



ANNUAL LEAVE ACT 1973 A.C.T

Level 3, 222 Pitt Street Sydney NSW 2000

PO Box A2178 Sydney South NSW 1235

Telephone: 02 8267 4365

Fax: 02 8267 4225

CONTENTS

SECTION	TITLE
1	Short title
2	Interpretation
3	Application
4	Annual leave
5	Period of leave
6	Annual leave pay
7	Leave to be taken within 6 months
8	Payment of leave pay
9	Public holidays not to count as leave
10	Employer may require employee to take annual leave
11	No payment in lieu of leave
12	Close-down
13	Annual leave records
14	No contracting out
14A	Registrar of Annual Leave
14B	Authorized officers
14C	Identity cards
14D	Powers of entry of authorized officers
14E	Complaints
14F	Notice to comply with Act
14G	Review of directions by Registrar
14H	Review of decisions
14J	Obstructing etc. authorized officers
14K	Liability
14L	Delegation by Registrar
15	Offences
16	Approved forms
17	Regulation – making power

1. SHORT TITLE

This Act may be cited as the *Annual Leave Act 1973*.

2. INTERPRETATION

(1) In this Act:

Note: A definition applies except so far as the contrary intention appears (see *Legislation Act 2001*, s 155)

“Agreement” means an industrial agreement made in pursuance of the *Workplace Relations and Other Legislation Amendment Act 1996* of the Commonwealth;

“approved training agreement” means a training agreement approved by the Vocational Education and Training Authority under paragraph 30 (2) (a) of the *Vocational Education and Training Act 1995*;

“authorized officer” means a person who is an authorized officer by virtue of section 14B;

“award” means an award made under the *Workplace Relations and Other Legislation Amendment Act 1996* of the Commonwealth;

“award holiday” means a day that is, by virtue of an award or agreement, a holiday for persons employed in an industry;

“shift-worker” means:

- (a) a person who is a shift-worker within the meaning of an award;
- (b) a person who is a shift-worker within the meaning of an industrial agreement made under the *Industrial Relations Act 1988* of the Commonwealth;
- (c) a person (not being a person to whom an award or an industrial agreement referred to in paragraph (b) applies) who:
 - (i) is rostered or required to commence work after 8pm and before 6.30am; or

- (ii) having commenced work before 8pm, is required, for the purpose of completing his or her ordinary hours of work, to continue work until after that time;

“trainee” means the person who is obliged under a training agreement to undertake training;

“training agreement” means a written agreement between a trainee and his or her employer, the terms of which are in accordance with the terms determined by the Vocational Education and Training Authority under section 33 of the *Vocational Education and Training Act 1995*.

- (2) For the purposes of this Act, a person shall be taken to be an employee of a person if:
 - (a) he or she performs work the remuneration for which is paid by that person and consists, either in whole or in part, of salary, wages or commission;
 - (b) he or she is a bound apprentice to that person or an employee of that person; or
 - (c) he or she is a trainee with that person or an employee of that person.

3. APPLICATION

This Act applies in relation to a year of employment that ends on or after the date of commencement of this Act.

4. ANNUAL LEAVE

- (1) Subject to this Act, an employee is entitled to annual leave at the end of every year of his or her employment by a person.
- (2) For the purpose of computing a year of employment:
 - (a) a period during which an employee was absent from his or her employment, being a period in respect of which the employee received compensation under the *Workers' Compensation Act 1951*, shall, except to the extent to which the period exceeds 3 months, be taken into account as if the employee had not been absent from his or her employment; and

- (b) a period during which an employee was absent from his or her employment without the leave of his or her employer or on leave of absence granted without pay (not being a period referred to in paragraph (a)) shall not be taken into account.
- (3) Without prejudice to any rights a person may have under an award or agreement, a person is entitled under this Act to annual leave at the end of a year of employment if, during the year:
 - (a) the average number of hours worked by that person in a week exceeded 22.8; or
 - (b) the person did not receive, under an award or agreement, a pay loading in excess of the base rate of pay in substitution for annual leave for that year and the payment is identifiable from leave records kept by the employer under section 13.

5. PERIOD OF LEAVE

- (1) Subject to subsection (2), the duration of the leave to which an employee is entitled under subsection 4 (1) is 4 weeks.
- (2) Where, during a year of employment, an employee has been a shift-worker, the duration of the leave to which that employee is entitled under subsection 4 (1) is 5 weeks.
- (3) In this section, “**week**”, in relation to an employee, means the employee’s ordinary working week.

6. ANNUAL LEAVE PAY

- (1) An employee who takes leave to which he or she is entitled under subsection 4 (1) is entitled to payment from his or her employer of an amount equal to the ordinary remuneration the employee would have received in respect of the period of leave if the employee had not taken leave.
- (2) If, under an award or agreement, an employee is entitled to:
 - (a) less annual leave than the annual leave to which he or she is entitled under this Act; and

- (b) payment of an amount (not being salary or wages) in respect of the taking by the employee of that annual leave;

there is payable to that employee, in addition to the amount payable under subsection (1), an amount calculated in accordance with the following formula:

$$AP \times \frac{ALACT}{ALAWAG}$$

where:

AP is the amount payable under the award or agreement (not being salary or wages) in respect of the taking of the annual leave;

ALACT is the amount of annual leave to which the employee is entitled under this Act;

ALAWAG is the amount of annual leave to which the employee is entitled under the award or agreement.

- (3) In this section, “**ordinary remuneration**”, in relation to an employee, means the sum of:

- (a) the salary or wages payable to the employee; and
- (b) any allowances payable to the employee in respect of skill, qualifications, board and lodging; and
- (c) any amounts payable to the employee under a bonus, performance pay or incentive scheme, being amounts that are usually paid to the employee with his or her salary or wages; and
- (d) where the employee is provided with board and lodging by his or her employer, an amount equal to the value of that board and lodging;

“**salary or wages**” does not include:

- (a) payments in respect of overtime;
- (b) payments at penalty rates of pay; or

- (c) allowances, which, by virtue of an award or agreement, are not to be taken into account in determining a rate of remuneration in respect of overtime.
- (4) In respect of a year during which an employee has been remunerated partly by salary or wages and partly by commission, subsection (2) applies as if:
 - (a) the employee were remunerated wholly by salary or wages throughout that year; and
 - (b) the amount payable for salary or wages to the employee in respect of a week in that year were the amount calculated by dividing the total amount payable to the employee during that year in respect of:
 - (i) salary, wages or commission; or
 - (ii) a combination of salary, wages or commission;by 52.
- (5) Where, during the whole or part of a year, an employee has been employed on terms providing for remuneration at a specified rate per hour, the employee shall, for the purposes of this section, be deemed to have worked during each week of that year the number of hours calculated by dividing the total number of hours worked by the employee during the year by 52.

7. LEAVE TO BE TAKEN WITHIN 6 MONTHS

- (1) Annual leave to which an employee is entitled under subsection 4 (1) shall be taken in 1 period or, if the employee and his or her employer so agree, in 2 periods.
- (2) Subject to this section, annual leave to which an employee is entitled under subsection 4 (1) shall be taken before the expiration of the period of 6 months after the date on which the employee becomes entitled to the leave or within such further period as the authorized officer, either before or after the expiration of the period of 6 months, in writing, allows.
- (3) The authorized officer shall not allow a further period for the purpose of subsection (2) unless he or she is satisfied that the employee concerned has not had a reasonable opportunity of taking his or her leave.

- (4) The Minister may, by instrument in writing, appoint a public servant to be the authorized officer for the purposes of this section.
- (5) An employer shall, not less than 4 weeks before the date on which an employee becomes entitled under this Act to annual leave, give to that employee a notice in writing setting out particulars of—
 - (a) the date on which the employee will become entitled to that annual leave; and
 - (b) the date on which the period of 6 months specified in subsection (2) will expire.

Maximum Penalty: 50 penalty units.

- (6) Subsection (2) does not apply to an employee if his or her employer fails to give notice to the employee in accordance with subsection (5).

8. PAYMENT OF LEAVE PAY

An amount to which an employee is entitled by virtue of section 6 is payable to the employee on the last day on which the employee is required to work before the commencement of the annual leave to which the payment relates.

9. PUBLIC HOLIDAYS NOT TO COUNT AS LEAVE

Where a public holiday or an award holiday falls during the period of annual leave taken by an employee in accordance with this Act, the period of that annual leave shall be increased by 1 day in respect of each such public holiday or award holiday.

10. EMPLOYER MAY REQUIRE EMPLOYEE TO TAKE ANNUAL LEAVE

- (1) Where:
 - (a) an employee is, or will be, at the end of the current year of employment, entitled under subsection 4 (1) to annual leave; and

- (b) the employer of that employee gives to the employee notice in writing that he or she requires the employee to take that annual leave from a date specified in the notice, being a date not earlier than 6 weeks after the date on which the notice is given to the employee;

the employee is not entitled to take the annual leave except in accordance with the requirement of the notice.

(2) Where:

- (a) an employee gives to his or her employer notice in writing that he or she is desirous of taking annual leave at the expiration of a period specified in the notice, being a period of not less than 6 weeks after the date on which the notice is given; and
- (b) the employee is, or will be, not later than the expiration of the period specified in the notice, entitled to annual leave;

the employee is entitled to take annual leave at the expiration of the period specified in the notice.

11. NO PAYMENT IN LIEU OF LEAVE

- (1)** Subject to this section, an employer shall not make a payment to an employee in connection with his or her entitlement under this Act to annual leave unless:
 - (a) the employer has given notice to the employee in pursuance of section 10 (1); or
 - (b) the employee has given notice to the employer in pursuance of subsection 10 (2).
- (2)** Where the employment of a person is terminated at a time at which that person is entitled under this Act to annual leave, that person is entitled to receive from the employer an amount equal to the amount that would have been payable to him or her under this Act if he or she had been taking that annual leave from the date on which his or her employment is terminated.
- (3)** Where the employment of a person is terminated at a time at which the person has been employed by his or her employer:
 - (a) for a period less than 12 months but not less than 1 month; or

- (b) for a period not less than 1 month during a year of employment;

the person is entitled to receive from the employer an amount equal to one-twelfth or, in the case of a shift-worker, five forty-sevenths, of the ordinary remuneration paid or payable to the person during the period of his or her employment or during the current year of employment, as the case may be.

- (4) In this section, “**ordinary remuneration**” has the same meaning as in section 6.
- (5) An amount payable to a person by virtue of subsection (2) or subsection (3) is payable to that person on the last day on which the person is required to work.

12. CLOSE-DOWN

- (1) Subject to this section, an employer may give to an employee notice in writing that the employer requires that employee, in common with 1 or more other employees, to take his or her annual leave from a date, and during the period, specified in the notice.
- (2) A notice given for the purpose of subsection (1) is not effective for the purpose of that subsection if it specifies a period exceeding 4 weeks or, in the case of a notice given to an employee who would be entitled, on the date specified in the notice, to annual leave of 5 weeks, a period of 5 weeks.
- (3) A notice given to an employee for the purpose of subsection (1) and specifying a date more than 6 months after the date of commencement of this Act is not effective for the purpose of this section unless the notice is given not less than 3 months before the date specified in the notice.
- (4) Where, on the date specified in a notice given for the purpose of subsection (1), the employee to whom the notice was given is entitled under this Act to annual leave, that employee shall take that annual leave from the date specified in the notice.
- (5) Where, on the date specified in a notice under subsection (1), the employee to whom the notice was given is not entitled to annual leave under this Act or is entitled to part of an annual leave, the employee:
 - (a) shall absent himself or herself from his or her employment during the period specified in the notice;

- (b) is entitled to payment from his or her employer of an amount equal to the ordinary remuneration the employee would have received in respect of that part of the period referred to in paragraph (a) that is equal to the sum of:
- (i) the part of an annual leave (if any) to which the employee is entitled;
 - (ii) a period equal to:
 - (A) 1/12; or
 - (B) In the case of a shift worker 5/47;Of the period of the employment of the employee during the current year of employment; and
 - (iii) Any public or award holidays that are observed during the period referred to in paragraph (a); and
- (c) Is entitled to receive from his or her employer an amount calculated in accordance with the formula:

$$\frac{AP \times SP}{AL}$$

Where:

- AP** is the amount payable to the employee under subsection 6(2) if the employee had been entitled to annual leave;
- SP** is the period equal to the sum of the periods referred to in subparagraphs (b) (i) and (ii); and
- AL** is the period of the annual leave to which the employee would have been entitled if, immediately before the date specified in the notice, the employee had completed a year of employment.

- (6) An amount to which an employee is entitled under subsection (5) is payable to the employee on the last day on which the employee is required to work before the date specified in the notice given to the employee for the purpose of subsection (1).
- (7) Where:
- (a) an employer gives notice for the purpose of subsection (1) to an employee;

- (b) a payment is made to the employee in accordance with subsection (5); and
- (c) the employee resumes his or her employment after the expiration of the period specified in the notice;

this Act shall apply to, and in relation to, that employee as if his or her employment by the employer referred to in paragraph (a) had commenced on the date specified in the notice given to the employee for the purpose of subsection (1).

- (8) In this section, “**ordinary remuneration**” has the same meaning as in section 6.

13. ANNUAL LEAVE RECORDS

- (1) An employer shall, in respect of each person he or she employs, keep a record specifying:
 - (a) the name, occupation and classification of the employee;
 - (b) whether the employee is full-time, part-time or casual;
 - (c) the employee’s ordinary remuneration (including the gross and net amounts paid), the base rate of pay and any loading payable to the employee, and the purpose of the loading;
 - (d) the number of hours worked each week by the employee;
 - (e) the date on which the employee commenced service;
 - (f) the period of any annual leave taken by the employee;
 - (g) each other occasion on which the person has been absent from his or her employment;
 - (h) where the person has ceased to be employed by the employer—the date on which, and manner in which, he or she so ceased to be employed;
 - (i) the date of birth of the employee as provided by the employee;
 - (j) the name of each award or agreement under which the employee has entitlements; and
 - (k) if overtime may be paid under the award to the employee:

- (i) the number of hours worked by the employee during each day; and
- (ii) when the employee started and ceased work.

Maximum Penalty: 20 penalty units

- (2) An employer shall retain a record referred to in subsection (1) until the expiration of a period of 2 years after the date on which the person to whom the record relates ceased to be employed by him or her.

Maximum Penalty: 20 penalty units

- (3) Subject to subsection (4), an employer shall, at the request of an authorized officer, make available for inspection by that officer a record kept or retained for the purposes of this section.

Maximum Penalty: 50 penalty units

- (4) An employer is not required by subsection (3) to make a record available for inspection otherwise than at a place of business of the employer during the hours during which the employer's business is normally conducted at that place.

14. NO CONTRACTING OUT

- (1) Subject to subsection (2), this Act has effect notwithstanding any award or agreement to the contrary.
- (2) Nothing in this Act affects the operation of an award or agreement to the extent that the award or agreement confers upon an employee rights that are more advantageous to the employee than the rights conferred upon the employee by this Act.

14A REGISTRAR OF ANNUAL LEAVE

- (1) There shall be a Registrar of Annual Leave.
- (2) In addition to performing the functions of the Registrar under this Act and the regulations, the Registrar shall perform such other functions as the Minister directs.

Note: A reference to an Act includes a reference to the statutory instruments made or in force under the Act, including regulations (see *Legislation Act 2001*, s 104)

- (3) The Chief Executive shall create and maintain an office in the Public Service the duties of which include performing the functions of the Registrar of Annual Leave.
- (4) The Registrar shall be the public servant for the time being performing the duties of the Public Service office referred to in subsection (3).

14B AUTHORIZED OFFICERS

- (1) There shall be 1 or more authorized officers for the purposes of this Act.
- (2) The Chief Executive may create and maintain 1 or more offices in the Public Service the duties of which include performing the functions of an authorized officer.
- (3) The following persons shall be authorized officers:
 - (a) any public servant for the time being performing the duties of a Public Service office referred to in subsection (2);
 - (b) any other person (including an officer of the Australian Public Service constituted under the *Public Service Act 1999* of the Commonwealth) appointed, in writing, by the Chief Executive for the purpose.

14C IDENTITY CARDS

- (1) The Chief Executive shall issue to the Registrar an identity card that specifies the Registrar's name and office, and on which appears a recent photograph of the Registrar.
- (2) The Chief Executive shall issue to a delegate of the Registrar with any delegated powers of an authorized officer an identity card that specifies the delegate's name and delegated office, and on which appears a recent photograph of the delegate.
- (3) The Chief Executive shall issue to an authorized officer an identity card that specifies the authorized officer's name and office, and on which appears a recent photograph of the authorized officer.
- (4) On ceasing:
 - (a) to occupy, or to act in, the office of the Registrar;

- (b) to be a delegate of the Registrar with any delegated powers of an authorized officer; or
- (c) to occupy, or to act in, an office of authorized officer;

a person shall not, without reasonable excuse, fail to return his or her identity card to the Chief Executive.

Maximum Penalty: 1 penalty unit.

14D POWERS OF ENTRY OF AUTHORISED OFFICERS

- (1) Subject to subsection (2), if an authorized officer has reasonable grounds for believing that it is necessary to do so for the purposes of this Act an authorized officer may, at any time, enter premises of an employer and exercise the powers referred to in subsection (4).
- (2) An authorized officer shall not enter premises under subsection (1) without the consent of the employer.
- (3) An authorized officer who enters premises under subsection (1) is not authorized to remain on the premises, and a person is not required to comply with a requirement made by an authorized officer under subsection (4), if, on request by the employer, or the person in charge of the premises, the authorized officer does not produce his or her identity card.
- (4) An authorized officer who enters premises under subsection (1) may:
 - (a) require the employer to make available for inspection records required to be kept under this Act; and
 - (b) make copies of, or take extracts from records referred to in paragraph (a).

14E COMPLAINTS

- (1) Where a complaint is made to the Registrar by an employee, the Registrar shall refer the complaint to an authorized officer.

Note: If a form is approved under s 16 (Approved forms) for a complaint, the form must be used.

- (2) Where a complaint made by an employee:
 - (a) is made to an authorized officer; or

- (b) is referred to an authorized officer under subsection (1);
- the authorized officer may, by notice in writing, require the complainant and the employer to whom the complaint relates, to attend a conference at a place, date and time specified in the notice to endeavor to resolve the complaint.
- (3) A conference shall be conducted in such a manner as the authorized officer thinks fit.
- (4) Except with the consent of the authorized officer:
- (a) a natural person is not entitled to be represented at a conference by another person; and
- (b) a body of persons (whether incorporated or unincorporated) is not entitled to be represented at a conference by a person other than a member, officer or employee of the body.
- (5) In this section, “**complaint**” means a complaint by an employee concerning his or her entitlements under this Act.

14F NOTICE TO COMPLY WITH ACT

An authorized officer may, if satisfied having regard to the relevant circumstances of a particular case that it is necessary to do so, by notice in writing, require an employer, within 28 days after the date of the notice, to comply with the Act.

14G REVIEW OF DIRECTIONS BY REGISTRAR

- (1) An employer may apply to the Registrar for a review of a requirement made of him or her under section 14F.
- (2) An application shall be in writing.
- (3) The Registrar may uphold, revoke or vary the terms of, the requirement.
- (4) Where the Registrar makes a decision under subsection (3), the Registrar shall give notice in writing of his or her decision to the applicant.

14H REVIEW OF DECISIONS

- (1) Application may be made to the Administrative Appeals Tribunal for a review of:
 - (a) a decision of an authorized officer under subsection 7 (2);
or
 - (b) a decision of the Registrar under section 14G.
- (2) A notice under subsection 14G (4) shall be in accordance with the requirements of the Code of Practice in force under subsection 25 (1) of the *Administrative Appeals Tribunal Act 1989*.

14J OBSTRUCTING Etc. AUTHORIZED OFFICERS

- (1) A person shall not, without reasonable excuse, obstruct or hinder an authorized officer in the exercise of his or her powers under this Act.

Maximum Penalty: 50 penalty units or imprisonment for 6 months, or both;

- (2) A person shall not, without reasonable excuse, contravene a requirement made under section 14F.

Maximum Penalty: 50 penalty units

14K LIABILITY

An action or other proceeding, civil or criminal, does not lie against the Registrar or an authorized officer for or in relation to any act done, or omission made, in good faith in connection with his or her powers under this Act.

14L DELEGATION BY REGISTRAR

The Registrar may delegate to any person any of the Registrar's powers under this Act or the regulations, other than the Registrar's powers under section 14G.

15 OFFENCES

- (1) Where, under this Act, money is payable by an employer to a person, the employer shall pay the money to that person on the day on which the money is payable.

Maximum Penalty: 50 penalty units;

16 APPROVED FORMS

- (1) The Minister may, in writing, approve forms for this Act.
- (2) If the Minister approves a form for a particular purpose, the approved form must be used for that purpose.
- (3) An approved form is a notifiable instrument.

Note: A notifiable instrument must be notified under the *Legislation Act 2001*.

17 REGULATION – MAKING POWER

The Executive may make regulations for this Act.

Note: Regulations must be notified and presented to the Legislative Assembly, under the *Legislation Act 2001*.