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UNIONSWA
WA's PEAK UNION BODY

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KPMG Review Team
Review into the Construction Industry
Portable Paid Long Service Leave Act
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Further consultation with respect to policy positions following the Review into the *Construction Industry Portable Paid Long Service Leave Act 1985*

UnionsWA is the governing peak body of the trade union movement in Western Australia. As a peak body we strengthen WA unions through co-operation and co-ordination on campaigning and common industrial matters. UnionsWA represents around thirty affiliate unions, who in turn represent approximately 140,000 Western Australian workers.

UnionsWA welcomes the opportunity to provide a submission in response to the discussion paper for the further consultation with respect to policy positions following the Review into the *Construction Industry Portable Paid Long Service Leave Act 1985*.

Question 1

UnionsWA supports the proposed capture of workers in Table 4 of section 5.2.2.2 of the Final Report, including peggies, traffic controllers and electrical trade workers conducting commissioning and decommissioning. UnionsWA also supports the capture of the additional occupations listed including, divers who conduct subsea construction work on or around ports, droner operators, and specialists in wind farm turbines, tower and blade installations, noting the comments in the Final Report by MyLeave that these occupations may already be captured under the Act.

In terms of the *Hydrocarbon Industry (Upstream) Award*, the relevant work 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.

UnionsWA notes that should, as per Discussion Question 3, the Act move away from prescribed industrial instruments as the mechanism for capturing workers in the construction industry, this consideration is not directly needed. Instead, it is important to ensure that any refined legislative drafting captures these workers.

Question 2

Employee to Worker

UnionsWA supports altering the Act to shift from a nomenclature of 'employee' to 'worker', better reflecting the nature of the modern construction workforce and the harmonisation with terminology used in the *Work Health and Safety Act 2020*.

Employer

UnionsWA strongly supports decoupling the definition of employer from the definition of construction industry. At best, maintaining a link between the definitions would be circular, whereby an employer is an employer because they engage a person in the construction industry, and at worst, it serves to unnecessarily obscure and confuse determinations of eligibility under the Act.

We consider the implications of *Aust-Amec Pty Ltd v The Construction Industry Long Service Leave Payments Board* that 'there may be persons who are "employees" within the meaning of the Act who are not employed by "employers" within the Act'[1] to be an untenable situation that requires addressing. The proposed decoupling establishes the test for eligibility to appropriately and sensibly centre the activity of the worker in question.

'On a Site' and 'Substantially Engaged'

UnionsWA does not support codifying the common law understanding of what work 'on a site' means into the Act. This would serve to entrench an outdated conception of modern construction practices, particularly in relation to prefabrication and modular construction. Addressing this issue as part of this review would ensure that the Act is fit-for-purpose and better future-proofed.

Instead, UnionsWA recommends removing the phrase 'on a site' as a component of the definition of 'construction industry' in the Act. 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.

UnionsWA recognises that without a definition of 'substantially engaged,' My Leave can face a difficult task in determining what constitutes substantial engagement. UnionsWA is not opposed to establishing a definition of 'substantially engaged' but considers that it must be ensured that any definition would leave no current or future worse off by the insertion of such a definition.

Deeming Provisions – Definition of Worker, On a Site & Substantially Engaged

The *Workers Compensation and Injury Management Act 2023* contains a modernised definition of worker which allows by regulations for groups of workers to be folded into the definition within the Act, even though they may not meet the test in the provision of the Act.

Such a provision would allow the Board to recommend to the Minister that regulations be drafted to adapt to changing circumstances without having to undergo a full parliamentary process.

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

Question 3

UnionsWA supports ceasing to use prescribed industrial instruments in the Act in order to target coverage of the scheme and to instead use refined legislative drafting with additional terms. This approach should be able to provide the necessary level of flexibility to capture the varieties of construction work, while also overcoming the shortfalls of the other two options. This would likely be the best approach to future-proof the Act so that it is adaptable to changes in how construction work is conducted.

UnionsWA does not support, however, the use of Ministerial Declarations as an additional means to determine coverage. Where there is a lack of clarity for industry as to whether certain occupations are captured by the provisions of the Act, guidance could be provided through different channels by MyLeave and its board. Where there is genuine ambiguity, however, or concerns that the drafting of the Act is no longer reflective of industry conditions, then legislative change would likely be the most appropriate course of action.

Question 4

UnionsWA supports amending the Act to revise the term 'days of service' to ensure that types of leave permitted under the *Long Service Leave Act* are also included in this Act. It is not tenable that construction workers under this Act are treated less favourably in terms of accrual during times of leave and absence than workers accruing long service leave under the *Long Service Leave Act*. If a definition of 'week' is inserted into the Act, it is essential that any workers who work weekends or seven-day weeks are not disadvantaged.

As noted in our response below to Question 5, UnionsWA considers that it is appropriate in defining ordinary pay and ordinary hours that overtime be included to support remote workers accrue their 220 days of service. It is also critical that in determining ordinary hours, that casual workers are not disadvantaged by the irregular work arrangements to which they are subject. Every possible work roster should be considered in determining the accrual method to ensure that no FIFO/DIDO worker is effectively penalised by the nature of their work arrangements in terms of accruing long service leave.

Question 5

UnionsWA supports shifting to an 'hours worked approach' to calculate 'days of service'. As part of this shift, we consider that it would be appropriate for overtime to be included in those hours worked.

Currently, the Act allows for a yearly maximum long service leave credit accrual of 220 days of service, with a day of service meaning any day on which an employee is entitled to receive ordinary pay. This had the effect of excluding overtime and penalty rate hours, which disadvantages construction workers engaged in 'swing' work now common in the industry.

For example, FIFO/DIDO construction workers on rosters like 8/6, 7/7, or 3/1, 2/1 experience difficulties in achieving a full year's accrual of 220 days. The current Act denies equitable access to yearly LSL credits for these workers of long hours in remote and challenging conditions. The system effectively discriminates against workers who make significant sacrifices in terms of time away from home and extended work hours and creates a particular

disadvantage for remote construction workers compared to those who work in the commercial construction sector.

By including overtime as part of calculating days of service for the purposes of this Act, this injustice can be remedied. It will ensure that workers are able to accrue the 220 days who are otherwise blocked from doing so due to how their work is structured.

Question 6

UnionsWA supports the principle that where a worker has a length of service with a single employer that would result in them qualifying for long service leave under the *Long Service Leave Act*, that they should receive their long service leave under that Act as it would mean their payment will attract superannuation. The *Construction Industry Portable Long Service Leave Act* provides an important safety net for construction workers who would otherwise be unable to access long service leave under the *Long Service Leave Act*. It is critical that this safety net not be undermined for those workers who would otherwise be eligible for long service leave under the *Long Service Leave Act*.

A pertinent example would be where the employer goes into administration, or the business is liquidated or wound up. It is essential that in making such a change, the long service leave entitlements of the small number of construction workers who can maintain a long period of service with a single employer, not be uniquely placed in jeopardy. It is essential, therefore, that the Portable Long Service Leave scheme remains accessible as a safety net for those workers.

A mechanism through which this could be achieved, for instance, could be where the refund is only provided to the employer at the point at which a worker seeks to access their long service leave from an employer for whom they have worker for the requisite period of time, rather than any process that may require the refund automatically occurring at a certain length of service.

Question 7

UnionsWA notes the importance of Recommendation 8 in the Final Report to employer MyLeave with mid-spectrum compliance and enforcement powers, including the ability to issue warning letters, compliance/improvement notices, infringement, and to provide payment plans. UnionsWA considers that infringements issued under these powers should be commensurate with the penalties awarded for other forms of wage theft, which is how denying workers their rightful long service leave credits should be understood.

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If you wish to discuss any matters raised in this submission further, please contact me at 9328 7877 or owhittle@unionswa.com.au.

Yours sincerely,

Owen Whittle
Secretary