



A Comprehensive Guide to the Victorian Long Service Leave Act 1992

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01

Long service leave laws in Victoria

Long service leave is a long-standing entitlement for Australian employees. The *Long Service Leave Act 1992* (LSL Act) sets out arrangements for long service leave in Victoria.

This brochure explains the entitlements and obligations of employees and employers under the LSL Act.

It is important to note that, as of 1 January 2006, there are changes to the LSL Act. This publication explains how the new rules operate. For extra clarity, the information about the post 1 January 2006 entitlement or obligation is also placed in a box.

02

Who does the LSL Act apply to?

Most Victorian employees are covered by the LSL Act.

An employee is defined by the Act as a person employed by an employer to do any work for hire or reward, and includes an apprentice and any person whose oral or written contract of employment requires him or her to learn or to be taught any occupation, such as a trainee.

A part time employee is entitled to long service leave paid on a pro rata basis according to the number of hours which are worked.

However, the LSL Act does not apply to employees who are covered by a federal award, a certified agreement, or an Australian Workplace Agreement where that award or agreement contains its own long service leave provisions. The LSL Act also does not apply to employees who have their long service entitlement provided by another Act or regulation, such as workers in building and construction, where it is provided by the CoINVEST scheme.

It is important for employees and employers to check if their employment is covered by a federal award, or certified agreement, and if that award or agreement contains its own long service leave provisions. This can be done by calling WageLine on 1300 363 264. To check whether an Australian Workplace Agreement (AWA) contains long service leave provisions contact should be made with the Office of the Employment Advocate on 1300 366 632.

If the relevant award or agreement is silent on long service leave, the LSL Act applies.

An employee may have a more generous entitlement than the LSL Act provides under an oral or written common law employment contract or agreement. However, a contract cannot legally contain a long service leave entitlement that is inferior to the entitlement provided in the LSL Act. If you are not sure what a common law employment contract or agreement is, please contact Industrial Relations Victoria on 1800 287 287.

Independent contractors and business owners are usually not regarded as employees and would not be eligible for long service leave provided by the LSL Act.



03

Are casual or seasonal employees covered by the LSL Act?

Yes. The LSL Act has historically not included specific reference to casual employees. However, over the past few decades, courts have determined that many casuals were entitled to long service leave, provided that the casual employee had continuous employment with one employer.

Before 1 January 2006, the general position is that if a casual employee has:

- > a continuing, regular and systematic pattern of employment;
- > an obligation to attend work; and
- > no breaks in service other than routine holidays, sick days or leave authorised by the employer;

then the employee is likely to be entitled to long service leave.

A casual hourly rate cannot be loaded to include the obligation of the employer to pay long service leave. Indeed, it is illegal to pay an employee in lieu of long service leave (section 74 of the LSL Act).

After 1 January 2006, the LSL Act explicitly includes casual and seasonal employees, provided that:

- > the employee has had continuous employment with one employer; and
- > there has been no more than a three month absence between two periods of employment.

The LSL Act also specifies that even if there is an absence of more than three months between two periods of employment, the employment may still be regarded as continuous if such an absence is in accordance with the terms of the employment.

Example

Valda works on a seasonal basis in the agricultural industry at Russell's Plant Nursery. Valda does not work in the coldest winter months, when there is a dormant period for the plants. The dormant period ranges from 5 weeks to a few months over the many years of working at Russell's. However, Valda's regular work always recommences after the winter shut down, although that gap might be variable according to the severity of a winter.

Valda will be eligible for long service in accordance with the terms of her employment.

Example

Matthew is a casual zoology tutor at a Victorian university. He has been employed by the same university for 13 years. Matthew and the university have an agreement that Matthew does not teach between November and March, due to the university non-teaching period.

Matthew therefore has a four month break from work each year. However, this is in accordance with his contract of employment and his employment is to be regarded as continuous.

Matthew will be eligible for long service leave in accordance with the terms of his employment.

04

What is the entitlement to long service leave?

Long service leave accrues at the rate of one week for each 60 weeks of employment with one employer, that is, at approximately 0.866 weeks per year.

For employees with 15 years or more of continuous employment with one employer

An employee with continuous employment with one employer is entitled to 13 weeks paid long service leave, taken in the form of a break from work, at 15 years.

For every 5 years of continuous employment after this initial 15 years, the employee is entitled to an additional 4 and one third weeks of leave.

For employees with between 10 and 15 years of continuous employment with one employer

After 1 January 2006, an employee will be entitled to take long service leave after 10 years of continuous employment with one employer. The entitlement is calculated on a pro-rata basis. Based on the formula of one week per 60 weeks of employment, an employee will be entitled to take approximately 8.66 weeks long service leave after 10 years of continuous employment.

It is very important to note that the entitlement to take leave after 10 years of continuous employment will be phased in.

For employees who have commenced employment before 1 January 2006, when working out when the employee is entitled to his or her 10 year long service leave entitlement, the employee's employment period prior to 1 January 2006 is to be reduced by one third. The table below demonstrates how this will work in practice.

All time worked after 1 January 2006 is counted with no reductions.

Calculating when an employee will be entitled to the 10 year long service leave entitlement, in accordance with the phasing in arrangements (table shows completed years only)

How many years have I been employed in my current job? (at 1 Jan 06)	1	2	3	4	5	6	7	8
How many years are recognised for the purpose of long service leave accrual? (at 1 Jan 06)	0.67	1.33	2.00	2.67	3.33	4.00	4.67	5.33
How many extra years do I need to work before I can take my leave?	9.33	8.67	8.00	7.33	6.67	6.00	5.33	4.67
How many years service will I have completed before I can take leave?	10.33	10.67	11.00	11.33	11.67	12.00	12.33	12.67
How many weeks leave would I be entitled to?	8.96	9.24	9.53	9.82	10.11	10.40	10.69	10.98



05

Taking long service leave - when and how

Although the LSL Act provides that the employee has an entitlement to take leave, the actual date the leave commences should be agreed between the employer and the employee.

An employee should take the initial entitlement in one period. At the employee's request, and with the agreement of the employer, the initial leave entitlement can be split into up to three periods.

Can long service leave be taken in advance?

Yes. The employee and employer may agree on the leave being taken before an entitlement is actually due. If the employment is then terminated before the long service leave is accrued, the employer may recover the amount of any advance payment.

Can the taking of long service leave be deferred?

Yes. an employee can request deferral of their long service leave. The deferral must be confirmed in a written agreement with the employer. The rate of pay when the employee then takes the long service leave will be the rate agreed in writing between the employee and employer. The rate cannot be less than the employee's ordinary rate of pay at the time the leave was due.

9	10	11	12	13	14	15
6.00	6.67	7.33	8.00	8.67	9.33	10.00
4.00	3.33	2.67	2.00	1.33	0.67	0.00
13.00	13.33	13.67	14.00	14.33	14.67	15.00
11.27	11.56	11.84	12.13	12.42	12.71	13.00

Can the period of leave be extended?

After 1 January 2006, an employee and employer may make an agreement which allows the employee to take a period of leave at half pay. For example, an employee with 13 weeks accrued leave could take a 26 week break at half pay.

06

What happens if employment is terminated, or an employee resigns, before all leave is taken?

On the day that employment ends an employee is entitled to receive, in full, payment for any untaken long service leave to which the employee is entitled. This will apply whether the employee has resigned, has had their employment terminated by the employer, or has died.

It is an offence for an employer to not pay an employee the full amount of the employee's long service leave entitlement on the day the employment ends.

After 1 January 2006, the penalty for this offence will increase to 20 penalty units for the employer. If an employer is found guilty of this offence, a criminal conviction may also be recorded.

For employees ceasing employment after at least seven years of continuous employment with one employer (applies after 1 January 2006)

After 1 January 2006, an employee with seven years or more of continuous employment with one employer is entitled to be paid long service leave at the standard accrual rate of one week for each 60 weeks of continuous employment, regardless of the reason for the termination of the employment.

There is no entitlement to a payment of accrued long service leave unless there are at least seven years of continuous employment.

Example

Marina resigns from her employment after seven years and 6 months employment.

Marina's long service leave entitlement is calculated as follows:

- 1. 7 years multiplied by 52 weeks = 364 weeks.*
- 2. There are 4.33 weeks in a month. 6 months multiplied by 4.33 weeks = 25.98 weeks.*
- 3. 364 weeks plus 25.98 weeks = 389.98 weeks in total.*
- 4. We then need to divide the total weeks by 60, as Marina will receive one week's long service leave for each 60 weeks of service. We round 389.98 up to 390 weeks and then divide 390 by 60, which equals 6.5.*

Marina is therefore entitled to payment of 6.5 weeks long service leave on the day her employment ends.

Example

Rosa resigns from her employment after 6 years and 9 months.

As Rosa has not reached seven years of continuous employment, there is no entitlement to a payment of accrued long service leave.

See page 9 for employees ceasing employment with a business after 10 years. This entitlement applies before 1 January 2006.



For employees ceasing employment after at least 10 years of continuous employment with one employer (applies before 1 January 2006)

Before 1 January 2006, there is no entitlement to a payment of accrued long service leave unless the employee has reached at least 10 years of continuous employment. At 10 years, the entitlement is to be paid at the standard accrual rate of one week for each 60 weeks of continuous employment.

See page 8 for information on employees ceasing employment with a business after seven years. This entitlement applies after 1 January 2006.

For employees ceasing employment after at least 15 years of continuous employment with one employer

After 15 years of continuous employment, an employee is entitled to be paid 13 weeks long service leave. If the employee has worked longer than 15 years, they are entitled to additional long service leave for the extra time worked, based on the formula of one week per 60 weeks of continuous employment.

What if the employee dies before leave is taken?

If an employee has accrued long service leave but dies before it is taken, a payment may be due to the employee's estate. Please contact Industrial Relations Victoria on 1800 287 287 for further information.

Example

Jenny is retrenched from her employment after 16 years and three months employment. She has not taken any long service leave during the course of her employment.

Jenny's long service leave entitlement is calculated as follows:

- 1. At 15 years, Jenny is entitled to 13 weeks long service leave.*
- 2. Jenny is also entitled to an additional amount of long service leave for the one year and three months worked since then, based on the one week per 60 weeks of service formula. Based on a 52 week year, the number of weeks in one year and three months is approximately 65 weeks. This is calculated by starting with 52 weeks (for the one year), then multiplying 4.33 weeks by 3 to come up with 12.98 weeks for the three months, and finally adding the total weeks together to total 65.*
- 3. As the long service leave entitlement is to one week per 60 weeks of service, we need to then divide the total additional weeks worked, that is 65 weeks, by 60. The outcome is 1.08 weeks.*
- 4. We then need to add the entitlement at 15 years (13 weeks) to the entitlement for the additional one year and three months (1.08 weeks). 13 weeks plus 1.08 weeks = 14.08 weeks.*

Jenny is therefore entitled to payment of 14.083 weeks long service leave on the day her employment ends.

Example

Jayne is retiring after 33 years employment with one employer. Jayne has had two long service leave holidays, the first of 13 weeks at 15 years and then a second 13 weeks at 30 years. There is, therefore, no long service leave entitlement remaining for the first 30 years of employment.

However, Jayne is entitled to an additional amount of long service leave for the three years worked since she last took long service leave, based on the one week per 60 weeks of service formula.

Jayne's long service leave entitlement is calculated as follows:

- 1. 3 years multiplied by 52 weeks = 156 weeks.*
- 2. As the long service leave entitlement is to one week per 60 weeks of service, we need to then divide the total additional weeks worked, that is 156 weeks, by 60. The outcome is 2.6 weeks.*

Jayne is therefore entitled to a payment of 2.6 weeks long service leave on the day her employment ends.

07

Can long service leave be “cashed out” rather than taken as a break from work?

No. An employee cannot “cash out” their long service leave. It is an offence under the LSL Act to give or receive payment instead of the employee actually taking the break from work. An employee can only receive payment in lieu of taking long service leave if their employment is ended before the leave is actually taken.

After 1 January 2006, the penalty for this offence will increase to 20 penalty units for each of the employee and the employer. If an employer or employee is found guilty of this offence, a criminal conviction may also be recorded.

08

What is meant by one employer?

The LSL Act sets out several situations where an employee is regarded as having been employed by one employer, even though in the strict legal sense they have worked for more than one employer.

When a business changes hands

Where a business is sold, transferred or assigned, and an employee remains with the business, the new employer becomes responsible for the employee’s long service leave entitlement. The period of employment with the old employer transfers to the new employer, who becomes liable for the long service leave accrued across the entire period of employment. It is common for the sale of business documents to reflect this liability, but such documents could not validly deny an employee’s entitlement. Even if there are no documents setting out this liability, the employee still has an entitlement.

It is important to note that, in the above situation of continuing employment, the old employer must not pay out accrued long service leave to the employee, as this would breach section 74 of the LSL Act.

Example

Robyn has been continuously employed by John’s Tyres for nine years. The owner of John’s Tyres, John, sells John’s Tyres to Terry. When the business is taken over, Terry continues to employ Robyn and there is no break in service.

In this situation, Robyn’s employment is continuous. Terry becomes liable for Robyn’s accrued long service leave over the past nine years, and for any long service leave that accrues in future.

John is not able to pay out Robyn’s accrued long service leave, as this would breach the LSL Act.

Employment may be considered continuous when the assets (for example, equipment), or part of a business, rather than the entire business itself, are transferred to another employer and the employee works for the new owner of the assets or part of a business.



Example

Jonathan has been continuously employed by Melissa of Melissa's Sweet Factory for seven years. He works with the chocolate making equipment. Melissa's Sweet Factory closes down, but all the chocolate making equipment is sold to Isabelle of Isabelle's Chocolate Factory. Jonathan obtains a job working with Isabelle's Chocolate Factory, working with the same chocolate making equipment that he used when working for Melissa's Sweet Factory.

In this situation, Jonathan's employment is continuous. Isabelle becomes liable for Jonathan's accrued long service leave over the past nine years, and for any long service leave that accrues in future.

Melissa is not able to pay out Jonathan's accrued long service leave, as this would breach the LSL Act.

If an employee is dismissed by the old or new business owner but is re-hired by the new business owner within 3 months, employment is not broken for purposes of the LSL Act.

If an employee does not remain with a business that has changed hands, the employer who sold the business is responsible for calculating and paying out any long service leave entitlements to which the employee has become entitled.

When work is performed for a related employer

Where an employee has worked first with one employer and later works with a related corporation, or a corporation with substantially the same directors and/or management, then employment will be continuous. In such a case, the related corporation will assume liability for the employee's long service leave entitlement from the time when the employee commenced with the previous employer(s).

Again, the old employer must not pay out accrued long service leave, as this would breach section 74 of the LSL Act.

What if the employee has been an apprentice?

If an employee has been apprenticed to an employer and is employed by the same employer within 12 months after completion of that apprenticeship, then the time of their apprenticeship is counted for the period of employment with that employer.

Some apprentices are employed by a Group Training company which places the apprentice with a host employer. The apprentice may later become employed by the host employer directly. In this situation, the employment is likely to be with two employers (first the Group Training company, later the business) who are not related. The time the apprentice has spent employed with the Group Training company will usually not be part of continuous employment, unless the Group Training company and the host employer are related in a way prescribed in the LSL Act.

What if an employee has worked for one employer, but in a variety of States and/or countries?

Some employees may work in a variety of locations over a period of years. As long service leave entitlements vary between States, the question then arises as to which long service leave legislation applies to the continuous employment. The answer will always turn on the particular circumstances of the case. If an employee is seeking to apply the law of a particular State, a court will consider whether the service of the employee has a "substantial connection" with that State. This will involve consideration of issues including, but not limited to, the location of the employee at the time the entitlement to long service leave arises, and the length of time the employee has worked in that location.

It is important to note that overseas service is likely to be included for the purposes of accruing long service leave, if it is part of continuous employment with one employer.

Employment in South Australia may be subject to different provisions. For more information, please contact the South Australian WageLine for information on (08) 8303 0400.

09

Which absences from work will not break continuous employment?

For an employee to become entitled to long service leave, their employment with the employer must be continuous. This does not prevent the employee taking certain breaks from work, paid or unpaid.

Any form of paid or unpaid parental leave (maternity, paternity or adoption leave), up to 52 weeks at a time, will not break continuous employment. Similarly, an absence of any length from work on account of illness or injury (which includes a WorkCover absence), annual leave, or long service leave itself will not break employment. Any other form of paid or unpaid leave, for example study leave, will also not break employment.

If an employee is stood down by their employer because of a lack of work, their employment will remain unbroken.

If an employee is dismissed by their employer but subsequently re-employed before three months have elapsed, then employment will be unbroken for purposes of long service leave.

Example

Silvie is employed as a dishwasher at the Happy Valley Coffee House. Her employment is terminated as the employer decides he no longer needs a dishwasher, because the kitchen-hand should be able to do those duties as well as his own. After one and a half months, the employer realises that it just isn't working and that in fact Silvie did a whole more than just dishwashing, and asks her to come back.

As Silvie is re-employed within 3 months, this break in the employment period will not break her continuity of employment.

10

Which absences from work will break continuous employment?

Continuous employment will be broken where an employee resigns from employment, even if the employee is subsequently re-employed.

Continuous employment will be broken where an employee is dismissed by their employer and is subsequently re-employed after three months have elapsed.

Example

Chester has been a mechanic at S.B.A Auto Repairs for six and a half years. He gets offered a job by a new repair shop which opens for business down the road. He accepts the offer and resigns from S.B.A. However, after just one month, Chester realises that he has made a mistake. He is required to work really long hours with minimum wages. He asks for his old job back at S.B.A. Auto Repairs and they welcome him back.

In this case, although Chester was only gone for one month, the fact that he resigned means his continuous service is broken.



11

Does time spent on leave count toward continuous employment for the purpose of accruing long service leave?

Before 1 January 2006, in addition to not breaking continuity of employment, most paid leave counts as employment for the purposes of calculating an employee's long service leave entitlement. This includes annual leave, carers' leave and long service leave. Some unpaid leave, where leave is approved by the employer, may also count. However, both paid and unpaid parental leave do not count.

After 1 January 2006, all forms of paid and unpaid leave, except unpaid parental leave, will count toward the period of employment (unless the employee requests otherwise). Although unpaid parental leave will not count, paid parental leave will count toward employment.

12

Does time spent on sick leave or WorkCover count toward continuous employment for the purpose of accruing long service leave?

Any absence from work of not more than 48 weeks in any year on account of illness or injury is to be counted as part of the period of employment. Any absence for that reason in excess of 48 weeks is not to be counted. Illness or injury leave includes a WorkCover absence.

Example

Emma worked at a pony stud for 11 years, during which time she slipped and sustained a back injury while at work. She commenced receiving WorkCover payments and was unable to attend work for 3 years following the injury. Emma then resigned from her employment after 14 years (11 years while working and 3 years while on WorkCover). Emma has never taken long service leave during her employment.

Emma's long service leave entitlement is calculated as follows:

- 1. 11 years multiplied by 52 weeks = 572 weeks.*
- 2. 3 years multiplied by 48 weeks (remember that only 48 weeks in each of the years that Emma has been absent on the basis of illness or injury will count toward her long service leave entitlement) = 144 weeks.*
- 3. 572 weeks plus 144 weeks = 716 weeks in total.*
- 4. We then need to divide the total weeks by 60, as Emma will receive one week's long service leave for each 60 weeks of service. 716 divided by 60 = 11.93.*

Emma is therefore entitled to a payment of 11.93 weeks long service leave on the day her employment ends.

13

How is payment for long service leave calculated?

The calculation is the total number of weeks' employment divided by 60 and multiplied by the ordinary weekly rate of pay at the time the leave is taken, or the employee ceases employment.

Example

My Linh has worked continuously for 11 years and decides to resign from employment.

My Linh's long service leave entitlement is calculated as follows:

- 11 years multiplied by 52 weeks = 572 weeks.*
- We then need to divide the total weeks by 60, as My Linh will receive one week of long service leave for each 60 weeks of service. 572 weeks divided by 60 = 9.33 weeks.*
- At the time of resignation, My Linh's ordinary pay is \$500.00 per week gross.*
- 9.33 weeks multiplied by \$500.00 per week is \$4,665.00 gross.*

My Linh is therefore entitled to a payment of \$4,665.00 (gross and subject to statutory taxation) on the day her employment ends.

How is ordinary pay calculated?

Ordinary pay is the pay received for working their normal weekly hours at the time the employee takes long service leave (or ceases employment and has their long service leave paid out). It does not include penalty or overtime rates but is the actual rate received even if the employee is a casual employee (note that a casual employee's ordinary rate includes a loading). Ordinary pay includes the cash value of any board or lodging that the employee receives from his or her employer.

What happens if there is a pay increase while an employee is on long service leave?

If an employee's rate of pay increases while the employee is on long service leave, then the employer must make up the difference between the amount paid and the new, higher rate.

How is long service leave calculated if the employee's hours vary from week to week?

An employee's long service leave entitlement is based on his or her normal weekly hours at the time the leave falls due or is to be paid out. However, in some cases, an employee's hours may vary from week to week. This may occur, in particular, for casual employees.

Before 1 January 2006, where an employee's hours vary from week to week, the employee's hours for calculating long service leave will be averaged over the preceding 12 months.

After 1 January 2006, where an employee's hours vary from week to week, the employee's hours for calculating long service leave will be averaged over the preceding 12 months, or the preceding five years, whichever average hours are the greater.

Example

Melinda has worked at a shoe shop as a casual for the last 22 years. She works according to a roster but depending on how busy the shop is, she works a different amount of hours week to week. Melinda has not taken any long service leave before, but would like to do so now.

Melinda's hours over the past five years have been as follows:

Year	Hours worked	Average number of hours worked per week (number of hours divided by 52)
2001	220	4.23
2002	200	3.8
2003	240	4.6
2004	210	4.0
2005	230	4.4
Average over 5 years	220 (total hours worked over 5 years divided by 5)	4.2 (total average hours divided by 5)



If Melinda's hours are averaged over the last 12 months of employment, her long service leave would be calculated at 4.4 hours per week. However, if her hours are averaged over the previous five years, her entitlement would be to long service leave based on 4.2 hours per week.

Melinda's long service leave should therefore be calculated based on the average weekly rate over the past 12 months, and she will be entitled to long service leave based on 4.4 ordinary hours per week.

How is long service leave calculated if the employee's fixed hours of employment have changed during the course of employment – for example, the employee has moved from full to part time employment?

An employee's long service leave entitlement is based on his or her normal weekly hours at the time the leave is taken or is to be paid out. However, in some cases, an employee's fixed hours of employment may alter. For example, an employee may move from full time to part time employment, or vice versa.

Before 1 January 2006, where an employee's fixed hours have changed during the course of employment, the employee's hours for calculating long service leave are those normal hours worked at the time the leave is taken or is paid.

After 1 January 2006, where an employee's fixed hours have changed in the 12 months immediately before the employee takes long service leave, the employee's hours for calculating long service leave will be averaged over the preceding 12 months or five years, whichever average hours are the greater.

Example

Danielle has been continuously employed for 16 years. However, she worked full time (38 hours) for the first 15 years of employment, and then part time for 20 hours per week in the 16th year.

Danielle's fixed hours over the past five years have been as follows:

Year	Hours worked per week
2001	38
2002	38
2003	38
2004	38
2005	20
Average over 5 years	30.8 (calculated by adding up the hours worked each week for the past 5 years and dividing by 5)

If Danielle's hours are averaged over the last 12 months of employment, her long service leave would be calculated at 20 hours per week. However, if her hours are averaged over the previous five years, her entitlement would be to long service leave based on 30.8 hours per week.

Danielle's long service leave should therefore be calculated based on the average weekly rate over the past 5 years and she will be entitled to long service leave based on 30.8 hours per week.



How is long service leave calculated if there is no fixed ordinary time rate of pay?

An employee’s long service leave entitlement is based on his or her ordinary time rate of pay at the time the leave is taken or is to be paid out. However, in some cases (where this is permitted by the relevant Award or agreement) an employee may not have a fixed ordinary time rate of pay. For example, the employee may be paid per piece of work, per delivery, or on commission.

Non-discretionary commissions and regular bonuses (for example, those based on sales targets) may be counted as part of ordinary pay if they are included in the employee’s oral or written contract of employment.

Before 1 January 2006, where an employee’s rate of pay varies from week to week, the employee’s rate of pay for calculating long service leave will be averaged over the preceding 12 months.

After 1 January 2006, where an employee’s rate of pay varies from week to week, the employee’s rate of pay for calculating long service leave will be averaged over the preceding 12 months or five years, whichever average rate is the greater.

Example

Dragan is a Real Estate agent who has worked for the same agency for 11 years. Dragan has resigned from his employment. He did not take any long service leave during the course of his employment. Dragan’s contract of employment specifies he is paid a retainer of \$25,000 per annum, plus commission for sales he has written for the company. In the last 5 years, Dragan’s retainer did not alter but commission was variable.

Dragan’s ordinary pay over the past five years has varied as follows:

Year	\$ Commission	\$ Retainer	\$ Total p.a.	Average weekly rate per year (total income divided by 52)
2001	12,000	25,000	37,000	\$711.54
2002	10,000	25,000	35,000	\$673.08
2003	15,000	25,000	40,000	\$769.23
2004	8,000	25,000	33,000	\$634.62
2005	6,000	25,000	31,000	\$596.15
Total average yearly pay for last 5 years				\$676.92 (calculated by first adding together the average weekly rate for the past 5 years (which totals \$3,384.62), and then dividing that number by 5.



If Dragan's ordinary weekly rate of pay is averaged over the last 12 months of employment, his long service leave would be calculated on the basis of his ordinary weekly pay being \$596.15. However, if his ordinary weekly rate of pay is averaged over the previous five years, his entitlement would be to long service leave based on an ordinary weekly rate of pay of \$676.92.

Dragan's long service leave should therefore be calculated based on the average weekly rate over the past 5 years, and he will be entitled to long service leave based on an ordinary weekly rate of \$676.92.

Does ordinary pay include the value of items such as mobile phones and cars?

Yes, if the value of the item forms part of salary and is included in the contract of employment (oral or written).

Example

Frank is a nurse working in a rural town. His contract of employment states that his total salary is \$40,000.00 per year, packaged to include part cash payment, part the value of private use of an employer provided mobile phone and part the value of private use of an employer-provided vehicle.

As the value of the vehicle and mobile phone form part of Frank's salary and are included in his contract of employment, the value of the items would form part of ordinary pay for long service leave purposes.

How is ordinary pay calculated when an employee is, or has been, on WorkCover?

Before 1 January 2006, if an employee is receiving WorkCover benefits and returns to work on a return to work plan (as defined in the *Accident Compensation Act 1985*), the employee's long service leave entitlement will be calculated on their pre-injury pay rate. This also applies where an employee has not yet returned to work but wishes to take leave, or the employee's employment is ended by termination or resignation.

After 1 January 2006, if an employee is receiving WorkCover benefits and returns to work on a return to work plan, the employee's long service leave entitlement will be calculated on either their pre-injury pay rate or their pay rate at the time leave is taken, whichever is the greater. This also applies where an employee has not yet returned to work but wishes to take leave, or the employee's employment is ended by termination or resignation.



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How do public holidays affect long service leave?

Before 1 January 2006, long service leave includes any public holiday that occurs during the period when the leave is taken. In other words, if an employee is on long service leave when a public holiday occurs, the employee will forgo the public holiday.

After 1 January 2006, a public holiday falling within the period of leave will now be added to the period of leave. This is the same way that public holidays during a period of annual leave are treated. Employees will have the benefit of a public holiday should it fall during a period of long service leave.

15

Can a person who is on long service leave be employed during the period of long service leave?

It is an offence to work while on long service leave or to employ someone who is on long service leave.

However, where an employee has more than one job (for example, two part time jobs), the situation may differ. If such an employee takes long service leave from one of their part time jobs (Job A), they may continue to work in the other part time job (Job B). However, while they are on long service leave from Job A, they must not work for Job B during the hours for which they would otherwise work for Job A and for which they are being paid long service leave by Job A.

Example

Matt has two part time jobs, one as a cleaner with Super Clean Pty Ltd and one as a bar attendant with Drinks are Here Pty Ltd. He works with Super Clean Pty Ltd between 7 and 10pm on Monday, Tuesday and Thursday evenings, and with Drinks are Here Pty Ltd between 7pm and 12am on Wednesdays, Fridays and Sundays.

Matt is presently taking long service leave from his work with Super Clean Pty Ltd.

While on long service leave from his work with Super Clean Pty Ltd, Matt is able to continue working for Drinks are Here Pty Ltd on Wednesdays, Fridays and Sundays, and also to do so outside the hours of 7 and 10pm on Mondays, Tuesdays and Thursdays if he wishes.

However, Matt cannot work for Drinks are Here Pty Ltd between 7 and 10pm on Monday, Tuesday and Thursday evenings. This is because those are the hours he would normally work for Super Clean Pty Ltd, and Super Clean Pty Ltd is currently paying him long service leave so that he can take a break from work in relation to those hours.

The penalty for this offence is five penalty units for both an employee and employer. If an employer or employee is found guilty of this offence, a criminal conviction may also be recorded.



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Can an employee claim long service leave entitlements if the company is liquidated?

If a business is liquidated, it is essential to contact the liquidator urgently to make an application to the liquidator to be paid from the available assets as a creditor of the business. If these are insufficient to meet an employee's long service leave entitlement, either of the following schemes may be available:

General Employee Entitlements and Redundancy Scheme

This scheme applies to employees who were terminated as a result of their employer's insolvency after 12 September 2001. The General Employee Entitlements and Redundancy Scheme (GEERS) is a federal government scheme which provides for the payment of certain entitlements of employees whose employment has been terminated as a result of their employer's insolvency. GEERS provides for payments to employees of all unpaid wages, annual leave, long service leave, payment in lieu of notice and up to 8 weeks redundancy pay if applicable.

Employee Entitlements Support Scheme

This scheme applies to employees who were terminated as a result of their employer's insolvency before 12 September 2001.

Contact the GEERS Hotline for full details of both schemes on 1300 135 040.

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Penalties for failure to keep records under the LSL Act

An employer must keep accurate records of the employee's long service leave for at least seven years after the employment ceases.

Records must be kept in the form prescribed by the Department of Innovation, Industry and Regional Development. The approved format will be available on the Industrial Relations Victoria website, www.irv.vic.gov.au

After 1 January 2006, the penalty for this offence will be 20 penalty units for the employer. If an employer is found guilty of this offence, a criminal conviction may also be recorded.

18

What happens if an employee is owed long service leave and the employer fails to pay?

An employee is able to seek recovery of money owed under the LSL Act as an application for arrears in pay. The application is heard in the Magistrates' Court and, if an order is made in the employee's favour, it may include an order that the payment be made with interest. The proceeding must, however, commence within six years of the employee's entitlement arising.

After 1 January 2006, employees may ask an organisation registered under the federal Workplace Relations Act 1996 (for example, a union) to take an action to recover money on their behalf. They may make such a request if they are a member of the organisation or eligible to be a member.

If an employer fails to pay an employee his or her long service leave entitlement, the employer may also be prosecuted in the Magistrates' Court. Industrial Relations Victoria is able to investigate claims of unpaid or underpaid long service leave entitlements, and with the authorisation of the Minister for Industrial Relations, to pursue a prosecution in the Magistrates' Court for an offence under the LSL Act.

If an employer is found guilty of failing to pay a long service leave entitlement, the employer may be fined the appropriate penalty and may also have a criminal conviction recorded against them. There is also the possibility of an order being made that the employer be responsible for the legal costs of the prosecuting agency.

If the employer is found guilty, the Court may also order that the employer pay his or her employee the money due to the employee, possibly with interest.

After 1 January 2006, the penalty for this offence will be 20 penalty units for the employer. If an employer is found guilty of this offence, a criminal conviction may also be recorded.

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Can an employer or employee be penalised for breaching the LSL Act?

Yes, there are penalties for breaching the LSL Act.

Penalties may apply where an employer:

- > fails to pay an employee whilst the employee is on long service leave;
- > fails to pass on a pay increase that occurred whilst the employee was on long service leave;
- > fails to pay an accrued entitlement on termination of employment;
- > fails to pay an accrued entitlement on the employee's death;
- > pays an employee in lieu of allowing the employee to take long service leave as a paid break from work;
- > knowingly employs a person whilst that employee is on long service leave from employment with that employer or another employer;
- > fails to maintain correct records; or
- > makes a false or misleading statement in a record.

Penalties may apply where an employee:

- > accepts payment in lieu of taking long service leave as a paid break from work; or
- > works elsewhere while on long service leave from another employer (see page 18 for information on how this is handled when an employee has more than one job).

Offences under the LSL Act attract a penalty of 20 penalty units.

The sole exception to this is the penalty for an offence relating to an employee working while on long service leave. This offence attracts a penalty of five penalty units for breach by an employee and/or an employer.

Where an employer or employee is found guilty of an offence, a criminal conviction may also be recorded.



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How do I find out more?

Can directors, or people involved in the management of a corporation, be personally liable for a corporation's breach of the LSL Act?

Yes. Under the LSL Act, a director of a corporation, or a person who takes part in the management of a corporation, may be liable for the conduct of the corporation where the director knew about the conduct, or was reckless as to whether the conduct was engaged in.

If found guilty, the director or manager would then be liable for penalties and/or criminal conviction, in the same way as the corporation.

Can a corporation be liable for a breach of the LSL Act by a director, employee or agent of the corporation?

Yes. Conduct of a director, employee or agent acting with apparent authority, or of a person authorised by a director, employee or agent, is also conduct engaged by the corporation itself.

What is a penalty unit?

Most modern legislation sets out fines in terms of penalty units instead of a dollar amount. To find out more about Penalty Units go to www.dms.dpc.vic.gov.au and click on FAQ, then go to the question "What is the value of a penalty unit?"

Detailed advice on long service leave can be obtained from Industrial Relations Victoria on 1800 287 287, or the Industrial Relations Victoria website, www.irv.vic.gov.au

The LSL Act can be found on the Industrial Relations Victoria website, www.irv.vic.gov.au

To check if an employee is covered by a federal award or agreement which contains long service leave clauses, call WageLine 1300 363 264 or check the WageNet website, www.wagenet.gov.au

Employers may contact their employer organisation for help.

Employees may contact their union or Job Watch (9662 1933 or 1800 331 617 for callers outside Melbourne) for help.



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For Further Information

For more information, go to the Industrial Relations
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www.irv.vic.gov.au

Industrial Relations Victoria

Department of Innovation, Industry and Regional Development

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