

WESTERN AUSTRALIA

**MINIMUM CONDITIONS OF
EMPLOYMENT ACT 1993**

(No. 14 of 1993)

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WESTERN AUSTRALIA

**MINIMUM CONDITIONS OF
EMPLOYMENT ACT 1993**

No. 14 of 1993

AN ACT to provide for minimum conditions of employment for employees in Western Australia and for related purposes.

[Assented to 23 November 1993]

The Parliament of Western Australia enacts as follows:

PART 1 — PRELIMINARY**Short title**

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

Commencement

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

Interpretation

3. In this Act, unless the contrary intention appears —

“**award**” means an award made under the *Industrial Relations Act 1979* and includes any industrial agreement or order under that Act;

“**casual employee**” means an employee who is employed on the basis that —

- (a) the employment is casual; and
- (b) there is no entitlement to paid leave,

and who is informed of those conditions of employment before he or she is engaged;

“**de facto spouse**” means a person who is co-habiting with another person as that person’s spouse, although not actually married to that person;

“employee” means —

- (a) a person who is an employee within the meaning of the *Industrial Relations Act 1979*, but for the purposes of this Act section 7B of that Act is to be disregarded;
- (b) a person to whom section 43 (1) of the *Workplace Agreements Act 1993* applies;

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 *Industrial Relations Act 1979*, but for the purposes of this Act section 7B of that Act is to be disregarded;

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

“minimum condition of employment” means —

- (a) a rate of pay prescribed by this Act;
- (b) a condition for leave prescribed by this Act; or
- (c) a condition prescribed by Part 5;

“workplace agreement” means a workplace agreement that is in force under the *Workplace Agreements Act 1993*.

Application to Crown

4. This Act binds the Crown.

PART 2 — APPLICATION OF MINIMUM CONDITIONS

Generally, minimum conditions apply unless conditions more favourable

5. (1) The minimum conditions of employment extend to and bind all employees and employers and are taken to be implied —

- (a) in any workplace agreement;
- (b) in any award; or
- (c) if a contract of employment is not governed by a workplace agreement or an award, in that contract.

(2) A provision in, or condition of, a workplace 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).

Application offshore

6. (1) Where under section 3 of the *Industrial Relations Act 1979* 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.

(2) In subsection (1), “**offshore area**” means the areas referred to in section 3 (3) of the *Industrial Relations Act 1979*.

Enforcement of minimum conditions

7. A minimum condition of employment may be enforced —

- (a) where the condition is implied in a workplace agreement, under Division 1 of Part 5 of the *Workplace Agreements Act 1993*;
- (b) where the condition is implied in an award, under Part III of the *Industrial Relations Act 1979*; or
- (c) where the condition is implied in a contract of employment, under section 83 of the *Industrial Relations Act 1979* 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.

Limited contracting-out of annual leave conditions

8. An employer and employee may agree that the employee may forgo his or her entitlement to annual leave under Division 3 of Part 4 if —

- (a) the employee is given an equivalent benefit in lieu of the entitlement; and
- (b) the agreement is in writing.

Limited contracting-out of minimum wage entitlement

9. (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 within the meaning of Part 3 that is applicable to the employee's age 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.

PART 3 — MINIMUM RATES OF PAY

Interpretation

10. In this Part —

“**Commission**” means Commission in Court Session within the meaning of the *Industrial Relations Act 1979*;

“**minimum weekly rate of pay**” means a minimum weekly rate of pay prescribed by an order under this Part.

Entitlement to a minimum rate of pay

11. An employee is entitled to be paid —

(a) in the case of a full-time employee —

- (i) the minimum weekly rate of pay (applicable to the employee’s age) for each week worked by the employee; and
- (ii) for each hour after 40 hours worked by the employee in a week, the minimum weekly rate of pay (applicable to the employee’s age) divided by not more than 40, or such other divisor as is prescribed by an order published under this Part, for that hour; or

(b) in the case of a part-time employee —

- (i) who is paid a proportion of a full-time employee’s pay; or
- (ii) who is paid according to the number of hours worked,

the minimum weekly rate of pay (applicable to the employee's age) divided by not more than 40, or such other divisor as is prescribed by an order published under this Part, for each hour worked by the employee.

Minimum rate of pay for casual employees

12. A casual employee is entitled to be paid 15% more than the amount which he or she is entitled to be paid under section 11 (a) or (b) as the case may be.

Minimum rates of pay on commencement

13. (1) Not later than 7 days after the commencement of this Part, the Minister is to publish in the *Gazette* an order prescribing —

- (a) the minimum weekly rate of pay in respect of employees who are 21 or more years of age;
- (b) the minimum weekly rates of pay in respect of employees who have not reached 21 years of age which may provide for different rates of pay according to the age of such employees; and
- (c) if the divisor referred to in section 11 (b) is to be less than 40, the divisor.

(2) The rate published under subsection (1) (a) is to be the same as the minimum wage prescribed by the General Order under section 50 or 51 of the *Industrial Relations Act 1979* in force immediately before the commencement of this Part.

Commission to review minimum rates of pay each year

14. The Commission is to —

- (a) review the minimum weekly rates of pay; and

(b) make a recommendation to the Minister,
not later than 31 May each year.

Minister to prescribe minimum rates of pay

15. (1) The Minister is to determine the minimum weekly rates of pay by either —

- (a) accepting the recommendation under section 14; or
- (b) determining a rate or rates different from the recommendation.

(2) Subject to subsection (4), the Minister is to publish in the *Gazette* an order prescribing —

- (a) the minimum weekly rates of pay determined under subsection (1); and
- (b) if the divisor referred to in section 11 (b) is to be less than 40, the divisor.

(3) The Minister is not to publish under subsection (2), orders less than 12 months apart.

(4) The Minister is not required to publish an order under subsection (2) unless he or she determines under subsection (1) a rate for a particular class of employee that is different from the rate for that class of employee in effect at the time of the determination.

Minimum rates and divisor effective on publication

16. A minimum weekly rate of pay and divisor prescribed by order under section 13 (1) or 15 (2) have effect from the day of publication of the order in the *Gazette* and continue in force until an order prescribing —

- (a) a rate for a particular class of employee that is different from the rate for that class of employee in effect at the time of the determination; or

(b) another divisor,

as the case may be, is so published.

Minimum rate not to include allowances etc.

17. No penalty rate, loading or allowance of any kind is to be prescribed by order under this Part.

PART 4 — MINIMUM LEAVE CONDITIONS

Division 1 — Preliminary

Assessment of payment for leave

18. (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 workplace 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 workplace 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.

Division 2 — Leave for illness or injury

Entitlement to leave for sickness etc.

19. (1) Subject to sections 20 and 22, an employee, other than a casual employee, who is unable to work as a result of the

employee's illness or injury, is entitled to be paid for periods of absence from work resulting from the illness or injury —

- (a) in the case of a full-time employee, up to 10 working days or 80 hours, whichever is the lesser, each year; or
- (b) in the case of a part-time employee —
 - (i) who is paid a proportion of a full-time employee's pay; or
 - (ii) who is paid according to the number of hours worked,

the proportion of the number of hours worked each week that the average number of hours worked each week bears to 40, up to 80 hours each year.

(2) An entitlement under subsection (1) accrues *pro rata* on a weekly basis.

(3) In subsection (1), “**year**” does not include any period of unpaid leave.

No entitlement to sick leave in some cases

20. 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 his or her employment, the employee is not entitled to be paid for his or her absence from work resulting from the illness or injury.

Accumulation, pay in lieu, of sick leave not minimum conditions

21. Nothing in this Division requires —

- (a) an employee's untaken entitlement under section 19 (1) to be carried over from the year in which the entitlement arose to the next year; or
- (b) 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.

Proof in support of claim for leave

22. An employee who claims to be entitled to paid leave under section 19 (1) is to provide to the employer evidence that would satisfy a reasonable person of the entitlement.

Division 3 — Annual leave

Entitlement to annual leave

23. (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 160 hours.

(2) An entitlement under subsection (1) accrues *pro rata* on a weekly basis.

(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.

Payment for annual leave

24. (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 an employee's employment terminates before the employee has taken annual leave to which he or she is entitled, the employee is to be paid for the untaken leave.

When annual leave to be taken

25. (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.

General Order as to annual leave of no effect

26. The General Order prescribing minimum conditions as to annual leave under section 50 (5) of the *Industrial Relations Act 1979* in force at the commencement of this Act is of no effect after the commencement.

Division 4 — Bereavement leave

Entitlement to bereavement leave

27. (1) Subject to section 28, on the death of —
- (a) the spouse or *de facto* spouse of an employee;

- (b) the child or step-child of an employee;
- (c) the parent or step-parent of an employee; or
- (d) any other person who, immediately before that person's death, lived with the employee as a member of the employee's family,

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.

Proof in support of claim for leave

28. 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

Interpretation

29. In this Division —

“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.

Entitlement to pay for public holidays

30. 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.

Penalty rates for work on public holidays not a minimum condition

31. 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

Interpretation

32. In this Division —

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

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

“continuous service” means service under an unbroken contract of employment and includes —

- (a) any period of parental leave; and
- (b) any period of leave or absence authorized by the employer or by a workplace agreement, an award, a contract of employment or this Act;

“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, as the case may be, to give birth to a child;

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

“spouse” includes a *de facto* spouse.

Entitlement to parental leave

33. (1) Subject to sections 35, 36 (1) and 37 (1), an employee, other than a casual 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
- (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 but this subsection does not apply to one week’s parental leave —

- (a) taken by the male parent immediately after the birth of the child; or
- (b) taken by the employee and the employee’s spouse immediately after a child has been placed with them with a view to their adoption of the child.

(4) The entitlement to parental leave is reduced by any period of parental leave taken by the employee's spouse in relation to the same child, except the period of one week's leave referred to in subsection (3).

Maternity leave to start 6 weeks before birth

34. A female employee who has given notice of her intention to take parental leave, other than for an adoption, 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.

Medical certificate

35. 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, as the case may be, is pregnant and the expected date of birth.

Notice of spouse's parental leave

36. (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 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.

Notice of parental leave details

37. (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.

Return to work after parental leave

38. (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.

Effect of parental leave on employment

39. 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 workplace agreement, award or contract of employment.

**PART 5 — MINIMUM CONDITIONS FOR EMPLOYMENT
CHANGES WITH SIGNIFICANT EFFECT, AND
REDUNDANCY**

Interpretation

40. (1) In this Part —

“**employee**” does not include a casual employee or an apprentice or industrial trainee within the meaning of the *Industrial Training Act 1975*;

“**redundant**” means being no longer required by an employer to continue doing a job because, for a reason that is not a usual reason for change in the employer’s work-force, 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.

Employee to be informed

41. (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.

Employer not bound to disclose prejudicial information

42. 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.

Leave for job interviews

43. (1) An employee 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.

(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.

PART 6 — KEEPING OF RECORDS

Keeping of employment records

44. (1) Subsection (2) does not apply to an employee during any period when the employee's contract of employment is governed by a workplace 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;
 - (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; 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 is retained for not less than 7 years after it is made.

Penalty: \$5 000.

Access to records kept by employer

45. (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.

Penalty: \$5 000.

(2) Relevant persons are —

- (a) the employee or a person authorized in writing by the employee; and
- (b) an industrial inspector under the *Industrial Relations Act 1979*.

(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.

Enforcement

46. (1) An industrial magistrate's court established under Part III of the *Industrial Relations Act 1979* has jurisdiction to hear and determine complaints for the offences in this Part under and in accordance with the *Justices Act 1902*, and that jurisdiction is exclusive of any other court except where an appeal lies to that other court.

(2) In subsection (1), the reference to the *Justices Act 1902* includes Part VIII of that Act.

PART 7 — REGULATIONS

Regulations

47. 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

Public holidays

The following are public holidays —

New Year's Day.

Australia Day.

Labour Day.

Good Friday.

Easter Monday.

Anzac Day.

Foundation Day (the day appointed by proclamation published in the *Gazette* under the *Public and Bank Holidays Act 1972*).

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.