another and from February 1985 to October 1987 with a third cleaning contractor. All employment in these periods was undertaken at the one business location.

The Commission held that the fact the applicant had been terminated by successive cleaning contractors did not change the fact that she had continued on ‘... in or about that place in the business of some other employer...’.

It was held that the business of all of the successor employers was ‘... of the same kind, or substantially the same kind as the business in which (the applicant) was employed ...’.

The Commission found that, although the last employing contractor had offered to re-employ the applicant within a period of six months after termination, the fact that the applicant declined the offer did not mean that she had forfeited the right to make a claim for pro rata long service leave.

The Commission confirmed that a further requirement of section 2(2) of the Act was satisfied, in that the breaks in employment did not exceed two months. The employee was deemed to be continuously employed.

In this case, the Commission ordered that the last employing contractor pay the applicant the relevant amount of pro rata long service leave accrued in the period of employment from July 1978 to October 1987.

*(T1807 of 1989 — Marney and Croucher Pty Ltd)*

## GRANTING LONG SERVICE LEAVE

[Section 12]

Long service leave may be taken *after* an employee has established an entitlement to leave. ***It cannot be taken in advance.*** An employer may grant the leave on application. There is no form to apply for long service leave. An application may be either a verbal or written request. In considering the request, the employer is entitled to have regard to the needs of the business.

Long service leave must be taken in one period unless the employer and employee have agreed that it will be taken in two periods.

### 'CASHING-IN' LONG SERVICE LEAVE

[Section 10]

***Employees with the agreement of their employer may 'cash-in' long service leave by receiving payment in lieu.*** This means that the employer may pay an employee the cash value of long service leave due and the employee will not be absent from work. An employee may also take a mixture of cash and leave.

### PAYMENT FOR LONG SERVICE LEAVE

[Sections 7A & 11]

An employee is to be paid '***ordinary pay***' for a period of long service leave. '***Ordinary pay***' is the remuneration that the employee would receive if the employee remained at work during that period.

'Ordinary pay' ***includes:***

- shift penalties
- part-time and casual loadings
- allowances which are generally paid both for all hours worked and for all purposes of the award
- the cash value of board and lodging, other than board and lodging provided by the employer for work in localities distant from the employee's genuine place of residence.

## **GRANTING LONG SERVICE LEAVE (CONTINUED)**

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The following payments are **excluded** from 'ordinary pay' and **are not payable during periods of leave**:

- overtime payments
- award special rates such as danger, hardship or inconvenience type allowances
- travel payments and allowances
- bonus payments
- living away from home allowance
- meal allowances.

The 'ordinary pay' for a **casual employee** is based on the average number of hours worked over the 12 months immediately prior to the commencement of leave.

That is, 
$$\frac{\text{total hours worked over past 12 months}}{52 \text{ weeks}}$$

### **Example**

Terry has completed 15 years' 'continuous employment' and in the year immediately preceding leave, worked 1508 hours. Terry would receive 13 weeks' leave at 29 ordinary hours pay for each week of leave. That is,

$$\frac{1508 \text{ hours}}{52 \text{ weeks}} = 29 \text{ hours per week}$$

'Ordinary pay' is calculated differently for an **employee on commission**, such as a commercial traveller or a real estate salesperson. It is based on the average weekly remuneration received over the **three months** immediately prior to the commencement of leave.

[Section 12 (6)]

An employee taking long service leave is to be paid in one of the following ways:

- in full when the employee commences leave
- on normal pay days throughout the period of leave
- in any other way agreed upon between the employer and employee.

## CASUAL AND PART-TIME EMPLOYEES

[Section 5(3)]

Casual and part-time employees are entitled to long service leave if they have **completed 15 years' 'continuous employment'**. They are considered to be continuously employed if they have been **regularly working for 32 hours or more in each consecutive period of four weeks**.

An employee engaged before 21 December 1979 is considered to be continuously employed if the employee was **regularly employed throughout any period**. **An employee in this situation is not required to regularly work a minimum of 32 hours in each four-week period**.

It is also important to note that casual and part-time employees **may have an entitlement to pro rata long service leave** if employment is terminated after seven years' 'continuous employment'. For more information refer to the section — 'Pro Rata Long Service Leave'.

## PRO RATA LONG SERVICE LEAVE

[Section 8 (2)(b), (3) and (3A)]

An employee, including part-time and casual employees, **may** be entitled to payment for pro rata long service leave on termination after completing seven but less than 15 years' 'continuous employment'. **The payment of a pro rata entitlement is not automatic and is only available in certain circumstances.**

This section considers **the circumstances when an employee will or may be entitled to payment for pro rata long service leave.** As most of these circumstances are not clear cut, you may wish to seek further advice if you are unsure. It is important that you know when an entitlement to pro rata long service leave may arise.

An employee having completed at least seven years' 'continuous employment', will be entitled to a pro rata payment **if employment is terminated by the employer** for any reason **other** than serious and wilful misconduct. For an employee to be denied pro rata long service leave, termination must have occurred because of **'serious and wilful misconduct'**. This is discussed in more detail in the section — 'If Employment is Terminated by the Employer'.

An employee, who has completed at least seven years' 'continuous employment', will also be entitled to a pro rata payment **if employment ceases either through illness that was of such a nature to justify the termination of employment, or retirement or death.** In the latter case, amounts are payable to the personal representatives of the deceased. Cases involving illness are discussed in the section — 'Illness'.

A pro rata entitlement will also be payable if an employee, who has completed at least seven years' 'continuous employment', **resigns due to incapacity or 'domestic or other pressing necessity' that was of such a nature to justify the termination of employment.** This is discussed in more detail in the section — 'Domestic or Other Pressing Necessity'.

When making a claim for pro rata long service leave, for reasons of illness, incapacity or 'domestic or other pressing necessity', it is in the interests of both parties that the employee provide the employer with supporting evidence **prior to ceasing employment.** An employer should then be able to consider whether the employee is entitled to a pro rata payment.

## **PRO RATA LONG SERVICE LEAVE (CONTINUED)**

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Criteria that you may wish to consider when examining whether a pro rata entitlement exists, are set out in the decision of the New South Wales Industrial Commission in ***Computer Sciences of Australia Pty Ltd v Leslie (1983 AILR at 557)***. Although that case was in relation to ‘domestic or other pressing necessity’, it may be of assistance in assessing if a pro rata entitlement exists in other circumstances. The criteria are:

1. Was the ***reason claimed for termination*** one which fell within the ***circumstances provided in the Act***? That is, illness, incapacity, retirement, death, ‘domestic or other pressing necessity’ or termination of the employment by the employer for any reason other than serious and wilful misconduct.
2. Was the reason ***genuinely held by the employee*** and not simply colourable, or a rationalisation ?
3. Although the reason claimed may not be the sole ground which influenced the employee’s decision to terminate, was it the ***real or motivating reason***?
4. Was the reason such that a ***reasonable person in the circumstances*** in which the employee was placed might have felt ***compelled to terminate his or her employment***? That is, was the motivation ***of ‘such a nature to justify termination’***? What would the ***consequences*** have been if the employee did not take that course of action?

If there is any doubt as to whether or not pro rata entitlements exist check with either:

- Workplace Standards Tasmania on 1300 366 322 (in Tasmania) or (03) 6233 7657 (outside Tasmania)
- your employer organisation
- your union.

## ‘DOMESTIC OR OTHER PRESSING NECESSITY’

What is ‘domestic or other pressing necessity’? There is no simple answer, but as a guide, ask yourself if the ‘domestic or other pressing necessity’ is of a kind which gives little reasonable option but to resign? The **key** word is **‘necessity’**. Necessity needs to be looked at mainly from the employee’s view. That is, what was going through the mind of the employee at the time of resignation. Did the employee genuinely regard themselves as being under a ‘domestic or other pressing necessity’? If so, that is sufficient.

What constitutes ‘domestic or other pressing necessity’ really **depends upon the circumstances of each case**. It is important to note that general statements may be misleading as the Industrial Commission will consider **all the circumstances of each case**, not just certain parts. The following cases are drawn from disputes that were determined by the Tasmanian Industrial Commission. In these cases **all the applicants (or former employees) had completed more than seven years’ ‘continuous employment’**.

### **Case Example 1**

The applicant’s reason for termination was due to **financial commitments**. He claimed that he did not earn enough to support his wife and small child.

The decision was that it was not appropriate to consider his income alone and ignore the income of his spouse. The applicant was therefore unable to highlight what the problem was, that is, if he did not resign an undesirable consequence would have taken place.

The application was rejected on the grounds that the applicant was not able to demonstrate that he had terminated his employment on account of ‘domestic or other pressing necessity’. He was therefore not entitled to pro rata long service leave.

*(T747 of 1987 — Behrens and TGIO)*

### **Case Example 2**

The applicant and his wife were both in the workforce and a decision had to be made about the **care of their five month old child**. Their options were limited. They decided that the applicant take on the carer’s role. This was the prime motivating factor for his resignation.

## **DOMESTIC OR OTHER PRESSING NECESSITY (CONTINUED)**

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The decision stated:

When deciding their future and the future of their children, parents have a fundamental right to choose whether or not their children will be cared for by themselves or some other person.

The undesirable consequence of not resigning was that the applicant and his wife would have been forced to place their child in care.

The application was considered to fall within the meaning of 'domestic or other pressing necessity' and the applicant was therefore entitled to pro rata long service leave.

*(T5156 of 1994 — Withers and Industrial Transmission and Engineering Supplies Pty Ltd)*

### **Case Example 3**

The applicant and all other employees were informed that the cable logging operation of the business was likely to close.

The decision stated that the onus is on the applicant to demonstrate to the satisfaction of the Commission that:

- the applicant terminated his employment because of, not only some pressing necessity, but also because it was of such a nature as to justify his actions, and
- a real and genuine problem existed and that had the applicant not resigned, a particular undesirable consequence would have taken place.

Although there was uncertainty, this did not mean that the employer's **entire** business was to cease. It appeared that the applicant arrived at the conclusion that once the employer's cable logging operation closed, it automatically made his position with the company redundant. However at no time did the employer inform the employee that his position **within the Company** would become redundant.

It was held that the applicant was unable to demonstrate that he resigned because of 'domestic or other pressing necessity'.

*(T5280 of 1994 — Radford and Northrop Logging Pty Ltd)*

## **DOMESTIC OR OTHER PRESSING NECESSITY (CONTINUED)**

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### **Case Example 4**

Whilst living and working in Launceston, the applicant's wife obtained employment in Hobart. The applicant unsuccessfully approached his employer to seek either a transfer to the Hobart office, or an arrangement where he could work from Hobart and frequently travel to the Launceston office.

After his wife took up work and residence in Hobart, the applicant again approached the employer and again was told there was no position in Hobart. As a consequence the applicant informed the employer of his intention to seek other employment in Hobart. His reason for terminating employment was to bring to a conclusion an 11-month separation from his wife.

In its decision, the Commission believed the applicant's view to be genuinely held and was satisfied that it was the real and motivating reason for doing what he did. The Commissioner stated that he was satisfied that the application fell within the requirements of 'domestic or other pressing necessity'. The applicant was therefore entitled to pro rata payment for long service leave.

*(T5390 of 1995 — Thomas and The Examiner Newspaper Pty Ltd)*

### **Case Example 5**

The applicant claimed an entitlement due to 'domestic or other pressing necessity' on the grounds that, at the time she ceased work, she was over six months ***pregnant and was terminating her employment to have and raise her child.***

In this decision the Commission stated that it considered the applicant genuinely believed that the reason she gave up work was to be available to care for her soon to be born child — a decision made together with her husband.

In this decision, the Commission stated that the real questions to be answered in this matter were:

- why the applicant terminated her employment
- whether the reasons claimed for doing so fell within the meaning of 'domestic or other pressing necessity'.

## **DOMESTIC OR OTHER PRESSING NECESSITY (CONTINUED)**

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The applicant's real and motivating reasons for terminating her employment were:

- because of pregnancy and the impending birth of the baby
- her desire to care for the child rather than placing the child under the care of others.

The decision of the Commission stated that the decision of a pregnant woman to cease work constituted a domestic necessity and therefore warranted payment of pro rata long service leave.

*(T6215 of 1996 — Brazendale and P & P Holdings Pty Ltd trading as Elphin Continental Cakes)*

## ILLNESS

When an employee claims payment for pro rata long service leave on the basis of illness, what is important is that the illness ***is of such a nature that the employee has no option but to resign.***

It is important to note that general statements may be misleading as the Industrial Commission will consider ***all the circumstances of each case***, not just certain parts. Three disputed Industrial Commission cases are examined below. In these cases ***all the employees had completed more than seven years' 'continuous employment'.***

### ***Case Example 1***

The applicant resigned because she could no longer cope with lifting or assisting to lift heavy and helpless patients. On advice from the employer, she obtained a certificate from her doctor stating that she had been advised to cease work in a hospital situation due to a back injury.

It was found that although the applicant did not supply a medical certificate ***until after termination***, it should not disentitle her to long service leave if the reason for leaving was her medical condition. The medical evidence and the nature of work were not contested by the employer.

The Commission decided that the applicant's medical condition justified her ceasing work and it caused her to terminate her employment. She was therefore entitled to payment of pro rata long service leave.

*(T2482 of 1990 — Smith and St Luke's Private Hospital Ltd)*

### ***Case Example 2***

An ex-employee claimed to have terminated her employment on account of 'illness of such a nature as to justify the termination of that employment'. She had been advised to resign by her doctor and an appropriate medical certificate was produced.

The Commission held the doctor's evidence to be sufficient to grant the applicant's claim. The issue of whether or not the work contributed to the termination was not really a factor that needed to be considered under the *Long Service Leave Act 1976*.

*(T5468 of 1995 — Spencer and Hawkins & Daly)*

**Case Example 3**

The applicant terminated her employment without notice after a heated discussion with the employer. She claimed an entitlement to pro rata long service leave because employment was terminated on account of 'illness of such a nature as to justify the termination of employment'.

To be eligible for pro rata long service leave, the applicant had to demonstrate that she terminated her employment on account of illness or a pressing necessity. It was also necessary for her to show that the illness or the pressing necessity were of such a nature as to justify the termination of her employment.

In its decision the Commission noted the content of the doctor's reports but was not satisfied that those reports established that the applicant's illness was of such a nature that it became necessary for her to terminate her employment. ***The doctor did not make any recommendation to that effect.***

The absence of a recommendation from the doctor did not, of itself, disentitle the applicant to pro rata long service leave on account of illness. But, without this type of medical evidence, ***the onus was on the applicant*** to establish that the alleged illness required her to terminate her employment.

The decision was that the illness was not the real and motivating reason for the applicant's termination and therefore the applicant was not entitled to pro rata long service leave.

*(T6426 of 1996 — Rowe and TSE Pty Ltd)*

## ‘IF EMPLOYMENT IS TERMINATED BY THE EMPLOYER’

An employee who has completed at least seven years’ ‘continuous employment’, will be entitled to a pro rata long service leave payment *if employment is terminated by the employer* for any reason *other than* serious and wilful misconduct. For an employee to be denied pro rata long service leave, termination must have occurred because of *‘serious and wilful misconduct’*.

### ‘SERIOUS AND WILFUL MISCONDUCT’

For an action to be considered ‘serious and wilful misconduct’ in relation to long service leave provisions, all three components must be shown to exist. That is, the action must be ‘serious’ *and* ‘wilful’ *and* constitute ‘misconduct’. In disputed matters *the onus is on the employer* to prove all three components exist.

What constitutes serious and wilful misconduct really *depends upon the circumstances of each case*. It is important to note that general statements may be misleading as the Industrial Commission will consider *all the circumstances of each case*, not just certain parts.

### CONSTRUCTIVE DISMISSAL

The central issue in disputes is the question of *whether employment was terminated by the employee or the employer*.

In essence, constructive dismissal takes place when an employee resigns at the suggestion of, or through pressure exerted by, the employer.

In a situation where the employer says to an employee something along the lines of ‘I want your resignation’ or ‘If you don’t resign I am going to sack you’, that is constructive dismissal, and may mean an employee has an entitlement for pro rata payment of long service leave.

## **'IF EMPLOYMENT IS TERMINATED BY THE EMPLOYER' (CONTINUED)**

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What has happened is that termination has occurred at the initiative of the employer. The employee has not resigned of his or her own free will; the resignation has taken place because the employer has forced the issue. There is no question of real choice; what the employer has said is 'Your employment is finished, your only choice is whether I sack you or you resign'.

What constitutes constructive dismissal will ***depend upon the circumstances of each case.***

***Cases involving 'serious and wilful misconduct' and constructive dismissal are not straightforward.*** Seek advice if you are unsure. Contact either:

- Workplace Standards Tasmania on 1300 366 322 (in Tasmania) or (03) 6233 7657 (outside Tasmania)
- your employer organisation
- your union.

## CALCULATION OF PRO RATA LONG SERVICE LEAVE

[Section 8(2)(b)]

A pro rata long service leave entitlement is calculated by dividing the employee's period of 'continuous employment' in years by 15 years and multiplying the result by 13 weeks. This is illustrated in the following example.

### **Example 1**

What is the pro rata entitlement of an employee who, having been continuously employed for 9 years, resigns because of ill-health, and is eligible for payment of pro rata long service leave on termination?

The calculation is as follows:

$$\frac{9 \text{ years}}{15 \text{ years}} \times 13 \text{ weeks} = 7.8 \text{ weeks}$$

### **Example 2**

What is the pro rata entitlement of an employee who, having been continuously employed for 13 years 6 months and 14 days, resigns because of ill-health, and is eligible for payment of pro rata long service leave on termination?

The calculation is as follows:

$$\frac{13.5383 \text{ years}}{15 \text{ years}} \times 13 \text{ weeks} = 11.733 \text{ weeks}$$

## CALCULATION ON THE DEATH OF AN EMPLOYEE

[Section 9]

A pro rata entitlement is calculated differently on the death of an employee. Two situations may exist.

In the first situation, if the deceased ***had not already accrued an entitlement to long service leave***, the pro rata entitlement is an amount equal to 1/60th of the deceased employee's ordinary pay for the period of 'continuous employment'.

## **'CALCULATION OF PRO RATA LONG SERVICE LEAVE (CONTINUED)**

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The second situation will occur if the deceased had ***already accrued an entitlement to long service leave*** at the time of death. In this situation the pro rata entitlement is calculated by adding both:

- the payment of any outstanding accrued entitlement
- an amount equal to 1/60th of the deceased employee's ordinary pay for the period of 'continuous employment' which occurred after the last accrual of an entitlement to long service leave.

In both of these situations amounts are payable to the personal representatives of the deceased.

If you need advice on calculating pro rata long service leave, contact either:

- Workplace Standards Tasmania on 1300 366 322 (in Tasmania) or (03) 6233 7657 (outside Tasmania)
- your employer organisation
- your union.

# LONG SERVICE LEAVE DISPUTES

## CAUSE OF DISPUTES

***Most disputes are about a pro rata entitlement.*** Some may be avoided by the employee providing full details of the reason for termination to the employer ***prior*** to ceasing employment. The circumstances where an entitlement will exist are discussed in the section — ‘Pro Rata Long Service Leave’.

## PROCEDURE

[Sections 13, 14, 14A, 15 & 16]

Disputed long service leave matters may be referred by employers or employees to Workplace Standards Tasmania which will investigate the dispute and attempt to resolve it with the parties.

***If a dispute cannot be resolved,*** Workplace Standards Tasmania will submit a report to the Tasmanian Industrial Commission outlining the circumstances of the dispute. A hearing date will be set and the matter heard and decided by a Commission member.

Parties to proceedings may choose to represent themselves or seek to be represented by an agent, including a union but excluding a barrister or legal practitioner.

After hearing the parties ***the Commission may either dismiss an application or make an order.*** An order may direct an employer to pay a long service leave entitlement or a pro rata long service leave entitlement.

Decisions of a single Commissioner can be appealed to a Full Bench of the Industrial Commission.

If an employer does not comply with the Commission’s decision, it can be enforced through the Magistrates’ Court.

## LONG SERVICE LEAVE RECORDS

[Section 18]

The *Long Service Leave Act 1976* requires employers to keep long service leave records. Keeping records is in the interests of both employees and employers. Accurate records are important, particularly in the event of a dispute. Long service leave records may be incorporated into any other employment record. The *Long Service Leave Act 1976* requires that the record for each employee **must** include:

- the employer's name and address
- the employee's name, address and position
- the date employment commenced
- details of any additional period of employment to be served, due to an absence or interruption that **does not count** towards 'continuous employment'
- the end date of the qualifying period, after allowing for any additional period(s) required to be served
- details of leave taken, including: commencing date, finishing date, number of days taken, amount paid and method of payment
- details of termination of employment, including: date of termination, reason for termination and rate of ordinary pay at the date of termination.

Employers should be aware that the records of a previous employer are to be transferred to a new employer on the transmission of a business.

***Long service leave records are not the only employment records that must be kept by an employer.***

The Tasmanian *Industrial Relations Act 1984* also requires employers to keep records. These requirements can be obtained from Workplace Standards Tasmania and are explained in more detail in the free publication, *Employment and Industrial Relations Basics — A Guide for Small Business*. Call (03) 6233 3281 if you would like a copy.

# MINING EMPLOYEES

[Sections 2(1) and 2A]

Mining employees are persons employed at a metalliferous mine.

## LONG SERVICE LEAVE ENTITLEMENTS

[Section 8A]

Unlike other employees covered by the *Long Service Leave Act 1976*, a mining employee is entitled to 13 weeks' long service leave **after each ten years' 'continuous employment'**. Apart from the differences in qualifying periods, the concepts of 'continuous employment' are the same for all employees under the *Long Service Leave Act 1976*. The meaning of 'continuous employment' is explained in the section — 'Continuous Employment'.

## PRO RATA LONG SERVICE LEAVE

[Section 8A (2)(b), (3) & (3A)]

Mining employees **may** be entitled to payment for pro rata long service leave on termination of employment after completing five but less than ten years' 'continuous employment'. Apart from the differences in qualifying periods, the concepts of pro rata leave are the same for all employees under the *Long Service Leave Act 1976*. For more information on pro rata long service leave refer to the section — 'Pro Rata Long Service Leave'.

## CALCULATION OF A PRO RATA ENTITLEMENT

[Section 8(2)(b)]

A pro rata long service leave entitlement is calculated by dividing the employee's period of 'continuous employment' by ten years and multiplying the result by 13 weeks. This is illustrated in the following example.

### **Example**

What is the pro rata entitlement of a mining employee who, having been continuously employed for eight years, resigns because of a need to provide full time care of an aged parent, and is eligible for payment of pro rata long service leave on termination?

The calculation is as follows:

$$\frac{8 \text{ years}}{10 \text{ years}} \times 13 \text{ weeks} = 10.40 \text{ weeks}$$

### CALCULATION ON THE DEATH OF AN EMPLOYEE

[Section 9(3)]

A pro rata entitlement is calculated differently on the death of a mining employee. Two situations may exist.

In the first situation, if the deceased ***had not already accrued an entitlement to long service leave***, the pro rata entitlement is an amount equal to 1/40th of the deceased employee's ordinary pay for the period of 'continuous employment'.

The second situation will occur if the deceased had ***already accrued an entitlement to long service leave*** at the time of death. In this situation the pro rata entitlement is calculated by adding both:

- the payment of any outstanding accrued entitlement
- an amount equal to 1/40th of the deceased employee's ordinary pay for the period of 'continuous employment' which occurred after the last accrual of an entitlement to long service leave.

In both of these situations amounts are payable to the personal representatives of the deceased.

If you need advice about the long service leave entitlements of mining employees, contact either:

- Workplace Standards Tasmania on 1300 366 322 (in Tasmania) or (03) 6233 7657 (outside Tasmania)
- your employer organisation
- your union.

## FREQUENTLY ASKED QUESTIONS

### WHAT IS THE LONG SERVICE LEAVE ENTITLEMENT?

[Section 8]

The entitlement to long service leave is 13 weeks' paid leave after completing 15 years' 'continuous employment'. After each additional ten years' 'continuous employment', an employee is entitled to eight and two thirds weeks' leave.

[Section 8A]

Unlike other employees covered by the *Long Service Leave Act 1976*, a mining employee is entitled to 13 weeks' long service leave after each ten years' 'continuous employment'.

### WHEN IS AN EMPLOYEE ENTITLED TO PAYMENT FOR PRO RATA LONG SERVICE LEAVE?

[Section 8 (2)(b), (3) & (3A)]

An employee **may** be entitled to payment for pro rata long service leave on termination of employment after completing seven but less than 15 years' 'continuous employment'.

[Section 8A (2)(b), (3) & (3A)]

However, a mining employee **may** be entitled to payment for pro rata long service leave on termination of employment after completing five but less than ten years' 'continuous employment'.

***The payment of a pro rata entitlement is not automatic and is only required in certain circumstances.*** For information on the circumstances where pro rata long service leave is to be paid, refer to the section — 'Pro Rata Long Service Leave'.

### ARE CASUAL EMPLOYEES ENTITLED TO LONG SERVICE LEAVE?

[Section 5(3)]

Yes, if they meet the 'continuous employment' provisions.

### CAN LONG SERVICE LEAVE BE 'CASHED IN'?

[Section 10]

Yes. By agreement, employees may 'cash-in' long service leave by receiving payment in lieu or may take a mixture of cash and leave.

## **FREQUENTLY ASKED QUESTIONS (CONTINUED)**

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### **WHAT HAPPENS WHEN PUBLIC HOLIDAYS OCCUR WHILE ON LONG SERVICE LEAVE?**

[Section 12(9)]

Public holidays are added on to the period of long service leave.

### **CAN AN EMPLOYEE ACCRUE LONG SERVICE LEAVE WITH TWO EMPLOYERS AT ONE TIME?**

[Section 5(3)]

Yes, if engaged on a regular basis with both.

### **CAN AN EMPLOYEE WORK FOR ANOTHER EMPLOYER WHILE ON LONG SERVICE LEAVE?**

Yes. The Act does not prohibit an employee from working for another employer while on leave.

### **CAN AN EMPLOYER BE EXEMPT FROM THE *LONG SERVICE LEAVE ACT 1976*?**

[Section 7]

Yes. The Secretary of the Department of Infrastructure Energy and Resources may grant an exemption to an employer from having to comply with the Act where:

- employees are entitled to benefits not less favourable than those set out in the Act
- it is in the best interests of the employees that the exemption is granted.

### **DOES AN APPRENTICESHIP COUNT TOWARDS 'CONTINUOUS EMPLOYMENT'?**

[Section 5(9)]






Yes, provided that following the completion of the apprenticeship, the person is engaged for work by that employer within three months.

### **DOES A PERIOD OF WORKERS COMPENSATION COUNT TOWARDS 'CONTINUOUS EMPLOYMENT'?**

[Section 5(1)(c)]

Yes. Any absence due to illness or injury that has been certified as necessary by a medical practitioner counts towards 'continuous employment'.

## WHO TO CONTACT FOR MORE INFORMATION

-  Workplace Standards Tasmania  
1300 366 322  
(in Tasmania)  
(03) 6233 7657  
(outside  
Tasmania)
-  Tasmanian Chamber of Commerce and Industry (03) 6234 5933
-  Unions Tasmania (03) 6234 9553
-  Your employer organisation
-  Your union

# THE ACT

## **WARNING**

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## **TASMANIA**

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### **LONG SERVICE LEAVE ACT 1976**

**(No. 95 of 1976)**

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## **THE ACT (CONTINUED)**

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### SCHEDULE 1 - ACTS REPEALED

### SCHEDULE 2 - MINERAL SUBSTANCES

## **TASMANIA**

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### **LONG SERVICE LEAVE ACT 1976**

(No. 95 of 1976)

**AN ACT to amend and consolidate the law relating to the granting of long service leave to employees, and for matters incidental thereto.**

**[Royal Assent 15 December 1976]**

Be it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:-

#### **Short title and repeal**

- 1 — (1) This Act may be cited as the *Long Service Leave Act 1976*.
- (2) The Acts that are specified in Schedule 1 are repealed.

## Interpretation

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

“**age for retirement**” means —

- (a) in a case where an age for retirement is prescribed in an industrial award that is applicable to an employee, or is fixed by the terms of an employee’s contract of employment — the age so prescribed or fixed; or
- (b) in any other case — the age of 65 years, in the case of a male, or 60 years in the case of a female;

“**business**” includes any trade, process, profession, or occupation, and any part thereof;

“**Commission**” means the Tasmanian Industrial Commission constituted under the *Industrial Relations Act 1984*;

“**Commissioner**” means a person appointed and holding office as a member of the Commission;

“**employee**” means a person who is employed by an employer to do any work for hire or reward, and includes an apprentice or any other person whose contract of employment requires him to learn or be taught any business;

“**employer**” means a person by whom an employee is employed, and includes the Crown;

“**Full Bench**” means a Full Bench of the Commission constituted in accordance with section 14 of the *Industrial Relations Act 1984*;

“**industrial dispute**” means a dispute in relation to any matter affecting or relating to the relations of employers and employees in any business, or their respective rights, privileges, duties, or obligations;

“**inspector**” means a person who is appointed as an inspector for the purposes of this Act or is an inspector by virtue of section 4 (1), and includes the Secretary;

## THE ACT (CONTINUED)

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**“metalliferous mine”** means —

- (a) a place, open cut, quarry, shaft, tunnel, drive, level or other excavation, drift, gutter, lead, vein, lode, or reef in or by which an operation is carried on for or in connection with the purpose of obtaining a mineral substance by any manner or method; or
- (b) a place adjoining a metalliferous mine within the meaning of paragraph (a) on which a product of that mine is stacked, stored, crushed, or otherwise treated.

and includes —

- (c) a place where 2 or more men are employed in connection with prospecting operations for the purposes of the discovery or exploration of or for a mineral substance, whether by drilling, boring, or any other method; and
- (d) so much of the surface of a place and the buildings, workshops, change-houses, structures, and works on that place surrounding or adjacent to the shaft, outlets, or site of a metalliferous mine, within the meaning of a preceding paragraph of this definition, as are occupied, together with the mine, for the purposes of or in connection with the working of the mine, or the removal from the mine of refuse, or the health, safety, or welfare of persons employed in, at, or about the mine;

**“mining employee”** means an employee who is employed in, at, or about a metalliferous mine;

**“Secretary”** means the Secretary of the Department;

**“transmission”**, used in relation to an employer’s business, includes any transfer, conveyance, assignment, or succession, whether by agreement or by operation of law;

**“workers’ compensation”** means compensation payable under —

- (a) the *Workers Rehabilitation and Compensation Act 1988*; or
- (b) the *Workers’ (Occupational Diseases) Relief Fund Act 1954* or a scheme substituted for the provisions thereof under section 41 of that Act.

(2) Where an employee is employed in or about any place in the business of an employer and the employment of the employee with that employer is terminated, and, not later than the expiration of a period of 2 months from the date on which that employment was so terminated, the employee becomes employed in or about that place in the business of some other employer, the business of the employer by whom his employment has been terminated shall, for the purposes of this Act, be deemed to have been transmitted to the employer by whom he so becomes employed if the business in which he so becomes employed is of the same, or substantially the same, kind as the business in which he was employed in the employment that has terminated.

(3) .....

**Mineral substances**

**2A** — (1) The several substances specified in Schedule 2 are mineral substances within the meaning of this Act.

(2) The Governor may, by order, amend Schedule 2 by adding a substance to, or removing a substance from, that Schedule.

**Non-application of Act**

**3** — This Act does not apply to an employee who —

- (a) is an employee within the meaning of the *Long Service Leave (State Employees) Act 1994*; or
- (b) .....
- (c) is entitled to long service leave under Division 1 of Part 7 of the *Local Government (Building and Miscellaneous Provisions) Act 1993*.

**Inspectors**

**4** — (1) A person who is an inspector under the *Industrial Relations Act 1975* is, by virtue of his office, an inspector for the purposes of this Act.

(2) The Secretary is, by virtue of that office, an inspector for the purposes of this Act.

(3) Subject to and in accordance with the *State Service Act 2000*, persons may be appointed as inspectors for the purposes of this Act.

(4) Persons appointed as inspectors for the purposes of the *Long Service Leave Act 1956* shall be deemed to have been so appointed for the purposes of this Act.

**Nature of continuous employment**

**5** — (1) For the purposes of this Act, employment (whether before or after the commencement of this Act) shall be deemed to be continuous notwithstanding —

- (a) the taking of any annual leave or long service leave;
- (b) any absence from work of the employee on a public holiday in accordance with the terms of his employment;
- (c) any absence from work on account of illness or injury that has been certified as necessary by a medical practitioner;
- (ca) the taking of any maternity leave by the employee in accordance with the terms of her employment;
- (d) any interruption or ending of the employment by the employer, if the interruption or ending is made with the intention of avoiding obligations in respect of long service or annual leave;
- (e) any interruption arising directly or indirectly from an industrial dispute, but only if the employee returns to work in accordance with the terms of settlement of the dispute;
- (f) any absence from work, by leave of the employer, for the purpose of the employee attending a meeting of the Training Authority of Tasmania or of any committee established under the *Industrial and Commercial Training Act 1985*;
- (g) the termination of the employment of an employee for any reason other than on account of slackness of trade, but only if he is re-employed by the same employer within 3 months after the date of that termination;
- (h) the standing down for a period not exceeding 6 months of an employee on account of slackness of trade, or the termination of employment of an employee who returns to work within a period not exceeding 6 months after the termination of his employment on account of slackness of trade, but only if the return to work by the employee is made within 14 days after —

## THE ACT (CONTINUED)

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- (i) receiving from the employer an offer of re-employment; or
  - (ii) the date on which the employer posts to the employee, by registered letter addressed to the employee at his last-known address, a notice to resume work;
- (i) any absence from work of the employee for the purpose of —
- (i) complying with a summons to appear as a juror;
  - (ii) appearing to give evidence before any court or body before which or person before whom persons may by law be required to appear to give evidence; or
  - (iii) complying with any requirement or exercising any right to appear before such a court, body, or person as is referred to in subparagraph (ii), whether as a party to any proceedings or as a witness or otherwise; or
- (j) any other absence of the employee from work by leave of the employer.

(2) In calculating the period of continuous employment of an employee, an interruption or absence of any of the kinds to which paragraphs (a), (b), (c), (d), (f), and (i) of subsection (1) relate shall be counted as part of the period of his employment, but an interruption or absence of any of the kinds to which paragraphs (ca), (e), (g), (h), and (j) of that subsection relate shall not be counted as part of the period of his employment.

(3) Without limiting subsections (1) and (2), where an employee is regularly employed by an employer for not less than 32 hours in each consecutive period of 4 weeks,

the employee shall be deemed for the purposes of this Act to be continuously employed by the employer, notwithstanding —

- (a) that any of the employment is not full-time employment;
- (b) that the employee was so employed under 2 or more contracts of employment separately entered into;
- (c) that, apart from this subsection, the employee would be regarded as being engaged in casual employment; or

## **THE ACT (CONTINUED)**

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- (d) that the employee engaged in other employment during that period.

(4) Where a business is, whether before or after the commencement of this Act, transmitted from an employer (in this subsection referred to as “the transmitter”) to another employer (in this subsection referred to as “the transmittee”) and a person who at the time of the transmission was an employee of the transmitter in that business becomes an employee of the transmittee —

- (a) the continuity of the employment of that employee shall be deemed not to have been broken by reason of the transmission; and
- (b) the period of employment of the employee with the transmittee shall be deemed to include the period of his employment, and any period deemed to be a period of his employment, with the transmitter.

(5) Where an employee transfers from employment with a corporation to employment with a corporation associated with that corporation —

- (a) the continuity of his employment shall be deemed not to have been broken by reason only of his so transferring; and
- (b) the period of his employment with the corporation to employment with which he so transfers shall be deemed to include the period of his employment, and any period deemed to be a period of employment, with the corporation from employment with which he so transfers.

(6) For the purposes of subsection (5) a corporation shall be deemed to be associated with another corporation if those corporations are related to each other within the meaning of section 50 of the Corporations Act.

(7) Without prejudice to the provisions of subsection (6), where —

- (a) an employee is transferred from employment with one corporation to employment with another;
- (b) the directors of each of those corporations are substantially the same or the corporations are under substantially the same management; and
- (c) the employee believes on reasonable grounds that he has remained in employment with the same employer,

## **THE ACT (CONTINUED)**

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this Act has effect in relation to that transfer as if those corporations were associated corporations within the meaning of subsection (5).

(8) In this section the expressions “corporation” and “director” have respectively the same meanings as they have for the purposes of the Corporations Act.

(9) Where the employment of an employee who is apprenticed to an employer has been continued by that employer upon or at any time within 3 months after the completion of the apprenticeship, the period of the apprenticeship shall be counted as part of the period of continuous employment of that employee with that employer.

(10) A period of service by an employee as a member of the naval, military, or air forces (other than as a member of the permanent force) of the Commonwealth shall be deemed to be employment with the employer by whom the employee was last employed before he commenced to serve as a member thereof.

(11) For the purposes of subsection (10), in the case of an employee whose last employment was temporary employment during a stand down period the expression “employer by whom the employee was last employed” means the employer who stood down the employee.

### **Employment before the commencement of this Act**

**6** — (1) For the purposes of this Act, the continuous employment of an employee by an employer by whom he is employed at the commencement of this Act shall, subject to this section, be deemed to have commenced on the actual date on which that employee was first employed by that employer before the commencement of this Act.

(2) Notwithstanding the provisions of subsection (1), in computing an employee’s entitlement to long service leave under this Act —

- (a) continuous employment before the commencement of the *Long Service Leave Act 1956*, to the extent to which it is in excess of 24 years, shall be disregarded; and

## THE ACT (CONTINUED)

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- (b) long service leave (or payment in lieu thereof) granted to the employee in respect of any period of employment that is, under this section, taken into account in computing the employee's entitlement to long service leave under this Act shall be taken into account, and shall be deemed to have been leave taken under this Act.

### Exemptions

7— (1) The Secretary may, subject to such conditions as he thinks fit to impose, exempt an employer from the operation of this Act in respect of all or any class of the employees employed by the employer where the Secretary is satisfied that —

- (a) those employees are, or that class of employee is, under the terms of employment with the employer, entitled, under any scheme established or conducted by or on behalf of that employer, to benefits that are not less favourable to those employees, or that class of employees, than those prescribed by this Act; and
- (b) it is in the best interests of those employees, or that class of employees, that the exemption should be granted.

(2) An exemption granted under subsection (1) shall be granted so as to operate for such period, not exceeding 5 years, as the Secretary may determine, and may be renewed so as to operate for such further periods, not exceeding 5 years at any one time, as the Secretary may think desirable.

(3) Where the Secretary revokes or refuses to renew an exemption granted under this section, the continuous employment, before the date of the revocation or refusal, of the employees in respect of whom or, as the case may be, of the employees included in the class of employees in respect of which, the exemption was granted shall be taken into account for the purpose of computing their entitlement to long service leave under this Act, but —

- (a) any period of long service leave granted to such an employee before that date pursuant to such a scheme as is referred to in subsection (1) (a) shall be deemed to have been a period of long service leave granted to him under the provisions of this Act; and
- (b) any sum paid to such an employee in lieu of long service leave before that date pursuant to such a scheme shall be deemed to have been a payment in lieu of long service leave under the provisions of this Act.

## THE ACT (CONTINUED)

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(4) The Secretary shall not grant an exemption under this section in respect of any scheme that does not provide for the granting of long service leave, as such, to the employees to whom the scheme relates.

(5) Subsection (4) does not apply in respect of a scheme in respect of which an exemption was in force immediately before the commencement of the *Long Service Leave Act 1964* or any scheme varying, altering, or amending that scheme.

(6) The Secretary —

(a) may of his own motion; and

(b) shall, on the application of an organization of employers or of employees or of the relevant employer,

review any exemption granted by him pursuant to this section before the commencement of the *Long Service Leave Act 1964*.

(7) If, on such a review as is mentioned in subsection (6), the Secretary is of the opinion that the benefits under the scheme that is the subject of the exemption are not as favourable as those prescribed by this Act or that it is no longer in the best interests of the employees to whom the scheme relates that the exemption should continue to operate, the Secretary may revoke the exemption or may determine that the exemption shall continue to operate only upon and subject to such terms and conditions as he may impose.

(8) An exemption or the renewal of an exemption granted under the *Long Service Leave Act 1956* shall be deemed to have been granted under this Act at the time it was actually granted.

### **Entitlement to long service leave**

**7A** — Subject to this Act, an employee is entitled to long service leave on ordinary pay in respect of continuous employment with an employer.

### **Period of long service leave to which employees, other than mining employees, are entitled**

**8** — (1) In this section, “employee” means an employee who is not a mining employee.

(2) Subject to subsection (4), the period of long service leave to which an employee is entitled under this Act is —

## THE ACT (CONTINUED)

---

- (a) on the completion by an employee of at least 15 years' continuous employment with his employer —
  - (i) 13 weeks' long service leave in respect of the first 15 years' continuous employment with his employer;
  - (ii) 8 <sup>2</sup>/<sub>3</sub> weeks' long service leave in respect of each additional 10 years' continuous employment with his employer; and
  - (iii) on the termination of his employment, an additional period of long service leave in respect of the number of years' continuous employment with his employer since the last accrual of entitlement to long service leave under the foregoing provisions of this paragraph, such period of long service leave as bears the same proportion to 13 weeks as that number of years bears to 15 years; or
- (b) in the case of an employee to whom this paragraph applies by virtue of subsection (3) who has completed 7 years', but has not completed 15 years', continuous employment with his employer such period of long service leave as bears the same proportion to 13 weeks as the total period of the employee's continuous employment with his employer bears to 15 years.

(3) Subsection (2) (b) applies to —

- (a) an employee who attains the age for retirement;
- (b) an employee whose employment is terminated on account of illness of such a nature as to justify the termination of that employment;
- (c) an employee who terminates his employment on account of incapacity or domestic or other pressing necessity of such a nature as to justify the termination of that employment; and
- (d) an employee whose employment is terminated by his employer for any reason other than the serious and wilful misconduct of the employee.

(3A) For the purposes of subsection (3), an employee who terminates his employment on or after becoming eligible for a service pension under section 84 of the *Repatriation Act 1920* of the Commonwealth shall be deemed to have attained the age of retirement.

(4) In the case of an employee whose period of employment with an employer began before the commencement of the *Long Service Leave Act 1964* and whose period of continuous employment with his employer would entitle him to long service leave under this section, the period of long service leave to which that employee is entitled is the total of the following periods, namely:—

- (a) a period calculated on the basis of 13 weeks for 20 years' continuous employment before the date of the commencement of that Act; and
- (b) a period calculated on the basis of 13 weeks for 15 years' continuous employment on and after that date.

**Period of long service leave to which mining employees are entitled**

**8A** — (1) In this section, “employee” means a mining employee.

(2) Subject to subsections (3) and (4), the period of long service leave to which an employee is entitled under this Act is —

- (a) On the completion by an employee of at least 10 years' continuous employment with his employer —
  - (i) 13 weeks' long service leave in respect of every period of 10 years' continuous employment with his employer; and
  - (ii) on the termination of his employment, an additional period of long service leave in respect of the number of years' continuous employment with his employer since the last accrual of entitlement to long service leave under subparagraph (i), being such a period of long service leave as bears the same proportion to 13 weeks as that number of years bears to 10 years; or
- (b) in the case of an employee to whom this paragraph applies by virtue of subsection (3) who has completed 5 years', but has not completed 10 years', continuous employment with his employer, such a period of long service leave as bears the same proportion to 13 weeks as the total period of the employee's continuous employment with his employer bears to 10 years.

(3) Subsection (2) (b) applies to —

- (a) an employee who attains the age for retirement;

## THE ACT (CONTINUED)

---

- (b) an employee whose employment is terminated on account of illness of such a nature as to justify the termination of that employment.
- (c) an employee who terminates his employment on account of incapacity or domestic or other pressing necessity of such a nature as to justify the termination of that employment; and
- (d) an employee whose employment is terminated by his employer for any reason other than the serious and wilful misconduct of the employee.

(3A) For the purposes of subsection (3), an employee who terminates his employment on or after becoming eligible for a service pension under section 84 of the *Repatriation Act 1920* of the Commonwealth shall be deemed to have attained the age for retirement.

(4) In the case of an employee whose period of employment with an employer began before the date fixed by proclamation under Section 2 (2) of the *Long Service Leave Amendment Act 1980* (in this subsection referred to as “the proclaimed date”) and whose period of continuous employment with his employer would entitle him to long service leave under this section, the period of long service leave to which that employee is entitled is the total of the following periods:—

- (a) a period calculated on the basis of 13 weeks for 20 years’ continuous employment before the date of the commencement of the *Long Service Leave Act 1964*; and
- (b) a period calculated on the basis of 13 weeks for 15 years’ continuous employment on and after the date referred to in paragraph (a) and before the proclaimed date;
- (c) a period calculated on the basis of 13 weeks for 10 years’ continuous employment on and after the proclaimed date.

### **Payment in lieu of long service leave on death of employee**

**9 —** (1) If an employee who is entitled to long service leave under this Act dies before or while taking that leave his employer, unless he has paid to the employee, in advance, a sum equal to the amount of his ordinary pay in respect of the period of that leave, shall pay to the employee’s personal representatives a sum equal to the amount of ordinary pay that would have been payable to the employee in respect of the period of long service leave not taken by the employee, less any amount already paid to the employee in respect of any long service leave not taken by him.

(2) Where an employee who is not a mining employee dies while he is still in the continuous employment of an employer after having completed —

- (a) more than 15 years' continuous employment with that employer, the employer shall, in addition to any sum payable under subsection (1), pay to the employee's personal representatives, in respect of the period of that continuous employment that is after the last accrual of entitlement to long service leave under section 8 (2) (a), a sum equal to the amount of his ordinary pay for a period equalling 1/60th of the first-mentioned period; or
- (b) at least 7 years', but less than 15 years', continuous employment with that employer, the employer shall pay to the employee's personal representatives a sum equal to the amount of the employee's ordinary pay for a period equalling 1/60th of the period of his continuous employment.

(3) Where a mining employee dies while he is still in the continuous employment of an employer after having completed —

- (a) more than 10 years' continuous employment with that employer, the employer shall, in addition to any sum payable under subsection (1), pay to the employee's personal representatives, in respect of the period of that continuous employment that is after the last accrual of entitlement to long service leave under section 8A (2) (a), a sum equal to the amount of his ordinary pay for a period equalling 1/40th of the first-mentioned period; or
- (b) at least 5 years', but less than 10 years', continuous employment with that employer, the employer shall pay to the employee's personal representatives a sum equal to the amount of the employee's ordinary pay for a period equalling 1/40th of the period of his continuous employment.

### **Payment in lieu of long service leave by agreement**

**10** — Where an employee becomes entitled to a period of long service leave under this Act; he may, by agreement with his employer, elect to accept payment in lieu of the period of long service leave to which he is so entitled and if he so elects the employer may pay him accordingly a sum equal of the amount of his ordinary pay in respect of a period commencing on the date specified in the election, or, if no date is so specified, the date of the election, and of the length of that period of long service leave.

**Computation of “ordinary pay”**

**11** — (1) Where, for the purposes of this Act, it is necessary to determine the ordinary pay of an employee for any period in respect of any employment (in this section referred to as “the relevant period”), that ordinary pay shall, subject to this section, be reckoned as a sum equivalent to the remuneration that he would reasonably be expected to have received in respect of that period from that employment if he had continued throughout that period to have worked therein.

(2) For the purposes of subsection (1), the following provisions have effect, namely:—

- (a) it shall be assumed that, throughout the relevant period, the employee works his normal weekly number of hours of work and does not receive, or become entitled to, any payments by way of overtime or as a consequence of his working in excess of that weekly number of hours;
- (b) where the employee is ordinarily employed on any shift or roster system or any other similar system whereby the times at which he is required to attend at his work vary from time to time, it shall be assumed, subject to paragraph (a), that he continues to be so employed throughout the relevant period;
- (c) any payments to which the employee may have become entitled by way of disability allowance shall be disregarded;
- (d) subject to paragraph (e), where the employee is provided with board and lodging by his employer, the cash value thereof shall be regarded as part of his remuneration;
- (e) where, because the work done by the employee is in such a locality as to necessitate his sleeping elsewhere than at his genuine place of residence, or because of other special circumstances, board and lodging are provided, or payments in respect thereof are made, by his employer, the value of that board and lodging and the payments made in respect thereof shall be disregarded;
- (f) subject to paragraphs (d) and (e), the value of any meals or refreshments provided for the employee, or any payments made in respect of meals or refreshments taken by him, shall be disregarded;

- (g) any payments to which an employee may become entitled in respect of his travelling to or from, or in the course of, his work, or the use of a vehicle for that purpose, shall be disregarded;
- (h) any payments that are, or may be, made to an employee at the discretion of his employer by way of bonus shall be disregarded.

(3) Subject to the provisions of subsection (2), where the remuneration received by an employee in his employment depends on the results achieved by him, it shall be assumed, for the purposes of subsection (1), that the rate of his remuneration in that employment for the relevant period is the average rate of the remuneration received by him in that employment during the period of 3 months ending on the commencement of that period.

(4) Subject to subsections (2) and (3), where no ordinary rate of remuneration is fixed for an employee's work under the terms of his employment, the rate of his remuneration in that employment for the relevant period shall be taken to be the average rate of his remuneration in that employment during the period of 12 months ending on the commencement of the relevant period.

(5) Subsections (3) and (4) apply to a part of the remuneration of an employee as if references therein to his remuneration included references to a part of his remuneration.

(6) Where no normal weekly number of hours of work is fixed for an employee under the terms of his employment, his normal weekly number of hours of work shall, for the purposes of this section, be taken to be the average weekly number of hours worked by him in that employment during the period of 12 months ending on the commencement of the relevant period.

(7) For the purposes of subsection (2), a disability allowance is any allowance payable to an employee as a consequence of his working in specified circumstances, being circumstances that involve, or are likely to involve, special danger, hardship, or inconvenience to the employee, but it does not include any such allowance in any case where it is reasonably to be expected that persons engaged in the type of employment in which the employee is ordinarily engaged would be entitled to that allowance for the whole, or the greater portion, of the time in which they are so engaged.

(8) The cash value of any board or lodging provided for an employee shall be deemed to be that fixed by or under the terms of his employment or, if it is not so fixed, shall be computed at such rate as may be agreed between the employer and employee or determined by the Secretary on the application of either of them.

(9) In the computation of the ordinary pay of an employee for a period for the purposes of section 9 or for the purposes of section 12 (4), any variation in the terms of his employment that would have come into effect during that period if he had remained in his employment shall be disregarded.

**How and when long service leave shall be taken**

**12** — (1) Subject to this Act, when an employee becomes entitled to long service leave under this Act, that leave shall be granted by the employer as soon as practicable after the employee becomes entitled to it, having regard to the needs of the employer's establishment, but —

- (a) the taking of the leave may be postponed to such date as is agreed upon between the employer and the employee or, in default of agreement, as the Secretary, having regard to the problems involved, directs, but no direction by the Secretary under this paragraph shall require the long service leave to commence before the expiration of 6 months after the date of the direction; and
- (b) in no case is any entitlement to long service leave lost or in any way affected by the foregoing provisions of this subsection or by any failure or refusal of the employer to grant the leave.

(2) Nothing in subsection (1), or in any agreement or direction made under this section, or in a determination made on an appeal against such a direction, requires an employee to take any long service leave, or any part of any long service leave, during any period in respect of which he is paid, or is entitled to be paid, any sum by way of workers' compensation and in which he is unable to work in his ordinary employment by reason of the injury or disablement in respect of which he is entitled to that workers' compensation.

(3) Where by virtue of subsection (2) any period of long service leave is not taken at the time agreed, directed, or determined under this Act the agreement, direction, or determination shall be of no effect with respect to that period of long service leave, but nothing in this subsection prejudices the making of a further agreement or direction under this section with respect to that period of long service leave.

(4) Notwithstanding anything in this section, where the employment of an employee is for any reason terminated before he takes any long service leave to which he is entitled, or where any long service leave entitlement accrues to an employee because of the termination of his employment, the employee shall be deemed to have commenced to take his leave on the date of the termination of employment and to be entitled to be paid by his employer ordinary pay in respect of that leave accordingly.

(5) An employer and employee may agree that any accrued entitlement to long service leave shall be taken in 2 periods, but, except in pursuance of an agreement under this subsection, long service leave shall be taken in one period.

(6) The ordinary pay of an employee on long service leave shall be paid to him by the employer when the leave is taken, and shall be paid in one of the following ways, namely:—

- (a) in full when the employee commences his leave;
- (b) at the same times as it would have been paid if the employee were still on duty;
- (c) in any other way agreed upon between the employer and the employee,

and the right to receive ordinary pay in respect of that leave accrues accordingly.

(7) In determining the amount of a payment required to be made in order to comply with subsection (6) (a) any variation in the terms or conditions of the employment of the employee that comes into effect during the period of the long service leave shall be disregarded, but, upon the termination of the period of the long service leave, the employer shall adjust the amount of the payment so as to accord with the variation.

(8) Where an employee's pay in respect of a period of long service leave is paid in accordance with subsection (6) (b), it shall, if the employee, in writing, so requires, be made by cheque posted to a specified address.

(9) Long service leave under this Act is not inclusive of any trade holiday, public holiday, statutory holiday as defined in the *Statutory Holidays Act 2000*, or annual leave to which an employee is entitled under the terms of his employment occurring during the period when the leave is taken.

## **THE ACT (CONTINUED)**

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(10) Except in the case of an employee to whom subsection (4) relates, nothing in this Act requires an employer to grant to an employee leave to which the employee has become entitled under this Act, unless —

- (a) in the case of an employee who is not a mining employee, the period of leave to which he has become entitled is equal to or greater than 13 weeks in respect of his first period of entitlement and 8 <sup>2</sup>/<sub>3</sub> weeks in respect of a subsequent period of entitlement; and
- (b) in the case of a mining employee, the period of leave to which he has become entitled is equal to or greater than 13 weeks in respect of each of his periods of entitlement.

### **Settlement of disputes**

**13** — (1) A dispute —

- (a) as to whether or when an employee is or has become entitled to long service leave or payment in lieu thereof, or a deceased employee's personal representatives are or have become entitled to payment in lieu of long service leave; or
- (b) with respect to the rate of ordinary pay of an employee for the purposes of this Act,

shall be referred to the Secretary who shall investigate the circumstances of the dispute and submit a report of his findings to the President of the Commission.

(2) Where a dispute referred to in subsection (1) is not resolved as a consequence of an investigation by the Secretary, the dispute shall be heard and determined, as prescribed, by a Commissioner.

(3) Subject to subsection (4), where the determination of a Commissioner under this section on the hearing of a dispute requires the payment of a sum of money by an employer to an employee, the Commissioner shall, without the necessity of any further application, order the employer to pay that sum to the employee.

(4) Where an appeal is brought under section 14 against the determination of a Commissioner under this section on the hearing of a dispute, an order of the kind referred to in subsection (3) that is made by him shall not take effect until the determination or abandonment of the appeal.

## **Appeals**

**14** — (1) Subject to subsection (2), an employer or employee who is aggrieved by —

- (a) a decision of the Secretary relating to the grant or refusal of an exemption under section 7 or the renewal or refusal to renew an exemption under that section; or
- (b) a determination of a Commissioner under section 13, may appeal to a Full Bench.

(2) An appeal under this section shall be instituted, heard, and determined as prescribed.

(2A) A Full Bench shall cause a copy of its decision in relation to an appeal under this section to be served on all parties to the appeal.

(3) The decision of a Full Bench on the hearing of an appeal under this section is final.

(4) Where the decision of a Full Bench under this section requires the payment of a sum of money by an employer to an employee, the Full Bench may, without the necessity for any further application, order the employer to pay that sum to the employee.

### **Provision relating to representation at hearings of disputes under section 13 and appeals under section 14**

**14A** — (1) A person is not entitled to be represented by a barrister or practitioner at the hearing of a dispute under section 13 or the hearing of an appeal under section 14.

(2) Where an officer or employee of an organization registered under Part V of the *Industrial Relations Act 1984* is a barrister or practitioner, nothing in subsection (1) prevents that officer or employee from representing a person at a hearing referred to in that subsection if he is employed to perform functions that may be performed by persons other than barristers or practitioners.

(3) In this section —

“**barrister**” means a person admitted as a barrister under the *Legal Profession Act 1993*;

## THE ACT (CONTINUED)

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“**practitioner**” means a practitioner within the meaning of the *Legal Profession Act 1993*.

### **Order for payment of money owing by an employer**

**15** — (1) An employee, or the personal representative of a deceased employee, may apply to a magistrate, as prescribed, for an order directing the employer to pay to the employee or to his personal representatives, as the case requires, the full amount of any payment that has, at any time during the period of 3 years immediately preceding the date of the application, become due to the employee or to his personal representatives under this Act and the magistrate may make such an order.

(2) The magistrate shall, as prescribed, hear and determine any application made to him pursuant to this section and the determination of the magistrate on the hearing of the application is final.

(3) In any case where the question of a long service leave entitlement has been determined by a Commissioner under section 13 or by a Full Bench under section 14, payment of that entitlement shall become due on the day of the determination.

### **Provision as to costs**

**16** — (1) A magistrate may, on the hearing of an application under section 15, award costs to any party to the application, and may assess the amount of those costs.

(2) Where costs are awarded by a magistrate pursuant to this section, those costs are recoverable in the same manner as to costs ordered to be paid to a complainant or defendant in a conviction or an order under the *Justices Act 1959*.

(3) In the application to costs awarded pursuant to this section of the provisions of the *Justices Act 1959*, any reference in those provisions to a justice, or to 2 or more justices, shall be construed as a reference to a magistrate.

### **Contracting out prohibited**

**17** — Except as otherwise expressly provided in this Act, the provisions of this Act have effect notwithstanding any covenant, agreement, or arrangement to the contrary (whether entered into or made before or after the commencement of this Act), and no such covenant, agreement, or arrangement operates so as to annul, vary, or exclude any of the provisions of this Act.

**Records to be kept by employers**

**18** — An employer shall keep or cause to be kept a long service leave record in such form as may be prescribed and containing the prescribed particulars.

**Powers of inspectors**

**19** — (1) An inspector —

- (a) may, at any reasonable time, enter, inspect, and examine the premises of an employer, or any place in which he has reasonable cause to believe that a person is employed or that an offence against this Act has been committed;
- (b) may require an employer to produce, at such time and place as the inspector specifies, the long service leave record required by this Act to be kept by the employer, and inspect or make a copy of, or extract from, that record;
- (c) may make such examination and inquiry as he thinks necessary to ascertain whether the provisions of this Act have been, or are being, complied with by an employer or an employee; and
- (d) may exercise such other powers as may be prescribed.

(2) Nothing in this section shall be construed as conferring on an inspector any authority to enter any parts of a building that are used exclusively for the purposes of a private dwelling.

**Offences and penalty**

**20** — (1) No person shall —

- (a) make a false or misleading statement in, or a material omission from, a long service leave record that he is required by this Act to keep;
- (b) fail to comply with a requirement or direction lawfully given by an inspector under this Act, or to furnish any information lawfully demanded under this Act by an inspector; or
- (c) contravene or fail to comply with any provision of this Act that is applicable to him.

Penalty: Fine not exceeding 20 penalty units.

## **THE ACT (CONTINUED)**

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(2) In proceedings in respect of an offence against the provisions of subsection (1) (a), it is a good defence if it is proved to the satisfaction of the court that the statement or omission complained of resulted from an error made in good faith and without intention to mislead.

### **Time within which proceedings may be commenced**

**21** — Notwithstanding anything in the *Justices Act 1959*, proceedings in respect of an offence against this Act may be commenced at any time within one year after the cause of complaint arises.

### **Proceedings to be heard by a magistrate**

**22** — Proceedings in respect of an offence against this Act shall be heard and determined by a magistrate.

### **Prosecution not a bar to entitlement**

**23** — Proceedings against an employer in respect of an offence against this Act do not prejudice or affect any right or benefit conferred by this Act on an employee in the employment of that employer or the personal representatives of a deceased employee who was in the employment of that employer.

### **Regulations**

**24** — (1) The Governor may make regulations under this Act.

(2) In addition to any other matters that may be prescribed, the regulations may impose penalties, not exceeding \$40, for offences against the regulations.

### **Application of amendments**

**25** — (1) For the purposes of this subsection, the *Long Service Leave Act 1956* and this Act are, on the dates on which they respectively commenced, taken to have contained the amendment made by sections 5(1) of the *Long Service Leave Amendment Act 1979* and, accordingly, an employee who was regularly employed throughout any period is, by virtue of this subsection, taken to have been continuously employed throughout that period for the purposes of the *Long Service Leave Act 1956* or this Act, as the case requires, whether or not his employment had terminated before the commencement of the *Long Service Leave Amendment Act 1979*.

(2) The amendment made by section 5(2) of the *Long Service Leave Amendment Act 1979* applies only to a period of employment commencing on or after the commencement of that Act.

**Savings**

**26** — (1) The amendments to this Act effected by the *Long Service Leave Amendment Act 1980* do not operate so as to entitle an employee employed in, at, or about a metalliferous mine —

(a) who has been granted long service leave under this Act before the proclaimed date, to long service leave as provided in section 8A; or

(b) who has not been granted long service leave under this Act before the proclaimed date, to long service leave under this Act as it was in force before that date as well as to long service leave as provided in section 8 A —

in respect of the same period of continuous employment with an employer.

(2) In this section, “proclaimed date” means the date fixed by proclamation under section 2(2) of the *Long Service Leave Amendment Act 1980*.

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**THE ACT (CONTINUED)**

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**SCHEDULE 1**

Section 1

<b>Number of Act</b>	<b>Title of Act</b>
8 of 1956	<i>Long Service Leave Act 1956</i>
69 of 1960	<i>Long Service Leave Act 1960</i>
74 of 1960	<i>Stevedoring Industry Long Service Leave Act 1960</i>
13 of 1961	<i>Long Service Leave Act 1961</i>
12 of 1963	<i>Long Service Leave Act 1963</i>
50 of 1963	<i>Long Service Leave Act (No. 2) 1963</i>
61 of 1964	<i>Long Service Leave Act 1964</i>
3 of 1965	<i>Long Service Leave Act 1965</i>
11 of 1966	<i>Long Service Leave Act 1966</i>
36 of 1968	<i>Long Service Leave Act 1968</i>
68 of 1972	<i>Long Service Leave Act 1972</i>
86 of 1973	<i>Long Service Leave Act 1973</i>

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**SCHEDULE 2**

Section

2A

**MINERAL SUBSTANCES**

- |                      |                           |
|----------------------|---------------------------|
| 1. Alumina           | 23. Nickel                |
| 2. Antimony          | 24. Osmiridium            |
| 3. Arsenic           | 25. Oxide of iron         |
| 4. Arsenical pyrites | 26. Pitchblende           |
| 5. Bauxite           | 27. Platinoid minerals    |
| 6. Bismuth           | 28. Platinum              |
| 7. Cadmium           | 29. Plumbago              |
| 8. Chromite          | 30. Radioactive minerals  |
| 9. Cinnabar          | 31. Rutile                |
| 10. Cobalt           | 32. Scheelite             |
| 11. Columbium        | 33. Silver                |
| 12. Copper           | 34. Sulphur               |
| 13. Galena           | 35. Tantalum              |
| 14. Gold             | 36. Tin                   |
| 15. Ilmenite         | 37. Titanium              |
| 16. Iron             | 38. Tungsten and its ores |
| 17. Iron-ore         | 39. Vanadium              |
| 18. Ironstone        | 40. Wolfram               |
| 19. Lead             | 41. Wulfenite             |
| 20. Manganese        | 42. Zinc                  |
| 21. Mercury          | 43. Zircon                |
| 22. Molybdenite      | 44. Zirconia              |





