CFMEU
CONSTRUCTION

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Independent Review of the Construction Industry Portable Long Service Leave Act 1985

We refer to the above matter.

The Construction, Forestry, Maritime, Mining and Energy Union, Construction and General Division – WA Branch **(CFMEU)** welcomes the opportunity to provide a submission to the independent review of the *Construction Industry Portable Long Service Leave Act 1985* **(the Review)**.

The CFMEU represents workers in the construction industry, one of the most transient and dangerous industries in our economy. Advancing the interests of our members, particularly in securing more substantial, stable wages and entitlements has always been at the core of the CFMEU's business.

There is no doubt that since the implementation of the *Construction Industry Portable Long Service Leave Act 1985* **(the Act)**, the construction industry in Western Australia has undergone significant change**.** In addition to the considerable number of new construction entrants into the sector since the Act's implementation, the Western Australian commercial, civil and mining construction industry has been transformed from an industry dominated by a small number of construction companies with large, directly employed skilled workforces to a pyramid of contractual relationships involving a head contractor at the top and multiple layers of smaller subcontractors underneath. These layers can be diverse and comprise larger entities all the way through to sole traders and "ABN" workers.

Further, with the federalisation of the industrial relations system, the rise of enterprise bargaining (as opposed to a reliance on the award system), the subsequent deregulation of work practices and classifications and the rise and prevalence of fly in fly out (or drive in drive out) work arrangements, the application of the Act has become a somewhat out of sync with its initial stated purpose. This is particularly the case as construction roles across the economy are increasingly diverse.

The CFMEU is seeking to create and foster a sustainable and prosperous construction industry. An industry where workers receive an equitable share of the profits generated by their labour and where their rights and entitlements are protected. In this vein, the scheme must work to the benefit of construction workers working within the modern construction workforce by ensuring it adequately reflects the industry. This is integral to ensuring the industry attracts new young people from diverse backgrounds.

In order to achieve this, the Act will require amendment, please find **attached** our submissions in that regard.

If you have any questions, please don't hesitate to contact me at mbuchan@cfmeuwa.com.

Yours sincerely,

M. Buchan

Mick Buchan

Secretary

1 The Definition of Construction Industry

1.1 The *construction industry* is defined in section 3 of the Act. This definition is fundamental in determining the scope and application of the Act. Unfortunately, long standing imperfections exist within its construction.

1.2 These deficiencies are demonstrated by the consistent and ongoing litigation associated with the definition's application. Generally, these proceedings are focussed on either employers seeking exclusion from the Act (so they do not have the expense of contributing to the fund), or employees (usually through their Union) seeking to secure the entitlement. In most instances, these workers would be precluded from any long service entitlement due to the nature and characterisation of their work.

1.3 The failings of the definition have become more severe with the development and changing face of the building and construction industry. There is no doubt that the construction industry has evolved. The construction industry has become more heavily populated, transient and more casualised, certainly since the implementation of the Act in the 1980s.

1.4 This change is in part due to the significant rise in the number of labour hire firms (who might undertake work across industries) and independent contractors within the industry, but also, the industry has become increasingly deregulated with a movement by employers away from the award (and those terms that under work classifications) to underpin their employment relationship with their employees. These developments have largely been driven by the industrial relations practices of the mining construction sector, which preference outsourcing its construction labour, to direct employment. These practices have flowed onto other sectors within the industry including the civil and commercial sectors.

1.5 In addition, since the implementation of the Act, we have seen significant investment in the mining construction sector. Thousands of construction workers in this sector now engage in remote work and in previously unfamiliar construction roles.

1.6 As result, there seems to be an ever-widening gap between the intention of the Act and its current application in the modern construction industry.

1.7 For context, during the second reading debate, Opposition spokesman and the Member for Mt Lawley, Mr Cash described the stated intention of the Act as follows:

> *"that due to the very nature of the building industry workers are often required to move from job to job and, as a result, it is impossible to build up a 15-year continuous period of employment with any one employer. The building industry operates on a job-to-job basis and by the very nature of the industry it operates on a short-term employment basis. The purpose of this Bill is to recognise the short- term nature of the industry and provide to the workers within the industry the benefits already enjoyed by workers in similar industries."*

1.8 It is plainly obvious that the Act was meant to be expansive, broad, and industry wide. The idea that the Act was intended to be expansive, is consistent with the core object of any long service leave legislation, both fixed and portable - to retain workers within an industry and support the industry by rewarding workers who stay within it.

1.9 In this regard, we have found the definition to be unnecessarily exclusionary, rigid, somewhat ambiguous and not wholly reflective of those that currently participate in the industry.

1.10 For instance, the definition seems to unfairly prohibit some construction industry participants from receiving benefits of the scheme such as:

1.10.1 Construction Cleaners, otherwise known as a "Peggies".

a) Peggies undertake work across all construction sectors. This work includes site cleaning throughout construction sites, both within and around site facilities and structures.

b) The origin of the term "Peggy" has long been debated, but some say it was derived from medieval times where the individuals would clean up the pegs used by stonemasons for re-purposing. This progressed to other items and cleaning up in general. The term developed to describe an individual that cleans up on a construction site.

c) In modern times, these workers have been classified as Trade Assistants, Builder's Labourer's or Peggies, but recently employers have re-classified these construction workers as Cleaners.

d) This re-classification has likely occurred to:

i. reduce the pay and conditions of this cohort of workers; and

ii. avoid the obligations of the Act,

notwithstanding that these workers undertake an essential role any construction project and operate exclusively within the construction industry. These workers provide a critical service in ensuring compliance with work health and safety obligations on construction sites.

e) The problem is not widespread in the commercial construction sector as workers and the CFMEU have been able to preserve this classification for purposes of the Act. The problem predominately exists within the civil and resource construction sectors.

f) On a strict construction of the Act, it is currently ambiguous as to whether this cohort of workers, when classified as Cleaners, fall within the definition in the Act.

g) Notwithstanding the above-stated ambiguity, the *Building and Construction General On-site Award 2020* **(the Award)** provides some guidance for construction-based contract cleaning (such as work undertaken by Peggies) to be considered construction work (specifically within the civil and resource industry construction sector):

i. Section 4.1 of the Award, states:

This industry award covers employers throughout Australia in the on-site building, engineering and civil construction industry and their employees…

ii. Section 4.2 of the Award, states:

For the purposes of clause 4.1, on-site building, engineering and civil construction industry means the industry of general building ad construction, civil construction and metal and engineering construction, in all cases undertaken on-site.

iii. Section 4.3(b)(i) of the Award, states:

civil construction means…the construction, repair, maintenance or demolition of...civil and/or mechanical engineering projects.

iv. Section 4.3(b)(viii) of the Award, states:

*civil construction means…**the industry or calling of either or both catering and cleaning** for or at premises provided for persons mentioned in clause 4 4.3(b)(i).*

This long standing, recognised definition draws an effective link between this cohort of worker and their participation in the construction industry.

h) Despite this, there is a clear discrepancy, or at least an inexplicable omission of these workers within the Act. It is therefore currently ambiguous as to whether these workers, when classified as Cleaners fall within the definition in the Act.

i) Currently, there seems to be two reasons for exclusion within the Act:

i. these workers may be impacted by the exclusion within section (f) of the definition of *construction industry* within the Act which considers:

the carrying out of maintenance or repairs of a routine or minor nature by employees for an employer, or another person under an arrangement with a labour hire agency, who is not substantially engaged in the industry describes in this interpretation.

Not only could the work be considered maintenance, but many Peggy's particularly in the resource and civil construction sectors, work for large labour hire agencies. This may give cause for employers to effectively assert that they do not work *substantially* in the construction industry by establishing that they provide labour across a range of industries.

ii. There is no explicit definition of "Cleaners" with the Act.

j) Failing specific coverage under the Act, these workers will be deprived access to any long service leave entitlements.

k) Having regard to the above, the Review should adopt findings which recommend the implementation of either:

i. A broader definition of construction industry to explicitly include the work construction Cleaners or Peggies undertake; and/or

ii. Removes the exclusion within section (f) of the definition of *construction industry* with the Act.

1.10.2 Traffic Controllers

a) Traffic Controllers are an essential cohort of workers across all sectors of the construction industry.

b) Not only do traffic controllers ensure construction projects are completed safely (both from the perspective of the worker but also the public), their engagement is a legislative requirement when undertaking construction work in the construction industry. To

participate in the construction industry, a principal contractor must engage Traffic Controllers in connection to the project.

c) Recently, employers have sought to exclude Traffic Controllers who engage in civil construction work from the Scheme. This has been done in three ways:

i. Using the *Miscellaneous Award 2020* to underpin the employment conditions of Traffic Controllers as opposed to the Award.

A key example is on the State Government's Metronet projects, where traffic control contractor ATM Pty Ltd (otherwise known as Advance Traffic Management), wound up its operations and employed its workers through another, related entity entity, using common law contracts. The new contracts moved from the Award to the *Miscellaneous Award 2020* to underpin the workers' pay and conditions. This had the effect of lowering the wages and entitlements of those workers, including (potentially) the application of the Scheme to these workers; and

ii. Asserting that Traffic Controllers employed to work on civil construction projects do not work in civil construction as defined in 4.3(b)(vi) of the Award; and

iii. Principal contractors have moved from engaging traffic management directly to contracting out large portions of work to specialised traffic management companies. Whilst these workers undertake the same work, in some instances, these companies provide labour across industries outside of the construction industry. This leaves the employer scope to dispute whether the employer is an *employer* as defined under section 3 of the Act.

d) We are of the view that Traffic Controllers undertaking work on and in connection to civil and resource construction projects should be covered by the Scheme.

e) To supplement this view, an assessment of the Award is useful as it provides some insight as to how the Award considers these workers construction workers for the purposes of the Award. Section 4(b)(vi) of the Award states:

civil construction means…traffic management in or connection with work under clause 4.3(b)(i).

f) Clause 4.3(b)(i) of the Award states:

civil construction means…the construction, repair, maintenance or demolition of:

a) Civil and/or mechanical engineering projects.

g) It follows that when interpreting the Award, where traffic management work being undertaken on a *civil and/or mechanical engineering project*, then that work is to be considered construction work.

h) Authorities have considered the scope of the term *civil and/or mechanical engineering projects* (as referenced in clause 4.3(b)(i) of the Award). For example, Munro J in *Re the Australian Workers' Union (1988, Print H0676)* said:

"An extract from the Engineering Handbook of the University of Sydney, which was tendered by the FIA as a reference on the branches of engineering, contains a definition

of civil engineering which generally accords with what I find to be the scope of the term "civil engineering projects". The relevant passage on the civil engineering branch reads:

"Civil Engineering covers a wide range including the conception, design, construction and maintenance of those more permanent structures and services such as roads, railways bridges, buildings, tunnels, airfields, water supply and sewerage systems, dams, pipelines, river improvements, harbours and irrigation systems."

i) Further, in the decision *096/96 Print M8947 [1996] AIRC 106; (2 February 1996)*, Vice President McIntyre stated:

"there was in addition evidence that an expression "Civil Work" is widely used in the construction industry to refer to a variety of construction activities associated with preparation of sites, formation and placement of foundations, making of roads and associated application of, or construction in, cement."

and

"the expression "civil and/or mechanical engineering projects" is broad in reference and is not readily defined with precision."

j) These authorities support the proposition that where traffic management work is being undertaken in connection with civil projects such as Metronet, where roads, rail and bridges are being constructed, then for the purposes of the Award, these workers are construction workers.

k) The Award is relevant because it is a listed Award under the *Construction Industry Portable Long Service Leave Regulations 1986*.

l) Having regard to the above, the Review should adopt the following findings:

i. The Act is ambiguous in determining whether Traffic Controllers in the civil construction sector are defined as being within the construction industry for the purposes of the Act.

ii. Apply the principles of the Award in classifying Traffic Controllers undertaking work in connection to civil construction projects as in the *construction industry* in accordance with section 3 of the Act.

2 The Accrual of Entitlements and the Application of the Concept of Days of Service

2.1 Since the implementation of the Act, the construction industry has undergone significant change. Whilst the industry remains a high-risk industry, new construction sectors and work practices have developed. There has been a significant expansion of construction work linked to the mining industry, predominately in the Northwest and Pilbara regions. Further, the construction industry has seen change in the industrial relations landscape and perhaps most prominently, we have experienced the effects of a global pandemic on the industry.

2.2 Each of these developments have had an effect on the accrual of workers long service leave entitlements within the Scheme. Measured against the intent and application of the Act, it is apparent that the legislation requires reform to properly cater for workers in the modern construction workforce.

2.3 We suggest there are two (2) areas of reform:

2.3.1 Days of Service Accruals for FIFO/DIDO construction workers

a) FIFO/DIDO work is by its very nature remote. These construction workers usually undertake work on highly compressed rosters. These rosters vary in length (or swings) but usually involve intense periods of work without break (including over weekends). These workers routinely work between 63 and 84 hours per week while working on a swing, notwithstanding (usually) being employed on a 38-hour week.

b) How these high compression rosters interact with the Act is important. The Act defines *ordinary pay*, of a person, as:

rate of pay (disregarding any leave loading) to which the person is entitled for leave (other than long service leave) to which the person is entitled.

And

..the ordinary pay of the person is the rate of pay to which the person is entitled for ordinary hours of work.

c) Further, a *day of service* is defined in section 3 of the Act and states:

day of service means any day on which an employee is entitled to receive ordinary pay and includes any day on which the employee in question is –

(a) on long service leave under this Act.
(b) on annual leave in excess of 4 weeks in any period of 12 months.
(c) on paid sick leave.

d) Having regard to these definitions, the Act only permits accrual of days of service on ordinary hours of work. This accrual predominately occurs during the ordinary work week and not on weekends.

e) The practical effect of high compression FIFO/DIDO rosters is that the capacity for remote construction workers to accrue the maximum yearly accrual of 220 days of service when compared to workers in commercial construction industry is diminished. This is despite in many instances, working more hours over the same period and undertaking long periods away from home.

f) There are now many thousands of construction workers who undertake work on these kind of work arrangements. This is a clear disadvantage for this cohort of workers.

g) The Review should consider a carve out for distant workers to expand the definitions of *ordinary pay* and *days of service* within the Act so that all hours of work are calculated (inclusive of overtime) for the purposes of accruing 220 days of service.

2.3.2 Days of Service Accruals for Construction Workers on Various Forms of Leave

a) The definition of *days of service* in the Act is inflexible. In order to ensure the Scheme is expansive, consistent with the intention of the Act, the definition could benefit from the inclusion of other types of leave or absences such as:

i. Workers' Compensation
ii. Paternity leave
iii. Job Keeper (or relevant scheme)

iv. Rostered Days Off
v. Stand downs

b) There is precedent for this kind of reform. During the onset of the pandemic, the *Construction Industry Portable Long Service Leave Amendment Bill (COVID-19) Bill 2020* sought to amend the Act by broadening the definition of a *days of service* on which an employee is entitled to receive ordinary pay. The amendment stated:

A day in respect of which an employee is stood down, if the employee is:

(a) Not a casual employee of an employer who has been working in that employment on a regular and systematic basis during the period of 12 months ending on the day.

(b) A casual employee of an employer who has been working in that employment on a regular and systematic basis during the period of 12 months ending on the day…

c) An expansion of the definition of *days of service* will address long standing restrictions by supporting workers during leave periods.

d) The Reform should recommend the permanent inclusion of additional leave periods (see 3.3.3 above) with in the definition of *days of service* in section 3 of the Act.

3 Payments Pursuant to Hardship and Pro-Rata payments

3.1 During the COVID-19 global pandemic, workers in the construction industry faced significant hardship. This was primarily due to large cohorts of workers being stood down without any income.

3.2 The associated financial hardship from being stood down was exacerbated when construction workers (who did not qualify for pro-rata long service leave) were denied any access to long service leave.

3.3 Ultimately, the accrued long service leave entitlements held by the Board represent workers' capital. In circumstances where workers does not qualify for long service leave entitlements (either for 10 years service or on a pro-rata basis), the Board should allow all accrued entitlements to be paid on the following hardship and compassionate grounds:

a) Terminal Medical Condition or Permanent incapacity: Payment of all accrued long service leave entitlements when a worker is diagnosed with a terminal medical condition or suffers permanent incapacity.

b) Compassionate Grounds:

i. Medical treatment and transport: Assistance to a worker who has a life threatening illness or injury (including acute, chronic pain or mental illness) including payment for medical treatment and transport;

ii. Mortgage payments: Assistance with home loan payments or council rates to avoid losing immediate accommodation;

iii. Disability: Assistance to home or vehicle modifications to accommodate a worker's severe disability;

iv. Palliative care or funeral expenses: Assistance with expenses associated with a worker's terminal illness, death, funeral or burial; and

v. Disability aids: Assistance to cate for a worker's severe disability.

c) Financial Hardship: where a worker has been on an eligible Commonwealth Government income support payment for a continuous period of 26 weeks and is unable to meet reasonable and immediate family living expenses.

d) The Review should endorse payment of all accrued long service leave entitlements on compassionate and hardship grounds.

4 The Effective Administration of Portable Long Service Leave – Breaks in Service

4.1 The Act should where possible, be expansive, inclusive and work to the benefit of employees in the construction industry. With this in mind, when interpreting and applying the provisions of the Act, consideration must be given to how workplaces and the employees that work within them behave.

4.2 Within the modern economy, workers are less likely to be employed by a single employer or within a single industry. This is also true for construction workers.

4.3 In this context, currently section 21(3) of the Act prescribes a limitation period in which a construction worker, after leaving the construction industry, must return to the industry in order to secure their accrued benefits. This is called a *break in service*. The Act states:

Break in service means:

a) *In the case of a person who has been engaged as an employee for any number of days that does not exceed 1100 days of service – period within which the person is not so engaged of 2 years or more commencing from the last day of that engagement; or*

b) *In the case of a person who has been engaged as an employee for any number of days exceeding 1100 days of service – a period within which a person is not so engaged of 4 years or more commencing from the last day of that engagement.*

4.4 These timeframes to are too onerous and not consistent with the modern construction industry and more broadly, the current labour market economy. We have received many reports from our members who have lost entitlements due leaving the construction industry and returning outside of the prescribed timeframes. A two (2) and four (4) year limitation severely disadvantages workers.

4.5 In this regard, the Review should extend the *break of service* period to four (4) and six (6) years respectively.

5 The Effective Administration of Portable Long Service Leave – Payments

5.1 In our experience, construction companies operate on tight profit margins, have limited cash flow and don't have the ability to absorb price fluctuations or variations easily. In these circumstances, the hierarchical system of contracting is beneficial to those construction companies who are able allocate as much of the financial risk, contractual liability and responsibility to subcontractors who are on the whole, less well-resourced and further down the contractual chain.

5.2 This includes the capacity to delay the timely release of funds to subcontractors who have undertaken the work (in many instances in good faith) and the ability to temporarily allocate capital to destinations outside the project itself to maintain solvency. In fact, it is the CFMEU's experience that many construction companies in Western Australia operate insolvent businesses from a technical standpoint.

5.3 These conditions have a real and tangible effect. As an example, the Australian construction industry accounts for a disproportionally high number of corporate insolvency events. In this environment, construction workers entitlements are regularly put at risk.

5.4 Insolvency issues in the economy have recently been recognised by the Federal Government, who have legislated to require employers to pay superannuation contributions at the same time the employees wages. Further, there is a recognition that these kinds of entitlements are owned by the employee. We are philosophically of the same view when we consider long service leave entitlements.

5.5 In this regard, the Review should recommend that long service leave entitlements be paid more frequently, consistent with other entitlements such as superannuation.

6 Employer Compliance, the Inspectorate and Certificate of Registration

6.1 The current system to ensure compliance with the Scheme should be improved. For instance:

a) Penalty provisions are not a deterrent for non-compliance

i. The current penalty for late payment by an employer to the Board is prescribed under 35A(1)-(2) of the Act. Whilst it is appropriate that there be a function for non-compliance, the current regime is not sufficient to constitute a deterrent for employers.

ii. The Act does not prescribe a specific penalty regime (in terms of figures).

iii. The Review should recommend an explicit and more substantial penalty regime for non-compliance with the Act.

b) Certificate of Registration

i. Section 30(10)(b) of the Act requires the Board, if it is satisfied with the information in the application by an employer for registration with the Scheme, to issue that employer with a certificate of registration.

ii. Recently the State Government amended section 49I(1) of the *Industrial Relations Act 1979* to explicitly enable authorised representatives (usually union officials) with the powers to enter site without notice to investigate suspected breaches of Act on behalf of construction workers. The purpose of such an amendment is to create another avenue (in addition to the Schemes inspectorate) to ensure compliance with the Act and to ensure consistency with the investigation power associated with the *Long Service Leave Act 1958*.

iii. As there is no requirement for that certificate of registration to be kept on the site where the relevant employees are engaging in construction work, investigations in accordance with section 49I(1) of the *Industrial Relations Act 1979* are often frustrated. Better outcomes in terms of compliance could be achieved if the Act required certificate of registration to be kept on site.

iv. In this regard, the Review should recommend an amendment to the Act which requires certification of registration to be kept on site by the employer. The absence of which should attract a penalty.

7 The Inclusion of Object Provisions within Act

7.1 One notable omission from the Act is the presence of principles or objects that guide its administration and application.

7.2 Well formulated object provisions give useful insight and guidance to those that administering and using the legislation such as the Board, particularly when applying their discretion to contentious matters (say with respect to disputed coverage). Object provisions may also assist the Court's in their interpretation of the legislation.

7.3 Since the implementation of the legislation, our assessment is that the application of the Act has been very rigid. The clear intent of the Act is to benefit construction workers. Object provisions should reflect that intent and assist the Board be more expansive and inclusive.

7.4 In this regard, the Review should recommend implementing object provisions within the Act which make it clear the intent of the Act is to benefit construction worker employees and to benefit the construction industry as a whole.

8 Investment Profile of Surplus Funds

8.1 Many schemes which deal with worker funds invest those surplus funds back into their relevant industry. Notable examples include industry superannuation funds and other worker entitlements funds in the construction industry such as redundancy funds (Reddifund in Western Australia and Incolink in Victoria are key examples).

8.2 The value this reinvestment brings to the construction industry is significant. By way of example, CBUS Property invest funds into building developments creating thousands of jobs in the construction industry.

8.3 Currently section 15(2) of the Act governs the way in which the Scheme's Board can apply funds. It is our view that this scope is restrictive. We are of the view that the Scheme can have a greater role to play in facilitating a prosperous and sustainable construction industry through direct investment. This investment should of course prudent, conservative and be limited to ensure the ongoing viability of the Scheme.

8.4 In this regard, the Review should recommend to increase the scope of 15(2) of the Act to enable direct investment by the Board into the construction industry. The purpose of such investment should be to generate and facilitate well paid jobs and a more prosperous and sustainable construction industry.

9 Levy

9.1 The Act seems to limit and/or restrict the Board ability to independently set the rates of contributions to be paid to the Board under section 34.

9.2 In particular, Sections 19(1)-(4) of the Act indicates that the contribution rate is required to be as a result of an investigation by an appointed actuary. With significant surplus funds, the current rate and cost to employers is negligible. Put simply, we are of the view this rate is unnecessarily low and is a lost opportunity for the Scheme to raise additional funds.

9.3 This proposal seems to be supported by schemes in other states, which simply set a minimum rate which does not fluctuate.

9.4 In this regard, the Review should recommend setting a minimum target for fund contributions by employers.