

## Division 9—Long service leave

### 113 Entitlement to long service leave

*Entitlement in accordance with applicable award-derived long service leave terms*

- (1) If there are applicable award-derived long service leave terms (see subsection (3)) in relation to an employee, the employee is entitled to long service leave in accordance with those terms.

Note: This Act does not exclude State and Territory laws that deal with long service leave, except in relation to employees who are entitled to long service leave under this Division (see paragraph 27(2)(g)), and except as provided in subsection 113A(3).

- (2) However, subsection (1) does not apply if:
- (a) a workplace agreement, or an AWA, that came into operation before the commencement of this Part applies to the employee; or
  - (b) one of the following kinds of instrument that came into operation before the commencement of this Part applies to the employee and expressly deals with long service leave:
    - (i) an enterprise agreement;
    - (ii) a preserved State agreement;
    - (iii) a workplace determination;
    - (iv) a pre-reform certified agreement;
    - (v) a pre-reform AWA;
    - (vi) a section 170MX award;
    - (vii) an old IR agreement.

Note: If there ceases to be any agreement or instrument of a kind referred to in paragraph (a) or (b) that applies to the employee, the employee will, at that time, become entitled under subsection (1) to long service leave in accordance with applicable award-derived long service leave terms.

- (3) ***Applicable award-derived long service leave terms***, in relation to an employee, are:
- (a) terms of an award, or a State reference transitional award, that (disregarding the effect of any instrument of a kind referred to in subsection (2)):
    - (i) would have applied to the employee at the test time (see subsection (3A)) if the employee had, at that time, been in his or her current circumstances of employment; and
    - (ii) would have entitled the employee to long service leave; and
  - (b) any terms of the award, or the State reference transitional award, that are ancillary or incidental to the terms referred to in paragraph (a).
- (3A) For the purpose of subparagraph (3)(a)(i), the test time is:
- (a) immediately before the commencement of this Part; or
  - (b) if the employee is a Division 2B State reference employee (as defined in Schedule 2 to the Transitional Act)—immediately before the Division 2B referral commencement (as defined in that Schedule).

*Entitlement in accordance with applicable agreement-derived long service leave terms*

- (4) If there are applicable agreement-derived long service leave terms (see subsection (5)) in relation to an employee, the employee is entitled to long service leave in accordance with those terms.
- (5) There are ***applicable agreement-derived long service leave terms***, in relation to an employee if:
  - (a) an order under subsection (6) is in operation in relation to terms of an instrument; and
  - (b) those terms of the instrument would have applied to the employee immediately before the commencement of this Part if the employee had, at that time, been in his or her current circumstances of employment; and
  - (c) there are no applicable award-derived long service leave terms in relation to the employee.
- (6) If the FWC is satisfied that:
  - (a) any of the following instruments that was in operation immediately before the commencement of this Part contained terms entitling employees to long service leave:
    - (i) an enterprise agreement;
    - (ii) a collective agreement;
    - (iii) a pre-reform certified agreement;
    - (iv) an old IR agreement; and
  - (b) those terms constituted a long service leave scheme that was applying in more than one State or Territory; and
  - (c) the scheme, considered on an overall basis, is no less beneficial to the employees than the long service leave entitlements that would otherwise apply in relation to the employees under State and Territory laws;the FWC may, on application by, or on behalf of, a person to whom the instrument applies, make an order that those terms of the instrument (and any terms that are ancillary or incidental to those terms) are applicable agreement-derived long service leave terms.

*References to instruments*

- (7) References in this section to a kind of instrument (other than an enterprise agreement) are references to a transitional instrument of that kind, as continued in existence by Schedule 3 to the Transitional Act.

### **113A Enterprise agreements may contain terms discounting service under prior agreements etc. in certain circumstances**

- (1) This section applies if:
  - (a) an instrument (the ***first instrument***) of one of the following kinds that came into operation before the commencement of this Part applies to an employee on or after the commencement of this Part:
    - (i) an enterprise agreement;
    - (ii) a workplace agreement;
    - (iii) a workplace determination;
    - (iv) a preserved State agreement;
    - (v) an AWA;

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|  | <ul style="list-style-type: none"><li>(vi) a pre-reform certified agreement;</li><li>(vii) a pre-reform AWA;</li><li>(viii) an old IR agreement;</li><li>(ix) a section 170MX award; and</li><li>(b) the instrument states that the employee is not entitled to long service leave; and</li><li>(c) the instrument ceases, for whatever reason, to apply to the employee; and</li><li>(d) immediately after the first instrument ceases to apply, an enterprise agreement (the <b><i>replacement agreement</i></b>) starts to apply to the employee.</li></ul> <p>(2) The replacement agreement may include terms to the effect that an employee's service with the employer during a specified period (the <b><i>excluded period</i></b>) (being some or all of the period when the first instrument applied to the employee) does not count as service for the purpose of determining whether the employee is qualified for long service leave, or the amount of long service leave to which the employee is entitled, under this Division or under a law of a State or Territory.</p> <p>(3) If the replacement agreement includes terms as permitted by subsection (2), the excluded period does not count, and never again counts, as service for the purpose of determining whether the employee is qualified for long service leave, or the amount of long service leave to which the employee is entitled, under this Division or under a law of a State or Territory, unless a later agreement provides otherwise. This subsection has effect despite sections 27 and 29.</p> <p>(4) References in this section to a kind of instrument (other than an enterprise agreement) are references to a transitional instrument of that kind, as continued in existence by Schedule 3 to the Transitional Act.</p> |
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