

EXPLANATORY STATEMENT

Defence Determination 2017/23

This Determination amends Defence Determination 2016/19, Conditions of service (the Principal Determination), made under section 58B of the *Defence Act 1903* (the Defence Act) and in accordance with subsection 33(3) of the *Acts Interpretation Act 1901* (AIA Act). Determinations made under section 58B of the Defence Act are disallowable legislative instruments subject to the *Legislation Act 2003*. These instruments are also subject to the interpretation principles in the AIA Act, as modified by section 58B of the Defence Act.

Chapter 5 of the Principal Determination sets out provisions dealing with leave for members of the Australian Defence Force (ADF).

The purpose of this Determination is to set out a range of reforms to leave that support the introduction of a new ADF payroll system to be used in the Department of Defence.

Section 1 of this Determination sets out the manner in which this Determination may be cited.

Section 2 is the commencement provision for the Determination and includes a table setting out the details of the commencement of sections of the Determination. Column 1 of the table sets out the provisions in numbered items, column 2 sets out the commencement and column 3 sets out date/details. Information in column 3 does not form part of the Act, so information can subsequently be inserted in the column (or edited) in a published version of the Determination.

- Item 1 in the table provides that sections 1 to 4 of the Determination commence on the day after this instrument is registered.
- Item 2 in the table provides that Schedule 1 commences on a single date to be fixed by a notifiable instrument. The commencement of these provisions will align with the commencement of the new ADF payroll system, which is expected to occur this year. Item 2 also provides for Schedule 1 to be repealed if the notifiable instrument is not made within the period of 12 months beginning on the day after this instrument is registered.

Section 3 provides that the authority for the instrument is under section 58B of the *Defence Act 1903*.

Section 4 provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 Part 1 sets out amendments to the Principal Determination and Part 2 provides transitional arrangements.

Schedule 1 Part 1 makes the following amendments to the Principal Determination.

- Section 1 inserts a note to subsection 5.4.17.1 of the Principal Determination. Section 5.4.17 sets out how additional recreation leave accrues for members posted to remote locations. The new note makes clear that a member will not get additional recreation leave if their dependants are living at a remote location but the member is not. In other words, additional recreation leave for service in a remote location is fundamentally tied to the location of the member, not the location in which the member's dependants live.

- Section 2 omits and substitutes Chapter 5 Part 4 Division 5 of the Principal Determination, which provides for purchased recreation leave. A variety of changes have been made to the policy in the revised Division.
 - Subsection 5.4.22.2 provides that recreation leave is purchased in hourly increments. For the purposes of consistent administration in a computerised payroll system, eight hours of purchased leave is equivalent to one full day of leave. In the ADF working environment, the hours of duty may vary between work areas. Eight hours does not reflect the actual hours of duty a member is required to attend for on that day, but instead provides a consistent unit of measure for calculation of Defence's leave liability on financial statements, and the purchase (and later provision) of recreation leave for the member in the new ADF payroll system.
 - The previous subsection 5.4.22.3 prescribed the information a member was required to provide on their leave application form. This prescription has been removed. While a member may be required to provide this information on the prescribed form for the purposes of calculation, it does not underpin the eligibility for purchase of recreation leave credits.
 - Subsections 5.4.22.4 and 5.4.22.5 set out the limits on the amount of recreation leave credits that may be purchased. Formerly the limit applied to each purchase. Now the limit will apply each financial year. It also makes clear that the maximum amount of recreation leave that can be held is calculated at the time the purchased recreation leave is approved, not when it is paid for. It also includes a new example which illustrates how the annual limit to the amount of recreation leave that may be purchased is to operate. The previous subsection 5.4.22.5 provided that a member may make further applications to purchase leave after the previous agreement is completed. This rule has been removed. The new limit imposed by subsection 5.4.22.4 and 5.4.22.5 above negate the need for the previous rule.
 - The note at subsection 5.4.23.3 is omitted as it was unrelated to the subsection and is provided for in the subsequent sections of this Determination.
 - The sequence of sections 5.4.24 and 5.4.25, which relate to credit and payment of purchased recreation leave, have been reversed to follow a more logical order.
 - Section 5.4.24 (formerly 5.4.25) provides for payment of purchased recreation leave. The revised section includes a new table that sets out the method for calculating repayments under the purchased recreation leave scheme. The revised arrangements vary the repayment amount as the member's salary changes over the course of the member's involvement in the scheme. The member accrues purchased recreation leave gradually and its value therefore reflects the salary the member had at the time of accrual. It is fair that the member should pay for the leave using the rate of salary current at that point in time.
 - Section 5.4.25 (formerly 5.4.24) provides for credit of purchased recreation leave. The revised section sets out a new method of accruing purchased recreation leave. Formerly a member who applied to purchase recreation leave was credited with the full period of purchased recreation leave when their application was approved. In effect this was an advance by the Commonwealth. The member was required to pay back the value of that leave, by regular salary deductions over an agreed period of time. Under the revised arrangements the member is credited purchased recreation leave to the value of payment deducted from the member's salary each pay cycle: in effect, a pay as you go type arrangement. This better aligns with the *Public Governance, Performance and Accountability Act 2013* by reducing the use of advances by the Commonwealth.
 - A new section 5.4.26 is inserted in the Division. It sets out how purchased recreation leave may be cancelled: if a member undertakes prescribed types of service, for example warlike service; or if a member notifies their supervisor that they wish to cancel their purchased recreation leave arrangement. A member whose purchased recreation leave arrangement is cancelled is unable to purchase any more leave until they make a fresh application. Any purchased leave credit that has been paid for remains available to the member.
 - Subsection 5.4.26A is substituted. The revised section includes a provision that purchased recreation leave may not be sold back to the Commonwealth.

- Section 3 inserts section 5.4.33A into the Principal Determination. The new section prescribes the order in which recreation leave credits are to be deducted from the member's balance when they take recreation leave. Under the revised policy, war service leave credits are exhausted first. This is followed by any unused purchased recreation leave credits, then any other recreation leave credits. This is important in determining how much of a member's recreation leave may be lapsed, as purchased recreation leave credits are exempt from lapsing.
- Section 4 repeals and substitutes Chapter 5 Part 4 Division 8 of the Principal Determination, which provides the rules for payment or transfer of a member's leave credits when they leave the ADF. The following changes have been made in the revised Division.
 - Definitions for 'accrued leave credit', 'daily rate of salary', 'daily rate of salary and allowances' and 'purchased recreation leave credit' have been added or amended in the table of definitions. By clearly defining these terms, the provisions in the Division are more easily described.
 - Provisions for leave credit payment or transfer remain the same but have been reworded to clarify intent for the member.
 - The treatment of unused purchased recreation leave has formerly been paid or transferred in the same manner as accrued recreation leave. Recreation leave attracts an additional two days credit for every five days of accrued leave. This is to recognise that members would ordinarily have weekends during periods of recreation leave, which would be paid due to the ADF seven-day week pay model. Purchased recreation leave does not attract the additional credit because the member does not pay for weekends when they purchase the leave. The Division has been amended to accommodate this change.
 - The provisions in former section 5.4.45 are omitted. The section formerly set out arrangements for repaying any outstanding purchased recreation leave debt on ceasing service. With the move to a revised model made by section 4 of this Determination, members entering into the new purchased recreation leave arrangements will not have a debt on ceasing service, making the section redundant. Members who have an outstanding debt from purchased recreation leave arrangements entered into before the date of effect of this Determination will be required to settle the debt under the transitional arrangements provided by Schedule 1 Part 2 of this Determination.
- Section 5 amends section 5.9.15 of the Principal Determination. It changes the maximum amount of examination leave that may be granted from 5 days to 40 hours. Examination leave is granted for the duration of the examination, plus reasonable travelling time. It is more usual for the leave to be granted for part days rather than full days. Expressing the maximum in hours makes it easier to administer and track how much of the maximum leave benefit remains for the member to use. The member also has greater flexibility in how they take the leave.
- Section 6 inserts a new subsection 5.9.15.1A into the Principal Determination. It provides that examination leave cannot be granted on the same day as another leave type, apart from short absence.

Schedule 1 Part 2 provide the following transitional arrangements.

- Section 1 provides that members who had not completed repaying purchased recreation leave debts under the arrangements ended by section 8 must continue to make fortnightly repayments until their commitment to the Commonwealth is met.
- Section 2 sets out arrangements for members who cease continuous full-time service while they have an outstanding purchased recreation leave debt under the arrangements ended by section 8. The value of that debt may be deducted from the member's final payments, or become a debt to the Commonwealth.

Criteria are provided for the exercise of discretions under the Principal Determination, as amended by this Determination. Adverse decisions may be subject to inquiry under the ADF redress of grievance system. A person may make a complaint to the Defence Force Ombudsman.

Consultation

Navy, Army and Air Force were consulted in the preparation of this Determination. The rulemaker was satisfied that external consultation was not required.

Authority: Section 58B of the
Defence Act 1903

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Defence Determination 2017/23, Leave – amendment

This Determination is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Determination

The purpose of this Determination is to set out a range of reforms to leave that support the introduction of a new ADF payroll system to be used in the Department of Defence.

Human rights implications

Right to the enjoyment of just and favourable conditions of work

The protection of a person's right to favourable working conditions engages Article 7 of the International Covenant on Economic, Social and Cultural Rights. Article 7 recognises a person's right to rest, leisure and reasonable limitations of working hours and periodic holidays with pay.

ADF members enjoy recreation leave benefits that are at Australian community standards. For many members their recreation leave benefits exceed those standards. Additional recreation leave may accrue for specific types of service, for working long hours and for duty in certain more challenging locations.

The recreation leave system is flexible and complex, the new ADF payroll system needs a more streamlined set of service conditions in order to operate. Simplicity is to the member's advantage as well as the administrator's. It allows for better understanding of arrangements that apply.

This Determination makes a range of subtle reforms to recreation leave, including the following.

- It changes the underlying model of purchased recreation leave to another that maintains the principle that the member has the option of paying for additional leave by regular salary deductions. The model has changed, but the benefit is the same.
- It changes the maximum amount of examination leave that may be granted from 5 days to 40 hours. Examination leave is granted for the duration of the examination, plus reasonable travelling time. It is more usual for the leave to be used for part days rather than full days. This amendment gives the member greater flexibility in how they take the leave.

Conclusion

This Determination is compatible with human rights because it advances the protection of human rights.

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