



CONSTRUCTION INDUSTRY LONG SERVICE LEAVE (MISCELLANEOUS) AMENDMENT ACT 1992

No. 80 of 1992

SUMMARY OF PROVISIONS

Section

1. Short title
2. Commencement
3. Amendment of s. 4—Interpretation
4. Insertion of s. 4a
 - 4a. Determination of ordinary weekly pay in certain circumstances
5. Amendment of s. 5—Application of this Act
6. Amendment of s. 6—The Board
7. Amendment of s. 14—Effective service entitlement
8. Amendment of s. 16—Long service leave entitlement
9. Amendment of s. 17—Cessation of employment
10. Amendment of s. 20a—*The Electrical and Metal Trades Fund*
11. Amendment of s. 18—Preservation of entitlements in certain cases
12. Amendment of s. 24—Investigation of the Funds
13. Amendment of s. 26—Imposition of levy
14. Amendment of s. 27—Returns by employers
15. Amendment of s. 29—Penalty for late payment
16. Insertion of ss. 38a and 38b
 - 38a. Exemptions for certain interstate employers
 - 38b. Inspectors
17. Amendment of s. 43—Offences
18. Amendment of s. 45—Expiation of offences
19. Amendment of first schedule



ANNO QUADRAGESIMO PRIMO

ELIZABETHAE II REGINAE

A.D. 1992

No. 80 of 1992

An Act to amend the Construction Industry Long Service Leave Act 1987.

[Assented to 3 December 1992]

The Parliament of South Australia enacts as follows:

Short title

1. (1) This Act may be cited as the *Construction Industry Long Service Leave (Miscellaneous) Amendment Act 1992*.

(2) The *Construction Industry Long Service Leave Act 1987* is referred to in this Act as "the principal Act".

Commencement

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

Amendment of s. 4—Interpretation

3. Section 4 of the principal Act is amended—

(a) by striking out from subsection (1) the definition of "agreement" and substituting the following definition:

"agreement" means—

(a) an industrial agreement within the meaning of the *Industrial Relations Act (S.A.) 1972*;

or

(b) a certified agreement within the meaning of the *Industrial Relations Act 1988* of the Commonwealth;

(b) by striking out from subsection (1) the definition of "award" and substituting the following definition:

"award" includes—

(a) an award or order of the Industrial Commission;

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

(c) by inserting after “metal trades work” in the definition of “construction work” in subsection (1) “and includes the supervision of such work by a foreman”;

(d) by striking out from subsection (1) the definition of “inspector” and substituting the following definitions:

“inspector” means a person appointed as an inspector under this Act:

“levy” includes any amount assessed by the Board under section 28.;

(e) by inserting after “during that period of service” in the definition of “ordinary hours” in subsection (1) “or, if no such ordinary hours are prescribed, means, in relation to each month, the average number of hours worked per week as a construction worker during the month (disregarding any week in which the worker did not work as a construction worker)”;

(f) by striking out from subsection (1) the definition of “ordinary weekly pay” and substituting the following definitions:

“ordinary weekly pay”—*see subsection (3)*:

“the relevant date” means the date as at which a person’s ordinary weekly pay is to be determined.;

and

(g) by inserting after subsection (2) the following subsection:

(3) Subject to this Act, a reference in this Act to a person’s ordinary weekly pay is a reference to the weekly base rate of pay for ordinary hours prescribed by an award or agreement in relation to work of the kind performed by him or her as a construction worker at the relevant date but this definition is subject to the following qualifications:

(a) if the person has ceased to be a construction worker, the person’s ordinary weekly pay will be calculated according to the kind of work last performed by the person as a construction worker;

(b) if during the period of 12 months immediately preceding the relevant date the person has worked as a construction worker in a kind of work for which no weekly base rate of pay for ordinary hours is prescribed by an award or agreement, the person’s ordinary weekly pay will be ascertained by averaging the person’s weekly earnings as a construction worker over that period of 12 months (and for the purposes of this paragraph, if in any week during that period the person worked as a construction worker in a kind of work for which a weekly base rate of pay for ordinary hours is prescribed by an award or agreement, that rate will be taken to be his or her earnings for that week, and any week in which the person did not work as a construction worker will be disregarded);

and

(c) the regulations may—

(i) declare payments made to or for the benefit of a construction worker that must be included in the worker’s ordinary weekly pay for the purposes of this Act;

and

(ii) declare payments made to or for the benefit of a construction worker that must be excluded from the worker’s ordinary weekly pay for the purposes of this Act.

Insertion of s. 4a

4. The following section is inserted after section 4 of the principal Act:

Determination of ordinary weekly pay in certain circumstances

4a. (1) If at any time it appears to the Board that a construction worker's ordinary weekly pay calculated in accordance with this Act is—

(a) excessive;

or

(b) insufficient,

by reason of—

(c) the nature of the work performed by the construction worker at any time material to the calculation;

or

(d) the remuneration that was payable to the construction worker in respect of any work performed by him or her at any time material to the calculation,

the Board may, by notice in writing to the construction worker and the construction worker's employer (if any), inform the construction worker (or his or her personal representative) and the employer that the Board proposes to determine the construction worker's ordinary weekly pay under this Act to be a different amount.

(2) A notice under subsection (1) must specify a time within which the construction worker (or his or her representative) and the employer may make written submissions to the Board that the construction worker's ordinary weekly pay should be an amount different to the amount proposed by the Board.

(3) In making a determination under this section the Board must take into account any written submission received within the time specified under subsection (2) and may otherwise inform itself in such manner as it thinks fit, but except as provided by this section the Board is not required to give to any person notice of or an opportunity to answer or to be heard in relation to any matter taken into account by the Board in making the determination.

(4) The Board must cause notice of its determination to be served on the construction worker (or his or her personal representative) and on the construction worker's employer (if any).

(5) The notice must include a statement of the grounds upon which the determination has been made.

(6) If the Board makes a determination of a construction worker's ordinary weekly pay under this section, that determination will prevail over any amount that would otherwise constitute the construction worker's ordinary weekly pay under this Act.

Amendment of s. 5—Application of this Act

5. Section 5 of the principal Act is amended—

(a) by striking out subsection (1) and substituting the following subsection:

(1) Subject to this section, this Act applies to a person's employment if—

(a) that person works under a contract of service in the construction industry;

(b) —

- (i) an award referred to in the first schedule or the regulations prescribes a weekly rate of pay for work of that kind;

or

- (ii) the person works on site as a foreman and within 12 months before commencing work as a foreman the person worked in some other capacity as a construction worker under an award referred to in the first schedule or the regulations;

and

(c) —

- (i) the employment involves on site work that makes up the whole, or a proportion of at least one-half, of the period of employment over—

(A) the whole period of employment;

(B) the first month of employment;

or

(C) any three-month period of employment;

or

- (ii) in the case of a foreman, the on site employment involves supervising other employees who work on the site,

but without affecting any accrued effective service entitlement, this Act ceases to apply to employment if the employee has not worked on site for the last three months or, in the case of a foreman, has not gone on site in the performance of his or her functions as a foreman for the last three months (disregarding any period during which the employee is absent from work as a result of an allowable absence).;

and

(b) by striking out from subsection (2) “(1) (c) (iii)” and substituting “(1) (c) (i) (C)”.

Amendment of s. 6—The Board

6. Section 6 of the principal Act is amended by inserting after subsection (4) the following subsections:

(5) The Board is subject to direction by the Minister.

(6) A direction given by the Minister under subsection (5) must be in writing.

(7) The Board must cause a direction given by the Minister to be published in its next annual report.

Amendment of s. 14—Effective service entitlement

7. Section 14 of the principal Act is amended by striking out subparagraph (ii) of subsection (4)(b) and the word “or” immediately preceding that subparagraph and substituting the following:

- (ii) has not received, or become entitled to receive, long service leave under the *Long Service Leave Act 1987* (or a corresponding previous enactment) for service as a construction worker within the meaning of this Act or as a building worker within the meaning of the repealed Act;

or

- (iii) has not received long service leave, or a payment on account of long service leave by virtue of completing 15 years (or more) service with the same employer, under the *Metal Industry (Long Service Leave) Award 1984* (or an agreement that applied to the exclusion of that award) for service as a construction worker within the meaning of this Act.

Amendment of s. 16—Long service leave entitlement

8. Section 16 of the principal Act is amended by striking out subsections (3) and (4) and substituting the following subsections:

(3) Notwithstanding subsection (2), an employer and a construction worker may agree that the construction worker take leave in separate periods subject to the following qualifications:

- (a) a construction worker's first long service leave entitlement cannot be taken in more than three separate periods;
- (b) each such period must be constituted by whole weeks of leave and be of at least two weeks duration;

and

- (c) any subsequent period of long service leave to which the construction worker becomes entitled must be taken in periods of at least two weeks duration.

(4) Where—

- (a) a construction worker takes long service leave;

or

- (b) the construction worker's employment by the employer referred to in subsection (2) comes to an end before he or she takes accrued long service leave and the worker, in a manner and form approved by the Board, makes an election under this provision,

the Board must pay to the person an amount calculated by multiplying his or her ordinary weekly pay by the period of leave referred to in paragraph (a) or (b) (as the case may be).

(4a) For the purposes of subsection (4), ordinary weekly pay will be determined at the date of payment unless the payment is made more than three years after the effective entitlement of 120 months was reached, in which case it will be determined according to the rate that applied to the construction worker at the expiration of that three year period, or at such later time as the Board, on the application of the construction worker or the employer, determines.

Amendment of s. 17—Cessation of employment

9. Section 17 of the principal Act is amended—

- (a) by striking out subparagraph (ii) of subsection (1) (a) and the word "or" immediately preceding that subparagraph and substituting the following:

- (ii) a construction worker has attained an effective service entitlement of less than 84 months and—

—has previously had an effective service entitlement of 120 months or more;

—has received, or become entitled to receive, long service leave under the *Long Service Leave Act 1987* (or a corresponding previous enactment) for service as a

construction worker within the meaning of this Act or as a building worker within the meaning of the repealed Act;

or

—has received long service leave, or a payment on account of long service leave by virtue of completing 15 years (or more) service with the same employer, under the *Metal Industry (Long Service Leave) Award 1984* (or an agreement that applied to the exclusion of that award) for service as a construction worker within the meaning of this Act;

or

(iii) a construction worker has attained an effective service entitlement of 120 months but has not taken all of the long service leave to which he or she is entitled;

and

(b) by striking out from subsection (1) “is the ordinary weekly pay for work of the kind last performed as a construction worker” and substituting “is the ordinary weekly pay applicable to the person under this Act”.

Amendment of s. 18—Preservation of entitlements in certain cases

10. Section 18 of the principal Act is amended by inserting after “regulations” in subsection (1) (d) “within six months after the person commences work as a self-employed contractor in the construction industry (or within such longer period as the Board may, in its absolute discretion, allow)”.

Amendment of s. 20a—The *Electrical and Metal Trades Fund*

11. Section 20a of the principal Act is amended—

(a) by striking out paragraph (a) of subsection (4);

and

(b) by striking out subsections (5), (6), (7) and (8).

Amendment of s. 24—Investigation of the Funds

12. Section 24 of the principal Act is amended—

(a) by striking out from subsection (1) “three-yearly” and substituting “yearly”;

and

(b) by inserting after subsection (4) the following subsection:

(4a) The Board must forward with the report such recommendations as the Board thinks fit relating to whether the rates of contribution to the Funds should be reduced, increased, or left unaltered.

Amendment of s. 26—Imposition of levy

13. Section 26 of the principal Act is amended by inserting after subsection (6) the following subsection:

(7) For the purposes of this section, if an employer pays a construction worker at a rate that exceeds the rate that applies to the construction worker under this Act for the purpose of determining his or her ordinary weekly pay, the amount of the excess may be disregarded for the purpose of calculating the remuneration paid by the employer.

Amendment of s. 27—Returns by employers

14. Section 27 of the principal Act is amended by striking out subsection (5) and substituting the following subsections:

(5) Where—

(a) an employer fails to comply with a requirement imposed under this section;

or

(b) an employer includes in a return information that is, to the knowledge of the employer, false or misleading in a material particular,

the employer is guilty of an offence.

Penalty: \$5 000.

(6) An employer who is registered with the Board but who does not employ any construction workers in a particular return period will nevertheless be taken to be an employer in the construction industry for the purposes of this section.

Amendment of s. 29—Penalty for late payment

15. Section 29 of the principal Act is amended—

(a) by inserting after “an employer fails” in subsection (1) “to furnish a return or”;

and

(b) by inserting after “the amount” in subsection (1) (a) “of any levy”.

Insertion of ss. 38a and 38b

16. The following sections are inserted after section 38 of the principal Act:

Exemptions for certain interstate employers

38a. (1) An employer—

(a) who is domiciled outside the State and involved in the construction industry in the State;

or

(b) who is domiciled in the State and involved in the construction industry outside the State,

may, in a manner and form determined by the Board, apply to the Board to be exempted from the requirement to be registered and pay a levy under this Act in respect of any construction worker, or class of construction workers, employed by the employer.

(2) If the Board is satisfied that any construction worker, or class of construction workers, affected by an application under this section is in the performance of construction work

covered by an appropriate long service leave scheme established under a corresponding law, the Board may grant the application.

(3) The Board may, at any time by notice in writing to the relevant employer, revoke an exemption under this section.

Inspectors

38b. (1) The Minister may appoint such inspectors as the Minister thinks fit for the purposes of this Act.

(2) Each inspector appointed by the Minister must be furnished with an appropriate identity card.

(3) An inspector must produce the identity card for inspection by any person who questions his or her authority to exercise the powers of an inspector under this Act.

(4) The Minister may, by notice in writing served on an inspector, revoke the appointment of the inspector under this Act.

Amendment of s. 43—Offences

17. Section 43 of the principal Act is amended—

(a) by inserting after “have been committed” in subsection (2) “or, with the authorization of the Attorney-General, at any later time within six years after the date on which the offence is alleged to have been committed”;

(b) by inserting after subsection (2) the following subsection:

(2a) An apparently genuine document purporting to be signed by the Attorney-General and to authorize the commencement of proceedings for an offence against this Act will be accepted in any legal proceedings, in the absence of proof to the contrary, as proof of the authorization.;

and

(c) by striking out subsection (3) and substituting the following subsections:

(3) Where, in proceedings for an offence against this Act, the court finds that the defendant has contravened, or failed to comply with, this Act, the court may, in addition to any penalty that it may impose—

(a) order the defendant to take specified action to make good the contravention or default in a manner, and within a period, specified by the court;

(b) order the defendant to furnish or make available to the Board, within a period specified by the court, such information or records as the Board may reasonably require for the purposes of this Act.

(4) A person to whom an order is given under subsection (3) who fails to comply with the order within the time specified in the order, or such further time as the court, on application, allows, is guilty of an offence.

Penalty: \$5 000.

Amendment of s. 45—Expiation of offences

18. Section 45 of the principal Act is amended by inserting after subsection (3) the following subsection:

(4) An expiation fee must, upon payment, be credited to the *Construction Industry Fund* or the *Electrical and Metal Trades Fund*.

Amendment of first schedule

19. The first schedule of the principal Act is amended by striking out the item:

National Building Trades Construction Award

and substituting the item:

National Building and Construction Industry Award.

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

ROMA MITCHELL Governor