HIA Submission

Discussion Paper

Further consultation on the Review into the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA)

Submission to KPMG

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Introduction

The Housing Industry Association (HIA) takes this opportunity to respond to the Discussion Paper for further consultation with respect to the policy positions following the Review into the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA) (the Act).

Final Report

HIA acknowledges the work carried out to date on the review of the WA construction industry portable long service leave scheme (Scheme), culminating in the Final Report, dated 30 November 2023. Notably, the Final Report included several recommendations that aligned with the feedback provided by HIA in its submission, dated 13 July 2023 (2023 Submission).

Recommendations 8 and 10A support HIA's position that mid-spectrum compliance powers should be legislated. It is positive that the work carried out by MyLeave in taking an educative approach and facilitating compliance prior to taking enforcement steps, will be formalised to ensure it is continued in future. This will provide clarity for Scheme participants and minimise adverse impacts to businesses, subject to the quantum and severity of the circumstances surrounding the underpayment.

This also overlaps with Recommendation 10A, which looks to provide MyLeave with expanded discretionary powers to waive penalties and late fees, as well as to grant extensions of time for payment of levies. In addition, finding 8(d) supported HIA's call for further measures to raise awareness and educate industry to facilitate compliance.

Recommendation 12 provides for the inclusion of an Object provision to clarify that the intention of the Act is to capture construction workers carrying out transient work on construction projects, as distinct from managerial, administrative, and professional staff. This aligns with HIA's position that any proposed amendments to the Act should not depart from the legislative objectives, which remain relevant and are unlikely to change in the foreseeable future.

HIA would also be supportive in principle of recommendations 9, 11A and 14.

Reassuringly HIA's positions regarding clarification of Scheme coverage and treatment of Scheme participants also have commonalities with recommendations 1B, 2B, 4A, 4B and 7B. Our positions on the specific questions related to these recommendations are set out more particularly to follow.

Executive Summary

HIA refers to and reiterates its positions set out in its 2023 Submission.

Any changes should be driven by the fundamental objectives of the Act, to provide access to long service leave entitlements for building and construction industry workers engaged in cyclical and project-based work. This should be based on their period of service within industry and in step with ordinary long service leave entitlements.

To this end, it is vital that any proposals for reform uphold the objectives and do not seek to expand the Scheme's application. HIA reiterates its strong opposition to the expansion the Scheme beyond its current coverage, such as the inclusion of off-site workers and subcontractors.

HIA is supportive, in principle, of amendments that will clarify and simplify the processes under the Scheme, assist Scheme users in complying with the requirements and reduce the administrative burden for businesses. However, industry is continuing to grapple with a constant stream of regulatory changes, which can further erode its ability to respond to the critical shortfall in housing and is detrimental to housing affordability.

Any approach to regulatory reform should ensure that the regulatory objectives are achieved, and genuine improvement is made, with minimal impact on housing affordability. Measures to test any proposed reforms should include a regulatory impact statement (RIS) including a cost-benefit analysis and investigation of alternative approaches, and result in justifiable benefits when compared to any increase in contributions or red tape.

HIA also reiterates the need for strategic transitional and interim measures for any new or amended requirements of the Scheme, to ensure industry has necessary time to make adjustments.

Clarifying the capture of specific cohorts of construction workers

Working directors

HIA supports the express exclusion of working directors from the Scheme.

Supervisors

Site supervisors have a range of different job titles. In addition, the role of a site supervisor can vary between businesses. Not only does this create challenges in determining their coverage under an industrial instrument, but also means Scheme coverage may vary from job to job.

In essence, where a site supervisor has managerial duties, they are typically considered to be award-free. Similarly, they would not be covered by the Scheme. Whereas a person with some supervisory duties under the Building and Construction General On-Site Award, for example, may have the job title 'site supervisor', but would typically be carrying out building work on site. This type of employee would be covered by the Scheme.

There may be scope to include some additional clarification in the definitions of the Act to assist Scheme users to understand when a site supervisor is covered by the Scheme. However, care must be taken in the drafting of any provisions given the various iterations across the many 'site supervisor' roles in industry, so as not to inadvertently alter Scheme coverage.

Subcontractors

HIA supports amendments to the Act to clarify the exclusion of independent subcontractors from the Scheme and this aligns with our position on the definition of 'employee'.

It is inappropriate for head contractors to be expected to make contributions on behalf of subcontractors in most instances, and a change of this nature has the potential to create an exceptionally complex system of overlapping duties throughout the contracting chain. This would undoubtedly add to the administrative burden and cost of running a business and introduce considerable uncertainty.

This change also adds no measurable benefit to the Scheme as it currently operates, with subcontractor businesses already required to make contributions on behalf of their eligible employees.

However, there may be some benefit in an education campaign to assist businesses in better understanding the circumstances in which contributions are currently required to be made for subcontractors, for example certain labour-only contractors.

Proposed expansion of coverage

HIA opposes in principle any changes that would expand the current coverage of the Scheme. However, if the review determined the need to expand coverage to ensure the objectives of the Act were realised, transitional arrangements will be necessary to preserve the integrity of the fund and ensure fairness for current participants.

The impact of changes to coverage on the fund, including the likelihood and quantum of future contributions must be thoroughly assessed. In the absence of a robust assessment, changes to current coverage could result in the Scheme carrying unfunded liabilities or the need for excessive increases to the contribution rate.

There is also a considerable, and yet-unknown period in which newly covered employees will be entitled to payment under the Scheme in excess of the quantum of contributions made by their employers. This will place an inequitable burden on current Scheme participants, including the residential building industry, in making up for the shortfall in funds to support payments to newly covered employees.

HIA requests the inclusion of robust transitional arrangements for newly covered employees, and that their ability to accrue entitlements for effective service under the Scheme will only commence upon commencement of the new provisions. That is to say that newly covered employees should only become entitled to benefits under the Scheme after a minimum period of 7 years from the commencement date.

Further, transitional arrangements should be put in place to allow for newly covered employers to make the necessary adjustments within their businesses to address the new requirements. During this time, there should be education and targeted engagement with impacted employers to ensure they are informed and prepared. While this job will largely fall to government, industry organisations also have considerable reach and can be engaged to assist.

Definitions that relate to coverage in the scheme

HIA is supportive in principle of steps towards resolving ambiguity in the definitions related to coverage. The aim should be to improve effectiveness of the Act, to provide clarity for Scheme participants and reduce the likelihood of non-compliance and disputes.

However, HIA strongly opposes any moves to expand the coverage of the current Scheme, particularly where there is potential for expansion of coverage to employees in off-site environments, which is at odds with the purpose of the Scheme.

As the reforms progress, consultation on the proposed drafting of any changes in definitions will also be important to ensure there are no unintended consequences.

Notably, there is an overlap between several definitions that are recommended for amendment. While in isolation the proposed changes may seem inert, collectively they may have a compounding effect, resulting in substantial change or adverse impacts for stakeholders. For example, the recommendations in relation to Finding 2 impact various definitions that intersect and cross-reference each other. As such, in order to understand the holistic impact on the Scheme, they must be considered together.

'employee'

HIA strongly opposes the change of the term 'employee' to 'worker'.

The Final Report identifies no genuine need or benefit for this change and appears to be somewhat superficial. The change is suggested for the purpose of being 'more inclusive', aligning with terminology used under similar schemes in other jurisdictions, as well as the *Work Health and Safety Act 2020* (WHS Act).

Attempts to harmonise terminology

Harmonisation for the sake of harmonisation is a flawed approach to policymaking and does not necessarily result in better outcomes for Scheme participants. In this case, harmonisation of terminology is suggested on the basis that it will align with reciprocal schemes, where otherwise there is no true harmonisation or Model basis for the laws across the states and territories. The difference in functionality, coverage, and underpinning policy decisions between schemes across the various jurisdictions is referenced in the Final Report.[1] 'Harmonisation' in this sense is likely to be even less beneficial, or even detrimental, to the Scheme as it stands and could undermine its functionality.

HIA also strongly opposes any moves to align the terminology used in the Act with the WHS Act, which has an entirely different purpose and function. For example, overlapping duties of Persons Conducting a Business or Undertaking (PCBUs) are integral to the operation of the WHS Act. The term 'worker' facilitates this. Notably, there was a considered shift from using the terms 'employer' and 'employee' under the *Occupational Safety and Health Act 1984*, when WA adopted the Model WHS laws. By contrast, the Review has not identified an intention to alter the obligations of a business to pay contributions to its subcontractors beyond those currently covered by the Scheme.

Inclusiveness

Similarly, where there is no intention to amend the definition for the purpose of changing the Scheme coverage, the notion that such a change to a legislative term would be more inclusive seems ideological, and solely serves those who write the legislation. HIA suggests there would be a narrow margin of Scheme participants who would have the need to delve into the legislative framework, and fewer still who may take

[1] See, e.g. 5.2.3.5, pg 46.

issue with the use of the term ‘employee’. Again, there is no measurable benefit to changing the terminology on this basis.

Impact on the Scheme

Fundamentally however, this change represents the potential to broaden the obligations for payment of the levy. The plain language meaning of the term ‘worker’ goes beyond that of the term ‘employee’, where a direct employment relationship exists. Indeed, it is the employment relationship that should determine whether contributions by a business are made on behalf of an employee or deemed employee and thus, use of the term ‘employee’ is more suitable.

At a minimum, the change in terminology could create confusion and exacerbate ambiguity for Scheme participants. At worst, it could create room for interpretation of the laws, resulting in unintended consequences such as increased or overlapping duties for contributions.

It is understood that MyLeave currently applies the common law tests in determining whether a worker is an ‘employee’ for the purpose of the Act. HIA considers this approach to be appropriate and would not oppose its continuation. This is also aligned with the imminent changes under the *Fair Work Legislation (Closing Loopholes No.2) Act 2024*, whereby an employment relationship will be assessed based on the real substance, practical reality and true nature of the relationship informed by both the contract and how the relationship works in practice.

‘employer’

HIA also strongly opposes the proposed change to the definition of 'employer’ to any entity who engages a ‘worker’. In relation to this amendment, we reiterate our comprehensive reasoning in opposition to the change to the term ‘employee’.

Separately, the proposal to decouple the term ‘employer’ from the term ‘construction industry’ at face value would simplify the definitions and remove seemingly unnecessary duplication. HIA agrees the decision in *Aust-Amec Pty Ltd t/a Metlab & SRC Laboratories and Others v Construction Industry Long Service Leave Payments Board (1995) 62 IR 412* highlights challenges for Scheme users in determining coverage and that there is opportunity for this ambiguity to be addressed.

However, HIA is concerned that the proposed change will increase Scheme coverage. It is unclear at this stage to what extent this may occur, and further analysis is necessary to determine the impact of this change.

‘construction industry’

‘on a site’

HIA would not oppose amendments that result in additional clarity around the terminology ‘on a site’ for the purpose of the Act. However, HIA would strongly oppose any amendments that would result in the expansion of the meaning to other sites, such as manufacturing environments, prefabrication areas, temporary lay-down zones and storage yards.

We reiterate that the expansion of the Scheme to capture sites that are not genuinely for the purpose of building and construction work is at odds with the Scheme’s purpose, despite the broad common law

interpretation of 'on a site'. Any proposed definition must reflect this. It is critical that the limits of the definition of 'construction industry' are clear so that workers carrying out duties such as prefabrication and manufacture of building components are not inadvertently included.

In conjunction with the definition of 'employer', there may also be some scope to address the existing ambiguity around work carried out by employers typically involved in the manufacture and supply of building products. For example, installation, maintenance and repair of fixtures and fittings in existing homes is currently captured by the Scheme, although this type of environment would not typically be considered 'on a site'. However, any changes to coverage in this regard would also need to consider transitional provisions to ensure equitable arrangements were made for previously covered employers and employees.

HIA also opposes any steps that attempt to future-proof the laws, which are likely to have unintended consequences. Whether a review of the scope of the Scheme is required in future, will be a matter for future consideration based on the circumstances at the time.

'substantially engaged'

In principle, HIA does not oppose the inclusion of a specific definition of 'substantially engaged' or the inclusion of further clarity within the definition of 'employee'. HIA also does not oppose the inclusion of a numerical measure for 'substantially engaged'. This would provide greater certainty for Scheme participants and for MyLeave in its implementation.

A starting point for determining the appropriate measure would be the current test applied by MyLeave in its assessments and would result in minimal departure from the current procedure, thereby minimising impacts for all stakeholders and on the fund. A RIS would be appropriate to understand the impacts of any alternative approach.

References in other legislation

The Final Report identifies reference to the use of the definition of 'construction industry' in the *Building Industry Construction Industry Training Fund and Levy Collection Act 1990* (CTF Act). In its submission on the 2024 Statutory Review of the CTF Act on 17 May 2024, HIA supported the inclusion of a dedicated definition within the CTF Act to best align with its objectives.

Alternatives to prescribed industrial instruments

Reference to industrial instruments

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. The recent inclusion of federal system instruments has gone some way to addressing this issue.

While HIA would not support moves to utilise the Building and Construction General On-site Award as the sole instrument for classification, we would agree with other employer representatives, that the classification system under the modern awards has been the subject to considerable attention in their development. As

such they provide a sturdy framework for the classification of employees for determination of entitlements under other schemes.[2]

In the residential building industry, the awards are still highly relevant. HIA, along with a number of other employer representatives, provides a service to assist its members in determining award coverage based on the attributes of the business, specific employee, and their role. Proper award determination and classification is a fundamental component of employment, and by extension the use of awards in determining coverage under the Scheme

It is apparent that the decision in *Positron v the Construction Industry Long Services Leave Payments Board [1990] WAIRC 3062* (Positron) highlights the challenges in distinguishing between coverage for the purpose of employment, e.g. employees covered by an enterprise agreement, and award classification for the purpose of the Scheme, where the two diverge. A minor clarification within the definition of 'employee' may be suitable to address this issue.

Further, the prescription of both federal and state-system awards, as well as potentially outdated awards also creates the opportunity for confusion around coverage. With the codification of Positron, it may no longer be necessary to prescribe the state-system awards.

Periodic reviews of the list of prescribed awards under Schedule 1 approximately every 5 years would also be an effective step to ensure the list remains current without unreasonably impacting employer operations. Should the need for an out-of-cycle amendment arise, the current inclusion of Schedule 1 within the Regulations is sufficiently flexible to allow for ad-hoc updates.

Alternative methods of classification

Without further detail on how it may impact the Scheme in WA, HIA would not support a move to an alternative method of classification, such as an occupation list. There is significant scope with this type of change to impact current Scheme coverage. If government is minded to make this change, further analysis and consultation with impacted stakeholders is necessary.

HIA would also not support a move towards a hybrid system, as the inherent duality in introducing two methods of classification erodes necessary clarity and ease of use for Scheme participants.

Core terms

Ambiguity in the definitions undermines the effectiveness of the Act by increasing the likelihood of non-compliance, incorrect contributions, disputes between employers and employees, and increases the administrative burden for businesses.

In principle, HIA would not be opposed to amendments to the definitions to improve clarity and where appropriate, include express definitions where reliance on implied definitions has previously been necessary and has led to confusion. This will assist in minimising inconsistencies and ensure a more uniform and predictable application of the requirements.

[2] Final Report, 5.2.4, pg 48-49.

‘days of service’

HIA does not oppose amendment of the definition of ‘day of service’ to specifically address contemporary leave arrangements. The proposal to update the definition to align with the types of leave included in the *Long Service Leave Act 1958* (LSL Act), s.6, to specifically address contemporary leave arrangements appears to be a reasonable compromise and aligns with the principles of the Scheme.

However, it is still unclear whether leave without pay during the course of employment will be classified as a ‘day of service’ and HIA requests this is expressly excluded.

‘ordinary pay’

There is room for improvement in the current definition of ‘ordinary pay’ under s.3(1), which has been amended by the inclusion of s.3(3a) for the purpose of addressing circumstances where the worker is not entitled to paid leave. These provisions should be reviewed, and the drafting improved, so that they can easily by understood and read together.

HIA does not oppose the inclusion of additional provisions in line with the LSL Act to assist with the calculation of ordinary pay. However, in accordance with discussions during the consultation session on 30 July, HIA strongly opposes any moves to capture penalty and overtime payments as ordinary pay. This is unconventional and not necessary for the building and construction industry. It is also out of step with the LSL Act, creating a situation where employees covered by the Scheme would receive an unfair advantage to those under the LSL system.

‘ordinary hours of work’

HIA does not oppose the inclusion of a definition for ‘ordinary hours of work’, subject to an identified benefit. If a definition of ‘ordinary hours of work’ is considered to be fundamental to the operation of the Act, such that it needs to be defined, HIA suggests that linking the definition of ordinary hours back to the applicable industrial instrument would be appropriate.

Alternatively, if a definition specific to the Scheme is considered necessary, proposals should be subject to a RIS to determine the potential impact and genuine need for change. However, HIA has strong concerns about creating dual and potentially diverging definitions where a single definition would be suitable. This only creates further uncertainty among stakeholders and increases the likelihood of non-compliance.

Accrual mechanism

Option 2A

Unintended consequences

Option 2A represents a shift from calculating days of service to hours of service in order to address inequity in the accrual of service for employees on a compressed roster arrangement. This change will undoubtedly have an impact for employers and their rate of contribution.

Any change to the current arrangements that may result in unfunded liabilities for the Scheme should be the subject of a RIS. It is important that the impacts of the changes are known and can be appropriately managed where incoming funds may be outweighed by outgoings.

Implementation

HIA would agree with commentary by CCI WA in its 7 July 2023 Submission; that a change of this nature could contribute to the escalating costs of doing business in WA, particularly for SMEs, ultimately impacting the State economy.[3] This is in addition to impacts on housing affordability and industry's ability to address growing demand.

Should these changes be adopted, transitional arrangements will be necessary, similar to those required to address any changes in the scope of the Scheme.

Alternative options

Option 1

In the event that Option 2A is not adopted, maintaining the status quo under Option 1 would cause the least disruption to Scheme participants and continues to be a viable option for determining contributions to the Scheme in most instances.

An alternative option may be to prescribe an increase to the minimum number of hours worked in a day to qualify for a day of service under the Scheme.

Option 2C

HIA strongly opposes any moves towards the inclusion of overtime in accrual of portable paid long service leave under Option 2C. In line with commentary provided herein related to 'ordinary pay', this proposal would go beyond the entitlements due to employees under the LSL Act and which is at odds with the intention of the Scheme.

Option 3

HIA also strongly opposes the adoption of a hybrid approach under Option 3, which would result in the introduction of unnecessary complexity to the Scheme.

Employees with long term services to a single employer

Entitlements under the LSL Act

Where an entitlement arises under the LSL Act for Scheme-covered employees, confusion arises around the appropriate avenue for employees to obtain leave payments. In particular, employers who have already made contributions for the employee under the Scheme may also be required to make payments for LSL entitlements.

Recommendation 7B contemplates repayment of contributions made by employers under the Scheme, where the employee is covered by the LSL Act. Repayments would be made prior to LSL payments being due. This ensures that employers are not paying entitlements twice and minimises cash flow impacts for business. HIA strongly supports this amendment.

[3] Final Report, 4.3.2.2, pg 31.

Unintended consequences

Given the historically low contribution rate it is likely that employers required to make payments under the LSL Act, will pay more than what they would otherwise have paid to MyLeave. In these circumstances, the refund to the employer may be out of step with the amount they will end up paying.

Importantly the payment to the employer should comprise not only the contributions made by that employer on behalf of the subject employee, but the entitlements that would otherwise be payable to the employee under the Scheme.

An alternative approach would be for MyLeave to pay out the entitlements due under the Scheme directly to the employee as the leave is taken. The employer could then top up the payments as necessary in the event of any difference between the MyLeave payments and the LSL entitlements. This would go some way to managing any adverse impacts on the employer and would not impact employees.

Implementation

Again, as with any change to the current system, HIA recommends suitable transitional arrangements, in addition to education and engagement with industry to support implementation.