

VICTORIAN
GOVERNMENT
LONG SERVICE
LEAVE BILL 2017 –
MAKING LONG
SERVICE LEAVE
FAIRER FOR
EVERYONE

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MINISTER'S FOREWORD

14 AUGUST 2017

I am pleased to announce major changes to Victoria's long service leave laws.



Long service leave is an entitlement that has existed for over 150 years. It is available to an employee as a reward for service to their employer.

Long service leave gives employees the chance to take a break from work and come back with renewed energy. In this way, everyone benefits.

It is important that the rules governing long service leave are appropriate to the modern workplace and to the modern worker. The rules must be flexible, consistent, clear and equitable. They must also be capable of being enforced effectively.

I am pleased to announce that the Victorian Government will be introducing a new Act that better meets the needs of today's workforce.

We have addressed the discriminatory treatment of parental leave in the current Act. From now on, parental leave will be treated the same as other similar forms of leave.

And we are changing the transmission of business rules to reduce the chances that an employee will lose their accrued entitlement when the business is sold.

We are making the rules governing how leave is to be taken more flexible and easier to understand. Employees, with the approval of their employer, will be able to take long service leave at a minimum of one day's leave at a time.

We are simplifying the rules governing when leave can be taken. Employees will be able to apply to take long service leave after seven years' service.

The reforms in the Bill will not change the basic premise of Long Service Leave – that is, a reward for a worker's service with the one employer. Also, the basic entitlement to leave, roughly 13 weeks leave after 15 years will not change. There are, however, a number of other changes that will affect employers and workers.

I thank everyone who contributed to this review. Your insights on how long service leave operates at a practical level has made it easier to modernise the laws.

The Hon Natalie Hutchins MP
Minister for Industrial Relations

1. REFORMING LONG SERVICE LEAVE

The Long Service Leave Discussion Paper released in February 2016 canvassed a number of possible reforms grouped around four key themes:

- 1. Flexibility:** for example, restrictions on the period of long service leave (LSL) that can be taken in one go, and the capacity to cash out LSL, may result in a lack of flexibility for employees and employers.
- 2. Consistency and equity:** for example, how previous service is recognised when an employee moves from one business to another, whether some forms of leave are treated less favourably for LSL purposes than some other forms, and the treatment of LSL for employees who usually work weekends or shifts can raise issues of fairness.
- 3. Clarity:** the number of queries the Department receives about the operation and application of the Act suggests that the drafting could be improved, particularly in relation to casual and seasonal workers, what happens when a business is sold, and how to determine the calculation of payments.
- 4. Compliance and Enforcement:** for example, the lack of powers to inspect records can hinder investigations and the recovery of entitlements where employers don't comply with their obligations.

The review ran for three months and received 30 written submissions. Twelve of these submissions were from unions, ten from employer groups, and the rest from individuals and community groups. Meetings were also held with 12 industry and union stakeholders. The experience of the Department of Economic Development, Jobs, Transport and Resources, which has administered the LSL Act for many years, also assisted the review.

Putting change into effect

Some of the key changes that the Long Service Leave Bill will make are:

A. Allowing employees to take leave one day at a time.

The current Act limits flexibility in how leave can be taken by requiring that it be taken in one, two or three periods.

CASE STUDY:

Employee A is nearing retirement and has never taken LSL. As a result she has 26 weeks of leave accrued. She could wait until she retires, and receive a payment in lieu, but she would like to ease into retirement by working a four day week for 12 months leading up to her retirement. Her employer likes this idea, as it will reduce the LSL payment he has to make when she retires. Unfortunately, the LSL Act does not allow this, as she cannot take her leave in this manner.

The LSL Bill allows leave to be taken in one-day periods, provided that the employer and employee agree to do so. In this case, employee A would be able to work a four day week for the last year of her employment, without loss of pay or reduction in superannuation. The balance of her leave will then be paid out on her retirement.

B. Allowing employees to take leave after seven years.

The current LSL Act provides that a pro rata LSL entitlement is available after seven years' service, but only on the termination of employment. Otherwise, the employee can only take the LSL once they have ten years' continuous service.

CASE STUDY:

Employee A started working for her employer on 1 March 2010. On 1 May 2017 employee A resigns and is paid out her LSL entitlement, on a pro rata basis. Employee A intends to take an overseas trip. At the same time, another employee, employee B, who has also worked for the employer for just less than 10 years would like to take a period of long service leave to visit family overseas. However, he has no automatic entitlement to take leave, as he has not reached the 10 year minimum requirement.

Under the new LSL Act, after seven years' employment, employee B would be able to apply for LSL to visit family overseas, which can only be refused on the grounds of business necessity, whilst remaining employed.

C. Treating parental leave the same as other forms of leave.

The current Act treats parental leave less favourably than other forms of leave. It also treats it less favourably than New South Wales, and the Commonwealth Fair Work Act.

The LSL Bill will make the treatment of paid parental leave the same as other forms of paid leave. All forms of paid leave will count as an employee's service.

Unpaid parental leave will be treated the same as other forms of unpaid leave. Any period of unpaid leave will not break service, and the first 12 months of that leave will also count as service. An employer and employee will be able to agree to count longer periods of unpaid leave as service.

CASE STUDY:

Employee A commenced work on 1 January 1998. She worked for six years, and then took 18 months unpaid parental leave to care for her first child. She then returned to work, and after four years took a further two years parental leave after the birth of her second child. She returned to work, and after five more years resigned her employment on 1 July 2016. Employee A was shocked to learn that even though she had worked at the same business for 18 and a half years, she was not entitled to long service leave. This is because the two periods of unpaid parental leave that she took were in excess of 12 months each, and thus had the effect of breaking the continuity of her employment.

Under the LSL Bill, any period of unpaid leave including parental leave will not break continuity of service, and the first 12 months of unpaid leave, including parental leave, will count as service (any period of paid leave also counts as service). So a person in employee A's position will be entitled to LSL calculated on the period of continuous service in accordance with the new LSL Bill. For employee A, this will mean her LSL will be calculated on the full period of her employment (18 and a half years), less 18 months (because of the two periods of unpaid leave she took that exceeded 12 months). Therefore, employee A is entitled to LSL based on 17 years' service.

Note: there are transitional arrangements in the Bill, so that the new parental leave arrangements only apply to leave taken after the commencement of the Act.

D. Making it harder for an employee to lose their entitlements by expanding the definition of 'assets' to include intangible assets.

The current LSL Act says that where there has been a transmission of business, service with the original employer will count as service.

However, where no physical assets have transferred as part of the sale of the business, employment with the first employer may not count as service, depending on the circumstances.

CASE STUDY:

Employee A works for a small IT company. The IT company has no office, and the employee works from home. The company becomes insolvent and is liquidated. The client list is sold to another business and the new owner of the business agrees to employ employee A and he commences work on the day following the transfer of the asset.

The current LSL Act defines the term 'assets' to only include a tangible asset. Under the current LSL Act therefore, despite having worked for his former employer for 5 years, employee A will have none of that service recognised, because there has been no transfer of 'assets' between the two businesses.

The LSL Bill defines 'assets' more broadly, so that non-tangible assets such as good-will are included in the definition. A person in employee A's position will be entitled to have their prior service recognised.

E. Fairer rules for when an employee changes their hours of work.

The current LSL Act includes rules for when an employee does not have fixed hours of work, or changes their hours of work in the 12 months before taking LSL. Often, this applies to women who have moved to part-time work following the birth of a child. The current Act says that the hours worked are averaged over the previous 12 months, and also over the previous five years, with the employee entitled to the greater of the two.

This often disadvantages the employee.

The LSL Bill retains the current averaging arrangement, but adds a third option, whereby the hours worked are averaged over the entire period of continuous service, with the employee entitled to the greater of the three averages.

CASE STUDY:

Employee A works has worked for her employer for 15 years, full time for the first 14 years and then half-time for the past 12 months. She now wants to take long service leave. Under the current LSL Act her hours of work are averaged as follows:

Average over the past 12 months = 13 weeks leave x 0.5 = 6.5 weeks' leave.

Average over the past five years = 13 weeks leave x 0.9 = 11.7 weeks' leave.

Under the new arrangements, her hours will also be averaged over the full 15 year period:

13 weeks leave x 0.966 = 12.6 weeks leave.

The employee is better off under this new arrangement.

Note: these figures are approximate only and assume a full time week of 38 hours.

F. Fairer rules for casual employees.

The current LSL Act allows a casual employee up to three months between engagements before their continuity of service is broken. Under the federal Fair Work Act, casual employees are entitled to parental leave, but if they exercised that right, and took more than three months parental leave, they would lose continuity of service under the LSL Act.

The LSL Bill retains the three month rule, but makes an exemption for a casual employee taking up to two years parental leave.

CASE STUDY:

Employee A has worked as a casual employee in a café every week for six years. She takes six months leave following the birth of her child. On her return to work, her employer informs her that because she was away for more than three months, she has lost continuity of service. Because she had worked for less than seven years she has no long service leave entitlement.

Under the LSL Bill, employee A is entitled to take up to two years parental leave, without losing her entitlements. Therefore, employee A will retain those six years of service. In addition, because up to 12 months of unpaid leave will count as service, the six months employee A took as parental leave will also count as service. Employee A will now have six and a half years service for the purposes of long service leave.

G. Giving authorised officers the power to demand employment records.

The current LSL Act does not give authorised departmental officers any real powers of enforcement. For example, they can ask for, but cannot require an employer to produce documents such as time sheets. This makes it difficult to properly enforce the Act, and means that many employees may be unfairly denied their proper entitlements.

More detail about the changes to Victoria's long service leave laws is at Appendix 1.

2. SEPARATE INQUIRY INTO PORTABILITY OF LONG SERVICE LEAVE

This review of the LSL Act and options for reform did not consider issues relating to the portability of LSL entitlements.

In 2015 an inquiry into the desirability of portable LSL schemes for Victorian workers was conducted by the Economic, Education, Jobs and Skills Committee of the Victorian Parliament. The Committee handed down its report on 8 August 2016.

The Victorian Government's response to that inquiry can be found here:

www.parliament.vic.gov.au/eejsc/inquiries/article/3123

APPENDIX 1

| Problem | Options considered | How the Government will address the problem |
|---|--|---|
| <p>1. Flexibility: Removing limitations on agreements to take any period of leave</p> <p>The LSL Act says that LSL should be taken in one period. However if an employer and employee agree, an employee may take the first 13 weeks of LSL in two or three separate periods and may take any further LSL to which he or she becomes entitled in two separate periods.</p> | <p>Allow employers and employees to agree that leave be taken in separate periods.</p> | <p>An employee will be able to take a minimum of one day of LSL.</p> |
| <p>2. Consistency and Equity: When can leave be taken?</p> <p>The LSL Act provides that a pro rata LSL entitlement is available after seven years' service, but only on the termination of employment. Therefore, if the employment ends, the LSL is paid out. Otherwise, the employee has accrued the leave pro rata but can only take the LSL once they have ten years' continuous service.</p> | <p>Allow leave to be taken after seven years' service.</p> | <p>An employee will be able to take LSL after seven years continuous service.</p> |
| <p>3. Consistency and equity: Change in the hours worked</p> <p>Many workers, particularly women, change their hours of work. Currently, if this happens, their hours of work for calculating LSL are averaged over the previous 12 months, or five years (whichever is the greater). This often disadvantages workers, and particularly women, who move from full time to part time employment.</p> | <p>Calculate the hours worked over the life of the employment period.</p> | <p>The current averaging arrangement is to calculate the average hours over the previous 12 months, or five years, whichever is the greater. Under the LSL Bill averaging will also be done over the full period of continuous employment. The employee will be entitled to the greater of the three averages.</p> <p>Further, the current Act says that the averaging arrangements apply if the employee does not have fixed hours of work, or if their hours of work change one or more times in the 12 months preceding the taking of LSL. This will be changed so that averaging will apply if the hours of work change one or more times in the two years before LSL is taken.</p> |

| Problem | Options considered | How the Government will address the problem |
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| <p>4. Consistency and Equity: treatment of parental leave and other forms of leave</p> <p>The LSL Act describes:</p> <ul style="list-style-type: none"> • which types of absences do not break continuity of service, but do not count as service; • which types of absences do not break continuity of service, and count as service; and • which types of absences break the continuity of service. <p>The current LSL Act treats parental leave less favourably than other forms of leave, and less favourably than other comparable legislation in New South Wales, Queensland, and also under the Commonwealth Fair Work Act.</p> | <p>Change the way that parental leave is treated so that:</p> <ol style="list-style-type: none"> 1. A period of parental leave of up to 12 months, regardless of whether it is paid or unpaid, will be counted as service; and/or 2. A period of parental leave beyond 12 months will not break continuity of service (but will not count as service), whether it is paid or unpaid. | <p>Parental leave will be treated the same as other comparable forms of leave. Any period of paid parental leave (or other form of paid leave) will count as service.</p> <p>Any period of unpaid parental leave (or other form of unpaid leave) up to 12 months at any one time will also count as service. Unpaid parental leave (or other unpaid leave) beyond 12 months will not count as service, but will also not break continuity of service.</p> <p>There is a further change to how unpaid leave is treated. Under the current LSL Act, a period of unpaid leave (other than unpaid parental leave) approved by the employer counts as service, unless the parties agree otherwise. Under the new arrangements, a period of unpaid leave beyond the initial 12 months will not count as service unless the parties agree otherwise. Sick or carer's leave, whether paid or unpaid, will continue to count as service (as it does in the current LSL Act).</p> |
| <p>5. Consistency and Equity: termination and re-engagement of workers</p> <p>The LSL Act states that where an employee has their employment terminated at the initiative of the employer, and are then re-employed by that employer within 12 weeks, employment is considered to have been continuous. This does not apply to a situation where the employee resigns, and is then re-employed. This can be confusing, and leads to disputes as to whether the employee was dismissed or resigned.</p> | <p>The LSL Act could remove the distinction between termination at the initiative of the employer, and termination at the initiative of the employee.</p> | <p>The LSL Bill provides that where employment ends for any reason, and the employee is re-employed by the employer within 12 weeks, employment is considered to have been continuous. However, the period that the employee did not work is not counted as service.</p> |

| Problem | Options considered | How the Government will address the problem |
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| <p>6. Clarity: arrangements for casual and seasonal employees</p> <p>The 2005 amendments to the LSL Act clarified that casual and seasonal employees are entitled to LSL, but the Department still gets many queries about this issue.</p> <p>Also, casual and seasonal employees are entitled under the Fair Work Act to take parental leave, but this is not acknowledged in the LSL Act.</p> | <p>The LSL Act could clarify that certain interruptions to employment of a casual or seasonal employee still count towards the period of continuous employment, for achieving an entitlement to LSL.</p> | <p>The Bill makes it clear that casual and seasonal workers have the same rights and entitlements as other workers, unless specifically stated otherwise.</p> <p>Further, the current LSL Act states that generally where there is a break in engagements greater than three months, continuity of service is broken. This general rule will be retained, but there will be a number of exceptions including where the casual or seasonal employee is on parental leave. This recognises the right that casual and seasonal employees have under the Fair Work Act to take parental leave.</p> |
| <p>7. Clarity: Recognising prior service where a business is sold</p> <p>The current Act defines the term 'one employer' and sets out several situations in which an employee is to be regarded as having been employed by the one employer, even though the employee may have worked over the relevant period of time for more than one employer in a strict legal sense.</p> <p>Where there has been a transmission of business, under the LSL Act it is clear that employment with the original employer will count as service. However, where there is a transfer of assets but no physical assets have transferred, employment with the first employer may not count as service, depending on the circumstances.</p> | <p>Amend the LSL Act to provide a more comprehensive definition of 'transfer of business'. Guidance could be taken from s.311 of the Fair Work Act .</p> <p>Amend the definition of 'assets' in the LSL Act so that the definition of 'assets' includes both tangible and intangible assets.</p> | <p>The definition of assets will be expanded to include intangible assets.</p> <p>The Bill also adopts some of the wording currently in section 311 of the Fair Work Act, to provide some consistency between the two instruments with respect to how business transfers are defined.</p> <p>The Bill also describes what happens where work is outsourced by one employer to another. If an employer contracts out work to another employer, and as a result an employee ceases work with the first employer, and commences work with the second employer, their service with the second employer is taken to have commenced on the day they started work with their first employer. Similarly, if the contract ends, and the work and employee return to the first employer, service with the second employer is also counted.</p> <p>Sick or carer's leave, whether paid or unpaid, will continue to count as service (as it does in the current LSL Act).</p> |

| Problem | Options considered | How the Government will address the problem |
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| <p>8. Clarity: Right to seek an exemption</p> <p>The current LSL Act allows an employer to apply to the Industrial Division of the Magistrates' Court to be exempted from complying with the LSL Act in respect of some, or all of its employees. It is believed that the last time this provision was used was sometime in the 1960's.</p> | <p>The right to seek an exemption could be abolished.</p> <p>A savings clause could be used to preserve any existing arrangement that is still operational.</p> | <p>The LSL Bill abolishes the right to seek an exemption to the application of the Act, although any existing exemption will remain in force.</p> <p>It should be noted that the Bill makes it clear that any existing arrangement in another Act or federal workplace agreement or award will override the Victorian LSL Act, to the extent of any inconsistency.</p> |
| <p>9. Compliance and Enforcement: Quantum of penalties</p> <p>The LSL Act imposes penalties (both criminal and civil) for a range of offences. Penalties in the LSL Act range from five penalty units to 20 penalty units. A penalty unit is about \$160. The criminal penalties were last reviewed in 2005, when they were increased. They are, however, still comparatively low, particularly when compared to penalties applying under the Commonwealth Fair Work Act 2009. For example, the penalty for contravening a modern award under the Fair Work Act 2009 is up to 60 penalty units (\$10,800).</p> | <p>Amend the LSL Act to bring the penalties more into line with comparable legislation such as the Fair Work Act 2009, the Queensland Industrial Relations Act 1999 or the New South Wales Long Service Leave Act 1955.</p> | <p>The LSL Bill increases penalties and also provides uniformity in terms of the penalties available. The two civil offences have been converted into criminal penalties, and the penalties are now all 12 penalty units for an individual or 60 penalty units for a body corporate.</p> |
| <p>10. Compliance and Enforcement: Production of documents</p> <p>The current LSL Act does not provide the department's information and compliance officers with a right to demand that an employer provide documents, such as payroll records. This makes the effective enforcement of the Act difficult. Compliance officers in all other states and territories, and the Commonwealth, have the power to demand documents.</p> | <p>Give compliance staff the power to demand that an employer provide documents such as payroll records. To unreasonably fail to comply with such a request would be an offence.</p> <p>Give compliance staff the power to enter premises to inspect records.</p> | <p>The Bill will empower compliance staff to demand the production of documents. However, compliance staff will not have a right to enter premises without consent.</p> <p>An employee will be able to request that their employer provide them with a statement detailing when the employee commenced employment, and any changes to hours of work. Such a statement may be used as evidence in court if there is a dispute over entitlements.</p> |

