

Western Australia

Minimum Conditions of Employment Act 1993

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Western Australia

Minimum Conditions of Employment Act 1993

An Act to provide for minimum conditions of employment for employees in Western Australia and for related purposes.

Part 1 — Preliminary

1. Short title

This Act may be cited as the *Minimum Conditions of Employment Act 1993*¹.

2. Commencement

This Act comes into operation on the day on which the *Workplace Agreements Act 1993* comes into operation¹.

3. Terms used in this Act

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

“annual leave” means leave provided for under Division 3 of Part 4;

“apprentice” has the same meaning as in the IR Act;

“award” means an award made under the IR Act and includes any industrial agreement or order of the Commission under that Act;

“carer’s leave” means leave taken by an employee to provide care or support to a member of the employee’s family or household who requires care or support because of —

(a) an illness or injury of the member; or

(b) an unexpected emergency affecting the member;

“continuous service” means service under an unbroken contract of employment and includes any period of leave or absence authorised by the employer or by an employer-employee agreement, an award, a contract of employment or this Act;

“employee” means a person who is an employee within the meaning of the IR Act, but does not include a person who belongs to a class of persons prescribed by the regulations as persons not to be treated as employees for the purposes of this Act;

“employer” has the same meaning as in the IR Act;

“employer-employee agreement” means an employer-employee agreement under Part VID of the IR Act;

“IR Act” means the *Industrial Relations Act 1979*;

“medical practitioner” means a person who is registered under the *Medical Act 1894* and who has a current entitlement to practise under that Act;

“member of the employee’s family or household” means any of the following persons —

- (a) the employee’s spouse or de facto partner;
- (b) a child, step-child or grandchild of the employee (including an adult child, step-child or grandchild);
- (c) a parent, step-parent or grandparent of the employee;
- (d) a sibling of the employee;
- (e) any other person who, at or immediately before the relevant time for assessing the employee’s eligibility to take leave, lived with the employee as a member of the employee’s household;

“minimum condition of employment” means —

- (aa) the requirement as to maximum hours of work prescribed by Part 2A;
- (a) a rate of pay prescribed by this Act;
- (b) a requirement as to pay, other than a rate of pay, prescribed by this Act;
- (c) a condition for leave prescribed by this Act;
- (d) the use, in manner prescribed by this Act, of a condition for leave prescribed by this Act; or
- (e) a condition prescribed by Part 5;

“public holiday”, in respect of an area in the State, means a day mentioned in Schedule 1 that is a public holiday in that area;

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“trainee” has the same meaning as in the IR Act.

- (2) In this Act a reference to a period worked does not include a reference to a period outside the hours the employee was required ordinarily to work during which the employee was on call.
- (3) For the purposes of subsection (2), the employee was **“on call”** in a period if, in that period the employee was required —
- (a) to remain at his or her place of employment; or
 - (b) to be available to undertake duties of employment,
- but was not required to undertake any other duty of employment.

[Section 3 amended by No. 79 of 1995 s. 66(5); No. 58 of 1996 s. 4; No. 20 of 2002 s. 22(2), 164 and 177; No. 28 of 2003 s. 144; No. 36 of 2006 s. 4 and 28; amended in Gazette 15 Aug 2003 p. 3688.]

4. Application to Crown

This Act binds the Crown.

Part 2 — Application of minimum conditions

5. Minimum conditions implied in awards etc.

- (1) The minimum conditions of employment extend to and bind all employees and employers and are taken to be implied —
 [(a) *deleted*]
 - (aa) in any employer-employee agreement;
 - (b) in any award; or
 - (c) if a contract of employment is not governed by an employer-employee agreement or an award, in that contract.
- (2) A provision in, or condition of, an employer-employee agreement, an award or a contract of employment that is less favourable to the employee than a minimum condition of employment has no effect.
- (3) A provision in, or condition of, an agreement or arrangement that purports to exclude the operation of this Act has no effect, but without prejudice to other provisions or conditions of the agreement or arrangement.
- (4) A purported waiver of a right under this Act has no effect.
- (5) This section has effect subject to sections 8 and 9(1).

[Section 5 amended by No. 20 of 2002 s. 22(3)-(4); amended in Gazette 15 Aug 2003 p. 3688.]

6. Application offshore

- (1) Where under section 3 of the IR Act that Act applies to and in relation to employers and employees in any industry carried on wholly or partly in an offshore area —
 - (a) this Act applies to those employers and employees; and
 - (b) subsection (4) of that section applies with all necessary changes for the purposes of this Act.

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- (2) In subsection (1), “**offshore area**” means the areas referred to in section 3(3) of the IR Act.

[Section 6 amended by No. 20 of 2002 s. 177.]

7. Enforcement of minimum conditions

A minimum condition of employment may be enforced —

- (a) under section 102 of the *Labour Relations Reform Act 2002*;
- (aa) where the condition is implied in an employer-employee agreement, under section 83 of the IR Act;
- (b) where the condition is implied in an award, under Part III of the IR Act; or
- (c) where the condition is implied in a contract of employment, under section 83 of the IR Act as if it were a provision of an award, industrial agreement or order other than an order made under section 32 or 66 of that Act.

[Section 7 amended by No. 20 of 2002 s. 22(5) and 177; amended in Gazette 15 Aug 2003 p. 3688.]

8. Limited contracting-out of annual leave conditions

- (1) After the completion of any year of service by an employee, the employer and employee may agree that the employee may forgo taking annual leave to which the employee became entitled in relation to that year of service if —
- (a) the amount of annual leave forgone does not exceed 50% of the whole amount of annual leave to which the employee became entitled in relation to that year of service;
 - (b) the employee is given an equivalent benefit in lieu of the amount of annual leave forgone; and
 - (c) the agreement is in writing.

- (2) An agreement referred to in subsection (1) is of no effect if the employer's offer of employment was made on the condition that the employee would be required to enter into the agreement.
- (3) The employer must not —
 - (a) require the employee to forgo taking an amount of annual leave; or
 - (b) exert undue influence or undue pressure on the employee in relation to the making of a decision by the employee whether or not to forgo taking an amount of annual leave.
- (4) A contravention of subsection (3) is not an offence but that subsection is a civil penalty provision for the purposes of section 83E of the IR Act.

[Section 8 amended by No. 20 of 2002 s. 165(1) and (2); No. 36 of 2006 s. 29.]

9. Limited contracting-out of minimum wage entitlement

- (1) An employer and an employee may agree that the employee is entitled to some other weekly rate of pay instead of the minimum weekly rate of pay that is applicable to the employee under section 12, 13, 14 or 15 if —
 - (a) the employee is either permanently or temporarily mentally or physically disabled; and
 - (b) the agreement is in writing.
- (2) Nothing in subsection (1) is to be taken to give a person capacity to enter into a contract if in law he or she lacks that capacity.

[Section 9 amended by No. 20 of 2002 s. 166.]

s. 9A

Part 2A — Reasonable hours of work

[Heading inserted by No. 36 of 2006 s. 5.]

9A. Maximum hours of work

- (1) An employee is not to be required or requested by an employer to work more than —
 - (a) either —
 - (i) the employee’s ordinary hours of work as specified in an industrial instrument that applies to the employment of the employee; or
 - (ii) if there is no industrial instrument that specifies the employee’s ordinary hours of work, 38 hours per week;
 - and
 - (b) reasonable additional hours as determined under section 9B.
- (2) For the purpose of subsection (1), in calculating the number of hours that an employee has worked in a particular week, the hours worked by the employee are taken to include any hours of authorised leave taken by the employee during the week.
- (3) Nothing in this section, or section 5(2), restricts the number of ordinary hours of work that may be specified in an industrial instrument.
- (4) In this section —

“authorised leave” means leave, or an absence, whether paid or unpaid, that is authorised —

 - (a) by an employee’s employer;
 - (b) by or under a term or condition of an employee’s employment; or
 - (c) by or under a law, or an instrument in force under a law, of the State or the Commonwealth;

“industrial instrument” means —

s. 9B

- (a) an award; or
- (b) an employer-employee agreement.

[Section 9A inserted by No. 36 of 2006 s. 5.]

9B. Reasonable additional hours

- (1) For the purposes of section 9A(1)(b), in determining whether additional hours that an employee is required or requested by an employer to work are reasonable additional hours, all relevant factors are to be taken into account.
- (2) The factors that may be taken into account include, but are not limited to, the following —
 - (a) any risk to the employee's health and safety that might reasonably be expected to arise if the employee worked the additional hours;
 - (b) the employee's personal circumstances (including family responsibilities);
 - (c) the conduct of the operations or business in relation to which the employee is required or requested to work the additional hours;
 - (d) any notice given by the employer of the requirement or request that the employee work the additional hours;
 - (e) any notice given by the employee of the employee's intention to refuse to work the additional hours;
 - (f) whether any of the additional hours are on a public holiday in the area of the State where the employee is required or requested to work;
 - (g) the employee's hours of work over the 4 weeks ending immediately before the employee is required or requested to work the additional hours.

[Section 9B inserted by No. 36 of 2006 s. 5.]

Part 3 — Minimum rates of pay

[Heading inserted by No. 20 of 2002 s. 167.]

10. Entitlement of employees to be paid a minimum rate of pay

An employee is entitled to be paid, for each hour worked by the employee in a week, the minimum weekly rate of pay applicable to the employee under section 12, 13, 14 or 15, divided by 38.

[Section 10 inserted by No. 20 of 2002 s. 167.]

11. Minimum rate of pay for casual employees includes a loading

(1) A casual employee is entitled to be paid the amount which he or she is entitled to be paid under section 10 plus the prescribed percentage of that amount.

(2) In subsection (1) —

“prescribed percentage” means —

- (a) 20%; or
- (b) if a percentage higher than 20% is set by order under section 51I of the IR Act for the purposes of this section, that percentage.

[Section 11 inserted by No. 20 of 2002 s. 167.]

12. Minimum weekly rate of pay for employees aged 21 or more

The minimum weekly rate of pay applicable at a particular time to an employee —

- (a) who has reached 21 years of age; and
- (b) who is not an apprentice or trainee,

is the rate in effect at that time under section 50A(1)(a)(i) of the IR Act in relation to employees who have reached 21 years of age and who are not apprentices or trainees.

[Section 12 inserted by No. 20 of 2002 s. 167; amended by No. 36 of 2006 s. 21(2).]

13. Minimum weekly rate of pay for employees aged under 21

The minimum weekly rate of pay applicable at a particular time to an employee —

- (a) who is of the age mentioned in the first column in the Table to this section; and
- (b) who is not an apprentice or trainee,

is the percentage, set out opposite that age in the second column in the Table, of the rate referred to in section 12 in effect at that time, rounded up to the nearest 10 cents.

Table

Age	Percentage of 21 year old rate
20 years	90%
19 years	80%
18 years	70%
17 years	60%
16 years	50%
Under 16 years	40%

[Section 13 inserted by No. 20 of 2002 s. 167.]

14. Minimum weekly rates of pay for apprentices

The minimum weekly rate of pay applicable at a particular time to an employee who is an apprentice —

- (a) in the case where a rate is in effect at that time under section 50A(1)(a)(ii) of the IR Act in relation to the class of apprentice to which the employee belongs, is that rate;
- (b) otherwise, is the rate in effect at that time under section 50A(1)(a)(ii) of the IR Act in relation to apprentices generally.

[Section 14 inserted by No. 20 of 2002 s. 167; amended by No. 36 of 2006 s. 21(3).]

s. 15

15. Minimum weekly rates of pay for trainees

The minimum weekly rate of pay applicable at a particular time to an employee who is a trainee —

- (a) in the case where a rate is in effect at that time under section 50A(1)(a)(iii) of the IR Act in relation to the class of trainee to which the employee belongs, is that rate;
- (b) otherwise, is the rate in effect at that time under section 50A(1)(a)(iii) of the IR Act in relation to trainees generally.

[Section 15 inserted by No. 20 of 2002 s. 167; amended by No. 36 of 2006 s. 21(4).]

[16-17. Repealed by No. 20 of 2002 s. 167.]

Part 3A — Other requirements as to pay

[Heading inserted by No. 79 of 1995 s. 66(6).]

17A. Terms used in Part 3A

- (1) A reference in this Part to an employee includes a reference to any person in any manner employed for wages in work of any kind or in manual labour.
- (2) In subsection (1), “**wages**” includes any money or thing had or contracted to be paid, delivered, or given as a recompense, reward, or remuneration.
- (3) A reference in this Part to the contract of employment only applies if the contract is in writing.

[Section 17A inserted by No. 79 of 1995 s. 66(6).]

17B. Employee not to be compelled to accept other than money for pay etc.

- (1) An employee is not to be directly or indirectly compelled by an employer to accept —
 - (a) goods of any kind; or
 - (b) accommodation or other services of any kind,instead of money as any part of his or her pay unless this is authorised or required under the employer-employee agreement, award or contract of employment or under a written law.
- (2) An employee is not to be directly or indirectly compelled by an employer to spend any part of his or her pay in a particular way.
- (3) In proceedings by an employee for recovery of any amount due as his or her pay —
 - (a) anything given or provided by the employer contrary to subsection (1) is to be treated as if it had never been given or provided;

s. 17C

- (b) any amount that the employee has been compelled to spend contrary to subsection (2) is to be treated as if it had never been paid to the employee.

[Section 17B inserted by No. 79 of 1995 s. 66(6); amended by No. 20 of 2002 s. 22(7); amended in Gazette 15 Aug 2003 p. 3688.]

17C. Employee's pay, methods of payment

- (1) To the extent that an employee receives his or her pay in money the employee is entitled to be paid in full and payment is to be made —
 - (a) in cash;
 - (b) by cheque, postal order or money order payable to the employee;
 - (c) by payment into an account, specified by the employee, with a bank or financial institution; or
 - (d) in any other manner authorised or required under the employer-employee agreement, award or contract of employment.
- (2) In the case of any employee who is not employed by the Crown, payment can be made under subsection (1)(b) or (c) if, and only if, the employee so authorises.

[Section 17C inserted by No. 79 of 1995 s. 66(6); amended by No. 20 of 2002 s. 22(7); amended in Gazette 15 Aug 2003 p. 3688.]

17D. Authorised deductions from pay

- (1) Despite section 17C, an employer may deduct from an employee's pay —
 - (a) an amount the employer is authorised, in writing, by the employee to deduct and pay on behalf of the employee;

- (b) an amount the employer is authorised to deduct and pay on behalf of the employee under the employer-employee agreement, award or contract of employment; and
 - (c) an amount the employer is authorised or required to deduct by order of a court or under a law of the State or the Commonwealth.
- (2) The employee is entitled to have any amount so deducted paid by the employer in accordance with the employee's instructions or in accordance with the requirements of the employer-employee agreement, award, contract of employment, court order or law of the State or the Commonwealth (as the case may be).
- (3) Nothing in this section requires an employer to make deductions requested by an employee.
- (4) An employee may, by giving written notice to the employer, withdraw an authorisation under subsection (1)(a).

[Section 17D inserted by No. 79 of 1995 s. 66(6); amended by No. 20 of 2002 s. 22(7); amended in Gazette 15 Aug 2003 p. 3688.]

Part 4 — Minimum leave conditions

Division 1 — Preliminary

18. Paid leave, how pay calculated

- (1) Where leave is paid leave, payment is to be made at the rate the employee would have received as his or her payment at the time the leave is taken under the employer-employee agreement, award or contract of employment.
- (2) If the number of hours for which an employee is entitled to be paid for a period of leave cannot be determined under subsection (1), the total number of hours worked under the employer-employee agreement, award or contract of employment in the 52 weeks immediately before the time the leave is taken are to be averaged as hours worked each week for the purpose of payment for the leave.
- (3) Payment for overtime, penalty rates or any kind of allowance is not required to be taken into account in determining any rate of payment for the purposes of this section.
- (4) Matters in relation to payment for leave under this Part or Part 5 may be prescribed by the regulations.

[Section 18 amended by No. 20 of 2002 s. 22(7); amended in Gazette 15 Aug 2003 p. 3688.]

Division 2 — Leave for illness or injury or family care

[Heading amended by No. 36 of 2006 s. 30.]

19. Entitlement to paid leave for illness, injury or family care

- (1) An employee, other than a casual employee, is entitled for each year of service to paid leave under this subsection for the number of hours the employee is required ordinarily to work in a 2 week period during that year, up to 76 hours.

- (2) An entitlement under subsection (1) accrues *pro rata* on a weekly basis.
- (3) Entitlements under subsection (1) are cumulative.
- (4) Entitlements under subsection (1) can only be used under sections 20 and 20A.
- (5) In subsection (1) —
“**year**” does not include any period of unpaid leave.
[Section 19 inserted by No. 36 of 2006 s. 31(1).]

20. Employee may use entitlement as paid sick leave

- (1) Subject to subsection (2), an employee who is unable to work as a result of the employee’s illness or injury, is entitled to use any part of the employee’s entitlement under section 19(1) as paid leave for periods of absence from work resulting from the illness or injury.
- (2) If an employee’s illness or injury is attributable to —
 - (a) the employee’s serious and wilful misconduct; or
 - (b) the employee’s gross and wilful neglect,in the course of the employee’s employment, the employee is not entitled to be paid for any period of absence from work resulting from the illness or injury.
[Section 20 inserted by No. 36 of 2006 s. 31(1).]

20A. Employee may use entitlement as paid carer’s leave

- (1) Subject to subsection (3), an employee is entitled to use any part of the employee’s entitlement under section 19(1) as paid carer’s leave.
- (2) Subsection (3) applies to an employee if, at a particular time (“**the time**”), the employee —
 - (a) is employed by an employer; and

s. 20B

- (b) for a continuous period of 12 months immediately before the time, has been in continuous service with the employer.
- (3) The employee is not entitled to take paid carer's leave at the time if, during the period of 12 months ending at the time, the employee has already taken a total amount of paid carer's leave that is as much as the entitlement accrued by the employee under section 19(1) during that period.

[Section 20A inserted by No. 36 of 2006 s. 31(1).]

20B. Unpaid carer's leave

- (1) Subject to subsection (2), an employee is entitled to unpaid carer's leave of up to 2 days for each occasion (a **"permissible occasion"**) on which a member of the employee's family or household requires care or support because of —
 - (a) an illness or injury of the member; or
 - (b) an unexpected emergency affecting the member.
- (2) An employee is entitled to unpaid carer's leave for a particular permissible occasion only if the employee cannot take paid carer's leave during the period.
- (3) In subsection (2) —

"paid carer's leave" means paid carer's leave authorised by the employer or by an employer-employee agreement, an award, a contract of employment or section 20A(1).

[Section 20B inserted by No. 36 of 2006 s. 31(1).]

21. Certain matters as to sick leave not minimum conditions

Nothing in this Division requires —

[(a) deleted]

- (b) leave under section 20(1), 20A(1) or 20B(1) to be taken as a whole working day; or

- (c) an employer to pay an employee in lieu of the employee's untaken entitlement under section 19(1), on the termination of the employee's employment.

[Section 21 inserted by No. 20 of 2002 s. 171; amended by No. 36 of 2006 s. 32.]

22. Employee to prove entitlements under this Division

An employee who claims to be entitled —

- (a) to use the employee's entitlement under section 19(1) as paid leave under section 20(1);
- (b) to use the employee's entitlement under section 19(1) as paid carer's leave under section 20A(1); or
- (c) to unpaid carer's leave under section 20B(1),

is to provide to the employer evidence that would satisfy a reasonable person of the entitlement.

[Section 22 inserted by No. 20 of 2002 s. 172; amended by No. 36 of 2006 s. 33.]

Division 3 — Annual leave

23. Paid annual leave, entitlement to

- (1) An employee, other than a casual employee, is entitled for each year of service, to paid annual leave for the number of hours the employee is required ordinarily to work in a 4 week period during that year, up to 152 hours.
- (2) An entitlement under subsection (1) accrues *pro rata* on a weekly basis.
- (2a) Entitlements under subsection (1) are cumulative.
- (3) In subsection (1), “**year**” does not include any period of unpaid leave.
- (4) Subsection (1) does not apply to an employee of a class prescribed by the regulations.

[Section 23 amended by No. 20 of 2002 s. 173(1); No. 36 of 2006 s. 34.]

24. Annual leave payments, when to be made

- (1) An employee is to be paid for a period of annual leave at the time payment is made in the normal course of the employment, unless the employee requests in writing that he or she be paid before the period of leave commences in which case the employee is to be so paid.
- (2) If —
 - (a) an employee lawfully leaves his or her employment; or
 - (b) an employee's employment is terminated by the employer through no fault of the employee,before the employee has taken annual leave to which he or she is entitled, the employee is to be paid for all of that annual leave.
- (3) If —
 - (a) an employee leaves his or her employment; or
 - (b) that employment is terminated by the employer,in circumstances other than those referred to in subsection (2) before the employee has taken annual leave to which he or she is entitled, the employee is to be paid for any untaken leave that relates to a completed year of service, except that if the employee is dismissed for misconduct, the employee is not entitled to be paid for any untaken leave that relates to a year of service that was completed after the misconduct occurred.
- (4) In this section —

“year” does not include any period of unpaid leave.

[Section 24 amended by No. 3 of 1997 s. 39.]

25. Annual leave, when may be taken

- (1) Where an employer and an employee have not agreed when the employee is to take his or her annual leave, subject to subsection (2), the employer is not to refuse the employee taking, at any time suitable to the employee, any period of annual leave the entitlement to which accrued more than 12 months before that time.
- (2) The employee is to give the employer at least 2 weeks' notice of the period during which the employee intends to take his or her leave.

26. General Order as to annual leave of no effect

The General Order prescribing minimum conditions as to annual leave under section 50(5) of the IR Act in force at the commencement of this Act is of no effect after the commencement.

[Section 26 amended by No. 20 of 2002 s. 177.]

Division 4 — Bereavement leave

27. Paid bereavement leave, entitlement to

- (1) Subject to section 28, on the death of a member of an employee's family or household the employee is entitled to paid bereavement leave of up to 2 days.
- (2) The 2 days need not be consecutive.
- (3) Bereavement leave is not to be taken during a period of any other kind of leave.

[Section 27 amended by No. 28 of 2003 s. 146; No. 36 of 2006 s. 35.]

28. Proof of entitlement may be required

An employee who claims to be entitled to paid leave under section 27(1) is to provide to the employer, if so requested by

the employer, evidence that would satisfy a reasonable person as to —

- (a) the death that is the subject of the leave sought; and
- (b) the relationship of the employee to the deceased person.

Division 5 — Public holidays

[29. *Repealed by No. 36 of 2006 s. 6.*]

30. Public holidays, entitlement to pay for

An employee, other than a casual employee, who in any area of the State is not required to work on a day solely because that day is a public holiday in that area, is entitled to be paid as if he or she were required to work on that day.

31. Penalty rates for work on public holidays not a minimum condition

Section 30 is not to be read as requiring an employer to pay a penalty rate in respect of work done on a public holiday.

Division 6 — Parental leave

32. Terms used in Division 6

(1) In this Division —

“adoption”, in relation to a child, is a reference to a child who —

- (a) is not the child or the step-child of the employee or the employee’s spouse or de facto partner;
- (b) is less than 5 years of age; and
- (c) has not lived continuously with the employee for 6 months or longer;

“employee” does not include a casual employee who is not eligible as described in subsection (2) or (3);

“expected date of birth” means the day certified by a medical practitioner to be the day on which the medical practitioner expects the employee or the employee’s spouse or de facto partner, as the case may be, to give birth to a child;

“parental leave” means leave provided for by section 33(1).

- (2) A casual employee is **“eligible”** if the employee —
- (a) has been engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months; and
 - (b) but for an expected birth of a child to the employee or the employee’s spouse or de facto partner or an expected placement of a child with the employee with a view to the adoption of the child by the employee, would have a reasonable expectation of continuing engagement by the employer on a regular and systematic basis.
- (3) Without limiting subsection (2), a casual employee is also **“eligible”** if —
- (a) the employee was engaged by a particular employer on a regular and systematic basis for a sequence of periods during a period (the **“first period of employment”**) of less than 12 months;
 - (b) at the end of the first period of employment, the employee ceased, on the employer’s initiative, to be so engaged by the employer;
 - (c) the employer later again engaged the employee on a regular and systematic basis for a further sequence of periods during a period (the **“second period of employment”**) that started not more than 3 months after the end of the first period of employment;
 - (d) the combined length of the first period of employment and the second period of employment is at least 12 months; and
 - (e) the employee, but for an expected birth of a child to the employee or the employee’s spouse or de facto partner

or an expected placement of a child with the employee with a view to the adoption of the child by the employee, would have a reasonable expectation of continuing engagement by the employer on a regular and systematic basis.

[Section 32 amended by No. 20 of 2002 s. 22(6); No. 28 of 2003 s. 147; No. 36 of 2006 s. 36; amended in Gazette 15 Aug 2003 p. 3688.]

33. Unpaid parental leave, entitlement to

- (1) Subject to sections 35, 36(1) and 37(1), an employee is entitled to take up to 52 consecutive weeks of unpaid leave in respect of —
 - (a) the birth of a child to the employee or the employee's spouse or de facto partner; or
 - (b) the placement of a child with the employee with a view to the adoption of the child by the employee.
- (2) An employee is not entitled to take parental leave unless he or she —
 - (a) has, before the expected date of birth or placement, completed at least 12 months' continuous service with the employer; and
 - (b) has given the employer at least 10 weeks' written notice of his or her intention to take the leave.
- (3) An employee is not entitled to take parental leave at the same time as the employee's spouse or de facto partner but this subsection does not apply to one week's parental leave taken by the employee and the employee's spouse or de facto partner immediately after —
 - (a) the birth of the child; or
 - (b) a child has been placed with them with a view to their adoption of the child.

- (4) An employee may request the employer to extend the period of parental leave to which the employee is entitled under subsection (1) for a further consecutive period of not more than 52 consecutive weeks.
- (5) An employee may request the employer to extend the period of parental leave which the employee is entitled under subsection (3) to take at the same time as the employee's spouse or de facto partner for a further consecutive period of not more than 7 consecutive weeks.
- (6) The entitlement of an employee to parental leave is reduced by any period of parental leave taken by the employee's spouse or de facto partner in relation to the same child, except —
 - (a) the period of one week's leave referred to in subsection (3); or
 - (b) if a request to extend the period of one week's leave referred to in subsection (3) is agreed to by the employer, that period as so extended.
- (7) If a request to extend the period of an employee's parental leave is agreed to by the employer, the reference in subsection (6) to the employee's entitlement to parental leave is a reference to that extended entitlement.

[Section 33 amended by No. 28 of 2003 s. 148 and 150; No. 36 of 2006 s. 37.]

34. Maternity leave to start 6 weeks before birth

A female employee who is pregnant and has given notice of her intention to take parental leave is to start the leave 6 weeks before the expected date of birth unless in respect of any period closer to the expected date of birth a medical practitioner has certified that the employee is fit to work.

[Section 34 amended by No. 28 of 2003 s. 149.]

35. Employee to prove entitlement to parental leave

An employee who has given notice of his or her intention to take parental leave, other than for adoption, is to provide to the employer a certificate from a medical practitioner stating that the employee or the employee's spouse or de facto partner, as the case may be, is pregnant and the expected date of birth.

[Section 35 amended by No. 28 of 2003 s. 150.]

36. Employee to notify employer of spouse's parental leave

- (1) An employee who has given notice of his or her intention to take parental leave or who is actually taking parental leave is to notify the employer of particulars of any period of parental leave taken or to be taken by the employee's spouse or de facto partner in relation to the same child.
- (2) Any notice given under subsection (1) is to be supported by a statutory declaration by the employee as to the truth of the particulars notified.

[Section 36 amended by No. 28 of 2003 s. 150.]

37. Parental leave period, notice to employer of etc.

- (1) An employee who has given notice of his or her intention to take parental leave is to notify the employer of the dates on which the employee wishes to start and finish the leave.
- (2) An employee who is taking parental leave is to notify the employer of any change to the date on which the employee wishes to finish the leave.
- (3) The starting and finishing dates of a period of parental leave are to be agreed between the employee and employer.

38. Return to work after parental leave

- (1) On finishing parental leave, an employee is entitled to the position he or she held immediately before starting parental leave.

- (2) If the position referred to in subsection (1) is not available, the employee is entitled to an available position —
- (a) for which the employee is qualified; and
 - (b) that the employee is capable of performing,
- most comparable in status and pay to that of his or her former position.
- (3) Where, immediately before starting parental leave, an employee was acting in, or performing on a temporary basis the duties of, the position referred to in subsection (1), that subsection applies only in respect of the position held by the employee immediately before taking the acting or temporary position.
- (4) An employee may request the employer to permit the employee, on finishing parental leave, to work on a modified basis in a position to which the employee is entitled under subsection (1) or (2).
- (5) If, on finishing parental leave, an employee has been permitted by the employer to work on a modified basis in a position to which the employee is entitled under subsection (1) or (2), the employee may subsequently request the employer to permit the employee to resume working on the same basis as the employee worked immediately before starting parental leave.
- (6) If, on finishing parental leave, an employee has been permitted by the employer to work on a modified basis in a position to which the employee is entitled under subsection (1) or (2), the employer may subsequently, if entitled to do so under subsection (7)(a) or (b), require the employee to resume working on the same basis as the employee worked immediately before starting parental leave.
- (7) A requirement can be made under subsection (6) if, and only if —
- (a) the requirement is made on grounds relating to the adverse effect that the employee continuing to work on a modified basis would have on the conduct of the

operations or business of the employer and those grounds would satisfy a reasonable person; or

- (b) the employee no longer has a child who has not reached the compulsory education period as defined in section 6 of the *School Education Act 1999*.

- (8) In subsections (4) to (7) —

“modified basis” means a basis that involves the employee working —

- (a) on different days or at different times, or both; or
 - (b) on fewer days or for fewer hours, or both,
- than the employee worked immediately before starting parental leave.

- (9) If —

- (a) before the employee started parental leave a change took place in the days on which, times at which or hours for which the employee worked; and
- (b) the change was a direct result of the employee’s pregnancy,

a reference in subsection (5), (6) or (8) or section 38A(5) or (7) to how the employee worked immediately before starting parental leave is a reference to the employee’s work immediately before the change took place.

[Section 38 amended by No. 36 of 2006 s. 38.]

38A. How and when a request or requirement as to parental leave or return to work can be made

- (1) A request under section 33(4) or (5) or 38(4) or (5) is to be made by notice in writing.
- (2) A request under section 33(4) is to be made at least 4 weeks before the day on which the employee finishes the period of parental leave to which the employee is entitled under section 33(1).

- (3) A request under section 33(5) can be made at any time before the end of the week referred to in section 33(3).
- (4) A request under section 38(4) is to be made at least 7 weeks before the day on which the employee finishes parental leave.
- (5) A request under section 38(5) is to be made at least 6 weeks before the day on which the employee wishes to resume working on the same basis as the employee worked immediately before starting parental leave.
- (6) Subject to subsection (2), (3) or (4), whichever is applicable, a request under section 33(4) or (5) or 38(4) can be made even if the birth or placement occurred before the coming into operation of section 39 of the *Labour Relations Legislation Amendment Act 2006*.
- (7) A requirement under section 38(6) is to be made by notice in writing at least 6 weeks before the day on which the employer wishes the employee to resume working on the same basis as the employee worked immediately before starting parental leave, and the notice is to set out the reasons for the requirement.

[Section 38A inserted by No. 36 of 2006 s. 39.]

38B. Grounds for determining a request or making a requirement as to parental leave or return to work

- (1) The employer is to agree to a request under section 33(4) or (5) or 38(4) unless —
 - (a) the employer, having considered the employee's circumstances, is not satisfied that the request is genuinely based on the employee's parental responsibilities; or
 - (b) there are grounds to refuse the request relating to the adverse effect that agreeing to the request would have on the conduct of the operations or business of the employer and those grounds would satisfy a reasonable person.

- (2) The employer is to agree to a request under section 38(5) unless there are grounds to refuse the request relating to the adverse effect that agreeing to the request would have on the conduct of the operations or business of the employer and those grounds would satisfy a reasonable person.
- (3) The employer is to give the employee written notice of the employer's decision on a request under section 33(4) or (5) or 38(4) or (5) and, if the request is refused, the notice is to set out the reasons for the refusal.
- (4) Without limiting subsection (1) or section 38(7)(a) the grounds on which a refusal under subsection (1)(b), or a requirement under section 38(6), may be based include the following —
 - (a) cost;
 - (b) lack of adequate replacement staff;
 - (c) loss of efficiency;
 - (d) impact on the production or delivery of products or services by the employer.
- (5) If a request is made under section 33(4) or (5) or 38(4) or (5), the subject matter of the request may be enforced as a minimum condition of employment in a manner set out in section 7, and in any enforcement proceedings the onus lies on the employer to demonstrate that the refusal of such a request was justified under subsection (1) or (2), whichever is applicable.

[Section 38B inserted by No. 36 of 2006 s. 39.]

39. Effect of parental leave on service record

Absence on parental leave —

- (a) does not break the continuity of service of an employee; and
- (b) is not to be taken into account when calculating the period of service for a purpose of a relevant employer-employee agreement, award or contract of employment.

*[Section 39 amended by No. 20 of 2002 s. 22(7); amended in
Gazette 15 Aug 2003 p. 3688.]*

Part 5 — Minimum conditions for employment changes with significant effect, and redundancy

40. Terms used in Part 5

(1) In this Part —

“employee” does not include a casual employee or an apprentice or trainee;

“redundant” means being no longer required by an employer to continue doing a job because the employer has decided that the job will not be done by any person.

(2) For the purposes of this Part, an action of an employer has a significant effect on an employee if —

(a) there is to be a major change in the —

(i) composition, operation or size of; or

(ii) skills required in,

the employer’s work-force that will affect the employee;

(b) there is to be elimination or reduction of —

(i) a job opportunity;

(ii) a promotion opportunity; or

(iii) job tenure,

for the employee;

(c) the hours of the employee’s work are to significantly increase or decrease;

(d) the employee is to be required to be retrained;

(e) the employee is to be required to transfer to another job or work location; or

(f) the employee’s job is to be restructured.

[Section 40 amended by No. 20 of 2002 s. 174.]

41. Employee to be informed

- (1) Where an employer has decided to —
 - (a) take action that is likely to have a significant effect on an employee; or
 - (b) make an employee redundant,

the employee is entitled to be informed by the employer, as soon as reasonably practicable after the decision has been made, of the action or the redundancy, as the case may be, and discuss with the employer the matters mentioned in subsection (2).

- (2) The matters to be discussed are —
 - (a) the likely effects of the action or the redundancy in respect of the employee; and
 - (b) measures that may be taken by the employee or the employer to avoid or minimize a significant effect,as the case requires.

42. Employer not bound to disclose prejudicial information

Nothing in this Act requires an employer, when providing information or holding a discussion under section 41(1) to disclose information that may seriously harm —

- (a) the employer's business undertaking; or
- (b) the employer's interest in the carrying on, or disposition, of the business undertaking.

43. Paid leave for job interviews, entitlement to

- (1) An employee, other than a seasonal worker who has been informed that he or she has been, or will be, made redundant is entitled to paid leave of up to 8 hours for the purpose of being interviewed for further employment.
- (2) The 8 hours need not be consecutive.

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- (3) An employee who claims to be entitled to paid leave under subsection (1) is to provide to the employer evidence that would satisfy a reasonable person of the entitlement.
- (4) Payment for leave under subsection (1) is to be made in accordance with section 18.

[Section 43 amended by No. 20 of 2002 s. 175.]

Part 6 — Keeping of records

44. Employment records to be kept by employer

- (1) Subsection (2) does not apply to an employee during any period when the employee's contract of employment is governed by an employer-employee agreement or an award.
- (2) An employer must ensure that details are recorded of —
 - (a) the employee's name and, if the employee is under 21 years of age, his or her date of birth;
 - (aa) the date on which the employee commenced employment with the employer;
 - (ab) the total number of hours worked by the employee in each week of the employee's employment with the employer unless the employee's contract of employment provides for an annual salary exceeding \$45 000 or the salary specified, or worked out in a manner specified, by the regulations;
 - (b) the gross and net amounts paid to the employee under the contract of employment, and all deductions and the reasons for them;
 - (c) all leave taken by the employee, whether paid, partly paid or unpaid;
 - (ca) such details as are necessary for the calculation of the entitlement to, and payment for, long service leave under the *Long Service Leave Act 1958*; and
 - (d) other matters prescribed by the regulations.
- (3) The employer must ensure that —
 - (a) the records are kept in accordance with the regulations; and
 - (b) each entry in relation to long service leave is retained during the employment of the employee and for not less

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than 7 years thereafter, and any other entry is retained for not less than 7 years after it is made.

- (4) A contravention of subsection (3) is not an offence but that subsection is a civil penalty provision for the purposes of section 83E of the IR Act.
- (5) Subsection (4) extends to a contravention that occurred within the period of 12 months ending on the coming into operation of section 40 of the *Labour Relations Legislation Amendment Act 2006* unless the employer was charged with an offence in respect of that contravention.

[Section 44 amended by No. 79 of 1995 s. 64; No. 20 of 2002 s. 22(7) and 176; No. 36 of 2006 s. 40; amended in Gazette 15 Aug 2003 p. 3688.]

45. Access to records kept by employer

- (1) An employer, on request in writing by a relevant person, must —
 - (a) produce to the person the records under section 44 relating to an employee to whom that section applies; and
 - (b) let the person inspect the records.
- (1a) A contravention of subsection (1) is not an offence but that subsection is a civil penalty provision for the purposes of section 83E of the IR Act.
- (1b) Subsection (1a) extends to a contravention that occurred within the period of 12 months ending on the coming into operation of section 41 of the *Labour Relations Legislation Amendment Act 2006* unless the employer was charged with an offence in respect of that contravention.
- (2) Relevant persons are —
 - (a) the employee or a person authorised in writing by the employee; and

- (b) an industrial inspector under the IR Act.
- (3) The duty placed on an employer by subsection (1) —
 - (a) continues so long as the record is required to be kept under section 44(3)(b);
 - (b) is not affected by the fact that the employee is no longer employed by the employer;
 - (c) includes the further duties —
 - (i) to let the relevant person enter premises of the employer for the purposes of inspection of the records; and
 - (ii) to let the relevant person take copies of or extracts from the records;
- and
- (d) must be complied with not later than the end of the next pay period after the request for inspection is received.

[Section 45 amended by No. 20 of 2002 s. 177; No. 36 of 2006 s. 41.]

[46.] *Repealed by No. 36 of 2006 s. 42.]*

Part 7 — Regulations

47. Regulations

The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.

Schedule 1

[Section 29]

Public holidays

The following are public holidays —

New Year's Day.

Australia Day.

Labour Day.

Good Friday.

Easter Monday.

Anzac Day.

Foundation Day.

Celebration Day for the anniversary of the birthday of the reigning
Sovereign (the day appointed by proclamation published in the
Gazette under the *Public and Bank Holidays Act 1972*).

Christmas Day.

Boxing Day.

[Schedule 1 amended by No. 74 of 2003 s. 84.]

Notes

- ¹ This is a compilation of the *Minimum Conditions of Employment Act 1993* and includes the amendments made by the other written laws referred to in the following table. The table also contains information about any reprint.

Compilation table

Short title	Number and year	Assent	Commencement
<i>Minimum Conditions of Employment Act 1993</i>	14 of 1993	23 Nov 1993	1 Dec 1993 (see s. 2 and <i>Gazette</i> 30 Nov 1993 p. 6439)
<i>Industrial Relations Legislation Amendment and Repeal Act 1995</i> s. 64 and 66(5) and (6)	79 of 1995	16 Jan 1996	s. 64: 16 Jan 1996 (see s. 3(1)); s. 66(5) and (6): 18 May 1996 (see s. 3(2) and <i>Gazette</i> 14 May 1996 p. 2019)
<i>Minimum Conditions of Employment Amendment Act 1996</i>	58 of 1996	11 Nov 1996	1 Dec 1993 (see s. 3)
<i>Labour Relations Legislation Amendment Act 1997</i> s. 39	3 of 1997	23 May 1997	23 May 1997 (see s. 2(1))
Reprint of the <i>Minimum Conditions of Employment Act 1993</i> as at 4 Jun 1997 (includes amendments listed above)			
<i>Labour Relations Reform Act 2002</i> s. 22 and Pt. 10 Div. 1 ^{2, 3, 4, 5}	20 of 2002	8 Jul 2002	Pt. 10 Div. 1: 1 Aug 2002 (see s. 2 and <i>Gazette</i> 26 Jul 2002 p. 3459); s. 22: 15 Sep 2002 (see s. 2 and <i>Gazette</i> 6 Sep 2002 p. 4487)
Reprint of the <i>Minimum Conditions of Employment Act 1993</i> as at 4 Oct 2002 (includes amendments listed above)			
<i>Acts Amendment (Equality of Status) Act 2003</i> Pt. 45	28 of 2003	22 May 2003	1 Jul 2003 (see s. 2 and <i>Gazette</i> 30 Jun 2003 p. 2579)
<i>Labour Relations Reform (Consequential Amendments) Regulations 2003</i> r. 9 published in <i>Gazette</i> 15 Aug 2003 p. 3685-92			15 Sep 2003 (see r. 2)
<i>Statutes (Repeals and Minor Amendments) Act 2003</i> s. 84	74 of 2003	15 Dec 2003	15 Dec 2003 (see s. 2)
<i>Courts Legislation Amendment and Repeal Act 2004</i> s. 141	59 of 2004	23 Nov 2004	1 May 2005 (see s. 2 and <i>Gazette</i> 31 Dec 2004 p. 7128)

Short title	Number and year	Assent	Commencement
<i>Criminal Procedure and Appeals (Consequential and Other Provisions) Act 2004 s. 78</i> ⁶	84 of 2004	16 Dec 2004	2 May 2005 (see s. 2 and <i>Gazette</i> 31 Dec 2004 p. 7129 (correction in <i>Gazette</i> 7 Jan 2005 p. 53))
Reprint 3: The Minimum Conditions of Employment Act 1993 as at 5 May 2006 (includes amendments listed above)			
<i>Labour Relations Legislation Amendment Act 2006 Pt. 2, s. 21 and Pt. 6</i> ⁷	36 of 2006	4 Jul 2006	4 Jul 2006 (see s. 2(1))

² The *Labour Relations Reform Act 2002* s. 165(3)-(5) reads as follows:

“

- (3) An agreement continues to have effect on and from the commencement day in respect of the employee’s entitlement to annual leave that accrued before the commencement day as if former section 8 had not been amended by this Act.
- (4) An agreement that provides for the foregoing of the employee’s entitlement to annual leave that would have accrued after the commencement day if former section 8 had not been amended by subsection (1) has effect on and from the commencement day as if it provided for the foregoing of 50% of that entitlement.
- (5) In this section —
 - “**agreement**” means an agreement —
 - (a) under former section 8 for an employee to forgo his or her entitlement to annual leave; and
 - (b) that is in effect immediately before the commencement day;
 - “**commencement day**” means the day on which subsection (1) comes into operation;
 - “**former section 8**” means section 8 of the *Minimum Conditions of Employment Act 1993* as it was in effect immediately before the commencement day.

”.

³ The *Labour Relations Reform Act 2002* s. 167 repealed the former Part 3 (including the former s. 15 relating to minimum rates of pay). Section 168 and Sch. 1 of that Act read as follows:

“

168. Transitional provisions for minimum weekly rates of pay

- (1) A minimum weekly rates of pay order under section 15 of the *Minimum Conditions of Employment Act 1993* that has effect immediately before the commencement of Part 10 of the *Labour Relations Reform Act 2002* has no effect after that commencement.
- (2) Schedule 1 and subsections (3) and (4) have effect for the period commencing immediately after the commencement of Part 10 of the *Labour Relations Reform Act 2002* and ending when the first order under section 51F(1) of the *Industrial Relations Act 1979* has effect.
- (3) Schedule 1 clause 2 has the same effect as if it were a provision of an order under section 51F(1) of the *Industrial Relations Act 1979* setting the minimum weekly rate of pay in relation to employees who have reached 21 years of age and who are not apprentices or trainees.
- (4) Schedule 1 clause 4 has the same effect as if it were a provision of an order under section 51F(1) of the *Industrial Relations Act 1979* setting the minimum weekly rate of pay in relation to apprentices and trainees.

Schedule 1 — Transitional minimum weekly rates of pay

[s. 168]

1. Interpretation

Unless the contrary intention appears, words and expressions used in this Schedule have the same respective meanings as they have in the *Minimum Conditions of Employment Act 1993*.

2. Minimum weekly rate of pay for employees 21 or more years of age

The minimum weekly rate of pay applicable at a particular time to employees who have reached 21 years of age but who are not apprentices or trainees is the rate for the minimum adult weekly award wage for employees who have reached 21 years of age and who are not apprentices or trainees, as provided for in the General Order made under section 51(2) of the *Industrial Relations Act 1979* that is in effect at that time.

3. Minimum weekly rate of pay for employees less than 21 years of age

- (1) The minimum weekly rate of pay applicable at a particular time to employees who are of the age mentioned in the first column in the Table to this subclause but who are not apprentices or trainees is the percentage, set out opposite that age in the second column in the Table of the rate referred to in clause 2 in effect at that time, rounded up to the nearest 10 cents.

Table

Age	Percentage of 21 year old rate
20 years	90%
19 years	80%
18 years	70%
17 years	60%
16 years	50%
under 16 years	40%

- (2) Subclause (1) is for information only and if there is any inconsistency between subclause (1) and section 13 of the *Minimum Conditions of Employment Act 1993*, the section prevails.

4. Minimum weekly rate of pay for apprentices and trainees

- (1) The minimum weekly rate of pay for an apprentice or trainee in relation to whom a workplace agreement or an employer-employee agreement is not in force is the rate of pay that is provided for under an award that applies to that apprentice or trainee.
- (2) The minimum weekly rate of pay for an apprentice or trainee in relation to whom a workplace agreement or an employer-employee agreement is in force is the rate of pay that is provided for under an award that would, if the workplace agreement or employer-employee agreement were not in force, apply to that apprentice or trainee.

”.

⁴ The *Labour Relations Reform Act 2002* s. 169(2) and (3) read as follows:

“

- (2) An entitlement to paid leave for illness or injury that accrued before the commencement day is preserved on and from the commencement day as if former section 19 had not been amended by this Act.
- (3) In this section —

“commencement day” means the day on which subsection (1) comes into operation;

“former section 19” means section 19 of the *Minimum Conditions of Employment Act 1993* as it was in effect immediately before the commencement day.

”.

⁵ The *Labour Relations Reform Act 2002* s. 173(2) and (3) read as follows:

“

(2) An entitlement to paid annual leave that accrued before the commencement day is preserved on and from the commencement day as if former section 23 had not been amended by this Act.

(3) In this section —

“commencement day” means the day on which subsection (1) comes into operation;

“former section 23” means section 23 of the *Minimum Conditions of Employment Act 1993* as it was in effect immediately before the commencement day.

”.

⁶ The amendment in the *Criminal Procedure and Appeals (Consequential and Other Provisions) Act 2004* s. 78 to amend s. 46(1) is not included because the subsection it sought to amend had been replaced by the *Courts Legislation Amendment and Repeal Act 2004* s. 141.

⁷ The *Labour Relations Legislation Amendment Act 2006* s. 31(2) reads as follows:

“

(2) Nothing in Part 4 Division 2 of the *Minimum Conditions of Employment Act 1993* requires an untaken entitlement that arose under section 19(1) or 20A(1) of that Act as enacted before the commencement of this section to be carried over from the year in which the entitlement arose to the next year.

”.