



Western Australia

Long Service Leave Act 1958

Incorporating the amendments proposed
by the *Industrial Relations Legislation
Amendment Bill 2021 Pt. 4 (Bill No. 53-1)*

Long Service Leave Act 1958

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Western Australia

Long Service Leave Act 1958

An Act to provide for the granting of long service leave to certain Western Australian employees and for matters incidental thereto.

[Long title amended: No. 79 of 1995 s. 45; No. 36 of 2006 s. 54.]

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Part I — Preliminary provisions

1. Short title

This Act may be cited as the *Long Service Leave Act 1958*¹.

2. Commencement

This Act shall come into operation on a day to be fixed by proclamation¹.

[3. Deleted: No. 44 of 1991 s. 10.]

Part II — Construction and application of this Act

Division 1 — General

[Heading inserted: Industrial Relations Legislation Amendment
Bill 2021 cl. 82.]

4. Terms used ~~Interpretation~~

(1) In this Act unless the context requires otherwise —

apprentice means a person who is an apprentice under a training contract registered under the *Vocational Education and Training Act 1996* Part 7 Division 2;

award means an award in force under the IR Act; ~~Industrial Relations Act 1979~~;

business includes any trade, process, profession, or occupation, and any part of it ~~thereof~~;

continuous employment has the meaning given in section 6;

employee —

(a) means —

(i) a person who is employed by an employer to do work for hire or reward, including as an apprentice; or

(ii) a person whose usual status is that of an employee;

and

(b) includes a casual or seasonal employee;

~~*employee* means, subject to subsection (3) —~~

~~(a) any person employed by an employer to do work for hire or reward including an apprentice;~~

~~(b) any person whose usual status is that of an employee;~~

~~(c) any person employed as a canvasser whose services are remunerated wholly or partly by commission or percentage reward; or~~

~~(d) any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner, whether wholly or partly, of any vehicle used in the transport of goods or passengers if the person is in all other respects an employee;~~

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Part II Construction and application of this Act

Division 1 General

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employer includes any of the following employing 1 or more employees —

(a) a person or public authority as defined in the IR Act;

(b) except as provided in the *Foreign States Immunities Act 1985* (Commonwealth) section 12, a foreign state or consulate;

(c) a related body corporate of the employer if the employer is itself a body corporate;

~~*employer* includes —~~

~~(a) persons, firms, companies and corporations; and~~

~~(b) the Crown and any Minister of the Crown, or any public authority,~~

~~employing one or more employees;~~

employer-employee agreement has the meaning given in the IR Act section 7(1);

industrial agreement means an industrial agreement in force under the IR Act; ~~*Industrial Relations Act 1979*;~~

industrial inspector has the meaning given in the IR Act section 7(1);

~~*industrial inspector* means an Industrial Inspector as defined in the *Industrial Relations Act 1979*;~~

industrial magistrate's court has the meaning given by the IR Act; ~~*Industrial Relations Act 1979*;~~

IR Act means the *Industrial Relations Act 1979*;

MCE Act means the *Minimum Conditions of Employment Act 1993*;

ordinary pay has the meaning given in Division 2;

~~*ordinary pay* means subject to subsection (2), remuneration for an employee's normal weekly number of hours of work calculated on the ordinary time rate of pay applicable to him, as at the time when any period of long service leave granted to him under this Act commences, or is deemed to commence, and where the employee is provided with board and lodging by his employer, includes the cash value of that board and lodging, where such board and lodging is not provided and taken during the period of leave, but does not include shift premiums, overtime, penalty rates, allowances, or the like.~~

related body corporate, of an employer that is a body corporate, has the meaning given in the *Corporations Act 2001* (Commonwealth) section 9.

- ~~(2) For the purpose of the interpretation of “ordinary pay” in subsection (1) —~~
- ~~~~[(a) deleted]~~~~
- ~~(b) where the employee is employed on piece or bonus work or any other system of payment by results, the employee’s rate of pay during any period when the employee is on long service leave is the average weekly rate earned by him while in employment during the period of 12 months —~~
- ~~(i) ending on the day immediately preceding that on which he commences long service leave or would but for payment in lieu of long service leave have commenced long service leave, if he is then in employment; or~~
- ~~(ii) ending on the day immediately preceding that on which he was last in employment, if he is not then in employment; or~~
- ~~(iii) ending on the day immediately preceding that of his death,~~
- ~~as the case requires; and~~
- ~~(c) where the normal weekly number of hours have varied over the period of employment of a full-time, part-time or casual employee the normal weekly number of hours of work shall be deemed to be the average weekly number of hours worked by the employee during that period of employment (calculated by reference to such hours as are ascertainable if the hours actually worked over that period are not known); and~~
- ~~(d) the cash value of any board and lodging provided for an employee shall be deemed to be its cash value as fixed by or under the conditions of the employee’s employment, or, if it is not so fixed, shall be computed at the prescribed rate; and~~
- ~~(e) where by agreement between the employer and the employee the commencement of the leave to which the employee is entitled or any portion thereof is postponed to meet the convenience of the employee, the rate of payment for such leave shall be at the ordinary time rate of pay applicable to him at the date of accrual or, if so agreed, at the ordinary time rate of pay applicable at the date he commences such leave.~~

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- ~~(3) Where a person is, by virtue of —~~
- ~~(a) an award or industrial agreement;~~
 - ~~(b) an employer-employee agreement under Part VID of the *Industrial Relations Act 1979* or other agreement between the person and his employer; or~~
 - ~~(c) an enactment of the State, the Commonwealth or of another State or Territory;~~
- ~~entitled to, or eligible to become entitled to, long service leave at least equivalent to the entitlement to long service leave under this Act, that person is not within the definition of “employee” in subsection (1).~~

[Section 4 amended: No. 37 of 1964 s. 2; No. 113 of 1965 s. 8; No. 97 of 1973 s. 3; No. 44 of 1991 s. 11; No. 79 of 1995 s. 46; No. 20 of 2002 s. 20; No. 36 of 2006 s. 55; No. 44 of 2008 s. 54; amended: Gazette 15 Aug 2003 p. 3687; [Industrial Relations Legislation Amendment Bill 2021 cl. 83 and 98.](#)]

4A. Employees with equivalent separate LSL entitlements

(1) In this section —

award, agreement or enactment means —

- (a) an award or industrial agreement; or
- (b) an agreement between an employer and employee (including an employer-employee agreement); or
- (c) an enactment of the State, the Commonwealth, another State or a Territory;

entitlement, in relation to long service leave or payment on termination instead of long service leave, includes an eligibility to become entitled to the long service leave or payment on termination instead of long service leave;

WA LSL means long service leave, or payment on termination instead of long service leave, under Part III.

(2) For the purposes of this section, a *separate LSL entitlement* is an entitlement to long service leave, and a payment on termination instead of long service leave, under an award, agreement or enactment.

(3) For the purposes of this section, a payment (whether in the form of a loading, other additional incremental payment or otherwise) instead of an entitlement under subsection (2) is not a *separate LSL entitlement*.

(4) This Act does not apply to an employee who has a separate LSL entitlement to take long service leave and to be paid on termination instead of long service leave that is at least equivalent to the entitlement to WA LSL to take long service leave and to be paid on termination instead of long service leave.

(5) Subsection (6) applies to an employee —

(a) who becomes entitled to WA LSL in relation to employment with an employer; and

(b) who, immediately before becoming entitled to WA LSL, had a separate LSL entitlement in relation to employment with the employer.

(6) Any long service leave taken by, or payment on termination instead of long service leave made to, the employee under the separate LSL entitlement must be taken into account in the calculation of the employee's entitlement to WA LSL as if it were taken, or paid on termination, as WA LSL.

[Section 4A inserted: Industrial Relations Legislation Amendment Bill 2021 cl. 84.]

5. Cashing out of accrued long service leave

(1) An employer and an employee may agree that the employee may forgo the employee's entitlement, or part of the employee's entitlement, to long service leave under section 8(2)(a) or (b) if —

(a) the employee is given an adequate benefit instead of the entitlement; and

(b) the agreement is in writing, signed by the employer and employee.

(2) For the purposes of subsection (1), a benefit is not adequate unless the employee is paid at least the amount of ordinary pay the employee would have received had the employee taken the long service leave or part of the leave.

(3) Nothing in this section enables the employer and employee to reach the agreement before the employee's entitlement to long service leave has accrued.

[Section 5 inserted: Industrial Relations Legislation Amendment Bill 2021 cl. 84.]

6. Continuous employment

(1) An employee's *continuous employment* with an employer includes an absence from work by the employee comprising any of the following, whether paid or unpaid and irrespective of the duration —

- (a) annual leave;
- (b) leave for illness or injury, or carer's leave;
- (c) long service leave;
- (d) parental leave;
- (e) compassionate leave;
- (f) bereavement leave;
- (g) family and domestic violence leave;
- (h) public holidays;
- (i) any other form of leave provided as part of the employee's employment.

(2) An employee's *continuous employment* with an employer also includes any of the following absences from work, whether paid or unpaid and irrespective of the duration —

- (a) a period following the termination of the employee's employment by the employer if the termination has been made with the intention of avoiding —
 - (i) obligations under this Act in respect of long service leave; or
 - (ii) obligations in respect of annual leave under an award, industrial agreement, employer-employee agreement, order of the Commission, the MCE Act or any other enactment;
- (b) if the employee resumes employment with the employer as soon as practicable after the absence — a period during which the employment is interrupted by service as a member of the naval, military or air forces of the Commonwealth other than as a member of the Permanent Forces of the Commonwealth of Australia.

(3) An employee has *continuous employment* with an employer despite an absence from work comprising any of the following, whether paid or unpaid and irrespective of the duration —

- (a) an absence other than that referred to in subsection (1) or (2) which is authorised by the employer;

-
- (b) a standing-down of the employee in accordance with the provisions of —
- (i) an award, agreement, order or determination in force under the IR Act; or
 - (ii) the *Fair Work Act 2009* (Commonwealth) or an enterprise agreement under that Act; or
 - (iii) any other enactment;
- (c) an absence arising directly or indirectly from an industrial dispute if the employee returns to work in accordance with the terms of settlement of the dispute;
- (d) a reasonable absence from work on legitimate union business in respect of which the employee has requested and been refused leave;
- (e) an absence for a reason not specified in subsection (1) or (2) or in this subsection unless the employer gives, during or within 14 days after the absence, written notice to the employee that the continuity of the employment has been broken by the absence.
- (4) An employee has ***continuous employment*** with an employer despite a termination of the employment by the employer —
- (a) on any ground other than slackness of trade — if the employee is re-employed by the employer within a period not exceeding 2 months from the date of the termination;
 - (b) on the ground of slackness of trade — if the employee is re-employed by the employer within a period not exceeding 6 months from the date of the termination.
- (5) A casual or seasonal employee has ***continuous employment*** with an employer despite an absence from work comprising any of the following, irrespective of the duration —
- (a) an absence under the terms of the employment;
 - (b) an absence caused by seasonal factors;
 - (c) any other absence after which the employee has, due to the regular and systematic nature of the employment, a reasonable expectation of returning to work for the employer.

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Division 1 General

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(6) In addition, a casual or seasonal employee has *continuous employment* with an employer despite the fact that the employee —

(a) is employed by the employer under 2 or more contracts of employment; or

(b) is also employed by another person during the period of employment with the employer.

(7) If an employee enters into a contract of employment with an employer within 52 weeks after completing an apprenticeship with the employer, the period of apprenticeship is taken to be a part of the employee's *continuous employment* with the employer.

[Section 6 inserted: Industrial Relations Legislation Amendment Bill 2021 cl. 84.]

6A. Calculating length of continuous employment

(1) When calculating the length of continuous employment for the purposes of this Act, a period is counted if it is any of the following —

(a) leave referred to in section 6(1) for which the employee has received payment;

(b) an absence referred to in section 6(2);

(c) an absence referred to in section 6(5).

(2) When calculating the length of continuous employment for the purposes of this Act, a period is not counted if it is any of the following —

(a) leave referred to in section 6(1) for which the employee has not received payment;

(b) an absence referred to in section 6(3);

(c) a period between a termination and re-employment referred to in section 6(4);

(d) in respect of an employee to whom section 6(7) applies, any period between —

(i) the completion of the employee's apprenticeship; and

(ii) the employment of the employee by the employer;

(e) a period during the transfer of business as defined in section 7D where —

(i) the employment of an employee of the old employer as defined in section 7D has terminated; and

(ii) the employee has not yet been employed by the new employer as defined in section 7D.

[Section 6A inserted: Industrial Relations Legislation Amendment Bill 2021 cl. 84.]

~~5. Limited contracting out of long service leave~~

~~An employer and an employee may agree that the employee may forgo his entitlement to long service leave under this Act if—~~

~~(a) the employee is given an adequate benefit in lieu of the entitlement; and~~

~~(b) the agreement is in writing.~~

~~[Section 5 inserted: No. 79 of 1995 s. 47.]~~

~~6. What constitutes continuous employment~~

~~(1) For the purposes of this Act employment of an employee whether before or after the commencement of this Act shall be deemed to include—~~

~~(a) any period of absence from duty for—~~

~~(i) annual leave;~~

~~(ii) long service leave; or~~

~~(iii) public holidays or half holidays, or, where applicable to the employment, bank holidays;~~

~~(b) any period of absence from duty necessitated by sickness of or injury to the employee but only to the extent of 15 working days in any year of his employment;~~

~~(c) any period following any termination of the employment by the employer if such termination has been made merely with the intention of avoiding obligations under this Act in respect of long service leave or obligations under any award or industrial agreement in respect of annual leave; and~~

~~(d) any period during which the employment of the employee was or is interrupted by service—~~

~~(i) as a member of the Naval, Military or Air Forces of the Commonwealth of Australia other than as~~

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Division 1 General

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~~a member of the British Commonwealth Occupation Forces in Japan and other than as a member of the Permanent Forces of the Commonwealth of Australia except in the circumstances referred to in section 31(2) of the *Defence Act 1903* and except in Korea or Malaya after 26 June 1950;~~

~~(ii) as a member of the Civil Construction Corps established under the *National Security Act 1939-1946*²; or~~

~~(iii) in any of the Armed Forces under the *National Service Act 1951*³, or any Act passed in substitution for, or amendment of, that Act,~~

~~but only if the employee, as soon as reasonably practicable after the completion of any such service, resumed or resumes employment with the employer by whom he was last employed prior to the commencement of such service.~~

~~(2) For the purposes of this Act, the employment of an employee whether before or after the commencement of this Act shall be deemed to be continuous notwithstanding —~~

~~(a) the transmission of a business as referred to in subsections (4) and (5);~~

~~(b) any interruption referred to in subsection (1) irrespective of the duration thereof;~~

~~(c) any absence of the employee from his employment if the absence is authorised by his employer;~~

~~(d) any standing down of an employee in accordance with the provisions of an award, industrial agreement, order or determination —~~

~~(i) in force under the *Industrial Relations Act 1979*;~~
~~or~~

~~(ii) in force under the *Commonwealth Conciliation and Arbitration Act 1904*⁴, or any Act enacted by the Parliament of the Commonwealth in amendment of, or substitution for, that Act;~~

~~(e) any absence from duty arising directly or indirectly from an industrial dispute if the employee returns to work in accordance with the terms of settlement of the dispute;~~

~~(f) any termination of the employment by the employer on any ground other than slackness of trade if the employee~~

~~is re-employed by the same employer within a period not exceeding 2 months from the date of such termination;~~

~~(g) any termination of the employment by the employer on the ground of slackness of trade if the employee is re-employed by the same employer within a period not exceeding 6 months from the date of such termination;~~

~~(h) any reasonable absence of the employee on legitimate union business in respect of which he has requested and been refused leave;~~

~~(i) any absence of the employee from his employment after the coming into operation of this Act by reason of any cause not specified in subsection (1) or in this subsection unless the employer, during the absence or within 14 days of the termination of the absence, gives written notice to the employee that the continuity of his employment has been broken by that absence, in which case the absence shall be deemed to have broken the continuity of employment.~~

~~(3) Any period of absence from, or interruption of employment referred to in subsection (2)(c) to (i) inclusive shall not be counted as part of the period of an employee's employment.~~

~~(4) Where a business has, whether before or after the coming into operation hereof, been transmitted from an employer (herein called *the transmitter*) to another employer (herein called *the transmittee*) and an employee who at the time of such transmission was an employee of the transmitter in that business becomes an employee of the transmittee—the period of the continuous employment which the employee has had with the transmitter (including any such employment with any prior transmitter) shall be deemed to be employment of the employee with the transmittee.~~

~~(5) In subsection (4) —~~

~~*transmission* includes transfer, conveyance, assignment or succession, whether voluntary or by agreement or by operation of law, and *transmitted* has a corresponding meaning.~~

~~[Section 6 amended: No. 97 of 1973 s. 5; No. 79 of 1995 s. 48; No. 19 of 2010 s. 51.]~~

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Division 2 Ordinary pay

s. 7

Division 2 — Ordinary pay

[Heading inserted: Industrial Relations Legislation Amendment Bill 2021 cl. 85.]

7. Ordinary pay: general

(1) Except as provided in subsection (4), an employee's **ordinary pay** is the employee's remuneration for the employee's normal weekly number of hours of work calculated on the ordinary time rate of pay applicable to the employee as at the time when any period of long service leave granted to the employee under this Act commences, or is taken to commence.

(2) For the purposes of subsection (1), the normal weekly number of hours of work of an employee whose hours have varied during a period of employment is the average weekly hours worked by the employee during the period, calculated by reference to ascertainable hours worked by the employee during the period, excluding any period referred to in section 6A(2).

(3) For the purposes of subsection (1), the rate of pay of an employee whose leave, or any portion of it, is postponed to meet the convenience of the employee by agreement between the employer and employee is the rate of pay applicable to the employee —

(a) on the day on which the leave accrues; or

(b) if the employer and employee agree — on the day on which the employee commences the leave.

(4) The **ordinary pay** of an employee employed on piecework, commission, bonus work, percentage reward, or any other system of payment, wholly or partly by results, is the employee's average weekly rate of pay earned over a period totalling 365 days ending on —

(a) if the employee is in employment and —

(i) takes long service leave — the day immediately before the day on which the employee commences the long service leave; or

(ii) takes payment instead of long service leave under section 5 — the day immediately before the day on which an agreement under section 5 is reached in relation to the payment;

or

(b) if the employee is not in employment — the day immediately before the day on which the employee was last in employment; or

(c) if the employee is dead — the day immediately before the day on which the employee died.

(5) For the purposes of subsection (4), the following periods must be disregarded —

(a) any period of unpaid leave;

(b) any period during which there is a standing-down of the employee in accordance with the provisions of —

(i) an award, agreement, order or determination in force under the IR Act; or

(ii) the *Fair Work Act 2009* (Commonwealth) or an enterprise agreement under that Act; or

(iii) any other enactment.

[Section 7 inserted: Industrial Relations Legislation Amendment Bill 2021 cl. 86.]

7A. Ordinary pay: shift premiums, overtime, penalty rates or allowances

Except as provided in section 7B, an employee's *ordinary pay* does not include shift premiums, overtime, penalty rates, allowances or any similar payments.

[Section 7A inserted: Industrial Relations Legislation Amendment Bill 2021 cl. 86.]

7B. Ordinary pay: casual employees' loading

A casual employee's *ordinary pay* includes any casual loading payable under any of the following —

(a) an award, industrial agreement, employer-employee agreement or order of the Commission;

(b) a modern award, enterprise agreement or national minimum wage order made by the Fair Work Commission under the *Fair Work Act 2009* (Commonwealth);

(c) a contract of employment;

(d) an enactment.

[Section 7B inserted: Industrial Relations Legislation Amendment Bill 2021 cl. 86.]

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Division 2 Ordinary pay

s. 7C

7C. Ordinary pay: board and lodging

(1) An employee's *ordinary pay* includes the cash value of board and lodging during a period of long service leave if the board and lodging —

(a) is provided to the employee by the employer; but

(b) is not provided to, and taken by, the employee during the period of long service leave.

(2) For the purposes of subsection (1), the cash value of board and lodging provided to an employee is —

(a) if the value is fixed by or under the conditions of the employee's employment — that value; or

(b) if the value is not fixed by or under the conditions of the employee's employment — a value calculated by reference to a rate prescribed in the regulations.

[Section 7C inserted: Industrial Relations Legislation Amendment Bill 2021 cl. 86.]

~~7. Employment before commencement of this Act~~

~~(1) For the purpose of this Act the employment of an employee by the employer by whom he is employed on the coming into operation of this Act shall, subject to the provisions of this section and to those of section 6, be deemed to have commenced on the day on which the employee was first employed by that employer, but in the calculation of the employee's entitlement to long service leave under this Act not more than 20 years' continuous employment before the coming into operation of this Act shall be counted.~~

~~(2) Any leave, in the nature of long service leave or, as the case may be, payment in lieu thereof, granted, whether before or after the coming into operation of this Act, under any long service leave scheme and irrespective of this Act to an employee in respect of any period of continuous employment with his employer, shall be taken into account in the calculation of the employee's entitlement to long service leave under this Act as if it were long service leave taken under this Act, or, as the case may be, payment in lieu of long service leave under this Act and to be satisfaction to the extent thereof of any entitlement of the employee under this Act.~~

~~(3) The entitlement to leave under this Act shall be in substitution for and satisfaction of any long service leave to which the employee may be entitled in respect of employment of the employee by the employer.~~

~~[Section 7 amended: No. 37 of 1964 s. 4.]~~

Division 3 — Transfer of business

[Heading inserted: Industrial Relations Legislation Amendment Bill 2021 cl. 87.]

7D. Terms used

In this Division —

connection between the old employer and the new employer has the meaning given in section 7G;

new employer has the meaning given in section 7E;

old employer has the meaning given in section 7E;

transfer of business has the meaning given in section 7E;

transferring employee has the meaning given in section 7F;

transferring work has the meaning given in section 7E.

[Section 7D inserted: Industrial Relations Legislation Amendment Bill 2021 cl. 87.]

7E. Transfer of business, old employer, new employer, transferring work

There is a ***transfer of business*** from an employer (the ***old employer***) to another employer (the ***new employer***) if the following requirements are satisfied —

(a) the employment of an employee of the old employer has terminated;

(b) within 3 months after the termination, the employee becomes employed by the new employer;

(c) the work (the ***transferring work***) the employee performs for the new employer is the same, or substantially the same, as the work the employee performed for the old employer;

(d) there is a connection between the old employer and the new employer.

[Section 7E inserted: Industrial Relations Legislation Amendment Bill 2021 cl. 87.]

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Division 3 Transfer of business

s. 7F

7F. Transferring employee

An employee in relation to whom the requirements in section 7E(a), (b) and (c) are satisfied is a **transferring employee**.

[Section 7F inserted: Industrial Relations Legislation Amendment Bill 2021 cl. 87.]

7G. Connection between old employer and new employer

(1) There is a **connection between the old employer and the new employer** if, in accordance with an arrangement between them, the new employer owns or has the beneficial use of some or all of the assets (whether tangible or intangible) that —

(a) the old employer owned or had the beneficial use of; and

(b) relate to, or are used in connection with, the transferring work.

(2) There is a **connection between the old employer and the new employer** if, because the old employer has outsourced the transferring work to the new employer, the transferring work is performed by 1 or more transferring employees as employees of the new employer.

(3) There is a **connection between the old employer and the new employer** if —

(a) because the new employer had outsourced the transferring work to the old employer, the transferring work had been performed by 1 or more transferring employees, as employees of the old employer; and

(b) because the new employer has ceased to outsource the work to the old employer, the transferring work is performed by those transferring employees, as employees of the new employer.

(4) There is a **connection between the old employer and the new employer** if the new employer is a related body corporate of the old employer when the transferring employee becomes employed by the new employer.

[Section 7G inserted: Industrial Relations Legislation Amendment Bill 2021 cl. 87.]

7H. Status of transferring employees on transfer of business

For the purposes of this Act, on a transfer of business —

- (a) a transferring employee's employment before and after the transfer is taken to be a single period of continuous employment; and
- (b) the new employer is taken to have been the transferring employee's sole employer for the entire period.

[Section 7H inserted: Industrial Relations Legislation Amendment Bill 2021 cl. 87.]

7I. Transfer of employment records

(1) In this section —

employment records means employment records required to be kept by an employer under section 26(1).

(2) On the transfer of a business, the old employer must transfer copies of all transferring employees' employment records to the new employer.

(3) A contravention of subsection (2) is not an offence but that subsection is a civil penalty provision for the purposes of the IR Act section 83E.

(4) In proceedings under the IR Act section 83E for a contravention of subsection (2), an industrial magistrate's court may, as an alternative, determine that a contravention of section 26(1) or (2) has occurred.

[Section 7I inserted: Industrial Relations Legislation Amendment Bill 2021 cl. 87.]

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Part III Entitlements to long service leave or to payment on termination instead

s. 8

Part III — Entitlements to long service leave or to payment on termination instead~~in lieu thereof~~

*[Heading amended: Industrial Relations Legislation
Amendment Bill 2021 cl. 88.]*

8. Long service leave

- (1) An employee is entitled in accordance with, and subject to, the provisions of this Act, to long service leave on ordinary pay in respect of the length of continuous employment calculated under section 6A with the same employer.~~continuous employment with one and the same employer, or with a person who, being a transmittee, is deemed pursuant to section 6(4) to be one and the same employer.~~
- (2) An employee who has completed at least 10 years of continuous employment~~such continuous employment, as is referred to in subsection (1)~~, is entitled to an amount of long service leave as follows —
 - (a) in respect of 10 years so completed, 8 ²/₃ weeks;
 - (b) in respect of each 5 years' continuous employment so completed after such 10 years, 4 ¹/₃ weeks; and
 - (c) on the termination of the employee's employment —
 - (i) by the employee's ~~his~~ death;
 - (ii) in any circumstances otherwise than by the ~~his~~ employer for serious misconduct,in respect of the number of years of such continuous employment completed since the employee last became entitled under this Act to an amount of long service leave, a proportionate amount on the basis of 8 ²/₃ weeks for 10 years of such continuous employment.
- (3) Where an employee has completed at least 7 years but less than 10 years of continuous employment~~of such continuous employment since the commencement thereof, but less than 10 years~~, and the employment is terminated —
 - (a) by the employee's ~~his~~ death; or
 - (b) in any circumstances other than by the employer for serious misconduct,
 - ~~(b) for any reason other than serious misconduct,~~

the amount of leave to which the employee is entitled ~~is~~ shall be a proportionate amount on the basis of $8\frac{2}{3}$ weeks for 10 years of such continuous employment.

- (4) If an employee has completed at least 9 but less than 15 years continuous employment prior to the commencement day, then, despite subsection (2)(a), the employee cannot take long service leave under subsection (2)(a) until after —
 - (a) if the employee has completed at least 14 years continuous employment prior to the commencement day — completing 15 years continuous employment; or
 - (b) in any other case — 12 months after the commencement day.
- (5) Subsection (4) does not apply if the employee and ~~his or her~~ employer agree to that effect in writing.
- (6) Subsection (4) does not apply in respect of a period of continuous employment prior to the commencement day in respect of which the employee has become entitled to take long service leave.
- (7) An employee who becomes entitled to take long service leave under subsection (2)(a) in accordance with subsection (4) or (5) also becomes entitled to take long service leave under subsection (2)(b), in respect of the period of continuous employment that exceeds 10 years, pro rata.
- (8) Subsection (7) does not apply to an employee if, before being granted the long service leave, the employee completes 15 years continuous employment.
- (9) If an employee takes long service leave in accordance with subsection (7), the employee is entitled, after completing 15 years continuous employment, to take the remainder of ~~the employee's his or her~~ entitlement under subsection (2)(b) not already taken in accordance with subsection (7).
- (10) In subsections (4) and (6) —

commencement day means the day on which the *Labour Relations Legislation Amendment Act 2006* Part 7 Division 2 came into operation ¹.

[Section 8 inserted: No. 37 of 1964 s. 5; amended: No. 79 of 1995 s. 49; No. 36 of 2006 s. 56; [Industrial Relations Legislation Amendment Bill 2021 cl. 89, 96, 97 and 98.](#)]

[8A. Deleted: No. 36 of 2006 s. 57.]

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9. Taking long service leave and payment on termination

~~Commencement of long service leave~~

- (1) Where an employee becomes entitled to a period of long service leave under this Act the leave is to be granted and taken —
- (a) ~~except as provided in subsection (1AA), subject to any agreement between the employer and the employee,~~ as soon as reasonably practicable after it becomes due; and
 - (b) in one continuous period, or if the employer and the employee so agree, in separate ~~periods, periods of not less than one week.~~

(1AA) The employee and employer may agree when the employee will take long service leave.

- (1a) Where an employer and employee have not agreed when the employee is to take the employee's long service leave, subject to subsection (1b), the employer is not to refuse the employee taking, at any time suitable to the employee, any period of long service leave to which the employee became entitled more than 12 months before that time.
- (1b) The employee is to give to the employer at least 2 weeks' notice of the period during which the employee intends to take the long service leave.

(1C) The employee may request the employer to grant the employee a period of long service leave —

- (a) twice as long as the period to which the employee would otherwise be entitled; and
- (b) at a rate of pay equal to half the employee's ordinary pay.

(1D) The employee may request the employer to grant the employee a period of long service leave —

- (a) half as long as the period to which the employee would otherwise be entitled; and
- (b) at a rate of pay equal to twice the employee's ordinary pay.

- (2) An employee whose employment is terminated is taken to have commenced long service leave on the day of termination if —

- (a) the employee is entitled to long service leave under section 8(2) or (3); and

-
- (b) the employment is terminated before the employee has taken all the long service leave to which the employee is entitled.
- (2A) On the day the employee commences long service leave under subsection (2), the employer must pay the full amount to which the employee is entitled in respect of the leave to —
- (a) the employee; or
- (b) if the employee has died — on request, to the employee’s personal representative.
- ~~(2) In a case to which section 8(2)(c) or section 8(3) applies the employee shall be deemed to have been entitled to and to have commenced leave immediately prior to such termination. In such cases and in any case in which the employment of the employee who has become entitled to leave hereunder is terminated before such leave is taken or fully taken the employer shall, upon termination of his employment otherwise than by death pay to the employee and upon termination of employment by death pay to the personal representative of the employee upon request by the personal representative, a sum equivalent to the amount which would have been payable in respect of the period of leave to which he is entitled or deemed to have been entitled and which would have been taken but for such termination. Such payment shall be deemed to have satisfied the obligation of the employer in respect of leave hereunder.~~
- (3) An employee is to be paid for a period of accrued long service leave at the time payment is made in the normal course of the employment, unless —
- (a) the employee requests in writing to be paid before the period of leave commences, in which case the employee is to be so paid; or
- (b) the employee and employer agree to another method of payment.
- (4) If —
- (a) a public holiday occurs during a period of long service leave taken by an employee under section 8(2)(a) or (b); and

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- (b) the employee is otherwise entitled to that holiday under the employee's conditions of employment,

the period of long service leave is increased by one day for each such public holiday.

[Section 9 amended: No. 37 of 1964 s. 6; No. 79 of 1995 s. 51; No. 36 of 2006 s. 58; [Industrial Relations Legislation Amendment Bill 2021 cl. 90.](#)]

10. Taking leave in advance

- (1) Any employer may by agreement with an employee allow leave to such an employee before the right ~~thereto~~ has accrued due, but where leave is taken in such a case the employee ~~shall not become~~ is not entitled to any further leave ~~hereunder~~ in respect of any period until after the expiration of the period in respect of which such leave had been taken before it accrued due.
- (2) Where leave has been granted to an employee pursuant to subsection (1) before the right ~~thereto~~ has accrued due, and the employment to which the leave relates subsequently is terminated, the employer may deduct from whatever remuneration is payable upon the termination of the employment such amount as represents payment for any period for which the employee has been granted long service leave to which the employee ~~he~~ was not at the date of termination of the employment or ~~before~~ prior ~~thereto~~ entitled.

[Section 10 amended: No. 37 of 1964 s. 7; [Industrial Relations Legislation Amendment Bill 2021 cl. 96 and 98.](#)]

Part IV — Enforcement of the provisions of the Act

[Heading inserted: No. 79 of 1995 s. 52.]

11. Industrial magistrate's courts

- (1) An industrial magistrate's court has jurisdiction to hear and determine all questions and disputes in relation to rights and liabilities under this Act, including without limiting the generality of ~~this subsection~~~~the foregoing~~, questions and disputes —
 - (a) as to whether a person is or is not an employee, or an employer, to whom this Act applies;
 - (b) whether and when and to what extent an employee is or has become entitled to long service leave, or ~~payment on termination instead of long service leave;~~~~payment in lieu of long service leave;~~
 - (c) as to the ordinary ~~rate of~~ pay of an employee;
 - (d) as to whether the employment of the employee was or was not ended by an employer ~~with the intention of avoiding or attempting~~~~in order to avoid or to attempt~~ to avoid liability for long service leave; and
 - (e) with respect to a benefit ~~instead of~~~~in lieu of~~ long service leave under an agreement made under section 5.
- (2) Jurisdiction granted under subsection (1) is exclusive of any other court except where an appeal lies to that other court.
- (3) Jurisdiction granted under subsection (1) is in addition to jurisdiction an industrial magistrate's court has —
 - (a) under the IR Act section 83(1)(e) to enforce a provision of Part III as an entitlement provision as defined in the IR Act section 7(1); and
 - (b) under the IR Act section 83E to enforce a provision of this Act that is a civil penalty provision as defined in the IR Act section 7(1).

[Section 11 inserted: No. 79 of 1995 s. 52; amended: Industrial Relations Legislation Amendment Bill 2021 cl. 91 and 98.]

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Part IV Enforcement of the provisions of the Act

s. 12

12. Industrial inspectors may institute proceedings

An industrial inspector may institute proceedings under section 11 in [the inspector's](#) ~~his or her~~ own name, whether or not an employee is to be a party to the proceedings.

[Section 12 inserted: No. 36 of 2006 s. 59; [amended: Industrial Relations Legislation Amendment Bill 2021 cl. 97.](#)]

[13-17. Deleted: No. 79 of 1995 s. 52.]

[Part V (s. 18-19) deleted: No. 79 of 1995 s. 52.]

*[Part VI: s. 23 deleted: No. 37 of 1964 s. 14;
s. 20-22, 24 deleted: No. 79 of 1995 s. 52.]*

Part VII — Miscellaneous provisions

[Division 1 (s. 25) deleted: No. 79 of 1995 s. 53.]

Division 2 — Records of employment

26. Keeping of employment records

- (1) An employer must ensure that the following employment records are kept ~~—details are recorded of—~~
 - (a) each employee's name and, if the employee is under 21 years of age, the employee's date of birth;
 - (aa) the employer's name and Australian Business Number (if any);
 - (ab) the date of any transfer of business as defined in section 7D during the employment of the employee;
 - (b) the date on which the employee commenced employment with the employer;
 - (ba) the weekly hours worked by the employee;
 - (c) the gross and net amounts paid to the employee under the contract of employment, and all deductions and the reasons for them;
 - (d) all leave taken by the employee, whether paid, partly paid or unpaid;
 - (e) any agreement made under section 5, including details of —
 - (i) the benefit for, and the amount of, long service leave that was foregone; and
 - (ii) when the benefit was paid;
 - ~~(e) details of any agreement made under section 5 between the employer and the employee;~~
 - (f) such other details as are necessary for the calculation of the entitlement to, and payment for, long service leave under this Act; ~~Act; and~~
 - (g) other matters prescribed by the regulations.
- (2) The employer must ensure that —
 - (a) the employment records are kept in accordance with the regulations; and
 - (b) each employment record ~~entry~~ is retained during the employment of the employee and for not less than 7 years after that ~~7 years thereafter~~.

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Part VII Miscellaneous provisions

Division 2 Records of employment

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(3) A contravention of subsection (1) or (2) is not an offence but those subsections are civil penalty provisions for the purposes of the IR Act section 83E.

~~(3) A contravention of subsection (2) is not an offence but that subsection is a civil penalty provision for the purposes of the Industrial Relations Act 1979 section 83E.~~

~~(4) Subsection (3) extends to a contravention that occurred within the period of 12 months ending on the coming into operation of the Labour Relations Legislation Amendment Act 2006 Part 7 Division 2¹ unless the employer was charged with an offence in respect of that contravention.~~

[Section 26 inserted: No. 79 of 1995 s. 54; amended: No. 36 of 2006 s. 60; amended: Industrial Relations Legislation Amendment Bill 2021 cl. 92 and 98.]

26A. Access to employment records kept by employer ~~Access to records kept by employer~~

(1) An employer, on request in writing by a relevant person, must —

- (a) produce to the person the employment records under section 26 relating to an employee to whom that section applies; and
- (b) let the person inspect the employment records.

(1a) A contravention of subsection (1) is not an offence but that subsection is a civil penalty provision for the purposes of the IR Act~~Industrial Relations Act 1979~~ section 83E.

~~(1b) Subsection (1a) extends to a contravention that occurred within the period of 12 months ending on the coming into operation of the Labour Relations Legislation Amendment Act 2006 Part 7 Division 2¹ unless the employer was charged with an offence in respect of that contravention.~~

(2) Relevant persons are —

- (a) the employee or a person authorised in writing by the employee; and
- (b) an industrial inspector.

(3) The duty placed on an employer by subsection (1) —

- (a) continues so long as the employment record is required to be kept under section 26(2)(b);

- (b) is not affected by the fact that the employee is no longer employed by the employer;
 - (c) includes the further duties —
 - (i) to let the relevant person enter premises of the employer for the purposes of inspection of the [employment](#) records; and
 - (ii) to let the relevant person take copies of, or extracts from, the [employment](#) records;
- and
- (d) must be complied with not later than the end of the next pay period after the request for inspection is received.

[Section 26A inserted: No. 79 of 1995 s. 54; amended: No. 36 of 2006 s. 61; [Industrial Relations Legislation Amendment Bill 2021 cl. 93.](#)]

Division 3 — Prohibition of employment during long service leave

27. Prohibition of employment during long service leave

- (1) An employee ~~shall~~must not, during any period when [the employee](#) ~~he~~ is on long service leave, engage in any employment for reward in substitution for the employment from which [the employee](#) ~~he~~ is on leave.
- (2) If an employee, during any period when [the employee](#) ~~he~~ is on long service leave, engages in any employment for reward in substitution for the employment from which [the employee](#) ~~he~~ is on leave the employee ~~forfeits the~~shall thereupon forfeit his right to leave ~~hereunder~~ in respect of the unexpired period of leave upon which [the employee](#) ~~he~~ has entered, and the employer ~~is~~shall be entitled to withhold any further payment in respect of the period and to reclaim any payments already made on account of such period of leave.
- (3) The provisions of this section ~~shall~~do not apply to an employee who, pursuant to section 9(2), is ~~taken~~deemed to commence a period of leave on the day of the termination of ~~his~~ employment.

[Section 27 amended: [Industrial Relations Legislation Amendment Bill 2021 cl. 96, 97 and 98.](#)]

[Division 4 (s. 28-31) deleted: No. 79 of 1995 s. 55.]

*[Division 5: s. 32-34 deleted: No. 79 of 1995 s. 56;
s. 35 and 36 deleted: No. 36 of 2006 s. 62.]*

Division 6 — Representation of parties in proceedings under this Act

37. Representation of parties in proceedings under this Act

Any person who is a party to proceedings under this Act, may appear in person or be represented by an Australian legal practitioner (within the meaning of that term in the *Legal Profession Act 2008* section 3) or by the person's agent duly appointed for that purpose.

[Section 37 amended: No. 79 of 1995 s. 58; No. 65 of 2003 s. 50; No. 21 of 2008 s. 676.]

Division 7 — Regulations

38. Regulation making power

- (1) The Governor may make regulations prescribing such matters as are contemplated, required, or permitted, to be prescribed by this Act, and such matters as appear to ~~him to~~ be necessary, desirable, or convenient, for giving effect to the purposes and objects of this Act.
- (2) Without limiting the generality of the power conferred by subsection (1), the Governor may make regulations prescribing as penalties for breaches of regulations so made penalties not exceeding in amount the sum of \$1 000.

[Section 38 amended: No. 113 of 1965 s. 8; No. 79 of 1995 s. 59; [Industrial Relations Legislation Amendment Bill 2021 cl. 97.](#)]

39. [Application to this Act of certain regulations made under the IR Act](#)~~Application to this Act of certain of the regulations made under the *Industrial Relations Act 1979*~~

To the extent to which the provisions of the regulations made under the [IR Act](#)~~*Industrial Relations Act 1979*~~ are capable of application under this Act, those provisions ~~shall~~ apply accordingly; but to the extent that other regulations in addition to, substitution for, or amendment of, those regulations are ~~deemed~~ necessary or desirable for the purposes of this Act, then to that extent other regulations may be made under this Act or under that Act, and such of the forms prescribed by the regulations made under that Act as are capable of use with adaptations for the purposes of this Act, may with such

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adaptations as are necessary, be used for the purposes of this Act.

[Section 39 amended: No. 79 of 1995 s. 60; [Industrial Relations Legislation Amendment Bill 2021 cl. 94 and 98.](#)]

Part 8 — Savings provisions for Industrial Relations Legislation Amendment Act 2021

[Heading inserted: Industrial Relations Legislation Amendment Bill 2021 cl. 95.]

40. Terms used

In this Part —

commencement day means the day on which the *Industrial Relations Legislation Amendment Act 2021* section 84 comes into operation;

former section means a section of this Act as in operation immediately before the commencement day.

[Section 40 inserted: Industrial Relations Legislation Amendment Bill 2021 cl. 95.]

41. Business transmitted before commencement day

(1) This section applies in relation to the transmission, as defined in former section 6(5), of a business before the commencement day.

(2) For the purposes of determining whether an employee in the business has had continuous employment with an employer, on and after the commencement day —

(a) former sections 6 and 8 continue in operation; and

(b) Part II Division 3 does not apply.

[Section 41 inserted: Industrial Relations Legislation Amendment Bill 2021 cl. 95.]

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Notes

- ¹ This is a compilation of the *Long Service Leave Act 1958* and includes the amendments made by the other written laws referred to in the following table. The table also contains information about any reprint.

Compilation table

Short title	Number and year	Assent	Commencement
<i>Long Service Leave Act 1958</i>	44 of 1958 (7 Eliz. II No. 44)	12 Dec 1958	24 Dec 1958 (see s. 2 and <i>Gazette</i> 24 Dec 1958 p. 3371)
Reprint of the <i>Long Service Leave Act 1958</i> authorised 30 Jan 1963			
<i>Long Service Leave Act Amendment Act (No. 2) 1964</i>	37 of 1964 (13 Eliz. II No. 37)	12 Nov 1964	12 Nov 1964
<i>Decimal Currency Act 1965</i>	113 of 1965	21 Dec 1965	Act other than s. 4-9: 21 Dec 1965 (see s. 2(1)); s. 4-9: 14 Feb 1966 (see s. 2(2))
<i>Long Service Leave Act Amendment Act 1973</i>	97 of 1973	27 Dec 1973	1 Mar 1974 (see s. 2 and <i>Gazette</i> 1 Mar 1974 p. 648)
Reprint of the <i>Long Service Leave Act 1958</i> approved 11 Jul 1974 (includes amendments listed above)			
<i>Acts Amendment (Industrial Magistrate's Courts) Act 1991 Pt. 4</i>	44 of 1991	17 Dec 1991	3 Jan 1992 (see s. 2 and <i>Gazette</i> 3 Jan 1992 p. 41)
<i>Industrial Relations Legislation Amendment and Repeal Act 1995 Pt. 8</i> ⁵	79 of 1995	16 Jan 1996	16 Jan 1996 (see s. 3(1))
<i>Labour Relations Reform Act 2002 s. 20</i>	20 of 2002	8 Jul 2002	15 Sep 2002 (see s. 2(1) and <i>Gazette</i> 6 Sep 2002 p. 4487)
Reprint 3: The <i>Long Service Leave Act 1958</i> as at 16 May 2003 (includes amendments listed above)			
<i>Labour Relations Reform (Consequential Amendments) Regulations 2003 r. 7</i> published in <i>Gazette</i> p. 3685-92			15 Sep 2003 (see r. 2)
<i>Acts Amendment and Repeal (Courts and Legal Practice) Act 2003 s. 50</i>	65 of 2003	4 Dec 2003	1 Jan 2004 (see s. 2 and <i>Gazette</i> 30 Dec 2003 p. 5722)
<i>Courts Legislation Amendment and Repeal Act 2004 s. 141</i>	59 of 2004	23 Nov 2004	1 May 2005 (see s. 2 and <i>Gazette</i> 31 Dec 2004 p. 7128)
<i>Labour Relations Legislation Amendment Act 2006 Pt. 7 Div. 2</i> ⁶	36 of 2006	4 Jul 2006	4 Jul 2006 (see s. 2(1))
Reprint 4: The <i>Long Service Leave Act 1958</i> as at 1 Sep 2006 (includes amendments listed above)			
<i>Legal Profession Act 2008 s. 676</i>	21 of 2008	27 May 2008	1 Mar 2009 (see s. 2(b) and <i>Gazette</i> 27 Feb 2009 p. 511)

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Short title	Number and year	Assent	Commencement
<i>Training Legislation Amendment and Repeal Act 2008</i> s. 54	44 of 2008	10 Dec 2003	10 Jun 2009 (see s. 2(2))
<i>Standardisation of Formatting Act 2010</i> s. 51	19 of 2010	28 Jun 2010	11 Sep 2010 (see s. 2(b) and <i>Gazette</i> 10 Sep 2010 p. 4341)
Industrial Relations Legislation Amendment Bill 2021 Pt. 4	Current Bill No. 53-1		

- ² Repealed by the *Statute Law Revision Act 1950* of the Commonwealth.
- ³ Repealed by the *Defence Legislation Amendment Act 1992* of the Commonwealth.
- ⁴ Repealed by the *Industrial Relations (Consequential Provisions) Act 1988* of the Commonwealth.
- ⁵ The *Industrial Relations Legislation Amendment and Repeal Act 1995* Pt. 8 Div. 2 are savings and transitional provisions that are of no further effect.
- ⁶ The *Labour Relations Legislation Amendment Act 2006* Pt. 7 Div. 3 reads as follows:
- “

Division 3 — Repeal of the LSL General Order

63. Meaning of terms used in this Division

In this Division —

Commission means The Western Australian Industrial Relations Commission;

employer has the meaning given to that term in the *Long Service Leave Act 1958* section 4;

industrial instrument means —

- (a) an award under the *Coal Industry Tribunal of Western Australia Act 1992*;
- (b) an order under the *Coal Industry Tribunal of Western Australia Act 1992* or an agreement that comes within section 12(4) or 17(1) of that Act;
- (c) an award as defined in the *Industrial Relations Act 1979* section 7(1);
- (d) an industrial agreement as defined in the *Industrial Relations Act 1979* section 7(1);
- (e) an order of the Commission under the *Industrial Relations Act 1979*;
- (f) an employer-employee agreement under the *Industrial Relations Act 1979* Part VID; or
- (g) any other agreement between a person and an employer, as such, that deals with long service leave;

LSL General Order means the General Order relating to long service leave made by the Commission on 27 January 1978 and published in the *Western Australian Industrial Gazette* on 22 February 1978 at page 120 and the Schedule attached to that order published in that *Gazette* on 25 January 1978 at pages 1 to 6.

64. LSL General Order repealed

The LSL General Order is repealed.

65. Transitional provision — references to the LSL General Order

- (1) The object of this section is to ensure that where, before commencement, a person's long service leave rights, entitlements or obligations arose under an industrial instrument by reference to the LSL General Order that person's long service leave rights, entitlements or obligations arise, after commencement, under the instrument by reference to the *Long Service Leave Act 1958*.
- (2) Unless the contrary intention appears or the context otherwise requires, a reference in an industrial instrument to the LSL General Order, or a provision of that Order, is, after commencement, to be read as a reference to the *Long Service Leave Act 1958*, or the corresponding provision of that Act, (whichever is relevant) and the instrument is to be construed so as to give effect to the object of this section.
- (3) Subsection (2) applies to references that, after commencement, have ongoing effect.
- (4) A provision of the *Long Service Leave Act 1958* corresponds to a provision of the LSL General Order if the provisions deal with substantially the same matter.
- (5) In this section —
commencement means the coming into operation of the *Labour Relations Legislation Amendment Act 2006* Part 7 Division 2.

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