

NORTHERN TERRITORY OF AUSTRALIA

ANNUAL LEAVE ACT

As in force at 27 October 2004

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NORTHERN TERRITORY OF AUSTRALIA

As in force at 27 October 2004

ANNUAL LEAVE ACT

An Act to provide for the grant of annual leave to certain employees

1 Short title

This Act may be cited as the *Annual Leave Act*.

2 Commencement

This Act shall come into operation on a date to be fixed by the Administrator by notice in the *Gazette*.

3 Repeal

The *Annual Holidays Ordinance 1974* (No. 68 of 1974) and the *Annual Holidays Ordinance 1978* (No. 26 of 1978) are repealed.

4 Application

- (1) This Act applies to all employees employed in the Territory other than:
 - (a) an employee, the Commissioner or a Chief Executive Officer within the meaning of the *Public Sector Employment and Management Act*,
 - (b) an officer or employee within the meaning of the *Public Service Act 1999* of the Commonwealth;
 - (c) an employee in respect of whom an employment award makes provision for annual leave;
 - (d) a casual employee; or
 - (e) an officer or employee in the Public Service within the meaning of the *Workplace Relations Act 1996* of the Commonwealth.
- (2) Nothing in this Act affects the operation of the *Work Health Act*.

5 Interpretation

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

award means an order, industrial agreement, determination or common rule declaration in force at the time of the employment of the employee under the *Workplace Relations Act 1996* of the Commonwealth.

casual employee means a person who has entered into an arrangement with an employer under which:

- (a) the employment is irregular and not fixed days or at fixed times;
- (b) employment is available and the person works only when required by the employer; and
- (c) there is no continuing contract of employment with the employer requiring the person to work on a subsequent occasion at a specified time.

employee means a person to whom this Act applies who has entered into or works under a contract of service or apprenticeship with an employer, whether the contract is express or implied, oral or in writing, on salary, wages or piecework rates or as a member of a butty gang, full-time or part-time, or as an outworker.

normal daily number of hours of work means:

- (a) in the case of an employee who is required by the terms of employment to work a fixed number of hours (not being hours of overtime) per day – the number of hours so fixed; or
- (b) in the case of any other employee – the average number of hours (not being hours of overtime) per day worked during the 12 months ending on the date when the employee commences annual leave, or the date of termination of employment or the death of the employee, as the case requires.

normal weekly hours of work means:

- (a) in the case of an employee who is required by the terms of employment to work a fixed number of hours (not being hours of overtime) per week – the number of hours so fixed; or
- (b) in the case of any other employee – the average number of hours (not being hours of overtime) per week worked during periods of actual employment in the 12 months ending on the

date of termination of employment or the death of the employee as the case requires.

ordinary pay, in relation to an employee, means remuneration for the employee's normal weekly number of hours of work calculated at the ordinary time rate of pay of the employee and **ordinary rate of pay** has a corresponding meaning.

ordinary time rate of pay means:

- (a) in the case of an employee who is remunerated in relation to an ordinary time rate of pay fixed by the terms of employment of the employee, the time rate of pay so fixed;
- (b) in the case of an employee:
 - (i) who is remunerated otherwise than in relation to an ordinary time rate of pay so fixed, or partly in relation to an ordinary time rate of pay so fixed and partly in relation to any other manner; or
 - (ii) where no ordinary time rate of pay is so fixed for an employee's work under the terms of the employment,

the average time rate of pay earned by the employee during the period actually worked by the employee in the service of the employer during the period of 12 months immediately preceding the date when the employee enters on leave or preceding the termination of the employment of the employee or the death of the employee, as the case may be.

pay, in relation to an employee, means the pay, salary, wages or remuneration in respect of his or her employment.

public holiday means a day to be observed as a public holiday under the *Public Holidays Act*.

shift worker means an employee who:

- (a) is rostered or required, for the purpose of completing the normal daily hours of work, to work for a period of time after 10 o'clock in the evening and before half past 6 o'clock in the morning; and
- (b) in the normal course of employment, is regularly rostered for work or is required to work on any of the days of each week, including a day that is a public holiday.

(2) A reference in this Act to an employee's pay shall be read as including a reference to:

- (a) an over-award payment, industry, leading hand, skill or qualification allowance or service grant;
- (b) any amounts payable to the employee under a bonus or incentive scheme, being amounts that are usually paid to the employee with his or her pay for normal weekly hours of work;
- (c) if the employee is provided with free board or lodging by the employer – an amount equal to the value of that board or lodging fixed by or under the terms of employment or, if not so fixed, \$15 per week for board or \$5 per week for lodging; and
- (d) any allowance of a specified kind prescribed by the Regulations to be included in an employee's pay for the purposes of this Act or a provision of this Act,

but not including a reference to district allowance, site allowance, climatic allowance or any other allowance or payment in respect of overtime or penalty rates of pay.

(3) For the purposes of this Act, the fact that:

- (a) some or all of an employee's pay consists of a share of the earnings of the employer; or
- (b) a vehicle, vessel, machine, tool or other article for the performance of his or her work is obtained by the employee under a contract of hire in consideration of the payment of a fixed sum or a share of the earnings of the employer, or otherwise,

does not in itself prevent the person from being regarded as an employee.

(4) For the purpose of calculating an employee's ordinary rate of pay where, during a year, an employee is remunerated partly by ordinary pay and partly by commission, the total of the ordinary pay and the commission payable to the employee during the year shall be added together.

(5) Where, by a provision of a law that governs an award applying to an employee in the Territory, a person is deemed, for the purposes of that law, to be an employer of another person, the person so deemed to be an employer shall, for the purposes of this Act, be deemed to be an employer of that other person.

6 Annual leave

- (1) Subject to this Act, an employee is entitled to a period of 28 consecutive days leave annually after completing each 12 months continuous qualifying service.
- (2) Where an employee who is a shift worker is required to work ordinary hours regularly on a Sunday or a public holiday, that employee shall be entitled, in addition to the amount of annual leave referred to in subsection (1), to a further 7 consecutive days leave.
- (3) Where an employee with 12 months continuous qualifying service is engaged for part of the 12 months as a 7-day shift worker, the employee shall be entitled to, in addition to the period of 28 consecutive days annual leave prescribed by subsection (1), a further half day for each month during which the employee so continuously served.
- (4) Subject to sections 10 and 11, an employer shall not pay to an employee and an employee shall not accept any amount in lieu of leave to which the employee is or may become entitled under this Act.
- (5) Subject to subsection (6), a period of annual leave under this Act is to be calculated inclusive of days that are not working days but is not to include public holidays.
- (6) If, during the period of an employee's annual leave, a public holiday is observed on a day that would have been an ordinary working day for the employee, there shall be added to the period of the employee's annual leave time equal to the ordinary time that the employee would have worked if that day had not been a public holiday.
- (7) Where a public holiday falls within an employee's period of annual leave and an employee fails without reasonable cause to attend for work at the employee's ordinary starting time on the working day immediately following the last day of the period of the employee's annual leave, the employee shall not be entitled to be paid for such public holiday.
- (8) Where an employee is entitled to annual leave under this Act, the employer must grant the leave and the employee shall take the leave in one continuous period or, where the employer and employee agree, in separate periods, not exceeding 3.

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- (9) Annual leave shall be taken at a time agreed between an employer and employee or fixed by the employer within a period not exceeding 12 months after the date when the right to annual leave accrued and after not less than 28 days notice to the employee.

7 Qualifying service

- (1) The period of qualifying service of an employee with an employer for the purposes of this Act is the period during which the employee has been employed continuously with the employer, including any period that commenced before the commencement of this Act, but not including any period of employment in respect of which annual leave has already been granted or payment in lieu of annual leave has already been made.
- (2) For the purposes of this Act, an employee shall be deemed not to break, or to have broken, continuity of service by reason of his or her absence from employment:
- (a) brought about by the action of his employer with the intention or result of avoiding an obligation imposed on the employer by this Act; or
 - (b) on account of leave granted to the employee by the employer for accident or illness to the employee or other reasonable cause.
- (3) The period during which an employee is or was absent from employment otherwise than on leave with pay granted by the employer or brought about by the action of the employer with the intention of avoiding an obligation imposed on the employer by this Act does not form part of the period of employment with that employer for the purposes of this Act.
- (4) Where an employee is absent from employment for a reason other than a reason referred to in subsection (2), the employer shall inform that employee in writing that such absence shall be regarded as having broken the continuity of that employee's service.
- (5) A notice under subsection (4) may be given by delivering the notice to the employee personally or by posting it to the last recorded address of the employee.
- (6) Where an employee is employed in a corporation and, at any time prior, has been employed in one or more related corporations and the periods for which the employee was so employed are continuous with one another within the meaning of this section, the sum of those periods of employment shall, subject to this Act, be included in the current period of employment for the purposes of this Act.

(7) For the purposes of subsection (6), a corporation shall be deemed to be a related corporation if it is a subsidiary, holding or related corporation within the meaning of section 50 of the Corporations Act 2001.

(8) Where:

(a) all or part of a business, undertaking or establishment of an employer has been transferred to another employer; and

(b) a person, who at the time of the transfer, was an employee of the first-mentioned employer, transfers his or her service to that other employer,

the period of service with such other employer shall be deemed not to have been broken by reason of the transfer, and the period of service with the first-mentioned employer shall be deemed to be a period of service with the other employer.

(9) For the purposes of subsection (8), **transfer** includes transmission, conveyance, assignment or succession, whether by agreement, under will, in pursuance of letters of administration of a deceased person's estate or by operation of law.

8 Annual leave taken before due

(1) An employer may allow an employee to take annual leave before it accrues.

(2) Where annual leave is taken before it accrues, a further period of annual leave does not accrue until after the expiration of the 12 months qualifying service in respect of which the first-mentioned annual leave was so taken before it accrued.

(3) Where annual leave has been granted by an employer to an employee before it accrued and the employee subsequently ceases to be employed by the employer before completing the 12 months qualifying service in respect of which the annual leave was granted, the employer may, for each complete month (excluding public holidays) of the qualifying service period of 12 months employment not served by the employee, deduct from whatever pay is payable upon termination of the employment one-twelfth of the amount of pay paid on account of annual leave.

9 Pay for annual leave

An employee shall be paid by the employer, before the employee goes on annual leave (including leave taken under section 12(2)), an amount equal to the pay (at the employee's ordinary rate) for the period of annual leave together with an amount equal to 17½% of that pay.

10 Payment on termination of employment

(1) If:

(a) after a period of one month's employment in the period of the first 6 months employment with an employer – an employee lawfully leaves that employment or the employment is terminated by the employer through no fault of the employee; or

(b) after a period of 6 months continuous qualifying service with an employer or, after a period of 12 months or more continuous qualifying service in respect of the whole of which annual leave has not been granted – an employee leaves that employment or the employment is terminated by the employer,

the employee shall be paid (in lieu of a proportion, for that qualifying service, of the annual leave in respect of 12 months qualifying employment) an amount calculated in accordance with subsection (2).

(2) The amount to be paid to an employee for the purposes of subsection (1) in lieu of annual leave on termination of employment shall be:

(a) if the employee had been employed as a 7-day shift worker for the whole of the period of qualifying service served by the employee referred to in that subsection – at the employee's ordinary rate of pay for 3.85 hours in respect of each completed week of that qualifying period of service;

(b) if the employee had been employed as a 7-day shift worker for part only of the period of qualifying service served by the employee referred to in that subsection – at the employee's ordinary rate of pay for 3.85 hours in respect of each completed week of that qualifying period of service; or

(c) in any other case – at his ordinary rate of pay for 3.08 hours in respect of each completed week of that qualifying period of service.

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- (3) Where an employee's hours worked in a week are less than 40 the number of hours referred to in subsection (2)(c) shall be calculated in accordance with the following formula:

$$\frac{4 \times B}{52}$$

where B is the average or normal number of hours worked per week.

11 Payment on death of employee

Where an employee dies, the former employer of the deceased employee shall, on demand by the personal representative of the deceased employee, pay to that personal representative the amount that would have been payable to the deceased employee under this Act if the employment had been terminated otherwise than by death.

12 Close down

- (1) Subject to this section, an employer may give not less than 4 weeks notice to an employee that the employer intends to close down the operation or establishment or sections of that operation or establishment from a specified date for a specified period and requires the employee, in common with one or more other employees, working in the operation or establishment or sections of that operation or establishment, as the case requires, to take leave from that date for that period.
- (2) Where, on the date specified in a notice given under subsection (1), the employee to whom the notice was given is entitled under this Act to an annual leave credit equal to or greater than the period of the close down specified in the notice, the employee shall take annual leave for the period specified in the notice.
- (3) Where, on the date specified in a notice given under subsection (1), the employee to whom the notice was given is not entitled under this Act to annual leave or is entitled to an annual leave credit for part only of the period of the close down specified in the notice:
- (a) the employer shall grant and the employee shall take leave of absence from employment for that period of the close down; and

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- (b) the employee is entitled to payment, at the employee's ordinary rate of pay, for:
 - (i) that part, if any, of the period of the close down equal to the period for which the employee is entitled to annual leave;
 - (ii) a period equal to one-twelfth of the part of the continuous qualifying period of employment in respect of which the employee has not accrued annual leave; and
 - (iii) any public holiday observed during the period of the close down.
 - (4) Any period which an employee takes as leave during a period of close down under this section shall be regarded as employment in the next following 12 monthly period of qualifying service for annual leave.

13 Calculation of payment due

An amount payable to an employee upon entering a period of annual leave granted or taken under this Act or an amount payable under this Act to an employee on termination of employment or to the personal representative of a former employee following the death of the employee shall be calculated by reference to the ordinary rate of pay of the employee at the date of:

- (a) taking the period of annual leave;
- (b) termination of employment; or
- (c) death,

as the case may be.

14 When payment to be made

Where an employer is required by this Act to pay an amount to an employee, he shall pay that amount in full on or before the last day on which the employee is required to work before the commencement of the annual leave, the termination of the employment, or the commencement of the period of close down referred to in section 12, as the case may be.

15 Exemptions

The Minister may, subject to such conditions as he or she thinks fit, by instrument in writing, exempt an employer or class of employers from the operation of this Act or of a provision of this Act in respect

of an employee, or a class of employees, specified by the Minister if the Minister is satisfied that the employee or class of employees is entitled to benefits in the nature of annual leave under a scheme conducted by or on behalf of the employer or class of employers not less favourable than those provided by this Act.

16 Leave records

- (1) An employer shall, in respect of each employee, keep and maintain or cause to be kept and maintained a record showing particulars of:
 - (a) the name of the employee;
 - (b) the date on which the employee commenced employment with the employer and the wages, salary or commission paid to such an employee;
 - (c) the accrued annual leave credit of the employee;
 - (d) each period of annual leave, or payment in lieu of annual leave, made to the employee;
 - (e) each occasion on which the employee has been absent from that employment; and
 - (f) where the employee ceased to be employed by the employer – the date on which the employee ceased to be so employed.
- (2) An employer shall retain a record referred to in subsection (1):
 - (a) after the date on which the person to whom the record relates ceased to be employed by the employer – until the expiration of a period of 3 years; and
 - (b) in the case of an employee whose employment is terminated by death – 6 years after the date on which all moneys owing to the legal personal representative are paid.
- (3) A person shall not make a false or misleading statement in, or a material omission from, a record that is required to be kept under this section.

17 Investigation of leave entitlements

- (1) A person authorised by the Minister may:
 - (a) conduct such investigations as the authorised person thinks fit to ascertain whether the provisions of this Act have been complied with; and

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- (b) for that purpose, require, by notice in writing, an employer to produce, at such reasonable time and place as the authorised person specifies, the records required to be kept under section 16.
 - (2) An employer shall not fail to comply with a written request given under subsection (1).
 - (3) An authorised person shall, if requested so to do by the Minister, as soon as practicable after conducting an investigation under this section, report in writing to the Minister the findings of the investigation.

18 Evasion, &c., of obligations

- (1) This Act has effect notwithstanding any employment agreement that confers on the employee rights that are not as advantageous to the employee as the rights conferred on the employee by this Act.
- (2) An employer shall not do any act or thing for the purpose of, or that has the effect of:
 - (a) avoiding or evading an obligation imposed on the employer by this Act; or
 - (b) defeating, evading, avoiding or preventing the operation of this Act.

19 Offences

- (1) A person shall not contravene or fail to comply with a provision of this Act.

Penalty: \$1,000 or imprisonment for 6 months.
- (2) Where a person is found guilty of an offence against this Act, the court may, in addition to the imposition of any penalty, make such order with respect to any payment or leave due under this Act to the person in respect of whom the offence was committed as it thinks just in the matter, including an order that the person found guilty pay to such other person any sum that the court is satisfied is due from the person found guilty to that other person in connection with that other person's employment.
- (3) Where a person found guilty of an offence against this Act is a body corporate, each person who, at the time of the commission of the offence, was a director or officer of the body corporate shall also be deemed to have committed the like offence and shall be liable on being found guilty to the penalty provided by this Act for the offence unless the court is satisfied that the offence was committed without

his or her knowledge or that he or she used all diligence to prevent the commission of the offence.

19AA Regulatory offences

Subject to sections 15 and 19(3), an offence of contravening or failing to comply with section 9, 10, 11, 14 or 16(1) or (2) is a regulatory offence.

19A Time for commencing proceeding

Notwithstanding anything in another law, proceedings for an offence against this Act may be instituted within the period of 3 years after the act or omission alleged to constitute the offence.

20 Regulations

The Administrator may make regulations, not inconsistent with this Act, prescribing all matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to this Act.

ENDNOTES
1**KEY**

Key to abbreviations

amd = amended
app = appendix
bl = by-law
ch = Chapter
cl = clause
div = Division
exp = expires/expired
f = forms
Gaz = Gazette
hdg = heading
ins = inserted
lt = long title
nc = not commenced

od = order
om = omitted
pt = Part
r = regulation/rule
rem = remainder
renum = renumbered
rep = repealed
s = section
sch = Schedule
sdiv = Subdivision
SL = Subordinate Legislation
sub = substituted

2**LIST OF LEGISLATION*****Annual Leave Act 1981 (Act No. 70, 1981)***

Assent date 18 September 1981
 Commenced 11 December 1981 (*Gaz G49*, 11 December 1981, p 2)

Annual Leave Amendment Act 1982 (Act No. 84, 1982)

Assent date 14 December 1982
 Commenced 14 December 1982

Criminal Law (Regulatory Offences) Act 1983 (Act No. 68, 1983)

Assent date 28 November 1983
 Commenced 1 January 1984 (s 2, s 2 *Criminal Code Act 1983* (Act No. 47, 1983), *Gaz G46*, 18 November 1983, p 11 and *Gaz G8*, 26 February 1986, p 5)

Companies and Securities (Consequential Amendments) Act 1986 (Act No. 18, 1986)

Assent date 30 June 1986
 Commenced 1 July 1986 (s 2)

Corporations (Consequential Amendments) Act 1990 (Act No. 59, 1990)

Assent date 14 December 1990
 Commenced 1 January 1991 (s 2, s 2 *Corporations (NT) Act 1990* (Act No. 56, 1990) and *Gaz S76*, 21 December 1990)

Public Sector Employment and Management (Consequential Amendments) Act 1993 (Act No. 28, 1993)

Assent date 30 June 1993
 Commenced 1 July 1993 (s 2, s 2 *Public Sector Employment and Management Act 1993* (Act No. 11, 1993) and *Gaz S53*, 29 June 1993)

Sentencing (Consequential Amendments) Act 1996 (Act No. 17, 1996)

Assent date 19 April 1996
 Commenced 1 July 1996 (s 2, s 2 *Sentencing Act 1995* (Act No. 39, 1995) and *Gaz S15*, 13 June 1996)

Corporations Reform (Consequential Amendments NT) Act 2001 (Act No. 17, 2001)

Assent date 29 June 2001
 Commenced 15 July 2001 (s 2, s 2 *Corporations Act 2001* (Cth Act No. 50, 2001) and *Cth Gaz S285*, 13 July 2001)

Statute Law Revision Act (No. 2) 2001 (Act No. 62, 2001)

Assent date 11 December 2001
 Commenced 11 December 2001

Statute Law Revision Act (No. 2) 2004 (Act No. 54, 2004)

Assent date 15 September 2004
 Commenced 27 October 2004 (*Gaz G43*, 27 October 2004, p 3)

3 LIST OF AMENDMENTS

s 4 amd No. 28, 1993, s 3; No. 62, 2001, s 15; No. 54, 2004, s 7
 s 5 amd No. 84, 1982, s 3; No. 62, 2001, s 15; No. 54, 2004, s 7
 s 6 amd No. 54, 2004, s 7
 s 7 amd No. 18, 1986, s 3; No. 59, 1990, s 4; No. 17, 2001, s 21; No. 54, 2004, s 7
 s 8 amd No. 84, 1982, s 4
 ss 9 – 13 amd No. 54, 2004, s 7
 s 15 amd No. 54, 2004, s 7
 s 16 amd No. 84, 1982, s 5; No. 54, 2004, s 7
 ss 17 – 18 amd No. 54, 2004, s 7
 s 19 amd No. 17, 1996, s 6; No. 54, 2004, s 7
 s 19AA ins No. 68, 1983, s 101
 s 19A ins No. 84, 1982, s 6
 amd No. 54, 2004, s 7