Further Report

On additional stakeholder consultation following the 2023 Final Report of the Review into the *Construction Industry Portable Paid Long Service Leave Act 1985*

12 September 2024

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Acknowledgement of Country

KPMG acknowledges Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia. We pay our respects to Elders past, present, and future as the Traditional Custodians of the land, water and skies of where we work.

At KPMG, our future is one where all Australians are united by a shared, honest, and complete understanding of our past, present, and future. We are committed to making this future a reality. Our story celebrates and acknowledges that the cultures, histories, rights, and voices of Aboriginal and Torres Strait Islander People are heard, understood, respected, and celebrated.

Australia's First Peoples continue to hold distinctive cultural, spiritual, physical and economical relationships with their land, water and skies. We take our obligations to the land and environments in which we operate seriously.

We look forward to making our contribution towards a new future for Aboriginal and Torres Strait Islander peoples so that they can chart a strong future for themselves, their families and communities. We believe we can achieve much more together than we can apart.

Contents

1. Executive Summary

In 2023, KPMG was engaged to deliver an independent review of the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA) (**the Review**). The MyLeave Board considered the Final Report of the Review and supported the Review's recommendations, noting some clarification on specific measures.

On 18 June 2024, the Hon. Simone McGurk, Minister for Training and Workforce Development; Water; Industrial Relations released the Final Report of the Review.

In July 2024, KPMG was engaged to conduct further stakeholder consultation during July and August 2024 to assist MyLeave seek further Western Australia (WA) construction industry insights on six specific policy matters identified by the 2023 Review. The purpose of the further consultation process and the approach used is detailed in section 2 and 3 of this Report.

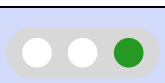
1.1 General observations

- A range of industry and government stakeholders participated in the further consultation process and it is apparent that industry is willing to collaborate with government to improve the MyLeave scheme's operation for the benefit of the WA construction industry.
- Stakeholder dialogue in the consultation sessions was respectful and productive. There remain only a limited number of issues where views deviate, or where there is strong opposition to the recommendations of the Review. It is likely that industry will broadly support the recommendations of the Review, provided that any amendments to the existing legislative framework are carefully drafted.
- Where a deviation in views is apparent (which is detailed in the summary contained below) there is support for the legislation being amended to codify the *current practices* applied by MyLeave to clarify the scheme's operation as an interim measure.
- More broadly, and beyond the six specific policy matters detailed in the Discussion Paper, the Housing Industry Association (**HIA**), the Electrical Trades Union (WA) (**ETU WA**) and Unions WA each agreed with Review recommendation 8, relating to amendments to legislate mid-spectrum compliance powers for MyLeave in the future.

1.2 Summary of stakeholder views on the six policy matters

With reference to the six specific policy matters detailed in the Discussion Paper, a traffic light system has been used to provide the following high-level summary to demonstrate which matters have attracted in-principle support from stakeholders, those matters which require further development, or those where concerns remain or where further consultation has identified that the matter need not be addressed. Please note, within these broad classifications, some caveats apply, which are summarised in the section 1.3 below.

The following rating system has been applied:



A green rating indicates that the policy issue in question has received in-principle stakeholder support, with some limited further development required on the details.

An orange rating indicates that the policy issue in question requires further development.

A red rating implies that after further stakeholder consultation the Recommendation of the Final Report is, either:

- not necessary; or
- stakeholders have raised objections or concerns at its implementation.

Table 1 – Summary of stakeholder views on each of the six policy matters

The overall outcome rating is a view of KPMG's based on the majority feedback provided by stakeholders as part of the further consultation process. It is proposed that MyLeave will use the 'overall outcomes' as the rating indicator to progress any future legislative reform efforts.

Overall Outcome	Discussion Question	Description	Stakeholder Comments
	1(a)	Clarifying the capture of specific cohorts of construction workers	Stakeholders generally agreed with the proposed future capture of certain cohorts of construction workers (see Table 3). However, they stressed that careful drafting is necessary, particularly for the eligibility of 'supervisors' and 'subcontractors', which are discussed further in section 6 of this Report. The Master Electricians Australia (**MEA**) raised concerns about the proposal to exclude Working Directors. This is discussed further in section 4.1.
			 Working Directors
			 Supervisors
			 Subcontractors
			 Building Trade Assistants and Construction Cleaners (Peggies)
			 Traffic Controllers
			 Workers conducting commissioning, decommissioning, and testing
	1(b)	Clarifying the capture of specific cohorts of construction workers – additional occupations.	Further stakeholder dialogue identified that earlier stakeholder calls for additional occupations to be added to the scheme's coverage may not be necessary, as MyLeave clarified that it considers the occupations in question are already captured by the existing coverage provisions if they are performing construction work on a site.
	2	Definitions that relate to coverage in the scheme: • 'Employer' • 'Employee' • 'Construction Industry'	 Stakeholders supported the recommendation to simplify the definitions of '**employee**' and '**employer**'. However, there were diverging views on how the simplification should best be achieved. KPMG recommends MyLeave seek legal advice with respect to the options under consideration.
			 Per the definition of **'Construction Industry'**, there was consensus amongst stakeholders that the criterion of being **'substantially engaged'** should be

			maintained, however there were no firm preferences expressed with respect to 'which' test should be adopted. The 'two-thirds rule' received general support, subject to transitional arrangements being available to avoid detrimental outcomes for existing eligible employees.
			Per the definition of **'Construction Industry'**, and the term '**on a site'** specifically, during discussions industry stakeholders generally agreed it would be helpful to codify the current common law position, although noted operational issues emerging with the term 'employer premises'. Following discussions, Unions WA and MyLeave both separately made suggestions to remove the term 'on a site' from the Construction Industry definition. This is a key issue that warrants further development. The details are discussed further in section 4.2 of this Report.
	3	Alternatives to prescribed industrial instruments: • Option A • Option B • Option C	This policy matter remains unsettled due to opposing views between stakeholders. The MyLeave Board supported Option B (occupation list) or Option C (refined drafting), with a preference towards Option B, however industry stakeholders expressed concerns about Option B and proffered various preferences between Option A (maintaining the use of prescribed industrial agreements with some amendments) and Option C. The relevant views are considered in greater depth in section 4.3 of this Report.
	4	Treatment of Core terms: • 'days of service' • 'ordinary pay' • 'ordinary hours of work' • 'week'	Industry stakeholders generally support the implementation of Recommendations 4A-4D, however stakeholders views differ with respect to the inclusion of overtime hours. Industry stakeholders agreed that 'all up rates' should be included as part of 'ordinary pay', however there is disagreement with respect to additional overtime. Aligning the Act with the use of the 'ordinary pay' definition within the *Long Service Leave Act 1958* (WA) (**LSL Act**) may address the disparity in views and provide a policy rationale for change. Alignment with the 'ordinary pay' definition would also address the question of 'ordinary hours of work'. This item is further discussed in section 4.4 of this Report.
	5	Accrual mechanism	Stakeholders expressed in-principle support to move to an 'hours worked' accrual mechanism, however there is disagreement as to whether overtime should be included. Within the various iterations of an 'hours worked' accrual mechanisms, the adoption of Option 2A attracted the least

			objection from industry stakeholders and is most likely to address current inequtities experienced within the operation of the scheme. This is discussed further in section 4.5.
	6	Employees with long-term service to a single employer	There was broad consensus for the underlying principle that the Act should only operate as a safety net where the LSL Act where the provisions of the *Long Service Leave Act 1958* (WA) (**LSL Act**) may not operate. Further policy development is required to consider options for the *timing* of employer refunds and the interaction between the Act and the LSL Act. This is discussed further in section 4.6 of this Report.

Table 2 groups the overall outcomes to provide a summary of consultation outcomes. It provides an indicator as to policy position 'readiness', ahead of any legislative reform efforts that may be pursued following the Review.

Table 2 – Summary of consultation outcomes

	Overall outcome	Reference
		• **Discussion Q1(a)**: Coverage in relation to clarification of cohorts • **Discussion Q4**: Treatment of Core Terms • **Discussion Q5**: Accrual Mechanism – Option 2A: The use of an 'hours of work' approach • **Discussion Q6:** Treatment of Employees with long-term service
		• **Discussion Q2:** Definitions for 'employee', 'employer', 'Construction Industry' • **Discussion Q3:** Alternatives to Prescribed Industrial Instruments
		• **Discussion Q1(b):** Coverage for additional occupations (on the basis it may not be necessary to add the additional occupations in question)

2. Purpose

This Further Report is intended to summarise the dialogue with MyLeave stakeholders that occurred in July and August 2024 following the findings and recommendation of the 2023 Review. The Review made 14 high-level recommendations to improve the operation of the *Construction Industry Paid Long Service Leave Act 1985* (the **Act**).

In its Final Report KPMG recommended that further stakeholder consultation occur with respect to six specific policy matters prior to any legislative reform being commenced. In KPMG's view, further stakeholder consultation was warranted to consider how the policy positions could be best crafted and implemented for the WA construction sector.

The six policy positions in question and the feedback on those specific matters form the substance of this Further Report. This Further Report is designed to be read alongside the Final Report of the Review. This Report does not amend the Findings or Recommendations of the Final Report of the Review. Rather, it seeks to test stakeholder

views on how the Review's recommendations can best be formulated into appropriate policy positions to be fit-for-purpose for the WA construction industry.

3. Consultation Approach

KPMG was engaged by MyLeave to conduct a second round of stakeholder consultation (the first occurring during 2023 as part of the Review). KPMG designed a consultation process in collaboration with MyLeave. The process was agreed with MyLeave and detailed in the Stakeholder Consultation Plan dated 11 July 2024. KPMG also prepared a Discussion Paper to offer stakeholders with questions and relevant background information for consideration.

In summary, the consultation process took place in July and August 2024 through two key channels:

1) stakeholder consultation forums in Perth; and
2) a publicly available online survey and written submission portal.

The consultation process focussed on the questions articulated in the Discussion Paper as the primary method of achieving stakeholder views on the six policy positions to be settled.

Opportunities to engage with this further review were advertised through the following methods, including:

- an announcement on the MyLeave website;
- advertisements in The West Australian Newspaper on 31 July 2024 and 3 August 2024, and;
- direct liaison with key stakeholders involved in the 2023 Review containing invitations to attend further targeted stakeholder consultation forums in Perth between 30 July 2024 to 1 August 2024.

The Stakeholder Consultation Plan sought to actively encourage participation from a range of stakeholders including employee representatives, employer representatives, peak industry bodies, relevant government agencies, employees and employers.

A list of stakeholders who were invited to attend a stakeholder consultation session is available at **Appendix A**. A total of four stakeholder consultation forums were conducted in Perth between 30 July 2024 and 1 August 2024. Stakeholders were provided with options for attendance, including a choice between in-person or virtual attendance. A summary of the organisations represented at the stakeholder forums is also contained at **Appendix A**. An additional consultation was held with the Department of Mines, Energy, Industry Regulation and Safety (DEMIRS) on 29 August 2024.

Written submissions

In addition to offering stakeholder consultation forums, the KPMG team also designed an online survey and portal for the receipt of written submissions. The online survey and written submission portal was available to the public for a three week period, including to any individual employees or employers who wished to participate.

A list of stakeholders who made written submissions is detailed in **Appendix B**. In summary, a total of four submissions were received from the Housing Industry Association (**HIA**), Master Electricians Australia (**MEA**), the Offshore Alliance and Unions WA. The online survey did not receive any responses from individual employees or employers.

4. Findings from further stakeholder consultation

4.1 Clarifying the capture of specific cohorts of construction workers

Discussion Question 1

Stakeholders were asked to consider the following in Discussion Question 1 (a):

Do you agree with the proposed capture of specified cohorts of workers in Table 4 of section 5.2.2.2 (page 39) of the Final Report of the Review? If not, please specify why, or your areas of concern.

Summary extract of Table 4 from the Final Report: Proposed capture of specific cohorts of construction workers

Scenario	Proposed Future Capture
Working Directors	All Working Directors to be excluded from the scheme
Supervisors	Amend the legislative framework to provide greater certainty
Subcontractors	Amend the legislative framework to provide greater certainty
Building Trade Assistants and Construction (Peggies)	Included (if substantially engaged in the construction industry)
Traffic Controllers	Included (if substantially engaged in the construction industry)
Electrical trade workers conducting commissioning, decommissioning, and testing*	Included (if substantially engaged in the construction industry)

* *Note*: While the Final Report of the Review focussed on Electrical Trade Workers involved in commissioning the MyLeave Board considers that all workers who conduct commissioning, de-commissioning, and testing, be included in the capture of 'commissioning'. Accordingly, this view was clarified and tested with stakeholders as part of the further consultation process.

Summary

Stakeholders generally supported, in-principle, the proposed future capture of the specific cohort of workers as listed in Table 4 of the Final Report of the Review, subject to the following caveats:

- in written submissions, MEA objected to the proposed exclusion of Working Directors (discussed further below). The MEA preferred the alternative, that Working Directors be offered the opportunity to 'voluntary opt-in' to the scheme. Other stakeholders agreed to the exclusion of Working Directors, contingent on transitional arrangements to ensure existing Working Directors participating in the scheme are not disadvantaged. The MyLeave Board also agreed with the Review's recommendation to exclude Working Directors, also noting the importance of implementing transitional arrangements for Working Directors currently covered by the Act.
- Ai Group and HIA both agreed in-principle to the proposed capture of cohorts listed in Table 4, however expressed concern to ensure careful drafting of any legislative amendments with respect to subcontractors and supervisors to better reflect the current position at common law without inadvertently expanding coverage arrangements under the scheme.

Further details

During the stakeholder consultation discussions, there were no significant objections to the proposals made on the future capture of cohorts of construction workers (per Table 4 of the Final Report). However, at those forums there was considerable dialogue about the approach to managing the coverage of 'subcontractors' and 'supervisors' within the scheme. Subsequently, written submissions were received from the MEA which expressed concern for the proposal to exclude 'working directors' from the scheme's coverage. Each point is addressed in turn below.

4.1.1 Working Directors

There was broad consensus, that Working Directors be excluded from the scheme's coverage, except for one submission that was received after the stakeholder consultation sessions. The Final Report of the Review proposed that Working Directors be excluded from the scheme's coverage, or in the alternative, be permitted to 'opt-in voluntarily'. The Final Report found that Working Directors hold ongoing employment in their business, and therefore fail the test of employment transiency which is a key factor relevant to the question of coverage. The recommendation also responds to operational concerns shared by MyLeave in its written submission that Working Directors are able to manipulate reportable income and re-define their roles at will, to potentially inflate a MyLeave claim. [1]

Most stakeholders agreed to the exclusion of Working Directors, contingent on transitional arrangements to ensure existing Working Directors participating in the scheme are not disadvantaged. The MEA preferred the alternative presented in the Final Report that Working Directors be offered the opportunity to 'voluntary opt-in' to the scheme, which is an approach currently used by comparable schemes in the Australian Capital Territory and South Australia.

In written submissions, MEA objected to the proposed exclusion of Working Directors on the basis that working directors face uncertainty in terms of:

- business risk;

[1] KPMG, *Final Report: Independent Review of the Construction Industry Portable Paid Long Service Leave Act 1985* (WA), 30 November 2023.

- the project-nature of the construction industry, in particular that there can be periods of time between projects which can create income instability and often require managing multiple contracts that can terminate before another commences;
- cyclical factors, suggesting working directors increase their involvement during peak times and decrease their work effort in downturns; and
- personal priorities. [2]

During the stakeholder consultation forum for relevant government entities, the Construction Training Fund (**CTF**) noted that it covers Working Directors, where they are found to be 'substantially engaged' in the construction industry. MyLeave expressed concerns about the implementation of a voluntary opt-in model for Working Directors, noting that it would require a second operating model that would impose a larger administrative burden on MyLeave for a small number of workers. MyLeave also supported the Review findings that Working Directors fail the test of employment transiency. On the totality of views provided by stakeholders there does not appear to be a strong reason to depart from the Review's recommendations with respect to Working Directors.

4.1.2 Subcontractors

The Final Report of the Review proposed that greater certainty could be achieved with respect to subcontractors by codifying the current common law test into the MyLeave legislative framework.

Currently, MyLeave fields many enquiries to assist employers and subcontractors clarify scheme coverage and considers individual scenarios on a case-by-case basis having regard to the common law test (that draws a distinction between an 'independent contractor' and an 'employee'). MyLeave has advised that its current practice is to apply the common law test when determining eligibility for scheme participants, meaning subcontractors who meet the common law test of an 'employee' are included within the scheme's coverage (and those characterised as 'independent contractors' are excluded from the scheme's operation).

During stakeholder discussions, both Ai Group and HIA discussed relevant considerations, including alignment with the definitions provided in the *Fair Work Act 2009* (Cth), the *Closing Loopholes Act* 2023 (Cth), and the *Closing Loopholes No. 2 Act 2024* (Cth). In written submissions, HIA indicated its support for amendments to the Act to clarify the exclusion of independent contractors from the scheme[3] and confirmed that it considers My Leave's current approach of applying the common law test to determine which subcontractors are to be considered 'employees' for the purpose of scheme coverage to be appropriate.[4]

After deliberations, stakeholders who participated in the further consultation agreed that codifying the existing common law test will assist clarify coverage arrangements for subcontractors.

4.1.3 Supervisors

The Final Report of the Review proposed that greater certainty could be achieved with respect to coverage for supervisors by progressing legislative reform that better articulates 'which types' of supervisors are captured by the scheme. Currently, Supervisors who are engaged in a role aligned with that of a foreperson may be eligible for coverage under the existing legislative framework where the types of work performed align with a prescribed classification in the regulations. This requires an assessment on a case-by-case basis.

During the stakeholder consultation forums, the HIA commented that within the housing industry the roles of supervisors can be understood in three key ways:

[2] Master Electricians Australia, *Written Submission*, 19 August 2024.
[3] Housing Industry Association, *Written Submission*, 19 August 2024, 2.
[4] Ibid, 5.

a) supervisors who primarily work onsite are covered by the *Building and Construction General On-site Award 2020*, directly overseeing workers;
b) supervisors covered by the *Miscellaneous Award 2020*; or
c) supervisors that are award-free, possessing managerial responsibilities and working across multiple sites, including offsite.

Stakeholders typically agreed with this characterisation and noted similar distinctions exist with respect to supervisors performing work in commercial, engineering and resourcing-related roles.

There was consensus between all stakeholders that the Act seeks to capture supervisors who perform a majority of their role directly supervising staff on-site, as distinct from those supervisors performing managerial tasks which is understood to include project management, budget and financial oversight, forecasting and job management.

Accordingly, stakeholders agreed that those supervisors covered by the *Building and Construction General On-site Award 2020* and the *Miscellaneous Award 2020* are captured under the Act and that legislative reform should be progressed to better articulate the current position and clarify coverage. Stakeholders agreed that individuals with managerial responsibilities, such as budget oversight, forecasting, and project management, should be excluded from the scheme.

For completeness, during stakeholder discussions Ai Group advocated for continued reliance on the Award system to determine classification, and noted while there can be confusion from time to time, the confusion is not insurmountable and could be addressed within the existing industrial and employment framework, including through the assistance of the Fair Work Ombudsman (FWO). MyLeave representatives present in the stakeholder discussions noted that as a statutory authority, charged with responsibilities to administer portable long service entitlements, its preference is to have clear legislative drafting that avoids the need for workers, employers and MyLeave to review Awards or examine the intricacies of industrial decisions. MyLeave also noted that Supervisor roles are not easily discernible in the Awards and more explicit drafting to clarify what is not a Supervisor would be beneficial.

4.1.4 Commissioning Workers

On consideration of the Final Report of Review, the MyLeave Board supported recommendation 1A of the Final Report (that recommended the inclusion of Electrical Trade Workers in the scheme's coverage), however noted that the capture of commissioning should include *all workers* who conduct commissioning, de-commissioning, and testing on a construction site and not be restricted to electrical trade workers only.

In written submissions received subsequent to the consultations sessions, the Offshore Alliance (represented by the Australian Workers' Union and the Maritime Union of Australia) concurred with the view of the MyLeave Board, independently indicating its preference that the 'legislative framework be broadened to ensure that all workers who undertake commissioning, decommissioning and inspection activities in the hydrocarbons sector are covered…'.[5] The Offshore Alliance supported the inclusion of electrical trade workers in the scheme, and considers that mechanical and metal trades, crane operators, riggers, scaffolders, rope access workers, service technicians, trade assistants and painter blasters should also be covered.[6] The Offshore Alliance also requested that AICIP Inspectors, Plant Inspectors, Tank Inspectors, Welding Inspectors, Marine Inspectors, NDT Inspectors and NACE Inspectors be included within the scheme's coverage.[7]

Noting the timing in which the written submission was received, it was not possible to test these specifics with other stakeholders. That said, during the consultations some employer representatives raised broader concerns with respect to any attempts to expand the scheme's coverage, and it is likely that if the Offshore Alliance's proposal was

[5] Offshore Alliance, *Written Submission*, 1.
[6] *Ibid*.
[7] *Ibid*.

further tested that other stakeholders may object to the inclusion of these additional occupations, especially where the work is being performed in the oil and gas industry, rather than the construction industry.

Observation:

- There is stakeholder support to progress legislative amendments to clarify ambiguity surrounding coverage for specific cohorts of workers discussed in Table 4 of the Final Report of the Review.
- With the exception of the MEA, there was broad support to exclude Working Directors from the scheme's coverage, on the basis that Working Directors hold ongoing employment and do not experience transiency of employment in the same manner as other construction workers.

  If progressing to implement legislative reform to exclude Working Directors from the scheme stakeholders indicated support for transitional arrangements to prevent disadvantage for existing Working Directors who are presently covered by the scheme.
- Careful legislative drafting is required to clarify the eligibility of 'Supervisors' and 'Subcontractors', particularly.
- Following stakeholder deliberations, there appears to be consensus that the capture of Supervisors within the scheme be clarified to include those performing roles and tasks consistent with, but not limited to, the *Building and Construction General On-site Award 2020* and *Miscellaneous Award 2020*, and excluding supervisors whose role is predominantly managerial.

Discussion Question 1 (cont.)

Stakeholders were asked to consider the following in Discussion Question 1(b):

Per section 5.2.2.1 (page 38) of the Final Report of the Review, as part of the earlier consultations conducted in 2023 some stakeholders advocated for additional occupations to be included within scheme coverage. Do you agree that additional occupations need to be added to the coverage of the MyLeave scheme, in particular:

i. divers, drone operators, specialists in wind farm turbines, tower and blade installations;
ii. other specified work covered by the Hydrocarbons Industry (Upstream) Award.

Summary

Further stakeholder consultation has been helpful in identifying that:

- the additional occupations suggested by employer representatives as part of the 2023 Review process may have been based on a misunderstanding of the current operation of the existing coverage provisions that MyLeave has since been able to clarify with stakeholders; and
- MyLeave considers employees fulfilling the roles (as above) on a site are already captured within the Act; and
- accordingly, it is not necessary to progress legislative amendment to include these occupations.

Further details

Discussions between stakeholders and MyLeave during the further consultation process revealed that earlier stakeholder calls for additional occupations to be added to the coverage of the Act may have been based on a misunderstanding of the current operation of the coverage provisions. MyLeave representatives present in the stakeholder consultations took the opportunity to clarify the operation of the coverage provisions and took the view that the occupations in question are covered within the existing operation of the legislation. This view was supported by a representative from the AMWU who highlighted that some drone operators are already covered by the scheme, often as Riggers, who have undergone additional training to operate drones on construction sites. Accordingly, legislative amendment to incorporate the additional occupations in question may not be required.

For completeness, in its written submission to the further consultation process, Unions WA clarified that relevant work under the *Hydrocarbon Industry (Upstream) Award* could include the preparatory work and development of an oil or gas field, including well servicing and decommissioning of hydrocarbon facilities; as well as the commissioning, servicing, maintaining; as well as the provision of temporary labour services used in these activities.

4.2 Definitions that relate to coverage in the scheme

Discussion Question 2

Stakeholders were asked to consider the following in Discussion Question 2:

(a) With respect to Recommendation 2A (a), do you have any concerns about the proposal to alter the term ‘employee’ to ‘worker’?

(b) With respect to Recommendation 2A(b), do you foresee any unintended consequences arising from the proposal to change the definition of ‘employer’?

(c) With respect to Recommendation 2B which recommends amendments to the definition of ‘construction industry’ to clarify what it means to be ‘on a site’ and ‘substantially engaged’:

i. would you support a move to codify the existing common law understanding of what work ‘on a site’ means into the *Construction Industry Portable Paid Long Service Leave Act 1985 (WA)?* If not, please explain why. (A summary of the current common law position is available in section 5.2.3.4 (page 45) of the Final Report of the Review).

ii. what test do you consider is the most objective method for assessing whether a worker is “substantially engaged” in the construction industry? (Section 5.2.3.5 (page 46) of the Final Report of the Review provides examples of the tests that are used in other comparable schemes for consideration).

Summary

- There were mixed stakeholder views concerning the proposal to alter the title of the definition from 'employee' to worker'. Opposition to the proposal was for two key reasons, being a concern that the terminology could expand the scheme's coverage, and that harmonisation is a secondary concern to meeting the needs of the users of the scheme. It is likely the stakeholder objection could be overcome once specific drafting details are available that demonstrate the title change will not impact on the scheme coverage arrangements.
- Stakeholders agreed that the definition for 'employer' and 'employee' should be simplified, however there were differing views on how that would best be achieved.
- With respect to the definition of the construction industry, stakeholders agreed to the proposal to clarify what it means to be 'substantially engaged' in the construction industry. There were no firm views as to *which* test should be adopted, although all stakeholders were keen to ensure transitional arrangements are put in place, so as to avoid any disadvantage to existing scheme participants.
- On the issue of work being performed 'on a site' most stakeholders agreed to the proposal to codify the existing common law position as a method of creating greater certainty, although Unions WA did not support that approach, instead preferring to see the term removed from the legislation. Separately, MyLeave further contemplated how the term 'on a site' could be removed as part of broader reform efforts, to enhance the operation of the legislation and increase clarity in the coverage provisions. Further detail is contained in section 4.2.3 of this Report.

Further details

4.2.1 Proposals to change the title of the definition of 'employee' to 'worker'

Recommendation 2A(a)

When contemplating the operation of the definition 'employee' under the Act, the Final Report of the Review considered there was merit in changing the *title* of the definition from 'employee' to 'worker' - to bring the language of the Act into conformity with comparable interstate schemes and to ensure the title reflects the substance of its content being construction workers, which currently includes certain types of subcontractors (who are found to be an 'employee' under the common law test).

During stakeholder discussions, Ai Group opposed the proposed change, a view which was echoed by HIA. The objections arose from a concern that the change in language could expand the scope of the coverage provisions. In its written submission, HIA suggested there was no genuine need for the change and that attempts to harmonise the language with reciprocal schemes 'will not necessarily result in better outcomes for Scheme participants'. [8]

No other stakeholder objected to the proposed change. In support for the recommendation, Unions WA commented that the shift in language would 'better reflect the nature of the modern construction workforce'. [9] The CCAWA suggested that the term "construction worker" might be more appropriate for the MyLeave scheme, than the term 'worker'. In discussion, the majority of stakeholders agreed that clear and refined legislative drafting to the substance of the 'employee' definitions would effectively address concerns raised about potential for scheme expansion.

[8] Ibid, 4.
[9] Unions WA, *Written Submission*, 19 August 2024.

4.2.2 Proposals to change the definition of 'employer'?

Recommendation 2A(b)

Drawing on the comments made in the 1995 Supreme Court of Western Australia decision in *Aust-Amec*[10], the Final Report of the Review recommended simplifying the definition of 'employer' under the Act to mean:

- any entity that engages an employee/worker as defined under the Act (retaining the existing exemptions for a Minister, authorities or local government prescribed under existing provision 4 (c) of the Act); and
- de-coupling the link of employer from the construction industry (to rely on the workers engagement in the WA construction industry as the primary test).

The Final Report suggested that the implementation of any amendments to the 'employer' definition would best follow amendments to the 'employee/worker' definition, positioning the employee/worker at the centre of the scheme's design.

During stakeholder consultations, there was a general agreement that the existing definition should be simplified to improve clarity, however stakeholders were unable to comment on the quantum of the conundrum posed by the current drafting of the 'employer' definition and some stakeholders suggested that further analysis is required to offer a greater degree of comfort that the proposed changes will not lead to inadvertent scheme expansion or unintended consequences.

Unions WA provided strong support for the proposal, particularly the notion that eligibility for the scheme pivot on the activity of the worker in question.[11] Government stakeholders also supported the proposal, the CTF citing an example of how the proposal would better recognise the mobility of workers within the industry and avoid employees 'on the fringes' from missing out on entitlements under the scheme. The Department of Finance (**DOF**) agreed, noting the proposal would contribute to greater clarity of the scheme's coverage.

In discussions, HIA and CCIWA agreed with the proposal to simplify the operation of the key definitions, however expressed some reservations on the proposal to entirely de-couple the definition of 'employer' from the construction industry. As an alternative, HIA and CCIWA suggested that simplification could also be achieved by amending the definition of 'employer' to remove reference to being '*in the* construction industry' and to instead adopt language analogous with the current 'employee' definition, being a reference to '*relating to*' to the construction industry.

Observation

- Given the importance of definitions in the legislative framework, there is merit in MyLeave seeking further advice on how the definition could be drafted to simplify the operation of the coverage provisions without causing unintended consequences.

4.3.3 Definition of 'Construction Industry': 'On a site' and 'substantially engaged'

The Review found that the interpretation of the 'construction industry' definition constituted approximately 60% of all disputes relating to the operation of the Act. The Final Report of the Review recommended that the current definition of 'Construction Industry' in the Act be amended to provide further guidance as to what it means to be 'on a site' and 'substantially engaged' in the construction industry.

'On a site'

The key issue is whether the Act should continue to use a location-based test to limit coverage to work performed 'on a site'. Evolving work arrangements and the adoption of new technologies means pain points have emerged that challenge the traditional boundaries of the construction industry in relation to ancillary industries such as manufacturing and mining, particularly with regard to prefabrication building that is transported to sites for installation.

[10] *Aust-Amec Pty Ltd t/a Metlab & SRC Laboratories and Others v Construction Industry Long Service Leave Payments Board* (1995) 62 (IR) 412.
[11] Unions WA, n6, 2.

MyLeave currently adopts the interpretation provided in common law which is summarised in the Final Report. The current position of the common law is that the term is to be construed broadly and it is:

> *not necessary for the relevant work to be performed on a building or construction site, as those phrases are commonly understood, as long as it is performed away from the employer's premises.*[12]

Case Study: 'Employer's premises'

The current definition is contributing to perverse outcomes for workers in some circumstances. For example, MyLeave provided an example where employees engaged by a company in southern Western Australia constructing a large-scale power generation plant were not covered by the scheme, despite engaging in construction work because of the employer owning the land the construction occurs on, thereby not conforming with the current common law understanding of the term 'on a site'. By contrast, contractors working alongside employees performing the same work at the power generation plant may be eligible employees under the Act, because they are working away from their employer's premises.

On this issue, the Construction Contractors Association of WA Inc noted that in the context of a construction company or a power plant an employer's premises may consist of both a head office and yards, and that fabrication yards can be used for a variety of projects as a location of work.

In its written submissions, Unions WA suggested that the Act be amended to allow regulations that effectively permit a group of workers to be 'deemed' to be an eligible employee/worker. It cited the *Workers Compensation and Injury Management Act 2023* as an example of how a group of workers who do not strictly meet eligibility requirements can be accommodated within the legislative remit. Unions WA suggested that if a similar provision were to be inserted into the MyLeave legislative framework that it would permit the Board to make recommendations to the Minister that regulations be drafted to assist the framework adapt to changing circumstances. [13]

Additionally, during consultation discussions MyLeave representatives noted that for reasons of fairness, the definition should, and does, apply to both freehold and leasehold premises.

The Final Report of the Review suggested that a solution may be to codify the current common law definition and to incorporate examples into the legislative drafting to provide additional clarity. When put to stakeholders as part of the further consultation process most stakeholders present agreed in-principle that if MyLeave is already applying the common law, then codifying the current position would be sensible. In discussions, MyLeave also suggested defining exclusions more clearly, particularly regarding the boundary with the manufacturing industry and the mining industry, to aid in interpretation and application. A representative from the AMWU indicated that in his view, drawing a distinction between the manufacturing and construction industries for the purposes of the MyLeave scheme should be achievable.

Subsequent to the stakeholder discussions, the Review team received further written submissions on this issue. In its written submissions, HIA indicated it would not oppose amendments that sought to achieve additional clarity of what it means to be on a site, however would strongly oppose any amendments that would result in expanded coverage for the scheme to other sites, citing manufacturing environments, prefabrication areas, temporary lay-down zones and storage yards as examples.[14]

Unions WA, in its written submissions indicated it does not support a codification of the current common law position, on the basis it would 'serve to entrench an outdated conception of modern construction practices, particularly in relation to prefabrication and modular construction'.[15] As an alternative, Unions WA suggests removing the term 'on

[12] *Quantum Blue Pty Ltd v The Construction Industry Long Service Leave Scheme* [2019] WAIRC 860.
[13] Unions WA, n6, 2.
[14] Housing Industry Association, n3, 5.
[15] Unions WA, n6, 2.

a site' as a component of the definition of 'construction industry', in favour of 'inserting explicit exclusions into the Act relating to manufacturing and certain mining activities would be a more effective mechanism to achieve the intended result of differentiating workers engaged in work of that nature from those engaged in the construction industry'.[16]

In a final consultation session held on Thursday, 1 August 2024 between the MyLeave Executive team and the KPMG Review Team, MyLeave reflected on what had been discussed with stakeholders and contemplated the proposal to eliminate the concept of "on site" from the definition of the construction industry. It considered this approach had merit and would negate the need for defining what constitutes a site by instead providing clear definitions of what is included and excluded, such as explicitly stating that manufacturing and mining is excluded while specifying what constitutes construction work. It noted that the level of detail had not been previously put to stakeholders and that it if it were to proceed it would need further stakeholder consultations and to be progressed holistically with other Review recommendations, notably any decisions to depart from the current use of prescribed industrial instruments as a method of defining coverage.

Observation: The term 'on a site' is a location-based test that has historically performed two key functions in the MyLeave legislative framework:

- it serves, along with the use of prescribed industrial agreements, to exclude white collar workers from the scheme's operation; and to
- differentiate between work conducted on a construction site and other locations, although the development of the common law has augmented that understanding.

Stakeholder consultations revealed less contention about the distinction between the boundaries of the construction and the manufacturing industries than might have been expected. The Review Team considers that stakeholders demonstrated a willingness to collaborate and that as a next step a collective exercise in determining examples of inclusions and exclusions for proposed legislative drafting may assist draw a clear line as to where the boundaries exist for the purposes of the scheme.

If a clear set of examples of inclusions and exclusions can be formulated and agreed with stakeholders, there would be scope to potentially depart from the use of the term 'on a site'. The remaining caution to be exercised would be to find an alternate method within the scheme to exclude 'white collar workers', which was a historical purpose of the legislative framework. Options for the use of an occupation list or refined legislative drafting (see Recommendation 3 of the Final Report) could assist provide a mechanism to exclude white collar workers from the scheme's operation in the future.

To prevent this, a potential solution would be to refine the occupational list, clearly defining "construction work" and excluding office-based tasks, managerial roles, and supervisory activities not directly related to construction, as well as explicitly excluding mining.

'Substantially engaged'

In the Final Report of the Review, KPMG recommended that the definition be amended to provide further guidance on what it means to be 'substantially engaged' in the construction industry. During stakeholder consultations, there was general agreement with the Review recommendation and discussions progressed to focus on the most appropriate method of determining what it is to be 'substantially engaged'.

The KPMG Review team noted that comparable interstate schemes use a variety of different methods, including a predominance test, and 'two-thirds rule' being applied in the Victorian construction scheme. MyLeave explained it currently determines what is 'substantially engaged' on a case by case basis, often considering anything more than 50% or half of the employees time working in the construction industry to meet the test.

[16] Ibid.

In discussions, the KPMG Review team suggested that the term 'substantial' implies more than 50% and considered that the 'two-thirds' rule might be a better test to apply to the term 'substantial'. There were no objections to that proposal, although stakeholders were concerned to ensure that any existing eligible employees captured under the current application of the 'substantially engaged' test are no worse off under any proposal to change the test in the future. On that point, HIA in its written submission suggested that a starting point to determine the appropriate test would be the current test applied by MyLeave, noting it would result in minimal departure from current procedures thereby minimising the impact on stakeholders and the fund. HIA also suggested that a Regulatory Impact Statement would be appropriate to understand the impact of any alternate approach under consideration. [17]

4.3 Alternatives to Prescribed Industrial Instruments

Discussion Question 3

The Review was asked to consider alternatives to the use of prescribed industrial instruments as an effective means of capturing workers in the construction industry. Finding 3 and Recommendation 3 offered three key options available. In selecting a preferred option, stakeholders were asked for views on:

a) What do you consider are the key issues (if any) with **Option A** (maintaining the existing system and update Schedule 1 to codify the position established in Positron)?

b) What do you consider are the key issues (if any) with **Option B** (implementing an occupation list in conjunction with a classification system)

   i. With respect to **Option B** only, do you foresee any unintended consequences or concerns about the use of an occupation list in combination with a classification system?

   ii. when choosing a classification system do you have any comments concerning the Review's proposal to rely on ANZSCO (being an employee/occupation focus) rather than ANZSIC (being a focus on the employer and broader industry) as a means of capture?

   iii. do you consider the ANZSCO occupation classifications are sufficiently similar to the occupation classifications provided by the relevant prescribed award? Would you have any concerns about adopting the ANZSCO occupational classification to determine coverage under the scheme?

c) What do you consider are the key issues (if any) with **Option C** (using refined legislative drafting with additional terms)?

d) Of the three options proposed by the Review, which option do you prefer and why?

e) Ministerial Declarations: Page 52 of the Final Report of the Review considers the use of Ministerial Declarations as an additional means to determine coverage. Do you support the notion of including Ministerial powers as an additional means of determining coverage? In what circumstances would you support Ministerial intervention and what limits, if any, do you consider appropriate to place on the use of such powers?

[17] Housing Industry Association, n3, 6.

Summary

- In contrast to the position expressed by the MyLeave Board (which prefers the adoption of Option B or Option C), the majority of industry stakeholders consulted expressed concerns about the use of Option B (use of an occupation list in combination with a classification system) and greater industry stakeholder support was received for Option A (maintain the use of prescribed industrial instruments modified for *Positron*) or Option C (adoption of refined drafting with additional terms).
- Industry Stakeholders did not support the insertion of Ministerial powers into the legislative framework because of concerns the powers could be applied in an *ad hoc* manner.

Further details

4.3.1 Considering the three alternatives

The Final Report of the Review offered three alternatives to the current method of prescribing industrial instruments:

Option A: Maintain the existing system but update it to reflect to the decision in *Positron*[18];

Option B: Design and implement an occupation list in conjunction with a classification system;

Option C: Adopt refined legislative drafting with additional terms.

Understanding the status quo

During stakeholder consultations, the KPMG Review Team commenced discussions by noting that during the consultations that took place in 2023 Review, some stakeholders had previously suggested that the operation of prescribed industrial instruments within the MyLeave Regulations were less helpful as a means of defining coverage, than had been the case historically. This view was clarified with stakeholders, and there was unanimous agreement between both employer and employee representative peak bodies that the Award system continues to play a critical role in determining terms and conditions of employment, notwithstanding the rise of enterprise bargaining and the deregulation of work practices and classifications.

MyLeave discussed the operational issues it experiences from relying on industrial instruments to apply its legislation correctly, in particular that Awards contemplate competency more than occupation or the tasks performed. MyLeave also noted that approximately 82% of employers within the scheme are small businesses with fewer than 20 employees, who typically do not use Awards as a tool of reference. HIA also indicated that 'historically the use of industrial instruments to determine employee coverage under the Act has been challenging due to the sole inclusion of state-system instruments', however noted that in its view the 'recent inclusion of federal system instruments has gone some way to addressing this issue'.[19] That view was not shared by all stakeholders.

Views on the alternatives

All stakeholders who attended a consultation session demonstrated a willingness to consider options that can improve the operation of the scheme and a collaborative discussion was achieved.

In discussions, Ai Group proffered a view that Option A is preferable, and noted at various junctures in the discussion that industrial relations parties and the Fair Work Commission have expended significant effort in modernising awards and have developed a sound basis for the agreement of employment terms and conditions which should be leveraged as the basis of determining coverage for the MyLeave scheme.

[18] *Positron The Construction Industry Long Service Leave Payments Board* [1990] WAIRC 3062.
[19] Housing Industry Association, n3. 6.

In contrast, MyLeave indicated that it is a statutory scheme administrator and a government entity that is external to the industrial relations domain, and would prefer its operations could be understood clearly in its enabling legislative framework without recourse to interpreting industrial instruments. MyLeave explained to stakeholders that its legislation expressly determines entitlements, and reference to industrial instruments is only relevant to the question of eligibility. MyLeave expressed concerns about the need for its staff to need to develop and maintain industrial relations expertise to administer its legislation. Representatives of the MyLeave Executive team in attendance considered there was merit in departing from the use of prescribed industrial instruments in the future, and moving towards Option B (use of an occupation list) or Option C (adopt refined legislative drafting) as a means of clarifying coverage without needing to interpret industrial instruments. CTF also expressed support for the use an occupation list in combination with a classification system designed by the Australian Bureau of Statistics.

In response, stakeholders expressed a diversity of views, however in summary the majority of stakeholders articulated concerns about the use of an occupation list (in combination with an Australian Bureau of Statistics classification system) and greater support was received for Option A (particularly by Ai Group and CCI WA) and Option C (supported by Unions WA and the CFMEU).

In discussions, Unions WA and the CFMEU indicated support for ceasing to use prescribed industrial instruments and move to adopt Option C (refined legislative drafting with additional terms). In written submissions, Unions WA has further advised it considers refined drafting offers a degree of flexibility to capture the varieties of construction work and is most likely to be best method of future-proofing the Act to make it adaptable to changes in how construction work is performed. [20]

HIA indicated it would not support an alternative option until further details of the proposals could be provided. With respect to Option A, HIA indicated it would not support moves to use the *Building and Construction On-site Award* as the sole instrument for classification. HIA considered that periodic reviews of the list of prescribed awards under Schedule 1 of the Regulations (approximately every five years) would be an effective step to ensure the list remains current.[21] MyLeave clarified that it last completed a review in 2021 and that periodic reviews are necessary to ensure existing cohorts of workers retain coverage.

Use of Ministerial Powers

The Final Report of the Review observed (at page 52) that the addition of a further power to enable the Minister to make declarations that could assist determine coverage and improve the operation of the Act. The Final Report cited an example of a similar power being used in the *Long Service Leave (Portable Schemes) Act 2009* (ACT). The MyLeave Board agreed to examine further the options for inserting Ministerial powers into the Act.

There was broad agreement among stakeholders on the need for a mechanism within the Act to promote flexibility, particularly for occupations at the margins. However, significant concerns were raised regarding the use of ministerial power as the mechanism to achieve this flexibility. The shared consensus amongst stakeholders present during the consultations was that flexibility should be managed through regulatory arrangements allowing for parliamentary scrutiny and oversight. KPMG suggested that any ministerial actions should be guided by the requirement to consider relevant administrative law principles as a means of controlling Ministerial action, however the views of the industry stakeholders were unchanged with many expressing concerns the powers could be used in an *ad hoc* manner.

[20] Unions WA, n6, 3.
[21] Housing Industry Association, n3. 6.

Observation

- Of the three options presented in the Final Report, Option B (the use of an occupation list with a classification system) received the least support from industry stakeholders.
- In considering the remaining two options, there was a division of industry stakeholder support between Option A and Option C, and the MyLeave Board has indicated a preference to move away from Option A for reasons listed above. **Option C may present a position of compromise**.
- Option A presents the least amount of change to the current arrangement. Option A could be progressed as an interim improvement on the current arrangement, that is, amending the Regulations to account for the Positron decision. This could allow more time for the development of Option C and further stakeholder testing prior to any legislative amendments being advanced. That said, from an implementation perspective a risk exists that the passage of time evades long-term reform measures, and the prospects of successful legislative reform may be improved with a single set of amendments, rather than attempting to advance both interim and long-term measures.

4.4 Core terms

Discussion Question 4

Finding 4 of the Final Report of the Review made recommendations to amend the Act to revise core terms.

Stakeholders were asked:

a) Do you foresee any unintended consequences arising from Recommendations 4A-4D.

b) **'Ordinary Pay':** what refinements, if any, do you consider are required to make the definition of Ordinary Pay that appears in the *Long Service Leave Act 1958* (WA) (**LSL Act**) appropriately nuanced for the WA construction sector (in particular, compressed roster arrangements and treatment of overtime and penalty hours)?

Summary of Findings

- Stakeholders expressed support for Recommendation 4A to extend to the current scheme's days of service to include modern types of leave available under the LSL Act.
- There were differing views on Recommendations 4B-4D, however overall, stakeholders supported their implementation, provided each is carefully drafted and a further opportunity exists to review the proposed drafting prior to implementation.

Recommendations	Description of recommendation	Summary of stakeholder views
4A	Amend the Act to revise the term 'days of service' to reflect the types of leave permitted under the LSL Act.	General Support: stakeholders supported the inclusion of modern leave types (excluding unpaid leave) per the LSL Act.
4B	Amend the Act to align the definition of 'ordinary pay' to the equivalent definition in the LSL Act and refined to reflect the nuances of the construction industry.	General support to amend the Act to align with the LSL Act definition of 'ordinary pay', although diverging views exist with respect to the inclusion of overtime.
4C	Insert a definition for 'ordinary hours of work'.	General support, although if Recommendation 4B is implemented it will mean that the term 'ordinary hours of work' will likely be removed from the Act.
4D	Amend the Act to insert a definition for 'week'.	General Support: further details below.

Further Details

Recommendation 4A: reflect modern leave types in 'days of service'

Recommendation 4A received general support from all stakeholders. HIA requested that the legislative drafting for a day of service to expressly exclude leave without pay.[22] MyLeave representatives present in the consultation sessions explained that the intention is for the MyLeave legislation to replicate the LSL Act to the extent possible, and that all paid leave should be a characterised as a 'day of service'.

Recommendation 4B: Amend the Act to align the definition of 'ordinary pay' to the equivalent definition in the LSL Act and refined to reflect the nuances of the construction industry.

The KPMG Review team sought stakeholder feedback on what nuances may need to be incorporated into the definition of 'ordinary pay' from the LSL Act, to make it fit-for-purpose for the MyLeave scheme. Stakeholders concurred that compressed rostering, overtime arrangements, and the use of 'all up rates of pay' are key factors relevant in the construction industry, that need to be contemplated in the development of a revised definition of 'ordinary pay'.

Whilst no stakeholders objected to Recommendation 4B (many agreed that amendments are required to improve the operation of the legislation) diverging views were expressed in relation to what should be included in the term 'ordinary pay'. Unions WA considers it appropriate that overtime be included in defining ordinary pay and ordinary hours,[23] whereas HIA[24] and Ai Group were opposed to the inclusion of overtime and penalty rates in the formulation of 'ordinary pay'.

[22] Housing Industry Association, n3, 8.
[23] Unions WA, n6, 3.
[24] Housing Industry Association, n3, 8.

The Department of Energy, Mines, Industry Regulation and Safety (DEMIRS) met with the KPMG Review team and MyLeave separately to discuss the operation of the LSL Act and the operation of the 'ordinary pay' definition in practice. As summarised on the DEMIRS its website, under the LSL Act:

> 'ordinary pay does not include shift premiums, overtime rates, penalty rates or allowances. However ordinary pay for a casual employee does include their casual loading'.[25]

Policy guidance by DEMIRS also stipulates that:

> *If an employee's normal weekly number of hours of work have varied during their employment, the normal weekly number of hours is the average weekly hours worked by the employee during that accrual period.*
>
> *An employee's normal weekly number of hours* ***will include overtime hours*** *if the employee regularly worked overtime during their period of employment.*
>
> *Averaging the hours worked by a casual, seasonal or FIFO employee takes into account periods when their employer did not provide them with work....*[26]
>
> (emphasis added)

It is understood that under DEMIRS' existing interpretation of the policy overtime hours are included in normal weekly number of hours, however entitlements are paid at the ordinary time rate of pay, not including the overtime penalty rate.

Ai Group advocated for aligning the revised definition with the position as expressed by the relevant Award structures. Other employer representatives present in the stakeholders discussions concurred. MyLeave clarified that while the Award structure is significant, the Act primarily concerns entitlements provided at law, not conditions of employment. When the Act was created, payments were made at the Award rate. However, since October 2006, payments have been made at the rate of ordinary pay, rendering the Award rate less relevant to the calculation.

There was general consensus between all stakeholders at the stakeholder discussions that "all-up rates" should be included for accrual purposes.

Recommendation 4C: Insert a definition for 'ordinary hours of work'

During stakeholder discussions, the KPMG Review team explained the Act currently references 'ordinary hours of work' however does not define the term. When seeking views on how the term should be defined, Ai Group indicated it would be appropriate to look to the Award system and also noted the issues of casuals will be addressed in federal reforms to be implemented to the *Fair Work Act 2009* (Cth) in 2026.

In written submissions, Unions WA considered it appropriate that when defining ordinary hours of work that overtime be included to support remote workers achieve their entitlements fairly. Unions WA also noted that when determining ordinary hours that casual workers are not disadvantaged by the irregular work arrangements.[27] HIA does not oppose the inclusion of a definition for 'ordinary hours of work', where it is fundamental for the operation of the Act and suggested that when formulating the drafting that the definition be linked to the application industrial instrument.[28]

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[25] Department of Energy, Mines, Industry Regulation and Safety (2024) *Long Service Leave – What do employees get paid?* (Long service leave - What do employees get paid? | Department of Energy, Mines, Industry Regulation and Safety (commerce.wa.gov.au) (accessed 29 August 2024).

[26] Ibid, 'Normal weekly number of hours'.

[27] Unions WA, n6, 3.

[28] Housing Industry Association, n3, 8.

MyLeave indicated that if Final Report recommendation 4B is adopted (aligning the definition of 'ordinary pay' to the equivalent definition in the LSL Act and refined to reflect the nuances of the construction industry) the need to define 'ordinary hours of work' will be addressed and will not require implementation. This is because the LSL Act definition of 'ordinary pay' refers to 'normal weekly number of hours of work'.

> ***7. Ordinary pay: general***
>
> *(1) Except as provided in subsection (4), an employee's ordinary pay is the employee's remuneration for the employee's* ***normal weekly number of hours of work calculated on the ordinary time rate of pay*** *applicable to the employee as at the time when any period of long service leave granted to the employee under this Act commences, or is taken to commence.*
>
> (2) *For the purposes of subsection (1), the* ***normal weekly number of hours of work*** *of an employee whose hours have varied during a period of employment is the average weekly hours worked by the employee during the period, calculated by reference to ascertainable hours worked by the employee during the period, excluding a*ny period referred to in section 6A(2)
>
> …
>
> (emphasis added).

Recommendation 4D: Insert a definition for 'week'

With respect to recommendation 4D, currently, there is no definition of the term 'week' in the Act, nor is the term included in the *Interpretation Act 1984* (WA). In stakeholder discussions, MyLeave highlighted the issue surrounding the definition of 'week,' noting that it is not synonymous with a seven-day period for accrual purposes and that it needs to be defined as a five-day week, totalling 44 weeks a year, excluding two weeks of sick leave, four weeks of annual leave, and two weeks for public holidays) as the basis of payment of LSL entitlements is based on 8.667 weeks after accruing 10 years of service.

The recommendation to insert a definition of 'week' was supported generally by all stakeholders to provide the better operation of the Act. Unions WA did not object to the recommendation however emphasised the need for the definition to be drafted in such a manner to avoid any workers who work weekends or seven days a week rosters are not disadvantaged. [29]

4.5. Accrual mechanism

Discussion Question 5

The Review was asked to consider whether the current method of accruing entitlements using 'days of service' reflects contemporary workforce models.

The Review considered three broad alternatives and considered a shift towards an 'hours worked' approach (specifically, option 2A) may be the alternative that best balances the various interests and results in greater fairness between cohorts and workforce models.

Stakeholders were asked the following questions:

a) Do you foresee any unintended consequences related to the adoption of Option 2A?
b) Do you have other comments relevant to the effective implementation of Option 2A?
c) Would you prefer to see another option implemented? If so, which option and why?

[29] *Ibid*.

Summary

- There was general support for a shift towards Option 2, an 'hours worked' approach, to promote greater fairness in the scheme's operation, although some peak bodies have commented that the approach may impact on employers and their contributions to the scheme – necessitating the need for a regulatory impact assessment.
- The majority of stakeholders considered the shift to an 'hours worked approach' is justified to enhance fairness between WA's construction workers on account of the prevalence of Fly-in Fly-Out (FIFO) arrangements and compressed rostering systems.
- Within the various iterations of an 'hours worked' accrual mechanism, there was broad support for Option 2A, although employee representatives preferred the adoption of Option 2C which includes overtime. In contrast, employer representatives were collectively firm on their view that overtime should not be included in the calculation of 'hours worked'.

Option	Description
1	**Maintain the current approach** which involves MyLeave placing reliance on employers to calculate the 'days of service' for each employee based on an entitlement to receive ordinary pay.
2	Shift to an '**hours worked approach',** being either: • **Option 2A** - An averaged ordinary hours variation *(preferred);* • **Option 2B** – standard working week variation. • **Option 2C** – Overtime inclusion
3	**Hybrid approach** which adopts 'hours worked' as method of accrual however contains variations to cater for those working a standard week and an additional formula for application for workers on a compressed roster.

Further Details

4.5.1 Views on Option 2

Most stakeholders expressed in-principle agreement with Option 2 which proposed the adoption of an 'hours worked' approach to accrual. The Review considered Option 2A best balances the stakeholder interests and is based on average ordinary hours. The details of Option 2A are articulated in Appendix F of the MyLeave submission[30] supplied as part of the 2023 consultation process.

The MyLeave Board supported the recommendation and Option 2A, however noted that further consideration needed to be given to casual workers who work more than 38 hours per week (e.g. 42 hours) over a year, and workers paid on a 'day rate' basis.

During stakeholder discussions, MyLeave explained that the proposal intends on retaining a 'day of service' in the legislation, for the purposes of permitting an ease of administration for circumstances involving workers moving across state and territory borders and needing to access reciprocal scheme

[30] MyLeave, *Submission to the Review of the Construction Industry Portable Paid Long Service Leave Act 1985,* August 2023.

arrangements. MyLeave explained that it intends to play a role as scheme administrator to translate 'hours worked' into a 'day of service', for that purpose and to reduce the administrative impost on employers. During stakeholder discussions, KPMG explained that if option 2A were adopted, it would present a new model not in use in any other Australian jurisdiction for construction schemes, however, is in use in other industry schemes. Stakeholders noted the information and agreed the priority should be to develop policy settings relevant to the WA construction industry, rather than trying to conform with reciprocal schemes necessarily.

Employee representatives were supportive of Option 2A, however preferred Option 2C, which if adopted, would include overtime hours in the calculation of hours worked. Employee representatives reiterated previous concerns about rostering arrangements and the disadvantage currently experienced by those workers engaged on compressed roster arrangements. In the 2023 consultation process, the Electrical Trades Union (ETU WA) expressed concerns about the ability of about workers on FIFO/compressed rostering arrangements to reach the 220 days entitlement requirement at the same speed as an equivalent worker engaged on a traditional roster arrangement.

Representatives of the ETU WA were unable to attend a scheduled 2024 consultation session however contacted the KPMG Review team in August 2024 to confirm its support for the adoption of the 'hours worked' approach, and requested that in its implementation that all possible work roster arrangements are considered to ensure no FIFO worker is denied the ability to fairly accrue entitlements. Unions WA also considered this matter further in its written submission and indicated its support for the adoption of an 'hours worked' approach, noting in its view it would be appropriate for overtime hours to be included in the calculation. [31]

During stakeholder discussions, the CFMEU commented that an 'hours worked' approach will also be easier for employers to comply with the requirement, noting that timesheet and payroll systems within the industry currently record hours, rather than a 'day of service'. A similar view was shared by the Construction Contractors Association of WA Inc.

While there were no direct objections from employer representatives and other peak industry bodies, the HIA considers the change may impact on employers and their rate of contribution and has suggested the proposal be the subject of a Regulatory Impact Assessment. [32] The HIA has also indicated that transitional arrangements will be necessary.[33] In discussions, Ai Group also expressed some reservations and queried how hours worked would be calculated and whether averaging would include reasonable additional hours of work. MyLeave explained the proposal is to align the hours worked approach with the approach underpinned by the LSL Act.

4.5.2 Views on other options

The HIA contemplated that if Option 2A is not adopted, maintaining the status quo under Option 1 (maintaining the status quo based on 'days of service') would cause the least disruption to scheme participants and that it continues to be a viable option for determining contributions in most circumstances.[34] Other stakeholders generally had little comment on Option 1 with most recognising that its continued application contributes to unfair treatment between employees, dependant upon the rostering arrangements in use.

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[31] Unions WA, n6, 3.

[32] Housing Industry Association, n3, 8.

[33] *Ibid.*

[34] *Ibid*, 9.

All employer representatives and industry peak bodies rejected the adoption of 2C, on the basis that overtime should not be considered within the 'hours worked' calculation. HIA noted that to include overtime in the calculation would go beyond the general entitlements currently provided to other WA employees under the LSL Act arrangements, [35] however a subsequent discussion with representatives from DEMIRS confirmed that over time hours are presently included in the calculation of entitlements for all WA employees, however included on the basis of ordinary rates.

No stakeholders favoured Option 3 (the hybrid approach) with all agreeing it could cause additional complexity.

Observation

- Stakeholders provided general support for a shift towards an 'hours worked' accrual mechanism. Within the various iterations of an 'hours worked' accrual mechanism, the adoption of Option 2A attracted the least objection from industry stakeholders and is most likely to address current inequities experienced within the operation of the scheme.

4.6. Employees with long-term service to a single employer

Discussion Question 6

Stakeholders were asked to consider the following**:**

With respect to employees with long-term service with a single employer the Review recommends that legislative amendments occur to require those employees to request their long service leave payment through the LSL Act only, and for a refund mechanism to be available for employers (to seek a refund for levies paid to MyLeave).

a) Do you foresee any unintended consequences associated with requiring employees with long term service with a single employer to seek their LSL payment through the LSL Act;

b) What do you consider is the best method of implementing this recommendation in a manner to reduce the administrative and regulatory burden on employers?

Summary

- Stakeholders appreciated that an unfairness presently exists on its face when employees with long term service receive their entitlements by MyLeave, rather than the employer (noting the payment from the employers attracts superannuation).
- There is general agreement with Recommendation 7B of the Final Report of the Review, and the underlying principle that the Act should act as a safety net, only having operation when entitlements under the LSL Act are not available. Further policy development is required to consider options for the *timing* of employer refunds and the interaction between the Act and the LSL Act.
- Employee representatives expressed concern to ensure any amendments would not disadvantage employees, particularly with arrangements to ensure workers' are able to access entitlements in circumstances when an employer enters administration or liquidation.

Further details

There was a broad consensus that the Act serves as a safety net for individuals unable to access their entitlements under the LSL Act. Stakeholders recognised that the receipt of entitlements under the LSL Act is more generous than the Act, by virtue of employers being required by law to pay superannuation on entitlements when an employee takes long service leave.

There was broad support for Recommendation 7B of the Report, in-principle. The MyLeave Board supported this recommendation however expressed some reservations about the *method* of refunding employers (being either the employer's contributions with or without interest, or the workers' entitlements). The proposal is that upon reaching seven years of service, employees and employers will be notified of the employees eligibility under the LSL Act, and that accordingly, employees should receive their entitlements from the employer. It is proposed that subsequently, the employer will be reimbursed by MyLeave, potentially with interest.

Should Recommendation 7B be adopted, there is a question as to *when* MyLeave should reimburse an employer. Employee representatives indicated they are keen to ensure employees receive their entitlement, including in circumstances where an employer enters administration or more problematically, liquidation. Unions WA considered the refund should only be provided to the employer 'at the point at which a worker seeks to access their long service leave from an employer…, rather than any process that may require the refund automatically occurring at a certain length of time'. [36] Conversely, HIA supported Recommendation 7B on the basis that the 'repayment [refund from MyLeave] would be made prior to LSL payments being due' – to ensure employers are not paying entitlements twice and to minimise cash flow impacts. MyLeave advised that its current service standard is to make refunds within 15 business days of an employer claiming payment for an entitlement that has been paid to an employee.

CCI WA discussed the operation of the Fair Entitlement Guarantee (FEG) as an existing statutory mechanism available under the *Fair Entitlements Guarantee Act 2012* (Cth) to provide financial assistance for unpaid employee entitlements in circumstances where an employer enters liquidation or bankruptcy. Employee representatives took the view that the operation of the FEG is not sufficient to address circumstances of insolvency and the failure to pay an employee LSL entitlement – and that accordingly, the MyLeave legislative framework should make provisions for this scenario, particularly noting the cyclical nature of the construction industry and the prevalence of phoenix arrangements.

In consultation discussions with DEMIRS, the government entity responsible for the administration of the LSL Act, it was noted that consequential amendments may be required to the LSL Act to permit the adoption of Recommendation 7B. Representatives from DEMIRS and MyLeave agreed they would need to work closely to successfully implement Recommendation 7B, if it is to be adopted.

[36] Unions WA, n6, 4.

4.7. Other comments received

The purpose of the further consultation process was to seek further stakeholder comments on six key policy settings, however MyLeave took the opportunity to seek broader views on the recommendations of the Final Report of the Review. Overwhelmingly, feedback provided by external stakeholders on the Final Report was positive or neutral. Except as provided in this Report, there were no express objection to the recommendations, rather a request that MyLeave continue consulting collaboratively with stakeholders so that industry views can been accommodated within decision points as to the best policy settings for the WA construction sector.

In written submissions, the following additional specific matters were raised:

- The Offshore Alliance noted it was 'pleased to see the recommendation to amend the definition of 'construction work' by removing the current exclusion relating to construction work on a ship'.[37]

- Unions WA noted the importance of Recommendation 8 in the Final Report to empower MyLeave with mid-spectrum compliance and enforcement powers, including the ability to issue warning letters, compliance/improvement notices, infringements and to provide payment plans. Unions WA considers that infringements issued under these powers should be commensurate with the penalties awarded for wage theft.[38]

- Similarly to the additional submissions raised by Unions WA, the ETU also separately agrees there is a pressing need to amend the Act to introduce changes in the application and progression of penalties for non-compliance, particularly targeting companies that fail to register with MyLeave or those that do not meet payment obligations as required. The ETU supports the proposal to grant MyLeave enhanced enforcement powers including that penalties should be commensurate with existing penalties in the employment context for wage underpayment. This view remains consistent with the submissions made by the ETU in 2023.

- In its written submissions, the HIA noted that recommendations 8 and 10A of the Final Report support HIA's position that mid-spectrum compliance powers should be legislated. HIA also indicated in-principle support for recommendations 9, 11A and 14. HIA noted that its views also have commonalities with recommendations 1B, 2B, 4A, 4B and 7B.[39] HIA pressed for appropriate:

    - regulatory assessments occur prior to the implementation of any proposed legislative amendments,
    - Transitional arrangements, where required; and
    - ongoing efforts by MyLeave to educate and raise awareness of requirements when engaging with industry.

[37] Offshore Alliance, *Further Submissions in relation to specific findings of the 2023 Review into the Construction Industry Portable Paid Long Service Leave Act 1985 (August 2024)*, 2.
[38] Unions WA, n6, 4.
[39] Housing Industry Association, n3, 1.

Appendices

APPENDIX A

Organisations invited to participate in the further consultation process

The table below lists all stakeholders contacted by the KPMG Review Team to participate in the 2024 further consultation process.

	Organisation Name	Participation at a consultation session
1.	Altus Group	✗
2.	Australian Industry Group	✓
3.	Australian Manufacturers and Workers' Union (WA Branch)	✓
4.	Australian Workers' Union (WA Branch)	✓
5.	Chamber of Commerce and Industry WA	✓
6.	Civil Contractors Federation WA	✓
7.	Construction Contractors Association of Western Australia	✓
8.	Construction Forestry Mining and Energy Union (WA Branch)	✓
9.	Construction Training Fund	✓
10.	Department of Energy, Mines, Industry Regulation and Safety	✓
11.	Department of Finance	✓
12.	ECA Western Australia	✗
13.	Electrical Trades Union (ETU) (WA Branch)*	✓
14.	Housing Industry Association	✓
15.	Maritime Union of Australia	✗
16.	Master Builders Association of WA	✗
17.	Master Electricians Australia	✓
18.	Mates in Construction	✗
19.	MyLeave (Executive Team)	✓
20.	National Fire Industry Association	✓
21.	Public Transport Authority of Western Australia	✗
22.	ReddiFund	✗
23.	Small Business Development Corporation	✗
24.	Unions WA	✓

**Representatives from the ETU WA were unable to attend the consultation on the day it was scheduled, however did contact the KPMG Review Team to provide views in respect of matters discussed during the sessions held on 30-31 July 2024.*

APPENDIX B

Written submissions received in August 2024

	Stakeholder
1.	Housing Industry Association
2.	Master Electricians Australia
3.	The Offshore Alliance (as represented by the AWU and MUA)
4.	Unions WA

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Inherent Limitations Disclaimer

This report has been prepared as outlined with the Construction Industry Long Service Leave Payments Board trading as MyLeave in the Award Letter and subsequent contractual arrangements. The services provided in connection with this engagement comprise an advisory engagement, which is not subject to assurance or other standards issued by the Australian Auditing and Assurance Standards Board and, consequently no opinions or conclusions intended to convey assurance have been expressed.

The findings in this report are based on stakeholder consultation and the reported results reflect a perception of stakeholders but only to the extent of the sample surveyed.

No warranty of completeness, accuracy or reliability is given in relation to the statements and representations made by, and the information and documentation provided by, MyLeave and other stakeholders consulted as part of the process.

KPMG have indicated within this report the sources of the information provided. We have not sought to independently verify those sources unless otherwise noted within the report.

KPMG is under no obligation in any circumstance to update this report in either oral or written form, for events occurring after the report has been issued in final form.

Notice to Third Parties

This report is solely for the purpose set out in the Award Letter and is not to be used for any purpose not contemplated in the contract.

Other than our responsibility to MyLeave, neither KPMG nor any member or employee of KPMG undertakes responsibility arising in any way from reliance placed by a third party on this report. Any reliance placed is that party's sole responsibility.

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