



# **HIA Submission**

## **Review of the *Construction Industry Portable Paid Long Service Leave Act 1985 (WA)***

Submission to KPMG

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## 1. Introduction

The Housing Industry Association (HIA) takes this opportunity to contribute to the review of the *Construction Industry Portable Long Service Leave Act 1985 (WA)* (the Act). HIA acknowledges that the aim of reviewing the Act is to improve the systems established under the portable long service leave scheme (Scheme) and ensure the legislation is relevant and consistent with its purpose 40 years on.

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. The scope and coverage of the Act should remain restricted to workers in the building and construction industry who carry out work on site. The laws must be well-defined and user-friendly to support compliance, ensure equitable benefits and promote appropriate regulation.

While HIA is aware of some relatively minor areas for potential improvement in the operation of the Act, including the review of definitions, HIA understands that the Scheme is currently functioning well. This is demonstrated by the relatively low incidence of formal actions for non-compliance. Any changes proposed should be thoroughly investigated with justifiable benefits when compared to any increase in cost or administrative burden to Scheme users.

HIA is also aware that the approach taken by MyLeave in its regulatory activities is typically proactive and cooperative, including several steps to educate and foster compliance prior to formal steps being taken. However, at present these steps are administrative in nature and Scheme participants would benefit from these steps being included under the legislative framework.

HIA is supportive, in principle, of amendments that will clarify and simplify the processes under the Scheme and assist Scheme users in complying with the requirements and reduce the administrative burden for businesses.

## 2. The 'construction industry'

Neither the Australian economy nor the labour market is static. Demand rises and falls over time, in sometimes very unpredictable ways. Work on site is cyclical and project based, particularly in WA where market forces are so closely linked to the boom-and-bust nature of the resources sector. The COVID-19 pandemic, as well as the skills and materials shortages and various natural disasters that followed, also demonstrated this.

These conditions, and the resultant nature of worker engagement in the residential building industry, are the reason portable paid long service leave schemes exist. They recognise the distinctive nature of employment in the construction industry where workers are typically engaged on a project basis and move from employer to employer, more so than with off-site work. It is vital that any proposals for reform uphold this intention and do not seek to expand the Scheme's application.

Any proposed reforms must give careful consideration to the definition of 'construction industry', ensuring that it is sufficiently comprehensive and aligned with the intended scope of coverage. The definition should



encompass all relevant sectors and activities in the construction industry, accounting for the diverse range of trades, services and operations involved.

Some ambiguity exists around work carried out for manufacturers and suppliers that is located outside the workshop, in established buildings or homes, for example, the installation of plumbing fittings and door hardware, or repair works to the same. HIA understands that work of this nature is currently captured by the Scheme, but this could be better articulated to improve clarity.

Work carried out off site, such as prefabrication and manufacture of building components, should not be captured under the Scheme. It is widely understood that worker engagement for building and construction work is typically project-based and linked to the duration of a construction project, and this is not present to the same extent for off-site work. It is important 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. To address this, an express exclusion for off-site work may be appropriate.

## **2.1 Dual coverage**

Historically there has been confusion around the application of the Scheme where a worker spends their working hours both on and off site or is otherwise entitled to paid long service leave under other legislation.

The Act addresses under s.51 the ability for an employer to recover from the Board proportionate amounts for a worker covered by the Scheme and another paid long service leave scheme, where the employer has already paid long service entitlements. However, this requires the employer to have paid out the entitlements prior to making the claim, in addition to its contributions to the Scheme.

HIA's position is that the entitlements should either be claimed directly by the worker from MyLeave, or recoverable by the employer in advance of the payments being due to the worker. This would reduce the cash flow impacts on the employer and is particularly important given the cash flow pressures faced in the building industry in its ordinary operations.

Further communications and awareness are necessary to ensure that industry is fully aware of the requirement to make contributions to the Scheme despite the employee's coverage under another scheme. In addition, if unamended, this campaign should also address the employer's ability to paid claim amounts from MyLeave, where covered.

## **3. Work arrangements in the residential building industry**

### **3.1 Classification of employees**

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.

New and evolving styles of workplace organisation have been a feature of the Australian economy for decades. The common law has clear, well settled tests for distinguishing between employees and independent contractors. Celebrated court cases have considered the status of encyclopaedia salespeople, cleaners, bicycle riding couriers, and labour hire workers. Importantly, all these cases were resolved using the long-standing distinction between common law employees and independent contractors.



Several recent cases<sup>1</sup> also confirm that the rights and obligations of the parties under a comprehensive written contract determine whether a person is an employee or an independent contractor, especially where there is a contractual right to control the activities of the worker. The greater the degree of control, the stronger the indication that the person is an employee. There is no reason why the common law tests cannot continue to be applied in administration of the Scheme by MyLeave.

Where state and federal governments have sought to legislate to codify independent contractors and deem some to be employees it has invariably added complexity, confusion, and cost to business operations, particularly for small businesses.

### **3.2 Independent contracting**

Alternative forms of work in the form of independent contracting relationships have been a long-standing feature of the residential building industry. The industry relies on these work arrangements as a way of productively managing the needs of building businesses, especially smaller businesses.

HIA estimates that over 80 per cent of the work completed in the sector is performed by independent contractors. Independent contracting is a quintessential part of the residential building industry and is a legitimate business model which needs to be preserved for workers, businesses, and consumers within the industry.

For residential builders, it provides a flexible, workable, and efficient model for engaging workers and managing the peaks and troughs of the home building cycle. Builders rely on access to good and reliable trade contractors to maintain competitiveness. For contractors, it is a pathway to business ownership, career flexibility and entrepreneurship.

An independent contractor is self-employed and can choose his or her own hours, clients, and the manner in which the work is completed. Since they choose their own jobs and clients, the quantity and quality of work (in theory) is better related to the amount of money they make. Highly motivated, efficient, and productive contractors are likely to earn more money than regular employees. For home buyers, independent contracting also improves housing affordability.

Independent contracting has been prevalent in the residential building industry for decades and arguably had a similar presence at the time the Act was first established. To this end, there has been insufficient change to work arrangements in the residential building industry to warrant revision or expansion of the Act. It is HIA's position that independent contracting arrangements should continue to be excluded under the Act.

### **3.3 The "gig economy"**

There has been a recent focus by Federal and State Governments on the changing industrial relations landscape, including the emergence of the "gig economy". The gig economy is facilitated via a digital platform on through which procurement of services occurs on demand and on a task-by-task basis.

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<sup>1</sup> See e.g., *Construction, Forestry, Maritime, Mining and Energy Union & Anor v. Personnel Contracting Pty Ltd* [2022] HCA 1, and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.



There is little crossover between the gig economy and the residential building industry. Further, the highly regulated, specialised and trade-specific nature of the industry largely precludes the ability for a future increase in presence of service-on-demand workers, beyond the established contracting systems. As such, there is no need for reform to address gig economy workers or any suggested modernisation of work arrangements.

## 4. Core definitions

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, leading to confusion. This will assist in minimising inconsistencies and ensure a more uniform and predictable application of the requirements.

### 4.1 'day of service'

It may be appropriate for the definition of 'day of service' to specifically address contemporary leave arrangements, such as leave without pay and parental leave. While it is currently implied that these types of leave do not count as a day of service, clarification of these exclusions will remove ambiguity.

### 4.2 'ordinary pay'

The definition of 'ordinary pay' under s.3(1) 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. However, the definition of ordinary pay doesn't expressly state that it only applies to paid leave. These provisions should be reviewed, and the drafting improved so that they can easily be understood and read together.

### 4.3 'ordinary hours'

The Terms of Reference for the review make mention of 'ordinary hours' as a core definition under the Act, however it doesn't appear that this term is defined under the Act or Regulations. If 'ordinary hours' 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, this should be part of a targeted consultation process and included in a RIS to determine the potential impact and genuine need for change.

## 5. Calculation of contributions

Any proposed reforms should ensure that the current method for calculation of contributions is not further complicated. In addition, improvements to the definition of 'ordinary pay' as outlined above, are recommended.

Currently the calculation of contributions is based on the average ordinary pay over the preceding period of 220 days of service. In circumstances where a worker has consistent hours on site this is reasonably straight forward. However, complications are introduced as inconsistency arises from week to week. An



example of this is where a worker has a change in pay rate during the period of calculation, or where the worker is a labour only contractor or casual employee.

By ensuring simplicity in the calculation process, accuracy and consistency is improved in the determination of contributions. This not only benefits employees and employers but also the regulatory body overseeing administration of the Scheme, allowing for improved transparency, accountability and monitoring.

## 6. Compliance measures

HIA understands MyLeave currently takes initial steps to engage, educate and facilitate participation in the Scheme when becoming aware of employer non-compliance and that these steps typically lead to the employer to voluntarily comply and make back-payments if necessary.

HIA also understands there is a relatively low incidence of deliberate non-compliance, as well as a reasonably low penalty rate for breaches of employer obligations. This suggests the initial steps taken by MyLeave have been effective in fostering a cooperative approach that assists employers and employees in understanding their obligations and responsibilities. There is no indication that this approach should change.

HIA would support in principle, amendment of the legislation to include the preliminary steps typically taken by MyLeave in instances of non-compliance, where appropriate. We would also encourage the availability of payment options for employers, subject to the amount to be paid and severity of the matter, to alleviate financial strain and facilitate compliance.

## 7. Industry awareness

HIA encourages initiatives aimed at increasing awareness of the Scheme, as well as offering industry support and education. Raising awareness is vital to ensure that all relevant stakeholders are informed of the existence of the Scheme, as well as its requirements and purpose. Moreover, providing support and education to the industry is likely to foster a deeper understanding of the Scheme's particulars, including its operation, reporting procedures and compliance measures.

Awareness can be achieved through targeted and frequent communication campaigns, information sessions and easily accessible resources. HIA maintains regular contact and fosters cooperative relationships with many Government Departments. This assists in understanding both industry and regulatory positions, results in improved legislative outcomes and provides another direct channel of communication from government to HIA's membership. HIA would be pleased to assist government in future with its work in increasing awareness of the Scheme and any changes to the current system.

Increased awareness of the Scheme also benefits workers. As active proponents for employer compliance, informed employees are able to self-advocate and prompt employers to comply if they have previously been unaware of their obligations. It also supports workers to remain in the industry, which is a benefit on many levels, from an economic perspective, as a support to small-to-medium business, and in terms of housing supply and affordability.



## 8. Housing affordability

It is essential that any review of the Act takes into consideration the potential impact of the amendments on housing affordability, weighed up against the benefit to Scheme stakeholders and users. The introduction of any changes to current legislative frameworks at this stage has the potential to impact the industry's abilities to respond to the current critical shortfall in housing and to push up the cost of delivering a home.

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 including a cost-benefit analysis and investigation of alternative approaches, comprehensive consultation and targeted engagement with stakeholders and industry representatives.

Further, transitional and interim measures will be necessary to allow industry time to adjust to any new or amended requirements.