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**Australian
Nursing &
Midwifery
Federation**
VICTORIAN BRANCH

*Nurses and Midwives (Victorian Public Sector)(Single Interest
Employers) Enterprise Agreement 2016-2020*

Implementation Guide

Operation of Clause 70 – Long Service Leave

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Purpose

The purpose of this guide is to:

- Support the implementation of clause 70.5 of the *Nurses and Midwives (Victorian Public Sector) (Single Interest Employers) Enterprise Agreement 2016-2020 (Agreement)*, and
- Detail when the Victorian *Long Service Leave Act 1992 (LSL Act)* applies to employees covered by the Agreement.

VHIA, DHHS and the ANMF have collaborated to reach an agreed interpretation of the Agreement provisions to enable clear and consistent advice to the sector.

Whilst considerable efforts have been made to ensure this implementation guide is comprehensive, additional situations that are not addressed may arise. VHIA, DHHS and the ANMF have agreed to review such situations when and if they arise, in order to expand upon the guidance material available to the sector.

Funding

Whilst accrued Long Service Leave entitlements are recorded in the financial statements of health services, the actual cost is funded by DHHS.

VHIA are advised at the introduction of casemix DHHS included a loading of 1.8% of salaries for LSL cash settlement purposes and this loading has continued to be applied in funding for subsequent award increases. This loading has since been increased to 2.8%.

For the purpose of calculating the 2.8% of salary component included in the agency's casemix and output measures, salaries and wages are defined as per circular 05/2013. The LSL debtor to be raised is the difference between the AASB 119 calculated increase in the LSL liability for the year and the 2.8% of salaries and wages.

Any changes to eligibility that increase a health services cost will be addressed through this process.

Application

Enrolled Nurses

This situation for Enrolled Nurses is unchanged.

Clause 70.2 of the Agreement provides 6 months of long service leave on completing 15 years of continuous service. No distinction is made between full / part time and casual service. Both casual and part/full time employment contribute to the period of continuous service.

An Enrolled Nurse is not entitled to Long Service Leave under the LSL Act.

Registered Nurses and Midwives

Historically, casual Registered Nurses and Midwives have not received a long service leave entitlement under the Enterprise Agreement; the National Employment Standards or the LSL Act.

This situation for casual Registered Nurses and Midwives has now changed under both the Agreement and the LSL Act. This is not a result of the new Agreement, but rather, as a result of legislative changes.

Further details are set out below.

Registered Nurses and Midwives LSL Entitlement Background

The Victorian LSL Act was amended in 2005 to extend long service leave entitlements to casual employees. Casual Registered Nurses and Midwives employed under the predecessor Agreements were excluded from the LSL Act because they were covered by a federal industrial agreement.

The *Fair Work Act 2009 (FW Act)* was introduced in 2010. The changes to the Fair Work Act in 2010 indirectly created an entitlement for casual Registered Nurses under the LSL Act.

From 2010 the FW Act provided any employee without an entitlement to LSL under the premodern award or agreement with an entitlement to long service leave under the LSL Act at the time a successor Agreement came into operation. In the case of the 2012-2016 Nurses Agreement this was 6 July 2012.

Casual Registered Nurse and Midwives Entitlement under the LSL Act

Casual Registered Nurses are entitled to long service leave under the LSL Act.

Key features of the entitlement are:

- The entitlement is 13 weeks of paid leave after 15 years (which can be proportionally taken after 10 years)
- A pro rata entitlement is paid after 7 years continuous employment upon termination. The employee cannot elect to transfer that service to another employer.

Key differences include between the LSL Act and Agreement include

- The test for continuous service (referred to as 'continuous employment' under the LSL Act)
- The allowable period of absence

Additional information is provided in Attachment 1 which is titled 'Additional Information – Long Service Leave Act 1992).

Agreement Changes – mixed service

To access long service leave under the Agreement, the Registered Nurse or Midwife must be employed in a full time/part time capacity at the time long service leave is sought to be taken or cashed out. A casual Registered Nurse continues to be excluded from the long service leave provisions of the Agreement.

The Agreement introduced clause 70.5(b) which describes the LSL entitlement for full-time / part-time Registered Nurses whose continuous service is a mix of permanent (Full Time/Part Time) and casual employment.

Under clause 70.5(b), the long service leave entitlement accrues at different rates to reflect the different modes of employment. That is, LSL accrues at a different rate during periods of casual employment, namely at the rate of 13 weeks for 15 years.

Continuous service under the Agreement, including eligible periods of casual employment, are transferable across employers in accordance with the provisions of the Agreement.

To assist Health Services, a flowchart is attached (Mixed Service Flow Chart) and a series of questions and answers at Attachment 3.

Attachment 1

Additional Information – Long Service Leave Act 1992

Please see below section extracts from the *Long Service Leave Act 1992* which are correct at the time of publication.

Section 56 - Basic entitlement to long service leave

An employee is entitled to—

- (a) 13 weeks of long service leave on ordinary pay on completing 15 years of continuous employment with one employer; and
- (b) 4 1/3 weeks of long service leave on ordinary pay on completing each period of 5 years of continuous employment with that employer after the first 15 years of continuous employment with that employer.

Section 56A - Entitlement to long service leave after 10 years

- (1) If an employee has completed at least 10, but less than 15, years of continuous employment with one employer, the employee is entitled to an amount of long service leave equal to 1/60th of the period of continuous employment with that employer.
- (2) For the purposes of working out when an employee becomes entitled to long service leave under this section, only 2/3rds of the employee's continuous employment completed before the commencement of this section¹ counts as continuous employment.

Section 57 - Additional entitlement to long service leave if employment stops after 15 years

- (1) This section only applies if an employee stops working for an employer after completing 15 years of continuous employment with that employer.
- (2) The employee is entitled to an amount of long service leave equal to 1/60th of the period of his or her continuous employment with that employer since he or she last became entitled to long service leave under section 56.
- (3) The period of an employee's long service leave that relates to a period of employment before 1 January 1965 and that had not been taken before the commencement of this Division is to be reduced by one quarter.

Section 58 - Entitlement to long service leave if employment stops after 7 years **S. 58(1) substituted by No. 23/2005 s. 6(2).**

- (1) This section only applies if an employee's employment is ended and the employee has completed at least 7, but less than 15, years of continuous employment with one employer.
- (2) The employee is entitled to an amount of long service leave equal to 1/60th of the period of his or her continuous employment.

¹ The amendments come into operation on 1 January 2006. Not relevant to the EBA entitlement once permanent, but relevant to the LSL Act provisions.

Section 62 - Meaning of continuous employment

(1) This section sets out several situations in which an employee is to be regarded, for the purposes of this Division, as having been continuously employed even though in a strict legal sense it could be said that the employee's employment was interrupted.

(2) An employee's employment is to be regarded as being continuous despite—

- (a) the taking of any annual leave or long service leave;
- (b) any absence from work on account of illness or injury;

Section 62A - Meaning of continuous employment for casual and seasonal employees

(1) Without limiting section 62, the employment of an employee who is employed by the same employer more than once over a period is to be regarded as continuous if—

- (a) there is no more than an absence of 3 months between each instance of employment in the period; or
- (b) there is more than an absence of 3 months between two particular instances of employment, but the length of the absence is due to the terms of the engagement of the employee by the employer.

(2) Without limiting section 62, the employment of an employee who is employed by the same employer more than once over a period is to be regarded as continuous if the absences between instances of employment are due to the seasonal nature of the employee's employment.

(3) Subsections (1) and (2) apply even if—

- (a) any of the employment is not full-time; or
- (b) the employee is employed by the employer under 2 or more employment agreements; or
- (c) the employee has engaged in other employment during the period.

Section 63 - Whether interruptions are to be included in the period of employment

(1) The absences from work referred to in section 62(2)(a), (d) and (e) are to be counted as part of the period of an employee's employment.

(2) 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 an employee's employment, but any absence for that reason in excess of that period is not to be counted.

(3) Any absence from work referred to in section 62(2)(c) is to be counted as part of the period of an employee's employment unless—

- (a) on it being approved, it was agreed in writing between the employee and the employer (at the request of the employee) that it not be counted; or
- (b) it is unpaid adoption, maternity or paternity leave.

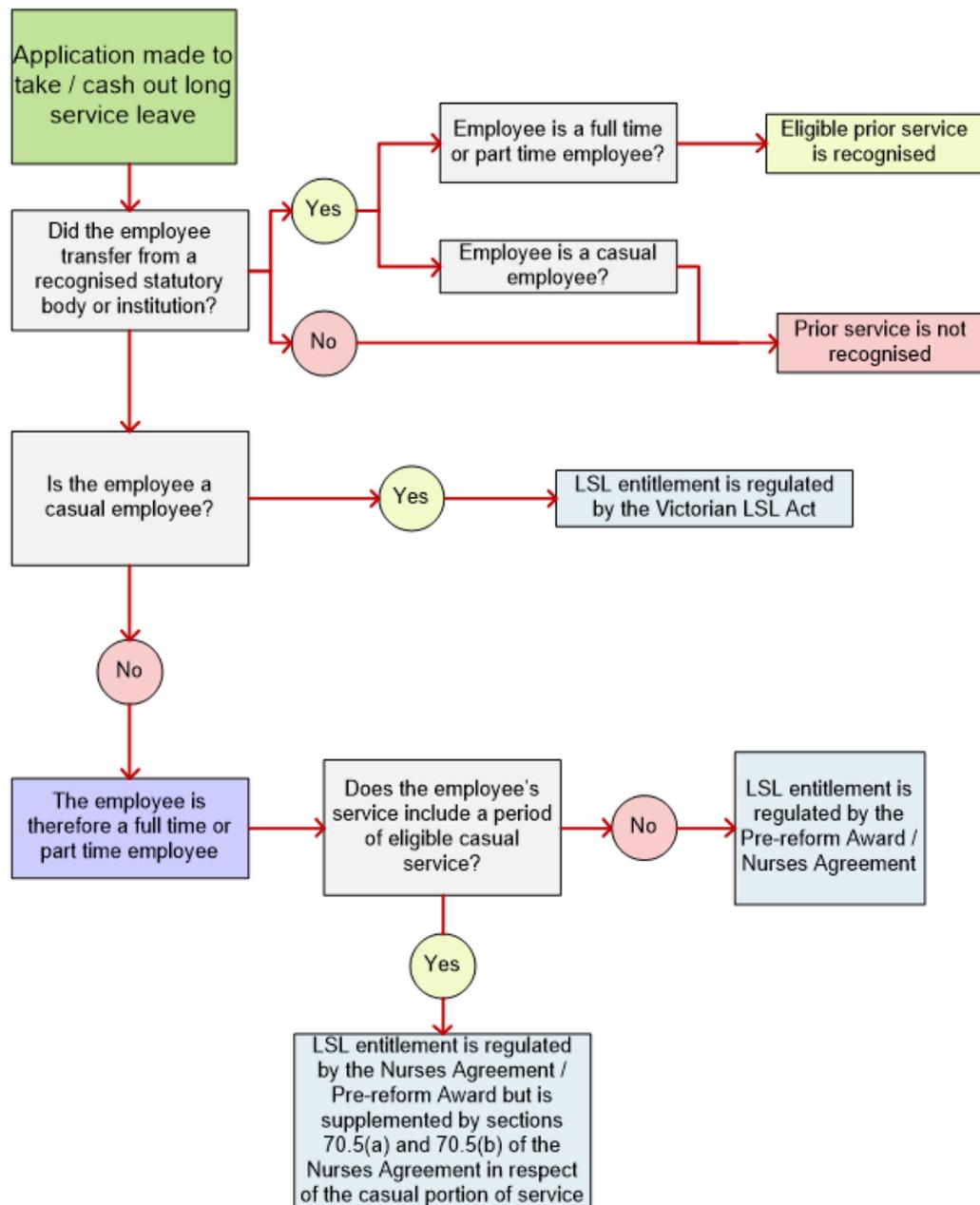
(4) The absences from work referred to in section 62(2)(f), (g) and (h) are not to be counted as part of the period of an employee's employment.

(5) In computing long service leave under this Division, any long service leave (or payment in lieu of long service leave) granted to an employee in respect of any period of employment which is under this section, or under section 61 or 62, to be taken into account in computing the employee's entitlement to long service leave under this Division is to be taken into account and regarded as having been leave taken under this Division.

Attachment 2

Mixed Service Flow Chart

Flowchart - Long service leave entitlements of employees covered by the Nurses and Midwives Agreement



Attachment 3

Questions and Answers - Long Service Leave entitlements of Registered Nurses and Midwives under clause 70 of the Agreement.

Question: Which classifications have an entitlement to long service leave under the Agreement?

Answer: Full time and part time registered nurses and midwives (Eligible Employees). A casual Registered Nurse or Midwife cannot access the Agreement long service leave entitlement.

Question: Are casual registered nurses or casual midwives entitled to long service leave pursuant to the State LSL Act and clause 70.5(b) of the Agreement?

Answer: No, the entitlement to LSL for casual registered nurses and casual midwives arises under the State LSL Act only.

Please note that should a casual registered nurses or casual midwife convert to full time or part time employment, then clause 70.5(b) of the Agreement will enable the employee to count their prior casual service for the purpose of their Agreement-based LSL entitlement if they are employed full time or part time at the point any long service leave entitlement is accessed.

However, the registered nurse or midwife will not be paid for any period under the Agreement that they have already received payment under the LSL Act.

Question: What can be counted as “continuous service” for the purpose of clause 70.2 and/or 70.5(a) and/or “Continuous Employment” for the purpose of clause 70.5(b)?

Answer:

(A) Prior Service with their current employer:

For a full or part time registered nurses or full or part time midwife, prior service as a casual employee with their current employer can be counted for the purpose of determining “continuous service” under clause 70.2 or 70.5(a) and/or “Continuous Employment” under 70.5(b).

(B) Prior Service with a different employer:

For a full or part time registered nurses or full or part time midwife, prior service as a casual employee with a different Employer can be counted for the purpose of determining “continuous service” under clause 70.2 or 70.5(a) and/or “Continuous Employment” under 70.5(b).

Question: What is the significance of the terms “continuous service” and “continuous employment”?

Answer: Continuous service for periods of non-casual employment remains unchanged from previous agreements.

Because the Agreement specifically addresses previous casual employment of a Nurse or Midwife who subsequently becomes full or part time, that casual service has to be measured in the same way continuous service for a casual is measured under the State Act, which is a different test known as “continuous employment”

Question: Do periods of part time/full time employment count towards service under the LSL Act?

Answer: Yes, if the Employee is casual at the time the entitlement is taken or cashed out.

Question: Is there any limit to the period of casual employment that can be included as continuous employment under the Agreement?

Answer: No, there is no limit, provided the Nurse or Midwife has ‘continuous employment’ as described in section 62A of the LSL Act.

Question: Is there any limit to the period of casual employment that can be included as continuous employment under the LSL Act?

Answer: No, there is no limit.

Question: Is an employer required to pay out the long service leave entitlement of a casual registered nurse or midwife who has completed 7 years of continuous employment when the employment ends?

Answer: Yes, in accordance with requirements of the LSL Act.

Question: In relation to casual Registered Nurses and midwives, what records are employers required to maintain under the LSL Act.

Answer: Section 80 requires employers to maintain LSL records.

Question: In relation to Registered Nurses and midwives, what records are employers required to maintain.

Answer: The Fair Work Act Regulations requires employers to maintain certain records for a period of 7 years. The Agreement also requires the employer to maintain LSL records for eligible employees.

Beyond this, the Agreement (cl. 70.5(b)(ii)) places the onus on the eligible employee to prove they have a sufficient aggregate of service to support the application for long service leave.

Question: Is there an error in the example provided on page 89 of the Agreement?

Answer: Yes, the entitlement under the Agreement only applies to Eligible Employees.

Question: What happens if a casual employee at Employer A commences permanent employment with Employer B?

Answer: If the casual employee terminates their casual employment with Employer A, then subject to the terms of cl 70.5(b) that service would:

- a) If the employee has completed at least ten but less than fifteen years' continuous service and a request in writing is made by the employee consistent with CI 70.8(b), and the employee is employed by Employer B within the "allowable period of absence", the service would transfer to Employer B.
- b) if (a) does not apply, to the extent the employee has an entitlement under the LSL Act, the employee would receive payment in lieu of accrued LSL.

If the employee remains casual at Employer A, and commences permanent employment at Employer B, then it would be considered "Concurrent service" and remains separate and distinct until the employee terminates employment with Employer A, and subject to the terms of the LSL Act, would be entitled to any benefit arising under the Act from Employer A.