Final Report

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

30 November 2023

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.

*This acknowledgement of country has been developed within KPMG Indigenous Network (KIN) should you wish to modify the wording please reach out for consultation of the KIN. The KIN is a culturally safe and supportive space for Aboriginal and Torres Strait Islander colleagues from all geographies, divisions, and levels of the firm and you can get in touch by emailing smoates@kpmg.com.au

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Hon. Bill Johnston MLA
Minister for Mines and Petroleum; Energy;
Hydrogen Industry; Industrial Relations

30 November 2023

Dear Minister Johnston

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

We present this report as an independent review of the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA) (the Act) consistent with the Terms of Reference (the Review).

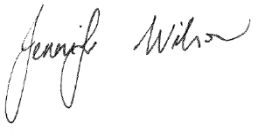
Nearing 40 years of operation, the Act has been pivotal in extending the benefits of long service leave to employees in the Western Australian (WA) construction industry, where the transiency and short-term project nature of the work had previously precluded accrual of such entitlements. In the time since the Act's inception, the WA construction industry and its workforce has undergone an evolution. This Review has considered the operation of the Act and whether its overarching intent is being met for the contemporary construction industry and workforce. This Review offers a series of findings, recommendations, and implementation considerations to ensure the Act continues to provide benefits to the modern construction workforce.

The Review recognises the integral role the Construction Industry Long Service Leave Payments Board (trading as MyLeave) plays as the statutory authority responsible for administering the Act. We thank MyLeave for its assistance to the Review, and for the operational insight it shared during the stakeholder consultation process.

We would also like to thank the many industry stakeholders who took time to attend consultations or prepare written submissions to assist the Review's deliberations. We have endeavoured to reflect those views, including the deep level of industry expertise shared with the Review, and the areas where consensus and divergence exist.

We trust the Review provides guidance to ensure the Act provides the WA construction industry and workforce with a fit-for-purpose framework to deliver long service leave entitlements now and into the foreseeable future.

Yours sincerely



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1 Executive summary

1.1 Purpose

On 18 May 2023, the Minister for Mines and Petroleum; Energy; Corrective Services; Industrial Relations (the Minister) announced the Review of the Act. The Review has been commissioned to determine whether the overarching intent of the Act is being met for the contemporary construction industry and its workers.

The Act is nearing 40 years of operation. In that time, the industry has evolved considerably, however the Act has undergone limited legislative reform. The composition of the industry has shifted from a smaller number of large employers to a much larger number of small businesses. Employment types have also evolved, to include casual workers and contractors in addition to permanent employees. The advancement of technologies and construction methods mean that some work is now performed off-site, prior to being transported to a construction site for assembly or installation. Additionally, the size of the workforce captured by the Act has grown from 9,000 to 10,000 employees at commencement,[1] to over 123,000 in 2023.[2]

1.2 Stakeholder consultation

The Review included a stakeholder consultation process which is detailed in Section 4. While every attempt was made to encourage participation from a broad range of stakeholders, the Review notes that participation from individual employees and employers was limited. For this reason, the Review has suggested that some specific reform measures be further tested and validated prior to implementation.

1.3 Guiding principles

As detailed in section 5.1, when commenting on whether the overarching intent of the Act is being met, the Review has adopted four guiding principles. The Review considers the Act should operate to:

1. place employee entitlements at the centre of the scheme's design;
2. provide a safety net for workers not captured by the *Long Service Leave Act 1958* (WA) (LSL Act);
3. promote parity with the LSL Act; and
4. encourage harmonisation with reciprocal schemes.

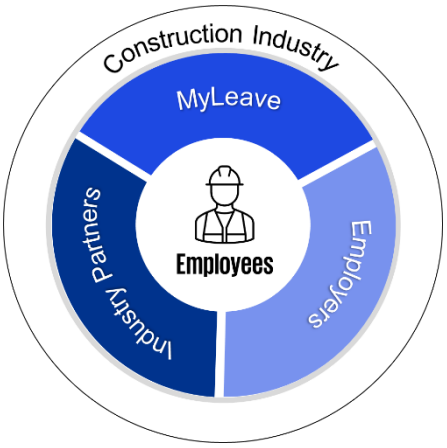

Figure 1: Employee-centric design

1.4 Key findings and recommendations

The Review makes 14 recommendations designed to reduce ambiguity and improve the operation of the Act. The Review considers **Findings 2, 3 and 5** and the associated recommendations represent **high impact areas**:

- Recommendation 2 will amend key terms (particularly, 'employee', 'employer' and 'construction industry') to clarify the coverage of the Act;
- Recommendation 3 presents alternatives to the use of prescribed industrial instruments as a method of determining employees covered by the operation of the Act;
- Recommendation 5 proposes the adoption of an alternate method of calculating accruals to respond to changes in modern rostering arrangements in the construction industry and improve fairness for workers.

Together, they represent the areas that will generate the greatest degree of change, if implemented.

[1] Western Australia, *Parliamentary Debates*, Legislative Assembly, 26 September 1985, 1678 ('*Parliamentary Debates, 26 September 1985*').
[2] MyLeave, *Annual Report 2022-23* (Report, 23 August 2023) 5, <https://www.wa.gov.au/system/files/2023-09/myleave_annual_report_2022-2023.pdf> ('*Annual Report 2022-23*').

With respect to Recommendation 2, which addresses the definition of the 'construction industry' and the use of the term 'on a site', the Review has tested the contemporary relevance of a location-based test and has found that the majority of construction work continues to occur 'on a site', with some notable exceptions concerning prefabrication and assembly. Over the longer-term, the Review foresees that the continued use of the term 'on a site' will likely constrain the operation of the Act as technology advances and developments in the manufacturing and mining industries continue to challenge the boundaries of the construction industry. For this reason, the Review considers further industry dialogue is necessary to validate the boundaries of the modern construction industry, noting this area generated the most divergence in stakeholder views.

Section 5 details the Review's analysis and how it has arrived at its key findings and recommendations. Section 5 also contains implementation considerations, to assist in progressing the recommendations arising from the Review. The key findings and recommendations are extracted below as a summary (excluding the implementation considerations).

In section 6, the Review concludes that targeted legislative reform, as distinct from a comprehensive structural reform, as sufficient to achieve the desired outcomes.

Term of Reference Matter 1

Finding 1

The Act has been historically effective in providing for the construction workforce, however, developments in employment practices and the construction industry mean the Act requires amendment to reflect the modern construction workforce, specifically to:

(a) address anomalies caused by existing exclusions;

(b) clarify ambiguity surrounding coverage for specific cohorts of workers (discussed in Table 4).

In response to external stakeholder calls to add new occupations, further consultation between MyLeave and industry stakeholders is required to test and validate the need to add new occupations to the coverage of the Act.

Recommendation 1A – address anomalies caused by current exclusions

The 'construction industry' definition should be amended to:

(a) remove the current exclusion relating to construction work performed on a ship; and

(b) clarify that construction work on a ship is captured by the Act.

Recommendation 1B – clarify ambiguity for specific cohorts of workers

Amend the legislative framework to:

(a) exclude working directors from coverage (per Table 4);

(b) clarify the capture of specific cohorts of construction workers including subcontractors, supervisors, construction cleaners (peggies), traffic controllers and electrical trade workers who conduct commissioning, de-commissioning, and testing) to reflect the proposed capture expressed in Table 4; and

(c) insert further clarity concerning coverage for workers engaged offshore in circumstances not accounted for in the *Industrial Relations Act 1979* (WA).

Term of Reference Matter 2

Finding 2

The Review finds that the key terms 'employee' and 'employer' do not provide sufficient certainty.

With respect to the term 'construction industry', there is a current lack of consensus between stakeholders as to where the boundaries of the construction industry begin and end. The current definition does not provide sufficient guidance on what it means to be 'on a site' or 'substantially engaged' in the construction industry. The operation of the Act could be improved by defining both terms.

Recommendation 2A – amend the definitions for 'employee' and 'employer'

The Review recommends revising the current definitions of:

(a) 'employee' to 'worker', to reflect the contemporary construction workforce and to align language with other comparable schemes; and

(b) 'employer' by:

i. simplifying the term to mean any entity that engages a 'worker' as defined under the Act (retaining existing exceptions for a Minister, authorities or local government prescribed under existing provision 4(c) of the Act); and

ii. de-coupling the link of employer from the definition of the 'construction industry' (so as to rely on the workers engagement in the WA construction industry as the primary test).

Recommendation 2B – amend the definition for the 'construction industry'

To reduce current ambiguity surrounding the distinction between work performed 'on a site' and work performed off-site, the Act should be amended to provide further guidance as to what it means to be 'on a site' and what it means to be 'substantially engaged' in the construction industry.

Over the longer-term, the retention of the term 'on a site' should be tested again to re-assess whether there is utility in maintaining the term having regard to the views of industry and technological advances.

Term of Reference Matter 5

Finding 3

The use of prescribed industrial instruments has historically provided an indirect method of targeting classification of work to capture employees eligible for entitlements under the Act however is unlikely to provide sufficient flexibility in the Act to respond to developments in the construction industry and industrial relations in the future.

Recommendation 3 – alternatives to the use of prescribed industrial instruments

There are three key options available:

(a) maintain the existing system of prescribing of industrial instruments and update Schedule 1 of the Regulations to codify the position established by *Positron*;

(b) cease to use prescribed industrial instruments and design and implement an occupation list in conjunction with a classification system; or

(c) cease to use prescribed industrial instruments and use refined legislative drafting with additional terms.

According to analysis in Table 6, Option (c) appears to address the features required to deliver on the overarching intent of the Act and has the benefit of being implemented in a reciprocal jurisdiction.

An additional opportunity exists for a further tool to be added to the legislative framework (in combination with any of the three options) to permit the Minister to make declarations to determine coverage.

Term of Reference Matter 3

Finding 4

To reduce ambiguity, the Review found that amendments are required to the following core terms relating to treatment of employees under the Act:

(a) 'days of service' does not reflect the modern types of absences permitted under the LSL Act;

(b) 'ordinary pay' does not align with the equivalent definition contained in the LSL Act;

(c) 'ordinary hours' is referred to with respect to casual employees, although is undefined in the Act; and

(d) 'week' is not defined by the Act either by a five-day or seven-day week.

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

Amend the Act to revise the term 'days of service' to reflect the types of leave permitted under the LSL Act.

Recommendation 4B – align 'ordinary pay' with the LSL Act

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.

Recommendation 4C – define 'ordinary hours of work'

Insert a definition for 'ordinary hours of work'.

Recommendation 4D – define 'week'

Amend the Act to insert a definition for 'week'.

Term of Reference Matter 4

Finding 5

The current method of accrual does not reflect modern workforce models and precludes employees engaged on contemporary work patterns, such as FIFO / DIDO rosters, from accruing entitlements at the same pace of an employee working a traditional work pattern (i.e. Monday – Friday).

Recommendation 5 – adopt an 'hours worked' approach to accruals

Amend the Act to adopt an 'hours worked' approach to calculate 'days of service'. The Review considers option 2A may best meet the needs of the contemporary construction workforce.

Term of Reference Matter 6

Finding 6

The Review finds that the Act does not provide sufficient flexibility for employees to access entitlements or manage absences, particularly:

(a) the Act provides no opportunity to access entitlements prior to reaching seven years of service, even when hardship exists; and

(b) the current tiered approach to breaks in service does not align with reciprocal schemes, and may also discourage certain cohorts of workers from returning to the construction industry.

Recommendation 6A – early access in response to hardship

Amend the Act to permit early access in circumstances of hardship, specifically incapacity and death of a registered employee, subject to certain conditions (e.g. at least 55 days of service accrued, consistent with reciprocal schemes).

Recommendation 6B – standardise breaks in service

Amend the Act to standardise a break in service to be four years irrespective of the number of days of service accrued consistent with reciprocal schemes.

Term of Reference Matter 7

Finding 7

Several anomalies arise from the operation of the Act with respect to treatment of employees under the Act.

Recommendation 7A – resolve anomalies and deficiencies

Amend the Act to:

(a) remove constraints on the number of periods that an employee may take their long service leave;

(b) permit the cashing out of entitlements *by agreement* to employees (similar to the approach adopted in the LSL Act and customised for suitability to a portable scheme);

(c) remove the current preclusion in section 22(1) related to instances of 'serious misconduct'; and

(d) create further alignment with the LSL Act by inserting guidance on the rates of pay applicable to the taking of leave in circumstances where an employee elects to postpone the taking of accrued entitlements.

Recommendation 7B – reduce disadvantage to employees with long-term service with a single employer

Consistent with the overarching intent of the Act, make necessary legislative changes to:

(a) require eligible employees with long-term service with a single employer to access their accrued entitlements through the LSL Act only; and

(b) permit MyLeave to refund an employer levy payments made in circumstances where the respective employee will access, or has accessed, accrued entitlements under the LSL Act (per recommendation 7B(a)).

Term of Reference Matter 10

Finding 8

The current statutory mechanisms substantially support an effective compliance regime through:

(a) the current penalty framework providing an effective deterrent to non-compliance; and

(b) the IR Act providing a sufficient basis for the enforcement of civil penalties.

The Review finds a small number of areas for improvement, including:

(c) the need for an enhancement of mid-spectrum enforcement powers available to improve the efficiency of compliance outcomes;

(d) increased educational campaigns to raise awareness of compliance obligations within the industry.

Recommendation 8 – legislate mid-spectrum enforcement powers

Amendments should be made to the Act to empower MyLeave with mid-spectrum compliance and enforcement powers, including the ability to:

- issue warning letters;
- issue compliance/improvement notices;
- issue infringements; and
- provide payment plans, especially to assist small businesses.

Term of Reference Matter 10(d)

Finding 9

The current statutory timeframe imposed by the IRC Regulations does not permit a credible internal review process to occur prior to a complaint being filed in the WAIRC.

Recommendation 9 – legislate an internal review process

Amend the legislative framework to provide for an internal review process.

Term of Reference Matter 8

Finding 10

In many regards the Act provides MyLeave with the ability to effectively administer the scheme, however a limited expansion in discretionary powers and additional flexibility for Board functions would improve efficiency.

Recommendation 10A – expand discretionary powers

Amend the Act to provide MyLeave with limited discretionary powers to administer the Act. Specifically, the Act should provide powers for the:

(a) granting extensions of time for the submission of levies and quarterly returns;

(b) waiving penalties and late fees in certain circumstances; and

(c) determining how the application of late fees may be administered.

Recommendation 10B – modernise Board governance

Amend the Act to modernise existing Board governance arrangements, particularly to permit:

(a) the appointment of an acting Chair;

(b) remote meetings; and

(c) circular resolutions.

Term of Reference Matter 9

Finding 11

The Review finds that:

(a) the legislative framework strikes an appropriate balance and does not impose undue regulatory burden by requesting employers complete returns on a quarterly basis;

(b) clarifying limitation periods would assist improve the administration of the Act and continuing to modernise the use of technology, systems, and data will further reduce the regulatory burden on employers and employees; and

(c) a mandated methodology would assist the process of calculating assessments and support a self-compliance framework for employers.

Recommendation 11A - Clarify limitation periods

Amend the Act to clarify the applicable limitation periods with respect to an employer's contribution liability and MyLeave's power to request historical records.

Recommendation 11B – mandate a methodology for contribution assessments

Amend the legislative framework to empower the MyLeave Board to mandate a methodology for use when calculating assessments of contributions.

Term of Reference Matter 12

Finding 12

The regulatory framework would be improved through the inclusion of an Object provision, especially to determine how the coverage and treatment provisions apply to an employee and employer.

Recommendation 12 – insert an Object provision

Amend the regulatory framework to insert an Object provision into the Act. Relevant policy considerations are considered in section 5.6.2.

Term of Reference Matter 12

Finding 13

The regulatory framework uses outdated gendered language.

Recommendation 13 – adopt gender neutral language

Amend the regulatory framework to remove male-centric references and replace with gender neutral terms.

Term of Reference Matter 12

Finding 14

The operation of the Act could be improved through legislative amendments to address operational matters relating to the deregistration of employees, refunds for employers and the provision of inspector identity cards.

Recommendation 14 – Incorporate legislative amendments to improve the operation of the Act

Amend the regulatory framework to:

(a) provide a mechanism to deregister employees (including an ability for employees to have the decision reviewed);

(b) permit MyLeave to refund contributions to employers where the contribution has been made in error or where the contribution relates to an employee who has subsequently been determined ineligible for entitlements under the Act; and

(c) provide for each inspector to hold an identity card.

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November 2023

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2.1 Scope

The Terms of Reference are contained at ***Appendix A: Terms of Reference***. The Review has categorised each of the 12 Terms of Reference matters into the following five key themes:

1. coverage;
2. treatment;
3. compliance, enforcement and dispute resolution;
4. administrative and regulatory considerations; and
5. other incidental and relevant matters.

Term of Reference matter 11 requires consideration of the arrangements used by comparable interstate schemes. The Review has considered comparable analysis across all themes.

While the Review was asked to consider whether the overarching intent of the Act is being realised, the Review has not been asked to comment on the appropriateness of the original intent of the Act or the policy rationale for the provision of portable long service leave. That broader subject continues to be debated, both within states and territories and the Commonwealth.

The Terms of Reference do not extend to reviewing the financial or investment aspects of the MyLeave scheme, nor providing legal advice. The Review has been undertaken by qualified Australian legal practitioners however does not constitute legal advice. Accordingly, while recommendations and implementation considerations have been offered to assist reform efforts, the Review has deliberately stopped short of offering drafting suggestions which is a matter for the Parliamentary Counsel's Office.

2.2 Methodology

The Review was completed in six key phases between March and November 2023:

1. **Planning**: The Review commenced with a project management meeting with the MyLeave Executive, where agreement was reached on the governance arrangements for the Review, including meetings with the Executive and the Board, status reporting, risk management and communication channels.
2. **Research**: An initial desktop review was completed that considered primary and secondary sources (both legislation and ancillary reference materials) to form a contextual understanding of the environment within which the Act operates.
3. **Consultation**: The Review planned and held a total of seven workshops for seven core stakeholder groups, including employee representatives (trade unions), employer representatives, government stakeholders, other key industry stakeholders, MyLeave staff, MyLeave Executive and the MyLeave Board.

   The Review also sought written submissions and designed a short online survey available to the public, offering a method specifically for interested employees and employers to share their views with the Review. Written submissions received have been made publicly available on the MyLeave website.
4. **Analysis**: The Review analysed and evaluated the evidence gathered from previous phases and presented its findings and observations in a Preliminary Analysis Briefing to MyLeave.
5. **Draft Report**: The Review prepared a draft report informed by the previous four stages. MyLeave was provided with a short period of time to comment, validate key facts, or highlight any inaccuracies based on its operational expertise.
6. **Final Report**: The Review completed its deliberations, considered comments provided by MyLeave and prepared this Final Report.

Figure 2: Review phases

2.3 Report structure and compliance with Terms of Reference

The Review has been structured into six sections, commencing with an executive summary that highlights the findings and recommendations, followed by an introduction and summary of stakeholder views. The analysis is contained in section 5, which provides details of the issues, findings, and recommendations relevant to the Terms of Reference. Section 6 provides observations on the options for reform and an implementation roadmap, to assist any reform efforts that may arise from the Review.

Figure 3: Report structure

Section 1: Executive summary

Provides a high-level level summary of purpose, key findings, and recommendations of the Review.

Section 2: Introduction

Presents an overview of the scope and methodology for the Review.

Section 3: Background

Discusses the history of the Act, the legislative environment, the operating environment, and considers comparable long service leave schemes in the construction industry across Australia.

Section 4: Stakeholder views

Details the views provided by stakeholders received through workshops, written submissions, and survey data.

Section 5: Analysis

Details analysis of the issues identified by the Review, subsequent findings, recommendations and implementation considerations.

Section 6: Options for reform

Considers options for reform and provides an implementation roadmap to assist MyLeave's response to the Review.

The Review has considered each matter listed in the Terms of Reference against five core themes of which form the basis of its analysis. Compliance with the Terms of Reference can be observed against each relevant theme as follows:

Table 1: Theme mapping with Terms of Reference

			Themes				
			Coverage	Treatment	Compliance, enforcement & dispute resolution	Administration & regulatory considerations	Other incidental matters
Terms of Reference	1	Review whether the Act contemplates the modern construction workforce to ensure all cohorts of construction workers can access portable long service leave.	✓				
	2	Consider if definitions of the Terms used in the Act provide certainty and consistency for employers and workers.	✓				
	3	Assess whether the core terms of 'days of service', 'ordinary pay' and 'ordinary hours' reflect the contemporary construction workforce and result in fair and equitable application of portable long service leave entitlements having regard to differing employment arrangements.		✓			
	4	Review whether the current method of accruing entitlements using 'days of service' reflects contemporary workforce models.		✓			
	5	Examine whether industrial relations instruments and prescribed classifications of work incorporated within the Act and Regulations is an effective method of capturing workers in the construction industry, and if not, propose alternatives.	✓				
	6	Consider if there is sufficient flexibility in the Act to provide for absences and allow workers flexibility in accessing portable long service leave entitlements having regard to the high-risk nature of the construction industry.		✓			
	7	Assess whether there are any deficiencies or anomalies in the operation of the Act in terms of the equitable and fair payment of contributions by employers and the payment of long service leave entitlements to workers.		✓			
	8	Assess whether the Act provides flexibility to allow for the efficient and effective administration of portable long service leave.				✓	
	9	Consider provisions to ensure the intent of the Act is consistently achieved and minimise the regulatory burden on participants.				✓	
	10	Review the statutory compliance and enforcement mechanisms with the objectives of: a) ensuring that workers are paid their correct entitlements, b) providing effective deterrents to non-compliance, c) updating the Board's powers and tools of enforcement to ensure the Board is able to effectively perform its statutory functions, and d) provide timely and cost-effective dispute resolution mechanisms.			✓		
	11	Consider the varying arrangements of portable long service leave schemes applying in other states and territories of Australia, and any beneficial changes or harmonisation opportunities resulting from that review.	✓	✓	✓	✓	✓
	12	Other matters incidental or relevant to the Reviewer's consideration of the preceding terms of reference.					✓

3 Background

3.1 The WA industrial relations landscape

The industrial relations system in WA is unique. While most Australian states referred their industrial relations powers to the Commonwealth in 2009, WA has elected to retain its industrial relations powers.

Therefore, in a contemporary context, two systems of industrial relations operate in WA:[3]

- the **WA State System**, which covers private sector businesses (excluding constitutional corporations), non-profit entities, household employers, local government employers, and public sector employees of the Western Australian Government; and
- the **National Fair Work System**, which covers constitutional corporations that fall within the meaning of a 'national system employer' under the *Fair Work Act 2009* (Cth) (FW Act),[4] as well as the Commonwealth and a small number of other entities.

3.1.1 Operation of industrial instruments

As identified above, the industrial relations system in WA operates on two-tiers, being the federal system (under the FW Act) for some employers, and the WA state system for other employers. Employers based in WA who are 'constitutional corporations' (i.e foreign, trading or financial corporations) and their employees are covered by the FW Act, including the National Employment Standards and modern awards. Enterprise agreements may also be bargained for and negotiated between employers and employees operating in the federal system.

Public sector employers who are not constitutional corporations, as well as sole traders and other unincorporated entities, will be covered by the WA state industrial relations system, which includes statutory minimum entitlements and state awards which provide for minimum entitlements to pay, leave, allowances, and penalty rates based on a particular industry or type of work. The *Minimum Conditions of Employment Act 1993* (WA) applies to all employees of state system employers, including those employers whose employment is covered by a state award or industrial agreement, or those employees who are 'award free'. In addition to state awards, the Western Australian Industrial Relations Commission (WAIRC) has the power to register industrial agreements negotiated between employees, employers, and their representatives in WA.[5] An industrial agreement contains conditions determined through a process of bargaining and negotiation between an employer/s and its employees (or representatives for the parties).

3.1.2 Long service leave entitlements

Coverage

The LSL Act is the primary source of long service leave for most workers in WA. Workers that are not covered by the LSL Act include employees accessing entitlements through the Act and local government employees covered by the *Local Government (Long Service Leave) Regulations 2021* (WA) (the Local Government Regulations).[6]

In summary, all employees covered by the LSL Act are entitled to:

- 8 $^{2/3}$ weeks of leave at ordinary pay following 10 years of continuous employment with the same employer;
- 4 $^{1/3}$ weeks of leave at ordinary pay for every 5 years of continuous employment with the same employer completed after their first 10 years.[7]

Accrual and payment

In contrast to the Act, long service leave provided under the LSL Act is tracked and accrued by the employer. The employer is responsible for making provisions for long service leave and the payment of entitlements directly to an employee.

[3] 'Guide to who is in the WA state system', *Government of Western Australia Department of Mines, Industry Regulation and Safety* (Web Page, 23 August 2023) <https://www.commerce.wa.gov.au/labour-relations/guide-who-wa-state-system>.
[4] *Fair Work Act 2009* s 14.
[5] *Industrial Relations Act 1979* (WA) s 41(2) ('*IR Act*').
[6] 'Long service leave - Who is covered by the Long Service Leave Act?', *Government of Western Australia Department of Mines, Industry Regulation and Safety* (Web Page, 20 September 2023) <https://www.commerce.wa.gov.au/labour-relations/long-service-leave-who-covered-long-service-leave-act>.
[7] *Long Service Leave Act 1958* (WA) s 8(2) ('*LSL Act*').

Long service leave entitlements may be accessed by an employee after 10 years of service with the same employer, however, the legislation provides for a pro-rata of entitlement after at least 7 years of service upon termination of employment.[8]

Administration

The Department of Mines, Industrial Regulation and Safety (DMIRS) provides educational resources and plays a key role in compliance and enforcement of the LSL Act. DMIRS operates 'Wageline', a free service available to employees to query their entitlements or raise a potential case of non-compliance of the LSL Act.[9] Where an employee believes they may have been underpaid their long service leave, the Private Sector Labour Relations Division of DMIRS will assist to resolve the matter by requesting voluntary compliance from the employer, before using its powers to conciliate, investigate and pursue matters in the Industrial Magistrates Court. The Private Sector Labour Relations compliance and enforcement team may also choose to use tools including compliance notices, enforceable undertakings, and infringement notices to achieve compliance.[10]

Recent amendments to the LSL Act

Recently, the LSL Act was amended by the *Industrial Relations Legislation Amendment Act 2021* (IRLA Act) with changes effective from 20 June 2022. Key changes to the LSL Act included:

- improved **flexibility** in taking of leave, such as autonomy for employers and employees to agree to the taking of leave in separate periods of any length and taking of half pay (for double the full period entitled) or at double pay (for half the period entitled);
- clarification of the **calculation of ordinary pay** including for casual employees, employees who experience a change to their hours of work, and employees paid by results-based payments;
- clarification of the types of **absences** that do and do not have an effect on the length of continuous employment; and
- clarification of long service leave entitlements for **casual** and **seasonal employees**.

3.1.3 The industrial relations policy landscape

The Australian Labor Party have governed WA since 2017. With respect to its industrial relations agenda and commitments, WA Labor has:

- made a commitment to ensuring that 'the relevant state policies have as their goal the maximisation of well-paid and secure employment';[11]
- highlighted the changing nature of the workplace, with one of the principal challenges being 'the erosion of full-time employment and the growth of casual, part-time, contracting, use of labour hire and insecure forms of employment'.[12]

The WA Jobs Plan identifies job creation within the construction industry as a focus, supported by increased government funding for 'innovative infrastructure projects'.[13] Relevantly, the WA Government has committed an investment of $33.9 billion towards critical infrastructure from 2021-2026.[14] It is foreseeable that this boost in government infrastructure investment may increase the number of employees working in the WA construction industry, and by extension, expand the number of employees captured by the Act.

[8] *LSL Act* (n 1) s 8(3).
[9] 'Contact Wageline', *Government of Western Australia Department of Mines, Industry Regulation and Safety*, <https://www.commerce.wa.gov.au/labour-relations/contact-wageline>.
[10] Department of Mines, Industry Regulation and Safety, 'Private Sector Labour Relations Division Compliance and Enforcement Policy' (Policy Document, 9 September 2022), <https://www.commerce.wa.gov.au/sites/default/files/atoms/files/private_sector_labour_relations_compliance_and_enforcement_policy_2022_0.pdf>.
[11] WA Labor, '2022 WA Labor Platform' (Policy Document, 2022) 91 <https://walabor.org.au/media/24uh3gj3/2021_wa_labor_platform.pdf> ('*WA Labor Platform*').
[12] Ibid 91.
[13] WA Labor, 'WA Labor Plan for Jobs' (Policy Document, February 2021) 71 <https://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3914776c5d11d8c77eecb0714825804c0005d229/$file/tp-4776.pdf>.
[14] Government of Western Australia , *Infrastructure Projects in Western Australia* (Report, 24 June 2022) 2 <https://www.wa.gov.au/system/files/2023-01/infrastructure-projects-in-western-australia-january2023.pdf>.

As evident from the amendments made to the LSL Act, the WA Government has prioritised advancing industrial relations legislation into its contemporary context to improve flexibility, rights for casual workers and clarify existing ambiguities such as how entitlements are to be calculated.

3.2 The WA construction industry

In the 2021-22 financial year, the WA construction industry generated an annual revenue of $18.2 billion representing 5 per cent of WA's gross state product.[15] As at December 2021, the Department of Jobs, Tourism, Science and Innovation reported the construction industry as the third largest employer in the state employing 123,443 individuals across the sector.[16] While this appears a significant number, it is important to note that not all of those working in the construction industry are covered by the Act. As discussed further in section 5.2, the Act is intended to capture employees who undertake construction work 'on a site'. It is not intended to cover workers who are working in an office environment, or performing internal-to-business roles (e.g. administrative, finance, legal or human resources personnel).

The WA construction industry continues to endure challenges associated with shortages of building materials and skilled trades. These impacts are evidenced throughout the sectors supply chain. Manufacturers, suppliers, contractors, subcontractors, and homeowners are all impacted by a lack of available building materials and labour to meet demand. The issues have been exacerbated by the COVID-19 pandemic and to some degree, the state and federal stimulus grants.[17] Ongoing supply chain disruption for imported construction materials and high demand on finishing stage materials continue to impact the operations of the industry.[18] These circumstances highlight the vulnerability of the construction industry to a range of factors including weather and natural disasters, changes in commodity prices,[19] and shortages of skilled trade workers brought on by the short-term nature and strong demand on labour.[20]

WA Labor has recognised that a 'vibrant housing construction industry is a critical element in the state's economy'.[21] However, the sector continues to face some headwinds, following policy changes introduced to provide support to homeowners affected by builders' insolvencies during the pandemic.[22] Media commentary has reported collapses of major building companies within WA, demonstrating the difficulties associated with increased demand for houses, paired with increasing costs and skill shortages facing businesses.[23]

The WA Building and Construction Consultative Committee (BCC Committee) was established in June 2022 by the Department of Mines, Industry Regulation and Safety to provide a forum for meaningful dialogue between the WA Government, employers representative associations, and unions regarding 'significant issues in the commercial

[15] *Government of Western Australia Department of Jobs, Tourism, Science and Innovation,* (Research Report, February 2022) 1 <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.wa.gov.au%2Fsystem%2Ffiles%2F2022-03%2FWA%2520Economic%2520Profile%2520-%2520February%25202022.docx%23%3A~%3Atext%3DGoods%252Dproducing%2520industries%2520accounted%2520for%2C4%2525%2520or%2520%252415.3%2520billion).&wdOrigin=BROWSELINK> ('*WA Economic Profile*').

[16] *WA Economic Profile* (n 16) 1.

[17] 'Residential building material and labour shortages', *Government of Western Australia Department of Mines, Industry Regulation and Safety* (Web Page, 9 March 2023) <https://www.commerce.wa.gov.au/building-and-energy/residential-building-material-and-labour-shortages> ('*Residential building material and labour shortages*').

[18] 'Producer Price Indexes, Australia', *Australian Bureau of Statistics* (Web Page, 27 January 2023) <https://www.abs.gov.au/statistics/economy/price-indexes-and-inflation/producer-price-indexes-australia/latest-release>.

[19] Michael Bleby, 'Rising costs dampen WA construction', *Australian Financial Review* (online, 12 January 2022) <https://www.afr.com/property/commercial/rising-costs-dampen-wa-construction-20220111-p59nc5>.

[20] *Residential building material and labour shortages* (n 18).

[21] *WA Labor Platform* (n 12) 91.

[22] 'Commerce Minister media statement – Insurance reforms to better protect home owners', *Government of Western Australia Department of Mines, Industry Regulation and Safety* (Web Page, 19 October 2022), <https://www.commerce.wa.gov.au/announcements/commerce-minister-media-statement-insurance-reforms-better-protect-home-owners>.

[23] Cason Ho, 'WA home construction sector slows to 2020 levels as opposition slams government's handling of sector', *ABC News* (online, 2 March 2023) <https://www.abc.net.au/news/2023-03-02/wa-building-sector-in-crisis/102046432>; Keane Bourke, 'Clough falls into voluntary administration, joins list of WA building firms hitting troubled waters', *ABC News* (online, 7 December 2022) <https://www.abc.net.au/news/2022-12-07/clough-voluntary-administration/101740756>.

construction sector'.[24] In July 2022, the BCC Committee considered that the current issues facing the building and construction industry include:[25]

- skill shortages and lack of trade qualifications;
- increasing prices of materials;
- diversity and equality of workforce, specifically regarding female and Indigenous workers;
- the uptake of apprenticeship programs and marketing the construction industry within schools;
- a need for communication and cohesion when handling procurement processes with the WA Government;
- recent changes in industrial relations laws and new laws introduced regarding work health and safety laws in Western Australia; and
- ongoing matters pertaining to Automatic Mutual Recognition legislation.

Most recently, the BCC Committee considered the culture of the construction industry and opportunities of reform to improve the quality and quantity of skills available to the industry in WA.[26]

3.3 The legislative environment

3.3.1 Legislative intent and historical considerations

Understanding the purpose of the Act

'… to make provision for paid long service leave to employees engaged in the construction industry and for incidental and other purposes.'

'The absence of any portable arrangements … are clearly inconsistent with the principles of justice and equity.'[27]

'The provisions of this [Construction Industry Portable Long Service Leave] Bill seek to make arrangements whereby employees in the construction industry in Western Australia can actually enjoy an entitlement which is already prescribed but, because of the intermittent nature of employment in the industry, is rarely enjoyed.'[28]

'[Workers] should be no better or no worse than the general standard.'[29]

[… to ensure that] 'employees of the construction industry in WA were enabled to participate in entitlements enjoyed by employees in other industries'.[30]

The Terms of Reference require the Review to consider whether the overarching intent of the Act is being met for the contemporary construction industry and its workers. The task is somewhat complicated by the absence of an Object provision in the Act, or the existence of an explanatory memorandum that accompanied the passage of the Act through the parliamentary process.

[24] 'Western Australian Building and Construction Consultative Committee', *Government of Western Australia Department of Mines, Industry Regulation and Safety* (Web Page, 5 April 2023), <https://www.commerce.wa.gov.au/labour-relations/western-australian-building-and-construction-consultative-committee>.
[25] Western Australian Building and Consultative Committee, Government of Western Australia, *Key Outcomes of the WA Building and Construction Consultative Committee* (Meeting Minutes, 7 July 2022) 2 <https://www.commerce.wa.gov.au/sites/default/files/atoms/files/key_outcomes_of_the_wa_building_and_construction_consultative_committee_meeting_held_7_july_2022.pdf>.
[26] Western Australian Building and Construction Consultative Committee, *Key Outcomes of the WA Building and Construction Consultative Committee* (Meeting Minutes, 7 September 2023) <https://www.commerce.wa.gov.au/sites/default/files/atoms/files/key_outcomes_statement_bcc_committee_meeting_7_september_2023.pdf>.
[27] Western Australia, Parliamentary Debates, Legislative Assembly, 17 September 1985, 1029 ('*Parliamentary Debates, 17 September 1985*').
[28] Ibid 1030.
[29] Ibid 1029.
[30] Ibid 1028.

To determine the legislative intent, a modern approach to statutory interpretation requires consideration of both the context and purpose of the statute, in addition to the text as expressed. Context and purpose may include consideration of legislative history and extrinsic material.

On 27 February 1984, some 26 years after the introduction of the LSL Act, the WA Cabinet approved the establishment of portability scheme for long service leave entitlements within the building and construction industry in WA. The approval was one 'in-principle' and contained a direction that the operation of the MyLeave scheme be subject to tripartite consultation.[31]

Whilst current and registered employees of the WA construction industry are covered by the Act, they are not precluded from accessing entitlements through the LSL Act, in circumstances when they meet the eligibility requirements. The Act supplements the LSL Act by providing that:

> *(1) where a person becomes entitled to paid long service leave under another Act or under an industrial instrument and a portion of that service is service in respect of which the employer has made contributions under this Act in respect of that person the employer is entitled to recover from the Board an amount that is proportionate to the ordinary pay that would have been payable to that person under this Act had that person continued to be employed by the employer as an employee at the time that he became entitled to long service leave.*[32]

The Act and the *Construction Industry Portable Paid Long Service Leave Regulations 1986* (WA) (the Regulations) were proclaimed on 19 December 1986.[33] From its long title, it is possible to ascertain that the Act was designed 'to make provision for paid long service leave to employees engaged in the construction industry and for incidental and other purposes'.[34] The Act provides for the establishment of the MyLeave Board and the registrations of employers and employees within the MyLeave scheme. The Act creates entitlements for eligible workers, imposes obligations on employers and a range of incidental matters relevant to the administration of the MyLeave scheme which are explored in section 3.3.2.1. The Regulations were enacted in December 1986 to provide supplementary information to assist interpretation, to prescribe the relevant awards, classifications of work and corresponding laws relevant to the operation of the Act.

At the time of the Act's creation, portable long service leave schemes existed in other states and territories and it was identified that a similar scheme was needed in WA to ensure that employees within its construction industry were 'enabled to participate in entitlements enjoyed by employees in other industries'.[35] The Act was designed to operate in addition to other legislation that makes provisions for long service leave entitlements.[36]

Relevantly, parliamentary debates that took place in 1985 concerning the Construction Industry Portable Long Service Leave Bill (the Bill) noted:

> *'It is not that the Government is imposing an additional entitlement or additional cost on the industry, the entitlement already exists. The Government is proposing that consistent with the construction industry in most other parts of Australia, Western Australia make arrangements whereby these employees can enjoy the entitlement which has been granted to them.'*[37]

Parliamentary debates provide a historical account of the Act's establishment and note that a Tripartite Consultative Council (consisting of unions, employers, and government representatives) was consulted on the contents of the Bill.[38] The debates provide a record of areas where consensus was reached between stakeholders at the time, and issues that remained in contention. The parliamentary debates considered the nature of the construction industry as consisting of short-term employment opportunities, and that absence of a portability scheme left workers 'unlikely to become eligible for long service leave'.[39] Importantly, it appears the Act was premised on the basis that '[workers] should be no better or no worse than the general standard'.[40]

In 1992, Justice Owen elaborated on the Act's objective in *Construction Industry Long Service Leave Payments Board v Precision Corporation Pty Ltd* [1992] 920130 stating:

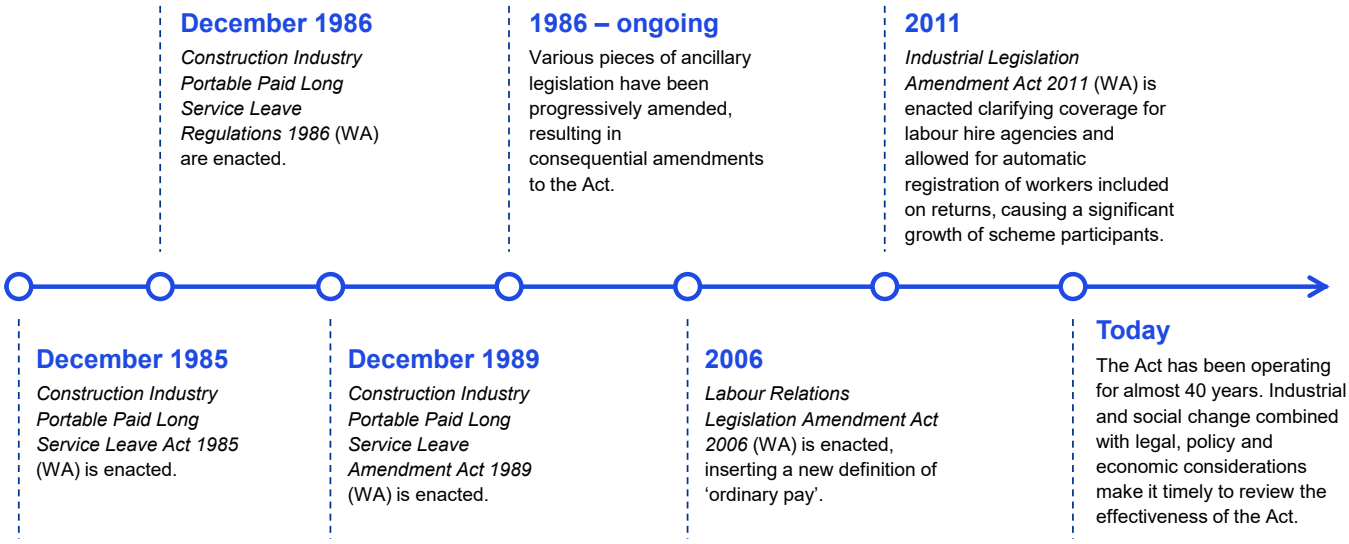
> *'The Act embodies the concept of providing long service leave based on service to an industry rather than service to a single employer. Instead of being eligible for long service leave after fifteen years of service to one employer, employees in the construction industry become eligible after fifteen years in the industry.*

[31] Ibid 1026.
[32] *Construction Industry Portable Paid Long Service Leave Act 1985* (WA) s 51 ('*the Act*').
[33] Western Australia, *Government Gazette of Western Australia,* No 147, 19 December 1986, 4923-4924.
[34] *The Act* (n 33) long title.
[35] *Parliamentary Debates, 17 September 1985* (n 28) 1028.
[36] *The Act* (n 33) s 51.
[37] *Parliamentary Debates, 17 September 1985* (n 28) 1028.
[38] Ibid 1026.
[39] Ibid 1029.
[40] Ibid 1029.

The legislation provides for a portable long service leave scheme for employees who may move from one employer to another or others but remain within the construction industry.'

Since its introduction, the Act has been updated on 17 occasions. Figure 4 illustrates the history of the Act in the context of key amendments over time. Most recently, the Construction Industry Portable Paid Long Service Amendment Bill (no. 2) 2020 (the Amendment Bill) was introduced to Parliament, however, did not pass into law. The Amendment Bill was designed to make allowances for supports during the pandemic, and has not been re-presented to Parliament.

Figure 4: Historical timeline of the Act



3.3.2 Relevant legislation

3.3.2.1 Governing legislation and relevant amendments

(a) The Act

The Act establishes the Construction Industry Long Service Leave Payments Board (MyLeave).

MyLeave is established as a statutory authority which oversees the operation of the Act and has as its mission to 'manage in an efficient and effective manner, portable long service leave for construction industry employees, established by the Act'.[41]

In achieving this purpose, MyLeave is guided by its statutory functions as provided in section 14 of the Act:

(a) to maintain the register of employers and register of employees;

(b) to administer payment to employees during long service leave established under the Act;

(c) to advise the Minister on the administration of the Act;

(d) to carry out such other functions as conferred on the Board under the Act.

The Act contains five Parts which set out the following aspects of the MyLeave scheme:

- preliminaries, including the offshore application of the Act;
- administration and governance requirements, including establishment of the Board and its powers;
- coverage and eligibility for entitlements to long service leave and pay;
- registration requirements; and
- compliance and enforcement mechanisms.

[41] 'About MyLeave', *Government of Western Australia* (Web Page, 22 March 2023), <https://www.wa.gov.au/organisaton/myleave-construction-long-service-board/about-myleave> ('*About MyLeave*').

Importantly, entitlement to portable long service leave is provided in section 21 of the Act, which provides that registered employees are entitled to 8 2/3 weeks of long service leave after completing ten years of service and 4 1/3 weeks leave after completing 5 years of subsequent service in the construction industry, with accrual of a year of service based on 220 days of service.

Registered employees may access a pro-rata of their long service leave entitlements after seven years of service and may access their full entitlements after ten years. This quantum of entitlement accrual is aligned with long service leave available to other WA workers covered by section 8 of the LSL Act. An employee covered by the Act will be paid at the ordinary rate of pay averaged across the last 220 days of service in the construction industry.

(b) The Regulations

The Regulations are subordinate to the Act and set out supplementary information, including prescribed awards, amendment history and the prescribed form for an inspector's certificate of appointment.

(c) *Construction Industry Portable Paid Long Service Leave Amendment Act 1989* (WA) (the 1989 Amendment)

The 1989 Amendment primarily clarifies and inserts content relating to definitions used in the Act.

(d) *Labour Relations Legislation Amendment Act 2006* (WA) (the 2006 Amendment)

The 2006 Amendment had the effect of changing various legislation relating to reasonable hours of work, right of entry provisions under the *Industrial Relations Act 1979*, enabling wage-related powers to the WAIRC, enabling good-faith bargaining under the *Industrial Relations Act 1979* (WA) (the IR Act), prohibiting employers from pressuring employees and improving various leave entitlements such as parental, sick, carer's and long service leave. It also abolished the Long Service Leave General Order of the WAIRC and enhanced existing Industrial Inspectors' powers under the LSL Act.[42]

Most significantly, the 2006 Amendment changed the definition of 'ordinary pay' from 'award rates' to the rate of pay to which an employee is entitled to, which was intended to better reflect take home wages of employees. The 2006 Amendment also made provision for employees to gain early access to a pro-rata of their long service leave entitlements after 7 years of service, as articulated in section 24A of the Act.

(e) *Industrial Legislation Amendment Act 2011* (WA) (the 2011 Amendment)

The Explanatory Memorandum for the 2011 Amendment states that it was intended to 'replace outdated references to Commonwealth legislation and industrial instruments, clarify the scope of the Act and improve the administration of portable long service leave scheme under the Act'.[43]

Amendments made to the Act through the 2011 Amendment were broad, including:

- extending the application of the Act to 'offshore' areas prescribed by the IR Act;
- extending the definition of 'employer' to include labour hire agencies;
- changing the definition of 'employee' with reference to 'industrial instruments' as opposed to 'award'. This was intended to ensure federal awards made under the *Workplace Relations Act 1996* (Cth) could be preserved under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (otherwise they would have been terminated);
- adding 'swimming pools and spa pools' to the definition of construction industry;
- amending the process for Board selection to allow the Minister to appoint two of the members and the other four members nominated by Chamber of Commerce and Industry WA (CCI WA), Master Builders and Unions WA (UWA). This was intended to provide broader representation;
- clarifying requirements around breaks in service i.e. a break in service for two or four years for employees with less than 1,100 days of service and more than 1,100 days of service, respectively;
- amending lump sum payments to allow for proportionate payment for any service after 10 years, as opposed to entitlement lump sum payment for each year completed after 10 years;
- permitting automatic registration of employees included in an employer's return; and

[42] Explanatory Memorandum, Labour Relations Amendment Bill 2006 (WA).
[43] Explanatory Memorandum, Industrial Legislation Amendment Bill 2011 (WA).

- adding a statutory deadline for employers to submit their contributions and returns within 15 days of period end.

3.3.2.2 Ancillary legislation

***Long Service Leave Act 1958* (WA) (the LSL Act)**

The LSL Act is the primary long service leave legislation for WA. It establishes an entitlement for long service leave described at section 3.1.

Refer to ***Appendix B: Legislation*** for complete list of legislation considered by this Review.

3.3.3 Governance

3.3.3.1 The Board

Governance has been established by, and codified into, the Act, including the existence, composition and functions of the Construction Industry Long Service Leave Payments Board (the Board).

Section 5 of the Act establishes the Board:

> ***Section 5 Construction Industry Long Service Leave Payments Board established***
>
> *(1) For the purposes of this Act there shall be established a body corporate by the name of the Construction Industry Long Service Leave Payments Board.*

Membership of the Board must be determined in accordance with section 6 of the Act:

> ***Section 6 Membership of the Board***
>
> *(1) Subject to this Act the Board shall consist of 7 members appointed by the Minister as follows –*
>
> *(a) one person who shall be chairman;*
>
> *(b) 2 persons appointed from among persons whose names are on a panel of 4 names comprised of –*
>
> *(i) 2 names submitted by the Master Builders' Association of Western Australia; and*
>
> *(ii) 2 names submitted by the Chamber of Commerce and Industry of Western Australia (Inc);*
>
> *(c) 2 persons appointed from among persons whose names are on a panel of 4 names comprised of –*
>
> *(i) 2 names submitted by UnionsWA; and*
>
> *(ii) 2 names submitted by The Building Trades Association of Unions of Western Australia (Association of Workers);*
>
> *(d) one person who in the Minster's opinion represents the interests of employers in the construction industry;*
>
> *(e) one person who in the Minster's opinion represents the interests of employees in the construction industry.*

Section 6(3) provides that a member is to hold office on the Board no longer than a period of five years. The terms of all Board members ended recently in September 2023. New appointments were recently made with terms ranging from one to three years to allow for staggered three-year terms going forward.

3.3.4 Disputes snapshot

Approximately **40 cases** have come before the WAIRC and Supreme Court of WA in the 38 years **since the commencement of the Act** in 1985. Many of the cases were brought early in the Act's operation.

As at 30 June 2023, MyLeave reported 123,100 workers registered under the MyLeave scheme (including 20,340 workers with vested benefits) and 5,368 registered employers.[44]

Given the significant number of employers and employees captured by the Act, the Review does not consider that the Act is frequently the subject of litigation, although notes that many stakeholders will not pursue litigation due to the efforts and costs associated, and that litigation numbers alone should not be used as a single indicator of the level of grievances.

[44] *Annual Report 2022-23* (n 2) 5.

Section 50(2) of the Act provides the WAIRC with jurisdiction to review a decision of the Board. The WAIRC was established by the *Industrial Relations Act 1979* (WA) and consists of a Chief Commissioner, a Senior Commissioner, and a number of other commissioners, as needed.[45] The WAIRC has jurisdiction in WA to resolve industrial disputes such as to work privileges, rights or duties of employers or employees.[46]

In the last five years five cases have been considered by the WAIRC:

- one decisions was set aside with another decision substituted by the WAIRC; and
- four decisions were dismissed by the WAIRC, including one matter[47] appealed to the Full Bench of the WAIRC and to the Western Australia Industrial Appeal Court (WAIAC). The issues raised in the five cases largely related to interpretation of definitions with respect to coverage of the Act. In canvassing the larger volume of cases litigated in the past three decades, four major themes of issues emerge with respect to the Act, relating to:
  - (i) interpreting the terms 'employee' and 'employer';
  - (ii) interpreting the term 'the construction industry';
  - (iii) interpreting work 'on a site'; and
  - (iv) issues related to the Act and interaction with workers compensation.

3.4 Comparable long service leave schemes

3.4.1 General trends

In 2016, the Senate Standing Committee on Education and Employment undertook a study of the '*Feasibility of, and options for, creating a national long service standard, and the portability of long service leave and other entitlements*.'[48] The Committee ultimately recommended that all levels of government in Australia review the current long service leave system to consider developing a nationally consistent scheme.[49] While the Committee acknowledged that there was a number of key stakeholders who opposed a national system for fear of increased costs for employers, it also noted that the complexity of the schemes should in all cases attempt to be resolved through standardisation of current arrangements across all jurisdictions.[50]

In addition to the construction industry, a number of other states and territories provide for the portability of long service leave in other industries. For example, portable long service leave exists for the contract cleaning industry in the Australian Capital Territory (ACT), Queensland (QLD), New South Wales (NSW) and Victoria (VIC), the community industry in the ACT, VIC and QLD and the security industry in the ACT and VIC. The ACT is due to expand portable long service leave into the hair and beauty industry and the accommodation and food industry in 2025, underpinned by recent amendments to its legislative framework.[51] Accordingly, it appears 'transiency' is not inherently exclusive to those who work in construction, but is increasingly recognised across other industries and sectors.

3.4.2 Comparable portable schemes in the construction industry

Each state and territory has a statutory portable long service leave scheme for the construction industry. Notably, the parliamentary debates in 1985 stated that 'proposals for setting up the Scheme have been drawn largely on the experience of elsewhere, and in particular on the experience of the Australian Capital Territory'.[52]

As such, this Review has drawn significantly on the legislative design of comparable schemes, both in identifying areas for harmonisation consistent with the Terms of Reference, but also to highlight alternative approaches.

In drawing such comparisons, the Review has focussed on the parallels between the Act and other wage or remuneration-based levy schemes, existing in the ACT, Tasmania (TAS), VIC and South Australia (SA). The

[45] *IR Act* (n 6) s 8.
[46] Ibid s 23.
[47] *Programmed Industrial Maintenance Pty Ltd v The Construction Industry Long Service Leave Payments Board* [2019] WAIRC 843.
[48] Senate Standing Committee on Education and Employment, *The feasibility, and options for, creating a national long service standard, and the portability of long service and other entitlements* (Report, February 2016) <https://aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/LSL_Portability/Report> ('*Feasibility Report*').
[49] Ibid vvi.
[50] Ibid 12.
[51] *Long Service Leave (Portable Schemes) Amendment Act 2023* (ACT).
[52] *Parliamentary Debates, 17 September 1985* (n 28) 1029.

remainder of the states and territories collect levies based on the value of a construction project, and therefore operate somewhat differently.

Figure 5: Comparable interstate schemes and levy rates (as at 31 October 2023).

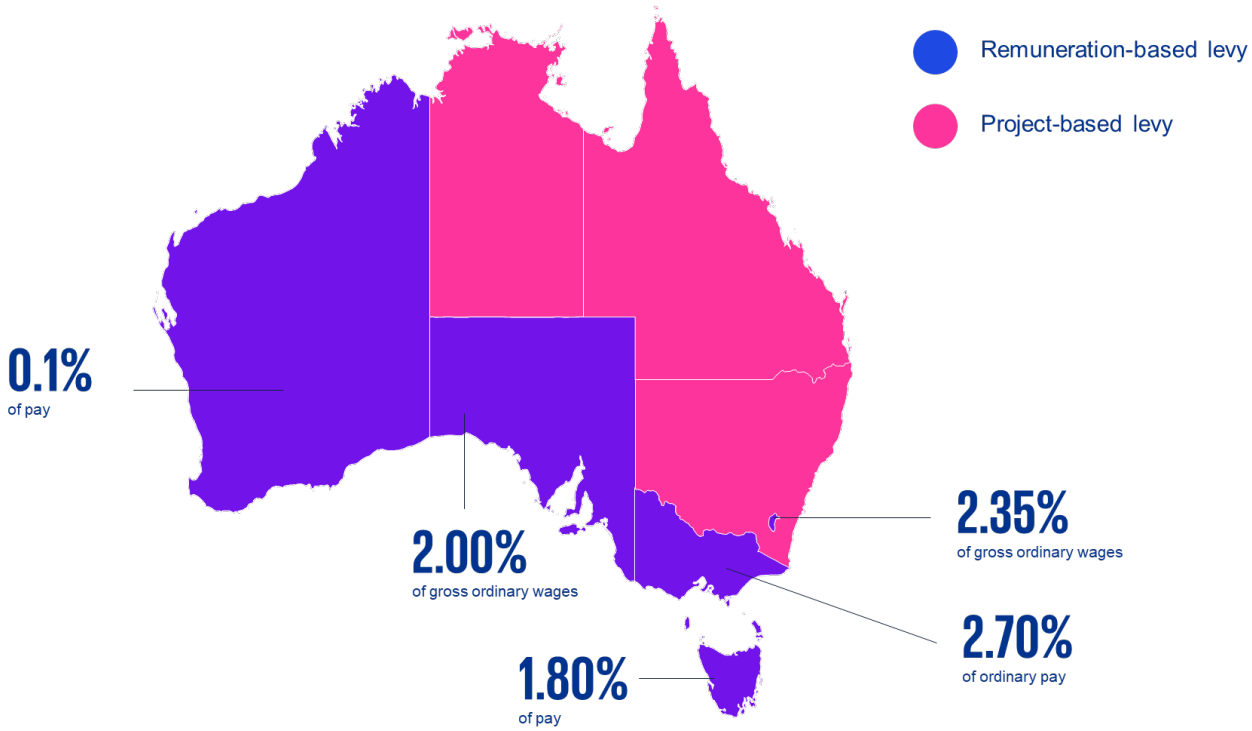


Table 2: Comparison of entitlement periods, accrual rates and levy rates

Jurisdiction	Entitlement after 10 years	Accrual Rate	2023 Levy Rate
WA	8.67 weeks	1.67%	0.1%
Vic	13 weeks	2.5%	2.7%
SA	13 weeks	2.5%	2.0%
Tas	13 weeks	2.5%	1.8%
ACT	13 weeks	2.5%	2.35%
NSW	8.67 weeks	1.67%	Project-based
Qld	8.67 weeks	1.67%	Project-based
NT	13 weeks	2.5%	Project-based

Note:

Accrual rates calculated as:

- 1.67% = 8.67 weeks ÷ 520 weeks (over 10 years)
- 2.50% = 13 weeks ÷ 520 weeks (over 10 years)

Mutual recognition of entitlements

Reciprocal portable long service leave schemes honour the accrued leave of construction workers who relocate interstate, per the National Reciprocal Agreement which has been entered into by every state and territory.[53] Section 29A of the Act provides the legislative basis for the Board to recognise contributions from reciprocal arrangements.[54]

3.4.3 Comparable Commonwealth schemes

At the federal level, the Coal Mining Industry (Long Service Leave Funding) Corporation (Coal LSL) is a corporate Commonwealth entity established under the *Coal Mining (Long Service Leave) Administration Act 1992* (Cth). Its primary purpose is to administer a portable long service leave scheme for the benefit of employees in the coal mining industry nationally.

Unlike the operation of the Act, the Coal LSL scheme operates on a reimbursement model so in many respects is not analogous. However, similarly to the MyLeave scheme, the Coal LSL scheme has been the subject of litigation concerning coverage and eligibility of employers and employees. Notably, the decision in in *Coal Mining Industry (Long Service Leave Funding) Corporation v Hitachi Construction Machinery (Australia) Pty Ltd*[55] (the Hitachi Decision) was recently handed down by the Federal Court of Australia on 8 February 2023. The Hitachi decision considered coverage and eligibility interpretation issues, and the limitation periods applicable under the legislation. The Hitachi decision may provide useful contemporary guidance on how courts approach the question of defining an 'industry' for the purposes of clarifying coverage disputes in portable long service leave schemes.

3.4.4 Other entities in the construction industry

During consultations, the Review met with representative of ReddiFund, MATES In Construction and the Construction Training Fund (CTF) as entities also operating in the construction industry. A summary of those entities' functions is provided below and discussed further in section 4 in the context of stakeholder feedback received.

ReddiFund

Since January 2010, employers covered by the Building and Construction General On-site Award [MA000020] have been required to pay the equivalent of 1.75 hours of wages per week of service to every employee made redundant.[56] ReddiFund offers a voluntary and fee-free employee redundancy entitlement service, whereby employers may choose to deposit monthly redundancy entitlement payments with Reddifund to manage. ReddiFund also undertakes additional activities by supporting industry training initiatives and sponsorship of the MATES in Construction WA scheme.[57]

MATES in Construction

MATES in Construction is committed to reducing the level of suicide within the Australian construction workforce, currently operating across WA, NSW, SA, NT, and QLD.[58] It offers community development programs, case management support for workers, and a 24/7 helpline. MATES in Construction is not established by legislation and is an Australian company limited by guarantee.

Construction Training Fund

Similar to MyLeave, the CTF is a statutory authority. The CTF is established by the *Building and Construction Industry Training Fund and Levy Collection Act 1990* (WA). CTF's primary purpose is to 'attract and retain workers by promoting training and skills development.'[59] Most relevant to the findings and recommendations of this review, the CTF's enabling legislation draws upon the Act for its definition of the 'the construction industry', stating in section 3:

> ***building and construction industry*** *has the same meaning as the term* ***construction industry*** *in the Construction Industry Portable Paid Long Service Leave Act 1985.*

[53] 'Portable Long Service Leave', *AusLeave* (Web Page) <https://www.ausleave.com.au>.
[54] *The Act* (n 33) s 29A.
[55] *Coal Mining Industry (Long Service Leave Funding) Corporation v Hitachi Construction Machinery (Australia) Pty Ltd* [2023] FCA 68 ('*Hitachi*').
[56] 'Reddifund Redundancy Funds, Cover and Insurance', *ReddiFund* (Web Page, 2023) <https://reddifund.com.au/redundancy-fund/>.
[57] 'About Us', *ReddiFund* (Web Page, 2023) <https://reddifund.com.au/about-us/>.
[58] 'About Us – MATES', *Mates in Construction* (Web Page, 2023) <https://mates.org.au/about-us>.
[59] 'About Us', *Construction Training Fund* (Web Page, 2023) <https://ctf.wa.gov.au/about-us>.

Any amendment to the definition of the 'construction industry' contained in the Act may have direct consequences for the CTF and the coverage of its activities, although the *Building and Construction Industry Training Fund and Levy Collection Regulations 1991* (WA) provide a framework for excluding certain work. Accordingly, the Review considers it important that CTF be actively consulted and kept abreast of any reform efforts arising from this Review.

3.5 Operating environment

3.5.1 Operational snapshot

MyLeave's mission is to 'manage in an efficient and effective manner, portable long service leave for construction industry employees, established by the Act'.[60] MyLeave pursues this mission by:[61]

- ensuring that all eligible employers are registered and are paying contributions on behalf of all eligible employees;
- ensuring that all eligible construction industry employees are registered; and
- minimising the contribution rate payable through optimising the rate of return-on-investment funds, and minimisation of administrative costs.

In the 2022-23 financial year, MyLeave reported the following statistics:

- 4,540 payments for long service leave;[62]
- 123,100 workers being registered under the MyLeave scheme;[63]
- 5,368 employers registered under the MyLeave scheme;[64] and
- $39.8 million worth of long service leave entitlements paid to 4,540 workers.[65]

The MyLeave scheme operates on a contribution levy paid by employers which is invested by MyLeave. The 2022-23 Annual Report indicated that the Board's net assets have reached $610 million with liabilities of $447 million.[66] The contribution rate was maintained at 0.1 per cent for 2023.[67]

MyLeave is progressing internal initiatives to modernise IT systems to improve its business operations and client service, including:

- a planned move from paper to electronic claim lodgements including verification of identity (VOI) to combat potential fraud and to collect information required to process claims at the time of submission to drive processing efficiencies (pending VOI programming);
- adoption of electronic registrations for employees and employers (pending Board approval);
- updating the missing service enquiry form from paper to electronic lodgement providing the compliance team with the information to enable more efficient compliance activities; and
- completion of an ICT transformation project using Microsoft Dynamics 365 platform and supporting Microsoft products to provide a future-proof IT environment and to ensure security of data.[68]

[60] *About MyLeave* (n 42).
[61] *About MyLeave* (n 42).
[62] *Annual Report* 2022-23 (n 2) 5.
[63] Ibid 5.
[64] Ibid 5.
[65] Ibid 5.
[66] *Annual Report 2022-23* (n 2) 17.
[67] 'MyLeave – 2023 Contribution Rate', *Government of Western Australia* (Web Page, 12 December 2022) <https://www.wa.gov.au/government/announcements/myleave-2023-contribution-rate>.
[68] *Annual Report 2022-23* (n 2) 13.

3.5.2 Compliance and enforcement

The Act empowers MyLeave with a limited number of compliance powers, namely, to impose penalties on employers making late payments,[69] the appointment of inspectors,[70] powers to obtain information and evidence,[71] and the ability to commence proceedings for an offence under the Act.[72]

In performing its functions, MyLeave undertakes proactive compliance activities. It sends questionnaires to a sample of employers and requires employer returns be submitted pursuant to the statutory timeframes as one method of gauging compliance. The return rates for 2022-23 exceeded 96 per cent each quarter.[73] Of queries received by MyLeave in the 2022-23 financial year, it reports that 54 per cent were resolved by communication with the relevant employer, and 18 per cent were referred for further examination, with the remainder of queries currently under examination.[74]

Prosecutions against non-compliant employers decreased by 48 per cent during the 2022-23 financial year, with 85 employer prosecutions being commenced during this time,[75] compared to 165 prosecutions initiated in 2021-22.[76] While there could be a number of reasons for a decline in the number of prosecutions, MyLeave has highlighted that it reserves prosecution as a last-resort mechanism only to be used when other resolution pathways have been exhausted without success,[77] and attributes the decrease of enforcement activity in 2022-23 to its prioritisation of proactive compliance activities.

[69] *The Act* (n 33) s 35A.
[70] Ibid s 44.
[71] Ibid s 45.
[72] Ibid s 48.
[73] *Annual Report 2022-23* (n 2) 11.
[74] Ibid 10.
[75] Ibid 11.
[76] MyLeave, 'Annual Report 2021-22' (Report, 26 August 2022) 12, < https://www.wa.gov.au/system/files/2022-12/MyLeave%20Annual%20Report%202021-2022.pdf> ('*Annual Report 2021-22*').
[77] *Annual Report 2022-23* (n 2) 3.

4 Stakeholder consultation

4.1.1 Summary of consultation process

The Review delivered the consultation process between 12 June 2023 and 7 July 2023 through two key channels:

1. stakeholder workshops; and
2. a publicly available online survey and written submission portal.

Opportunities to engage with the Review were advertised through the following methods, including:

an announcement on the MyLeave website and promotions by MyLeave to their existing clients;

advertisements in The West Australian Newspaper; and

targeted stakeholder consultation.

The Review extended the opportunity to participate to a diverse range of stakeholders including employees, employers, employee representatives, employer representatives, government, and other key stakeholders.

Workshops

The Review undertook a rigorous process to maximise participation, commencing with an initial contact list provided by MyLeave of existing stakeholders. The Review expanded the contact list to identify all stakeholders likely to have an interest in the Review. Seven stakeholder consultation workshops were facilitated by the Review using a standardised workshop presentation to assist discussion of the Terms of Reference matters. An additional two workshops did not proceed due to lack of registrations.

Survey and written submissions

The Review developed and hosted an online survey and written submissions portal. All responses received were anonymous, with attribution only made out to the relevant stakeholder category (e.g. employee, employer). The survey posed 15 short questions, with answers based on a Likert scale (yes, neutral, no, or unsure) with the option to provide free text responses. A total of **40 survey responses** and **ten written submissions** were received**.**

The written submission process was designed to provide an opportunity for stakeholders to share their views in writing. Extensions of time were provided for all stakeholders who requested additional time to participate. In uploading written submissions to the portal, stakeholders were advised that their submission would be made public unless marked as confidential. Copies of each written submission is accessible at MyLeave's website.

Table 3: Stakeholder written submissions received

	Stakeholder
1	Chamber of Commerce Institute WA (CCI WA)
2	Construction, Forestry, Maritime, Mining and Energy Union (CFMEU)
3	Electrical Trades Union WA Branch (ETU)
4	Housing Industry Australia (HIA)
5	Individual (spouse of deceased worker) (confidential submission)
6	Maritime Union Australia (MUA)
7	MyLeave
8	National Fire Industry Association (NFIA)
9	Portable Long Service Leave (SA)
10	Unions WA

4.2 Stakeholder views

4.2.1 Key feedback from consultation

Feedback from the stakeholder consultation process returned a variety of views pertaining to the four substantive themes set out below.

Figure 6: Stakeholder consultation feedback

Coverage

- A lack of clarity exists regarding the cohorts of workers captured by the Act;
- Ambiguity surrounds the definition of 'on a site' and capturing of workers performing work 'off-site';
- Inconsistency exists regarding the definition of 'construction industry' between the Act and various other WA legislation; and
- Concerns surround the exclusion of employees working in non-traditional construction settings, such as ships, and fabrication workshops.

Compliance, enforcement, and dispute resolution

- There is a general lack of awareness by stakeholders of the compliance framework;
- Some noted the limited nature of the compliance tools available;
- Divergent views around enforcement tools, including quantum of penalties;
- Lack of clarity regarding pathways for review and for complaints through MyLeave; and
- Opportunity to increase awareness and reform the Act to provide a more comprehensive system of compliance and dispute resolution.

Treatment

- Concerns expressed that the current definitions and method of accrual inadvertently disadvantage certain workers (including FIFO/DIDO workers);
- Lack of legislative clarity regarding entitlements of employees whilst on workers compensation, including possible unfairness to employers concerning the making contributions for an employee who is absent from work; and
- Lack of flexibility under the Act, particularly where it does not provide MyLeave with the discretion to allow early payment for employees experiencing hardship.

Administrative and regulatory considerations

- Limited stakeholder views concerning administrative and regulatory matters;
- Inconsistencies between record keeping requirements contained in the Act and other legislative frameworks;
- Need to balance the achievement of the Act's purpose with the cost and resource burden on employers.

4.2.2 Survey analytics

Figure 7: Stakeholder survey data summary

Key Insights

The following points were frequently made in the free text sections of the survey, highlighting key areas of concern for stakeholders:

"**Offsite workers** should be eligible under the scheme;

The Act does not account for **circumstances of hardship**;

Fly-in-fly-out (FIFO) and **casual workers** are not served fairly by the current Act;

Options needed for those **who leave the industry, spend time away or retire** to claim their entitlements;

Reform should not make **administrative burden for employers**;"

40

Total **survey responses received***

**Noting some responses were incomplete*

Employees and Employers

While no employees and employers nominated to participate in workshops, these groups represent a significant majority (63 per cent) of survey participants.

Response Demographics

Stakeholder Group	No. of Responses
Employer (small & large businesses)	13
Employee (current & former)	12
Other industry stakeholder	6
Employer Representative	4
Employee Representative	2
Interested member of the public	2
BAS Agent/Bookkeeper	1

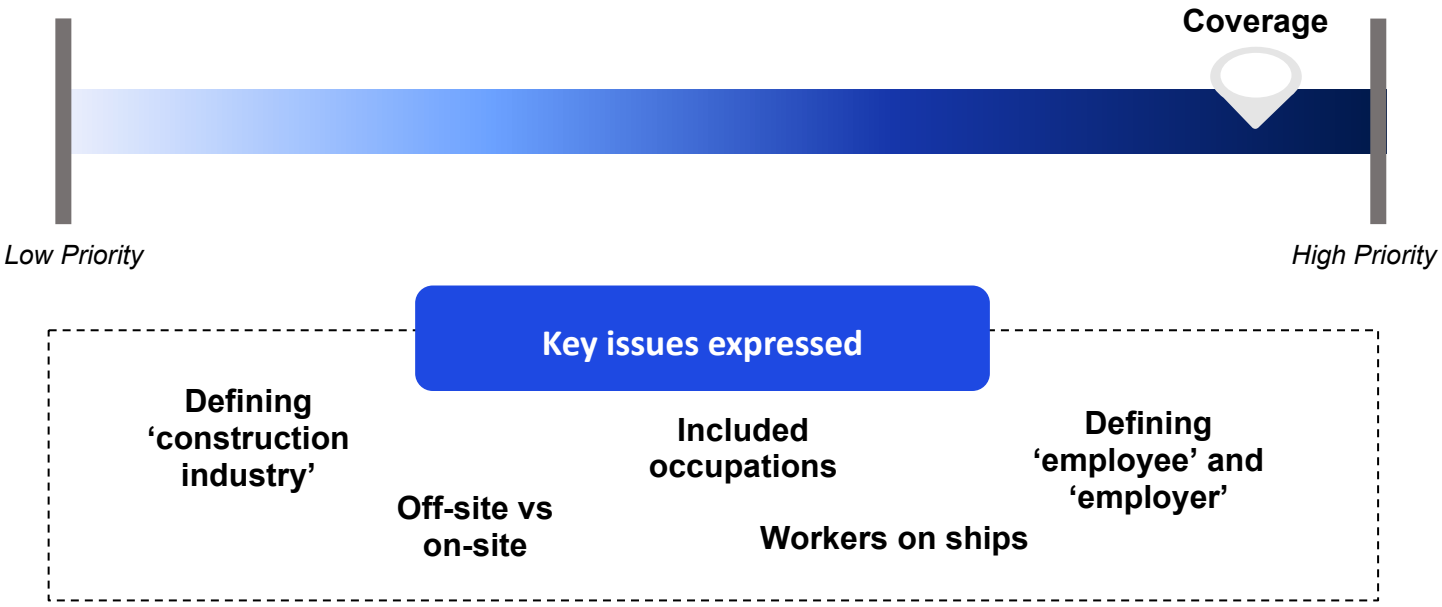
Disclaimer on data quality: The Review observes that responses received from the survey were sometimes incomplete, with some stakeholders only providing partial responses. The quantum of responses received were also low having regard to the total registered employers and employees in the scheme. For that reason, the Review has exercised caution in forming decisive conclusions based on the limited data received.

4.3 Emerging themes

4.3.1 Coverage

The frequency in which coverage issues were raised with the Review reveal that coverage is the most prominent issue for stakeholders.

Figure 8: Frequency scale of coverage issues raised



4.3.1.1 Areas of consensus

There is strong agreement amongst stakeholders that the Act is, at times, ambiguous in its application of definitions and interpretations relevant to coverage. Stakeholders expressed that further clarity is required to consolidate key terms and meanings, especially surrounding the definition of the 'construction industry', as well as the terms 'employee' and 'employer'. It was expressed that the capture of scheme participants under these terms does not always reflect the intended purpose of the Act and that greater clarity is required.

Furthermore, employee representatives, employer representatives, government stakeholders and MyLeave each discussed the use of prescribed industrial instruments. It was noted in these discussions that the evolving industrial relations landscape in the WA construction environment places less reliance on the award system than was historically the case.

4.3.1.2 Areas of divergence

A large component of the stakeholder consultation workshops was directed to hearing views of industry on the issue of the definition for the 'construction industry'. On this matter, there was the greatest degree of divergence in views.

As a general trend, employer representatives typically considered that either no change, or nominal change was required to permit the Act to operate effectively, whereas employee representatives advocated for amendments to extend coverage, and clarify increased coverage to a number of occupations which they considered indicative of the modern construction workforce.

The different stakeholder groups deviated in views regarding the object of the Act in terms of coverage and capture of different groups. Employee representatives expressed a desire to see the following cohorts of workers captured by the Act:

- employees working on ships, with the Maritime Union of Australia (MUA) suggesting the Act should remove the exclusion and expressly include 'ships' and 'vessels' to the definition of 'construction industry';[78]
- divers who conduct subsea construction work on or around ports;

[78] Written Submission from Maritime Union of Australia to the Review, 27 July 2023.

- drone operators, specialists in wind farm turbines, tower, and blade installations;
- other specified work covered by the Hydrocarbons Industry (Upstream) Award;
- traffic controllers; and
- construction cleaners ('peggies').

Specifically, in its written submissions the CFMEU stated that it considers the definition of 'construction industry' as fundamental, however, considers there are longstanding imperfections that need to be remedied. In particular, it considers the definition to be exclusionary, rigid and somewhat ambiguous, noting a growing chasm between the Act's intent and how it responds to the those currently participating in the modern construction industry.[79] Moreover, the CFMEU supports the specific inclusion of construction cleaners ('peggies') and traffic controllers working on, or in connection to, civil and resource construction projects. On the issue of shipping in particular, the MUA, a division of the CFMEU, advocated for the current exclusion of shipping expressed in section 3 of the Act should be removed, and an express provision be inserted to include workers engaged in the construction of ships and vessels in the Act's capture.[80]

Similarly, the ETU advised some of its members have been denied the opportunity to receive long service leave credits as part of the portable scheme because they are deemed to be working for an electrical contractor involved in 'commissioning' work, which is presently excluded from the definition of the 'construction industry'. [81] The ETU seeks to have the definition amended to include 'commissioning'.

Conversely, some employer representatives suggested the definition for the construction industry should be derived from the General Building Construction Award [MA000020], with others suggesting this would adversely narrow the current coverage of the Act in a way that would be disadvantageous to workers. Additionally, employer representatives generally did not support any changes to the coverage of the Act that would increase the administrative burden on business owners.

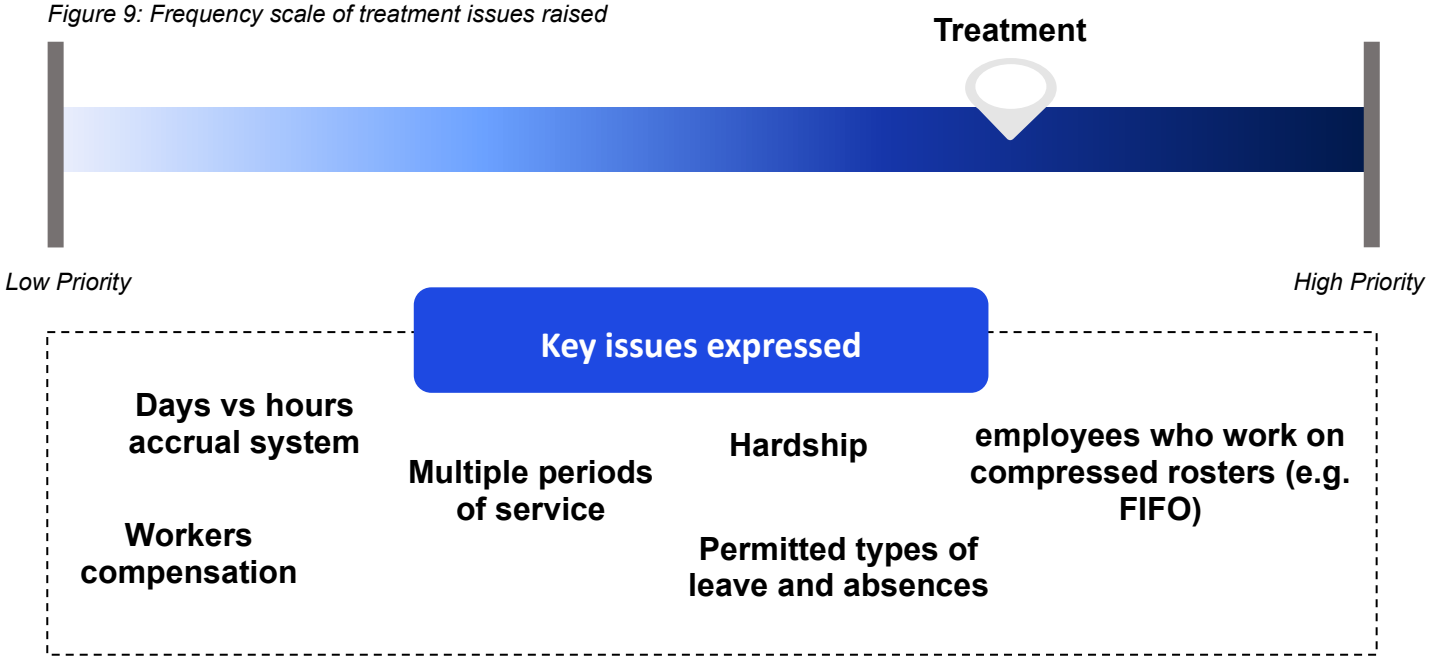
In its written submission, the HIA cautioned that any reforms must carefully consider the definition of the 'construction industry' to ensure alignment with the intended scope of coverage. Relevantly, the HIA indicated that ambiguity exists concerning work carried out for manufacturers and suppliers located outside of a workshop, often in established buildings or homes, and considers the current policy settings to include this work is appropriate, however, could be articulated more clearly. The HIA expressed clear views that off-site work such as prefabrication and manufacture of building components, should not be captured by the Act, and that an express exclusion for off-site work may be appropriate.[82] More broadly, the Chamber of Commerce and Industry WA contends that the Act is not deficient, and relevant to the key terms related to coverage, '[an] exclusion of an employee from eligibility for long service leave under the Act does not constitute a deficiency in the operation of the Act.'[83]

[79] Written Submission from Construction Forestry Maritime Mining Energy Union WA Branch to the Review, 14 July 2023, 2.
[80] Written Submission from Maritime Union of Australia to the Review, 27 July 2023, 1.
[81] Written Submission from Electrical Trades Union WA Branch to the Review, 27 July 2023, 2.
[82] Written Submission from Housing Industry Association to the Review, 14 July 2023, 2.
[83] Written Submission from Chamber of Commerce and Industry WA to the Review, 7 July 2023, 2.

4.3.2 Treatment

Various elements of an employee's treatment under the Act closely followed coverage as the second most frequently cited issue during consultation with stakeholders.

Figure 9: Frequency scale of treatment issues raised



4.3.2.1 Areas of consensus

Ambiguity and lack of clarity

Pervasive throughout the consultation process was the feedback that the Act is ambiguous and lacks clarity, particularly with respect to core terms such as 'days of service', 'ordinary pay' and 'ordinary hours' (noting that 'ordinary hours' is referred to but not defined in the Act). In its written submission, HIA stated that '[it] 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'.[84]

Leave types

Many stakeholders raised that the core term 'days of service' causes ongoing issues for the calculation of accruals under the Act. Commenting on the term in its written submission, HIA suggested amendments may be appropriate 'to specifically address contemporary leave arrangements, such as leave without pay and parental leave'. Similarly, this view was shared by the CFMEU who encouraged the Review '[to] recommend the permanent inclusion of additional leave periods … within the definition of days of service in section 3 of the Act'. The ETU echoed this point in its written submission stating 'accruals should be fully credited' for employees whilst on a type of leave recognised by the National Employment Standards (NES).[85] MyLeave also agreed that amendment to the Act is required to clarify the modern types of leave available to the contemporary construction workforce.

FIFO and DIDO rosters

The calculation of accruals for employees who work on compressed rosters, such as fly-in-fly-out (FIFO) and drive-in-drive-out (DIDO) rosters, was a significant concern for employee representatives. In its written submission, the ETU offered a number of case study calculations to demonstrate its concern that 'most construction workers working a FIFO/DIDO roster of 8/6, 7/7 days on/off, or 3/1, 2/1 weeks on/off, who have penalty rates applying to overtime hours and on weekends, are denied any chance of gaining a full years' accrual of 220 days, despite working long hours on their on-swing'.[86] Similarly, the CFMEU expressed that 'the practical effect of high compression FIFO/DIDO

[84] Written Submission from Housing Industry Association to the Review, 14 July 2023, 2.
[85] Written Submission from Electrical Trades Union WA Branch to the Review, 27 July 2023, 5.
[86] Ibid 2.

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.'[87]

Throughout workshop discussions with stakeholders, consensus emerged between employee and employer representatives regarding the lack of clarity and consequent risk of the Act resulting in unfair treatment for workers engaged on particular roster patterns.

Both groups agreed in-principle that the Act should be amended to provide greater fairness and that moving from an accrual method based on 'days of service' to 'hours worked' would better reflect the work outputs, however, details on how the solution might operate has received differing views.

4.3.2.2 Areas of divergence

Accrual mechanism and hours worked

With respect to the calculation of accruals for employees on FIFO/DIDO work rosters, the ETU and CFMEU suggested in their respective written submissions that calculating accruals based on actual hours worked would promote fairer and more equitable outcomes for employees. During consultation workshops, employer representatives noted the accrual mechanism may be better tied to 'ordinary hours' averaged across the period. In its written submission, MyLeave suggested that an hours worked approach would be more appropriate than the current approach and proposed an alternative model to calculate days of service based on hours worked. This would simply require employers to submit on behalf of each employee, ordinary hours worked, and days spent on permitted types of leave, for MyLeave to then calculate the accruals using set formulas.[88]

Cost on businesses

In its written submission, the CCI WA expressed concern for the imposition of further burdens on employers resulting from any amendments to the Act, stating '[we] contend that any legislative reform around employee's entitlements should carefully consider the impact these changes have on the cost of doing business pressures in WA and the State's economy'.[89]

In contrast, employee representatives suggested that the levy rate is currently low and should be increased in line with the rates used other interstate schemes and the frequency of returns to be increased to monthly. On the issue of return frequency, employer representatives suggested quarterly returns were adequate, although preferred an annual frequency.

Workers compensation

During consultations, employer representatives indicated that it is unfair to require employers to make *contributions* on behalf of employees absent from work whilst in receipt of workers compensation.

Similarly on the issue of *accruals,* employee representatives raised that employees should be entitled to accrue full days of service for days absent from work whilst receiving workers compensation. However, no employer representatives commented on whether employees should be entitled to accrue days of service whilst on workers compensation.

4.3.2.3 Other issues

A number of other issues were raised with respect to treatment, both during workshops held and in written submissions received, and are considered in greater depth in the Review's analysis contained in section 5.

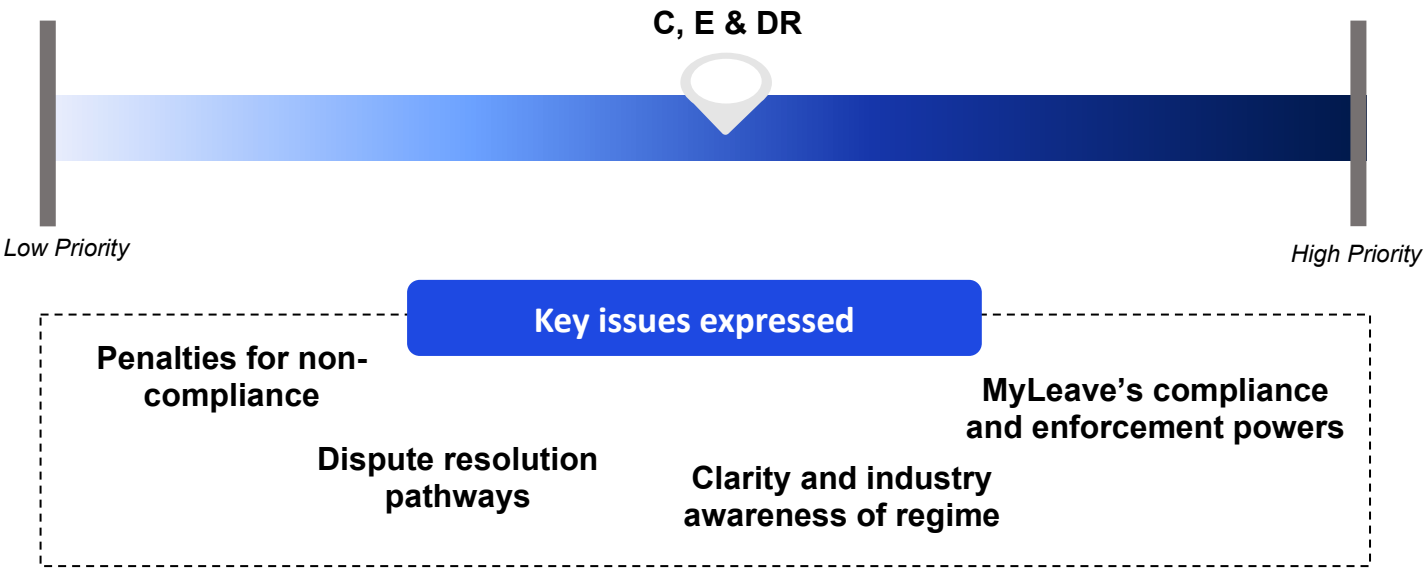
[87] Written Submission from Construction Forestry Maritime Mining Energy Union to the Review, 14 July 2023, 7.
[88] Written Submission from MyLeave to the Review, 18 August 2023, 24.
[89] Written Submission of Chamber of Commerce and Industry WA to the Review, 7 July 2023, 1.

4.3.3 Compliance, enforcement, and dispute resolution

All stakeholders who participated in the consultation process were asked to share their views on compliance, enforcement, and dispute resolution. Most external stakeholders did not highlight compliance, enforcement, and dispute resolution as a pressing issue, however, did offer some comments as to areas of improvement.

In contrast, MyLeave, in its capacity as scheme administrator, provided a number of insights into current issues it encounters with managing compliance based on the powers provided in the Act.

Figure 10: Frequency scale of scale of compliance, enforcement and dispute resolution matters raised



4.3.3.1 Areas of consensus

Amongst external stakeholders who participated in the consultation process, the Review found there was a general lack of awareness as to how the Act's compliance and enforcement framework operates, which is not surprising given many stakeholders only learn of the function when subject to the use of its powers.

Employer representatives made the point of expressing that small businesses often do not have the knowledge of the administrative and regulatory aspects of the industry and may struggle, more than large corporates with dedicated compliance functions, to manage their compliance obligations.

On the matter of dispute resolution, the Review observed a general lack of awareness of dispute resolution pathways.

4.3.3.2 Areas of divergence

The most prominent area of divergence concerned the adequacy of MyLeave's enforcement powers. Employee representatives expressed that harsher penalties are necessary to deter non-compliant employers, especially by 'repeat offenders', and to ensure that workers covered by the Act have their entitlements correctly reported by their employers.

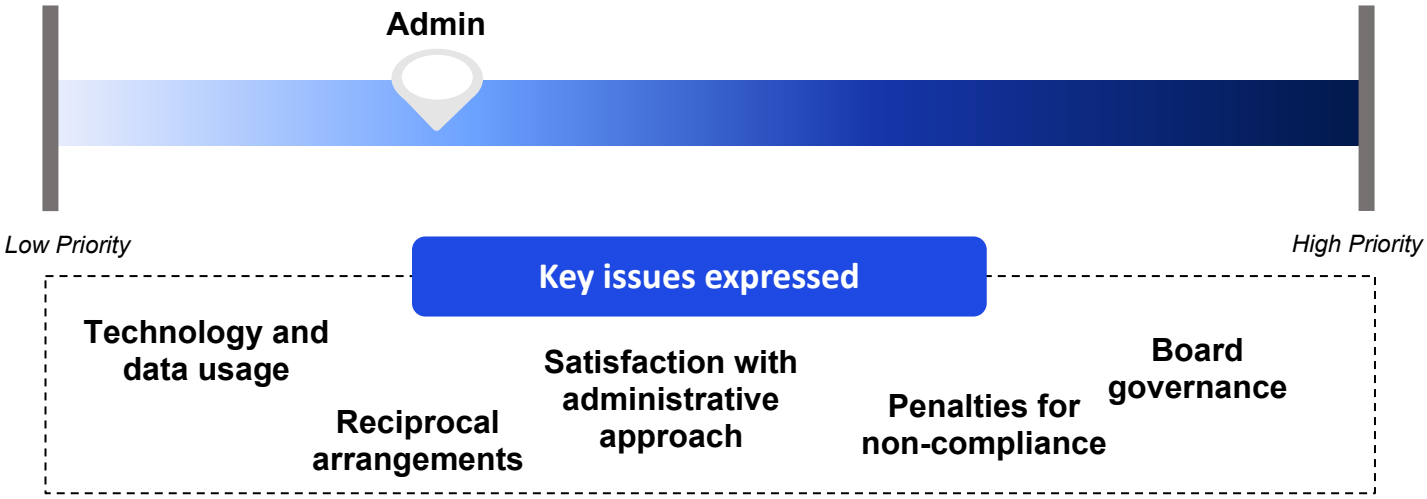
MyLeave expressed perspectives surrounding inefficiencies in the current compliance and enforcement framework and provided insights on the challenges it experiences managing employer compliance using the tools currently provided by the Act. MyLeave suggested that statutory timeframes hamper its preference to offer a comprehensive internal review mechanism for aggrieved parties.

On the matter of dispute resolution, most external stakeholders commented that the dispute resolution pathways function adequately for the intended purpose, however, employee representatives had greater experience with its use, and shared examples of occasions where a trade union has funded proceedings concerning entitlements under the Act, particularly in circumstances where an employee has neither the expertise or funds to permit them access to judicial review.

4.3.4 Administrative and regulatory considerations

While administrative and regulatory matters are generally more relevant to government entities, for completeness the Review sought the views of all stakeholders on the specific issue of whether the Act provides MyLeave with sufficient flexibility to administer the Act efficiently and effectively. The Review found that generally the matter of scheme administration was of little concern to external stakeholders. MyLeave, in its written submission, did explore a number of administrative and regulatory matters relevant to its operation, which is summarised below and considered in greater detail in section 5.5.

Figure 11: Frequency scale of administrative and regulatory concerns raised



4.3.4.1 Areas of consensus

During workshops, stakeholders offered positive views on MyLeave's approach to administering the Act and no significant complaints were received concerning MyLeave's role and activities.

In its written submission, MyLeave raised a number of areas where it considered greater flexibility is required to administer the Act, particularly:[90]

- expanded discretionary powers under the Act, for example the power to grant extensions of time with respect to the submission of returns;
- an alternative mechanism to obtain interpretation of the Act; and
- modernisation of board governance arrangements, such as the ability to conduct remote meetings and issue circular resolutions.

MyLeave also raised in its submission that it would prefer the Act to be amended to improve efficiency concerning the process for undertaking contribution assessments under section 34.[91]

More broadly, during workshops, government stakeholders and employee representatives agreed that improvements could be made to MyLeave's use of technology and data. Similarly, in its written submission, MyLeave noted that it has made it a priority to improve its digital systems and data capture capability.

Also in its written submission, MyLeave noted that the limitation period in the Act pertaining to record keeping does not align with the *Limitation Act 2005* (WA) and the requirements of the Australian Taxation Office (ATO).[92] Similarly, it also noted that it is unclear how far back an employer's contribution liability could extend, and that this requires clarification.[93]

[90] Written Submission from MyLeave to the Review ,18 August 2023, 42.
[91] Ibid 43.
[92] Ibid 44.
[93] Ibid 44.

4.3.4.2 Areas of divergence

The key area of divergence concerned the frequency of returns, with employee representatives indicating a strong preference for a monthly return frequency, whereas employer representatives expressed a preference for annual returns.

In its written submission, CCI WA strongly urged that any amendments to the Act or informal changes to MyLeave's approach to administration should consider the costs and pressures that may be put on businesses in the instance of any reform, in particular, for small businesses.

4.3.5 Other incidental matters

For completeness, the Review sought stakeholder views on whether there were other matters, not specifically referenced in the Terms of Reference that ought to receive consideration. Few matters were raised and are addressed below.

Figure 12: Frequency scale of other incidental matters raised

4.3.5.1 Areas of consensus

During consultation workshops, alignment and harmonisation with other WA legislation, as well as other comparable interstate long service leave schemes featured as other matters of interest for stakeholders, as did the importance of arriving at a clear view of the object of the Act.

4.3.5.2 Areas of divergence

There were no identified areas of divergence amongst stakeholders in consideration of this theme. A limited number of stakeholders commented that the Act should provide more flexibility for MyLeave to provide services to the construction industry akin to the services offered by the industry-based entities identified in 3.4.4.

5 Analysis

5.1 Guiding principles

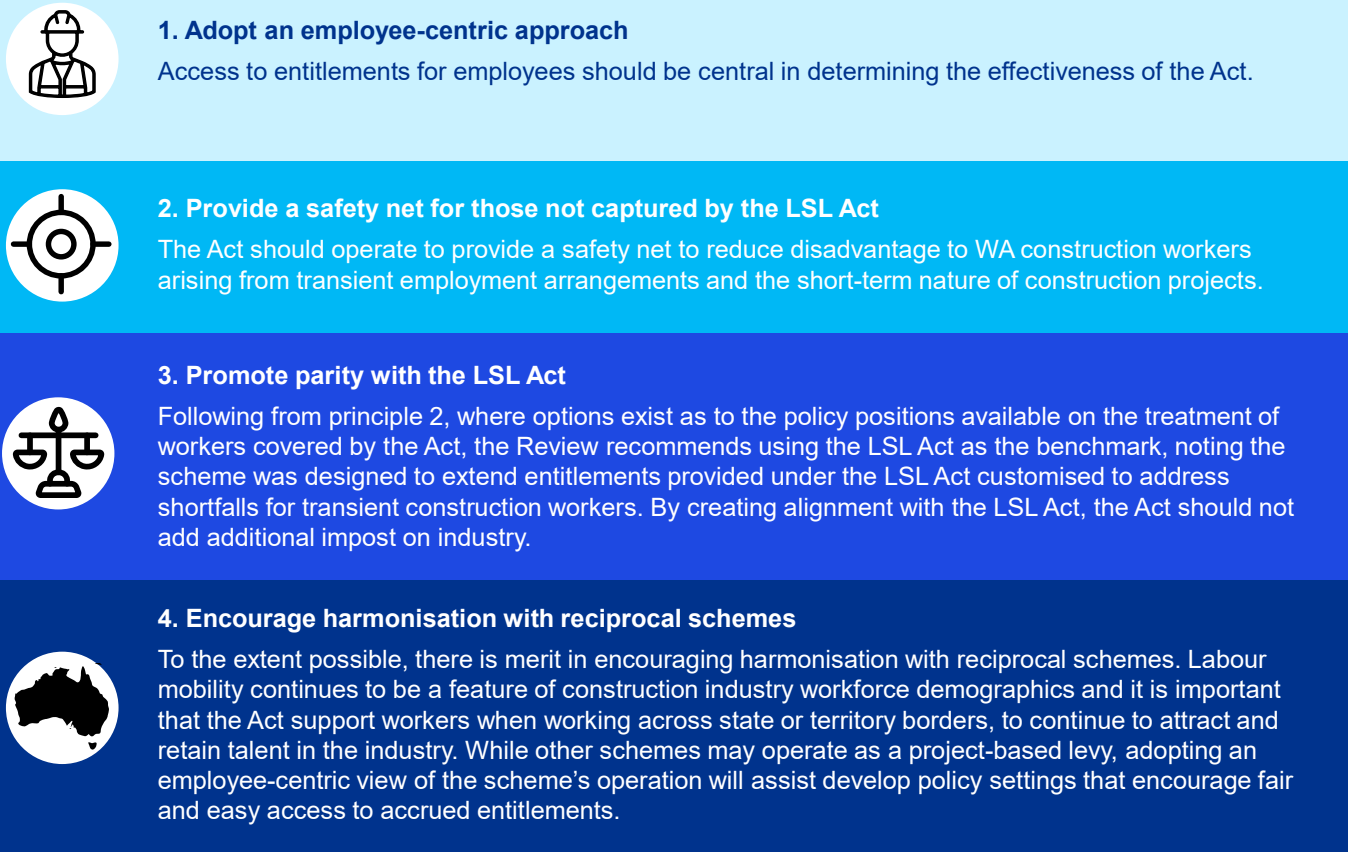
The Terms of Reference require the Review to determine whether the overarching intent of the Act is being met for the contemporary construction industry and its workers. Accordingly, it is necessary to revisit the intent of the Act. This task is somewhat complicated in the absence of an Object provision, however, the Review has approached the task through an exercise in statutory interpretation, including consideration of relevant extrinsic material, notably the parliamentary debates that accompanied the passage of the Act.

The Review considers it possible to infer the following intent to the Act, to:

- make provision for paid long service leave to employees engaged in the construction industry and for incidental and other purposes;[94]
- ensure WA construction workers (as covered by prescribed awards) are treated no less favourably than other workers who are eligible to receive entitlements through the LSL Act; [95]
- safeguard the entitlements of WA construction workers engaged on short-term projects whose employment may be characterised as 'transient';[96]
- prevent additional impost on industry;[97] and
- work in harmony with reciprocal schemes.[98]

Accordingly, when considering the operation and effectiveness of the Act, the Review has adopted the following four guiding principles:

Figure 13: Guiding principles



[94] *The Act* (n 33) long title.
[95] *Parliamentary Debates, 17 September 1985* (n 28) 1028.
[96] Ibid 1028.
[97] Ibid 1028.
[98] Ibid 1027.

5.2 Coverage

5.2.1 Terms of Reference matters considered

Terms of Reference matter 1:

Review whether the Act contemplates the modern construction workforce to ensure all cohorts of construction workers can access portable long service leave.

Terms of Reference matter 2:

Consider if the definitions of the Terms used in the Act provide certainty and consistency for employers and workers.

Terms of Reference matter 5:

Examine whether industrial relations instruments and prescribed classifications of work incorporated in the Act and Regulations is an effective method of capturing workers in the construction industry, and if not, propose alternatives.

5.2.2 Providing for the modern construction workforce

A note on terminology

Throughout this section, the Review refers to 'blue collar workers' and 'white collar workers'. The Review considered the use of alternate terms, including construction trade workers, however after preliminary testing of new proposed terms with stakeholders the Review has reverted to the use of the colloquial terms for ease of understanding. The Review considers that there is benefit in continuing to test the narrative, noting that the nature of work may change over time due to technological advances.

During the consultation process, the Review canvassed stakeholder views as to the composition of the modern construction workforce. There was consensus between stakeholders who engaged with the Review that the modern construction workforce comprises:

- construction workers who may work on a full-time, part-time or casual basis;
- construction apprentices (and group training organisations); and
- construction contractors,

all of whom may perform work onshore (and offshore in some circumstances). The Review and stakeholders recognise that the modern construction workforce consists of both Australian citizens and permanent residents, and migrant workers who have a valid visa and work entitlement that permits employment in Australia.

The Review has also considered whether the modern construction workforce comprises 'white collar' workers. Stakeholders shared the view that the industry includes both 'blue collar' and 'white collar' workers, however reached consensus that the Act was not designed to capture 'white collar workers' (including those construction industry workers who perform managerial, professional or internal-to-business functions (for example, human resources, finance and payroll, administrative or legal) noting that the LSL Act exists to provide entitlements to that cohort of workers.

The Review adopts the same view, noting that the design of the legislation captures only those employees performing work under a classification of work prescribed by an award. Accordingly, the Review does not include employees who perform internal-business-functions within the construction industry as a group to be captured under the Act.

The Review has considered the degree to which the current operation of the Act provides access to portable long service leave for the modern construction workforce. The Review finds that the Act accommodates most cohorts within the modern construction workforce, however, notes that:

1. stakeholders have called for additional occupations to be captured;
2. ambiguity exists for specific cohorts of workers, including:
    (a) working directors;
    (b) supervisors, subcontractors;
    (c) construction cleaners/peggies;
    (d) traffic controllers;
    (e) electrical trade workers conducting commissioning, de-commissioning and testing; and
    (f) certain construction work performed offshore which is not covered by the IR Act.

We address each point in turn.

5.2.2.1 Stakeholder calls for additional occupations to be added to the MyLeave scheme

The Review has synthesised various submissions made by stakeholders and provides the following summary of calls to expand the coverage of the Act to include:

a) divers, drone operators, specialists in wind farm turbines, tower and blade installations;
b) other specified work covered by the Hydrocarbons Industry (Upstream) Award; and
c) work conducted on ships and vessels.

Additional occupations

The list of additional occupations above has been put to the Review in written submissions from Unions WA, the ETU and the MUA. The submissions do not specify the tasks being performed in each occupation listed above however the Review is aware that drone operators are increasingly being used in the construction industry, especially in pre-construction planning phases of a project, for surveying, mapping and to monitor progress and enhance safety and security outcomes. There is a question as to whether that usage aligns with the role of construction worker, as distinct from construction management operations (which are not covered by the Act). Further stakeholder discussions would be advantageous, including to understand the precise nature of work covered by the Hydrocarbons Industry (Upstream) Award that is seeking to be included, noting that the concepts presented in written submissions have not yet been socialised with employers or employer representatives.

On the inclusion of specialists in wind farm turbines (including tower and blade installations) MyLeave considers those occupations are included under the Act where those workers are 'substantially engaged' in the construction industry and not carrying out maintenance or repairs, per the definition of Construction Industry in section 3 of the Act. Further engagement between MyLeave and stakeholders could assist clarify current coverage and the need for further occupations to be included within the operation of the Act.

The Review considers it important that any expansion of coverage to include the points above be limited to work performed on, or in connection to, civil, commercial building, residential and resource construction projects, noting some of these occupations are capable of being performed in other industries.

The Review considers it important that the Act keep pace with the emergence of new construction industry occupations, especially those emerging from the adoption of new technology or areas of government priority. There is merit in MyLeave conducting periodic reviews of occupations captured by the Act, to achieve this objective.

Construction work conducted on ships and vessels

On the specific matter of work conducted on ships and vessels, the Review is aware of representations made by the MUA to reverse the current exclusion of construction work occurring on ships.[99] The WA Government made a pre-election policy commitment to amend the Act to accommodate workers who work on ships and were excluded by the decision in *Ben Thompson v The Construction Industry Long Service Leave Payments Board* (2016)[100]. The Review supports this amendment on the basis that it addresses a technicality and anomaly that left unaddressed, creates a perverse outcome whereby workers undertaking construction work on fixed offshore rigs or non-self-propelled vessels are captured, however, workers performing the same work performed on a ship are excluded. The MUA has called for the current exclusion contained in section 3(1)(d) of the Act within the definition of 'construction industry' to be removed, and for an additional provision to be inserted to positively confirm that construction work aboard a ship

[99] *The Act* (n 33) s 3(d).
[100] *Ben Thompson v The Construction Industry Long Service Leave Payments Board* (2016) WAIRC 00054.

be included for capture under the Act.[101] The Review considers that to avoid further uncertainty there is merit in removing the current exclusion and inserting a positive clarification.

Updating of prescribed industrial instruments

In addition to calls for further occupations to be added, many stakeholders who participated in the Review consider the current list of prescribed industrial instruments is out of date. Employer representatives and government stakeholders suggested that the current list contains 'legacy' awards that should be removed.

The Review notes the Regulations were updated in 2021, and on advice from MyLeave, is informed that many legacy awards were deliberately retained acknowledging that the transition to the modern award system is not a direct replacement, with the Regulations amended to specify that the listed prescribed awards continued to have effect, whether in force or not. Accordingly, the Regulations contemplate awards that are both 'in force' and no longer in effect.

5.2.2.2 Addressing uncertainty for specific cohorts of workers

There are several scenarios that have arisen during the Act's operation that have highlighted areas of uncertainty, owing to the Act being silent on whether specific roles and locations of work fall within the remit of the Act. In MyLeave's written submission it highlights six cohorts of workers where uncertainty exists as to coverage. The Review has considered each cohort and suggests a proposed future capture in Table 4.

Table 4: Proposed capture for specific workers

Scenario	Transient?	Current capture	Proposed Capture
Working Directors	**No**	**Considered on a case-by-case basis**	**All Working Directors to be excluded**
'Working Directors' are not defined in the Act, although the term has been defined in in other legislation, notably the *Corporations Act 2001* (Cth). Unlike other forms of employees, Working Directors are often self-employed and may be both an employer and employee. Accordingly, they hold a unique status within a business where they enjoy a degree of control over their work allocation, location, and payment for services or hours worked. In its submissions, MyLeave raised a number of concerns about the inclusion of Working Directors as eligible employees under the Act, including not least because of concerns that Working Directors are in a position where they may manipulate reportable income to inflate a MyLeave claim.[102] By way of contrast, the LeavePlus scheme includes some Working Directors where the work is covered by the Victorian scheme, whereas ACT Leave and the SA scheme administrator provides a voluntary opt-in mechanism for Working Directors. By contrast, TASBuild introduced a new rule in October 2022 which gives Working Directors the ability to opt-out, by requesting deregistration from the register of employees.[103] Accordingly, there is no uniform approach adopted by comparable schemes. When applying a test of transiency, the Review forms the view that a Working Director fails by reason of ability to hold ongoing employment that is not limited by the short-term nature of construction projects. While they may move between construction sites, their employment is not transient in the same way experienced by other employees. To provide certainty the Review suggests that Working Directors be excluded from coverage under the Act, noting that they would be entitled to long service leave payments through the LSL Act and that no disadvantage exists on its face. Alternatively, the Review notes that voluntary-opt could be adopted, as used in other jurisdictions, and that if adopted it would need to apply a different metric of contributions, and would require additional administration for MyLeave to implement.			
Supervisors	**Sometimes**	**Considered on a case-by-case basis (at policy)**	**To amend legislative framework to provide greater certainty**
The breadth of work performed by a person titled a 'Supervisor' can be varied which presents issues for determining whether that person is performing classifications of work captured under the Regulations. MyLeave currently rely on case-by-case assessment using policy factors detailed on its website, which focus on a			

[101] Email from Maritime Union of Australia to the Review, 27 July 2023.
[102] Written Submission from MyLeave to the Review, 18 August 2023, 15.
[103] TasBuild, 'February 2023 Employer Newsletter' (22 February 2023) *Newsletter* 2 <https://tasbuild.com.au/wp-content/uploads/2023/06/FEBRUARY-2023.pdf>.

supervisor's actual duties, rather than the title of the role. MyLeave has expressed concerns that the current approach may lead to inconsistent application of the Act.

Currently, Supervisors when engaged in a Foreperson role may be eligible for coverage under the Act on an assessment of the principal or substantial purpose of their role that aligns with a prescribed classification in the Regulations, however, an assessment needs to occur on a case-by-case basis. This approach is not dissimilar to the approach adopted by LeavePlus. Under the Victorian scheme legislation and Rules, a foreman is generally covered when directly overseeing other workers and in circumstances when not more than 25 per cent of the working day in spent in the site office. LeavePlus distinguishes the role from a Manager (who is not captured) by reason of principally being concerned with the management of the site from a site office (where tasks include overseeing budgets and administrative functions), rather than the day-to-day direction of workers on-site. LeavePlus provide public guidance that Supervisors are generally covered by their scheme if working in a Foreperson capacity, who would typically spend more than 25% of a working day in a site office and directly oversees other workers on-site.

It is important that any reforms focussed on clarifying coverage for Supervisors ensure that Supervisors are not prevented from accessing entitlements accrued as construction workers prior to moving into a supervisory role.

The Review considers that the current approach of assessing factors on a case-by-case basis will continue to be necessary, however could be improved through legislative reform. Two key options exist to clarify coverage for supervisors:

1. Amend the definition of 'Employee' to include a reference to a person involved in the direct supervision of work being undertaken in the Construction Industry (which could be advanced in association with the Recommendation 2A); or
2. insert a criteria for assessment in the legislative framework that focuses the test on the performance of relevant duties, which may include:
    - duties consistent with a classification of work contained in the existing prescribed awards;
    - directly overseeing the work of other construction workers covered by the Act;
    - work principally carried out 'on a site'; and
    - delivery of the work effort, including ordering of materials and quality control of tasks being performed by those under supervision.

Salary and salary caps: While high salaries may often be associated with professional or managerial roles, the Review recommends caution for the use of salary as a single indicator to determine coverage noting salary is often a reflection of market conditions. To address concerns about coverage for workers who receive high incomes, the Act could contain a salary cap to place a threshold of income up to which a worker can receive entitlements. A similar approach is adopted in superannuation legislative framework by way of imposing a cap on employer-contributions for high income earners.

Supervisor seniority and ineligibility from the Act: It is foreseeable that for many Supervisors, there may become a point in time where the duties performed change and extend beyond 'supervisory' to 'managerial' functions which should be excluded from the Act. To avoid disadvantage, any legislative reform should permit access to prior entitlements accrued during service as an eligible employee, prior to excluding the worker from the operation of the Act. Any amendments to the legislative framework should be accompanied by relevant education material to ensure Supervisors are aware of the impact that increased managerial duties will have on their coverage under the Act.

Subcontractors	**Sometimes**	**Considered on a case-by-case basis**	**To amend legislative framework to provide greater certainty**

The term 'subcontractor' has received judicial consideration and in summary may include both independent contractors (who are excluded from the operation of the Act) and subcontractors considered as employees (who are covered by the Act).

Currently, MyLeave considers the coverage of subcontractors, sometimes referred to as 'ABN workers', on a case-by-case basis, having regard to the totality of the employer-employee relationship (adopting the common law test). This creates a level of complexity and requires an assessment based on a list of indicia, noting the volume of construction workers that are engaged as subcontractors has increased since the Act's inception. The LSL Act operates similarly.

By way of comparison, other comparable remuneration-based construction industry portable schemes tend to adopt a voluntary opt-in mechanism. ACT Leave approaches the challenge of determining eligibility for sub-contractors by way of a statutory voluntary opt-in mechanism for contractors performing covered construction work in the ACT. This approach addresses the complexity in part, through transferring the decision to the subcontractor. Similarly, LeavePlus requires self-employed subcontractors with an ABN to register themselves for the LeavePlus scheme, however, provides the making of contributions optional. Only those subcontractors who elect to make contributions will be entitled to claim long service leave from LeavePlus. TASBuild offers a similar arrangement, where upon meeting an eligibility criteria, a self-employed construction worker may register and make voluntary contributions. Those contributions occur using a different metric to the levy applied to employers of employees.

On its face, all comparable schemes all appear to have regard to the common law test, although some have taken steps to codify the test into the relevant scheme legislation or rules. An opportunity exists to improve clarity for this cohort of workers under the Act and promote harmony with reciprocal schemes by inserting clarifying detail in the legislative framework, which could include codifying the common law test.

Building Trade Assistants and Construction Cleaners (Peggies)	**Yes**	**Often excluded**	**Included (if substantially engaged in the construction industry)**

As a result of re-classification of construction cleaners, there is ambiguity as to whether construction cleaners (when classified as cleaners rather than Trade Assistants, Builders Labourers or Peggies) are captured by the Act. The CFMEU indicates that the problem predominately exists in civil and resource construction projects, rather than in commercial construction projects.[104] It advocates for the inclusion of construction cleaners within the capture of the Act, provides a rationale to support its claim and offers proposed solutions for legislative amendments.

Separately, MyLeave has highlighted the broad remit of work often performed by Building Trades Assistant does not fit neatly into prescribed classifications of work and that as a result, this cohort of worker is comparatively disadvantaged. The disadvantage manifests in circumstances where they perform work on a construction site and experience transiency of employment due to the project-based nature of work, similar to other workers captured within the remit of the Act, however are excluded from the capture of the Act.[105]

The Review adopts the view that despite construction cleaners often being engaged through a labour hire agency, in circumstances where a building trades assistant or construction cleaner has a long tenure in the construction industry (noting many construction cleaners previously held other roles in the industry earlier in their careers) and continues to perform work predominately for the construction industry, their continued transiency and tenure to the industry justifies their inclusion in the MyLeave scheme.

Traffic Controllers	**Yes**	**Included**	**Included (if substantially engaged in the construction industry)**

The Review acknowledges that the transiency of traffic controllers performing work on a construction site is not dissimilar to other employees in the construction industry, as the demand for work will vary based on the construction projects underway.

The issue was recently considered in *Contra-Flow Pty Ltd v The Construction Industry Long Service Leave Payments Board* [2022] WAIRC 648 (Contra-Flow). In that matter, the WAIRC considered the eligibility of a Traffic Controller who 'manually direct road traffic and pedestrian flow on, near, or adjacent to roads in a variety of circumstances that result in road closures or part road closures.' It was held that the work of Traffic Controllers performed on sites where roadwork is carried out are eligible under the Act as they are engaged 'in the construction industry'.

To achieve consistency with the interpretation provided by the WAIRC in Contra-Flow, the Act could be amended to clarify that Traffic Controllers are covered under the Act when they are substantially engaged in the construction industry. The need for the application of a 'substantially engaged' test for this cohort of worker is necessary to avoid inadvertently capturing Traffic Controllers who work outside of the construction industry, for example Traffic Controllers who work to manage traffic in school zones or ports and airports.

[104] Written Submission from Construction Forestry Maritime Mining Energy Union to the Review, 14 July 2023, 3.
[105] Written Submission from MyLeave to the Review, 18 August 2023, 17.

Electrical trade workers conducting commissioning, de-commissioning and testing	**Yes**	**Excluded**	**Included (if substantially engaged in the construction industry)**
While many of its members are registered with MyLeave, the ETU raised that many members who conduct electrical trade through commissioning, decommissioning, and testing, are not eligible as this type of work is not recognised in the current definition of the 'construction industry'. Specifically with respect to commissioning, MyLeave raised in its written submission that 'commissioning workers are often working alongside other workers that are eligible under the Act and employed on similar conditions', recommending that employees undertaking commissioning work be made eligible under the Act. Notably, the *Work Health and Safety (General) Regulations 2022* (WA) defines 'construction work' to include any work in connection with commissioning,[106] decommissioning,[107] and testing.[108] The Review compared treatment under the Victorian scheme which recognises electrical workers covered under the Electrical, Electronic and Communications Contracting Award 2010. The Victorian scheme prescribes the following types of work undertaken by an electrical tradesperson is covered: 'installing, repairing, maintaining, servicing, modifying, commissioning, testing, fault finding and/or diagnosing of various forms of machinery and equipment…'.[109] The Review Is conscious that some electrical trade workers who undertake commissioning, de-commissioning and testing may not do so on a site where construction works occur, for example, commissioning of new electrical installations in an established building for the purposes of maintaining existing electrical systems. Therefore, it may be appropriate to include in the Act, a threshold test for such a worker to be 'substantially engaged' in on site work of the construction industry. The Review considers it appropriate to expressly include electrical trade workers who conduct commissioning, decommissioning, and testing on a construction site so as to align with ancillary legislation. Further, given the nature of the work is also transient the Review considers that it is consistent with the purpose of the Act to include such workers in the MyLeave scheme.			

Additionally, there is current ambiguity concerning the coverage of workers performing construction work offshore. The Act applies to employers and employees in WA and section 3A provides, in summary, that employer obligations and employee entitlements will apply in offshore areas as defined in the IR Act. In its submission, MyLeave indicated that uncertainty exists as to coverage and accrual of entitlements for workers engaged offshore in an arrangement not accounted for in the IR Act.[110] Specific examples were not provided, however it would be beneficial for any uncertainty to be addressed alongside other amendments to the legislative framework to address ambiguity in the operation of the legislation for other specific cohorts of employees.

Term of Reference Matter 1

Finding 1

The Act has been historically effective in providing for the construction workforce, however, developments in employment practices and the construction industry mean the Act requires amendment to reflect the modern construction workforce, specifically to:

(a) address anomalies caused by existing exclusions;

(b) clarify ambiguity surrounding coverage for specific cohorts of workers (discussed in Table 4).

In response to external stakeholder calls to add new occupations, further consultation between MyLeave and industry stakeholders is required to test and validate the need to add new occupations to the coverage of the Act.

[106] *Work Health and Safety (General) Regulations 2022* reg 289(1).
[107] Ibid r 289(1).
[108] Ibid r 289(2)(e).
[109] LeavePlus, 'Rules of the Construction Industry Long Service Leave Fund as at 10 March 2023', *LeavePlus* (Web Page, 10 March 2023) Appendix B <https://leaveplus.com.au/wp-content/uploads/2023/03/CoINVEST-Rules-10-March-2023.pdf>.
[110] Written Submission from MyLeave to the Review, 18 August 2023, 19.

Recommendation 1A – address anomalies caused by current exclusions

The 'construction industry' definition should be amended to:

(a) remove the current exclusion relating to construction work performed on a ship; and

(b) clarify that construction work on a ship is captured by the Act.

Implementation consideration

Recommendation 1A could be progressed simultaneously with Recommendation 2B.

Recommendation 1B – clarify ambiguity for specific cohorts of workers

Amend the legislative framework to:

(a) exclude working directors from coverage (per Table 4);

(b) clarify the capture of specific cohorts of construction workers including subcontractors, supervisors, construction cleaners (peggies), traffic controllers and electrical trade workers who conduct commissioning, de-commissioning, and testing) to reflect the proposed capture expressed in Table 4; and

(c) insert further clarity concerning coverage for workers engaged offshore in circumstances not accounted for in the *Industrial Relations Act 1979* (WA).

Implementation consideration

With respect to the exclusion of working directors discussed in Recommendation 1B (a), it will be necessary to contemplate transitional arrangements for working directors currently covered by the Act.

The clarification of coverage for particular cohorts may be progressed simultaneously with Recommendation 2A and 2B when amending key terms.

5.2.3 Terms and definitions

5.2.3.1 Understanding the key terms

The key terms 'employer', 'employee', 'construction industry' contained in section 3 of the Act work in unison with Part III of the Act (in particular section 21 which creates an entitlement to long service leave) and the Regulations (which prescribe the relevant awards) to determine coverage under the Act.

As a starting point, to be eligible for entitlements under the Act, employees must be registered. Relevantly, section 21 of the Act provides that:

(1) Notwithstanding any other Act or any industrial instrument but subject to this Act, **a person registered as an employee under this Act** is entitled to the following long service leave in respect of service **in the construction industry**… (emphasis added)

Section 30 of the Act requires every 'employer' (within the meaning attributed in section 3) to register as an employer under the Act.

Relevantly, section 3 defines an 'employer' as:

(a) a natural person, firm or body corporate who or which engages persons as employees in the construction industry; or

(b) a labour hire agency which arranges for a person who is a party to a contract of service with the agency (person A) to do work in the construction industry for another person (person B), even though person A is working for person B under an arrangement between the agency and person B,

(c) but does not include a Minister, authority or local government prescribed under subsection (4I).

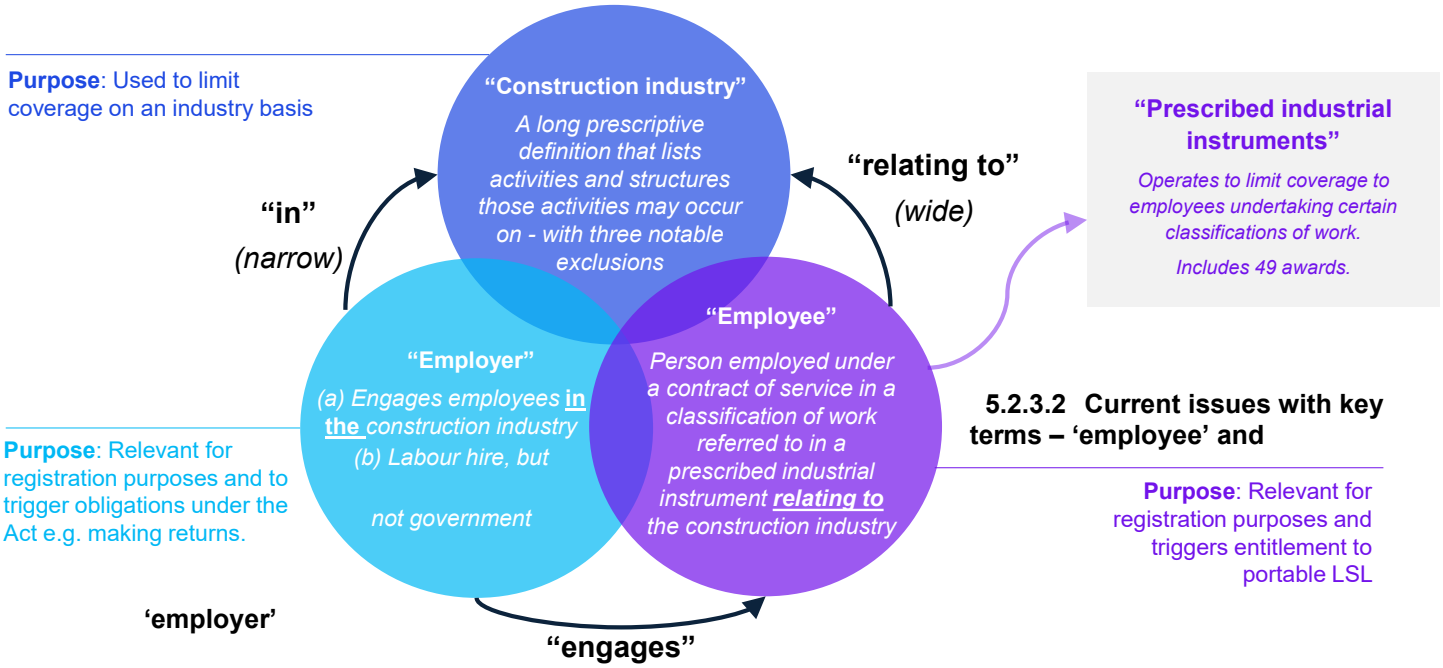
An employee is defined by section 3 of the Act as:

(a) a person who is employed under a contract of service in a classification of work referred to in a prescribed industrial instrument relating to the construction industry that is a prescribed classification; or

(b) an apprentice.

The decision in *Positron v The Construction Industry Long Service Leave Payments Board* [1990] (Positron) clarified that an employee does not need to be employed in a classification under a prescribed award, but rather that the work they do is within a classification of work in a prescribed award.[111] It is a subtle, however, important distinction that has important ramifications for how the Act presently operates.

Figure 14: Operation of key terms



5.2.3.2 Current issues with key terms – 'employee' and

Figure 14 highlights, through overlapping connections, that both the definitions of 'employer' and 'employee' import the definition of the 'construction industry' to limit application and capture – although two important distinctions are apparent:

1. an 'employee' is defined with reference to a classification of work in a prescribed industrial instrument *relating to* the construction industry (our emphasis added), whereas;
2. an 'employer' is defined by reference to a person which engages persons as employees *in* the construction industry (our emphasis added).

It is an interesting distinction that has received judicial consideration and results in the definitions having different ambits of operation. As highlighted by Justice Ipp in *Aust-Amec Pty Ltd v The Construction Industry Long Service Leave Payments Board* (*Aust-Amec*):

> … an "employer is not defined simply to mean a person who employs an "employee" as defined. An employer is a person who engages persons as employees "in the construction industry" but does not include a Minister, authority of council as prescribed. Thus while employees are defined by reference to prescribed awards "relating to the construction industry" the definition of "employer" imports the additional qualification that the employees must be in the "construction industry". […] The consequence of this is that there may be persons who are "employees" within the meaning of the Act who are not employed by "employers" within the Act.[112]

The practical ramifications of the conundrum highlighted in *Aust-Amec* is that there may be cohorts of employees who consider they should be registered for the Act, but for their employer not being required to register because the employer adopts the view, or is found to be, not engaging persons as employees 'in' the construction industry.

The distinction created by the words 'relating to' and 'in' within the definitions of 'employee' and 'employer' respectively, creates a level of complexity and uncertainty for employers and employees and has given rise to coverage disputes in the past.

There is merit in simplifying the definitions for 'employee' and 'employer'. The Review recommends re-designing the coverage provisions of the Act to place the 'employee' at the centre of the MyLeave scheme as a design principle.

[111] *Positron v The Construction Industry Long Service Leave Payments Board* [1990] WAIRC 3062.
[112] *Aust-Amec Pty Ltd t/a Metlab & SRC Laboratories and Others v Construction Industry Long Service Leave Payments Board* (1995) 62 IR 412.

An employee-centric approach will better fulfil the intent of the Act which was to create a portable scheme that ensures WA construction workers are no worse off than workers in other industries.

The operation of the Act would be improved if the definition of 'employer' was to be de-coupled from the definition of the 'construction industry'. The Review recognises this is a considerable paradigm shift, and if adopted, would require careful re-drafting of the 'employee' definition to capture all those workers who provide specified services to the construction industry and would allow the definition of 'employer' to be simplified to merely capture those persons or entities who engage 'employees' as defined.

The effect of such a change would mean that employers who operate across a range of industries would not be precluded from having employees who may be eligible for the Act, where those employees are engaged in work for the construction industry. This change would place employees at the centre of the Act's operation and simplify the definitions to prevent scenarios of the variety addressed in *Aust-Amec* from occurring. We acknowledge that where an employee performs specified work across a range of industries, that a test for being 'substantially engaged' in the construction industry may continue to be warranted.

Separately, on the point of nomenclature, the Review notes that most reciprocal schemes (with the exception of the ACT) have shifted to use the term 'worker' in contrast to 'employee'. Notwithstanding that the LSL Act continues to use the term 'employee' there is merit in adopting the term 'worker' as a better representation of the modern construction workforce, which increasingly involves contracting arrangements. If sub-contractors are to continue to be covered by the Act in certain circumstances, the term 'worker' is more inclusive and also harmonises with the *Work Health and Safety Act 2020* (WA).

5.2.3.3 Current issues with key terms: the definition of 'construction industry'

Disputes relating to interpretation of the term 'construction industry' constitute approximately 60 per cent of all disputes relating to the operation of the Act. Most frequently, the matters are brought in response to employers seeking exclusion from the operation of the Act, often driven by employees seeking to secure entitlements under the Act.

The definition of 'construction industry' is extracted at ***Appendix C: Key terms.*** In summary, the definition contains a list of activities that are to be expressly included, in addition to a smaller number of activities or locations of work that are expressly excluded. Importantly, to be captured within the 'construction industry' the Act requires that work generally be carried out 'on a site'.[113]

For consideration, the Review notes that the 'construction industry' as defined by the Act also informs definitions within the *Building and Construction Industry Training Fund and Levy Collection Act 1990* (WA) and that any amendments to the definition may have implications for the CTF and its clients.

5.2.3.4 The issue with references to the term 'on a site'

In addition to the issues highlighted by stakeholders which are summarised in section 4.3.1, the pivotal issue concerning the current definition of the 'construction industry' is whether it should continue to use a location-based test to limit coverage to work performed 'on a site'.

The inclusion of the term 'on a site' within the definition of 'construction industry' has important ramifications, especially when considering that industry developments have occurred where, for example, prefabricated building or the building and construction of modular designs has become more common, and typically occurs 'off site' prior to being transported to a project site for assembly. This is an issue which raises the question of where the construction industry begins and ends, with reference to ancillary industries such as mining and manufacturing. By way of comparison, the approach adopted by the reciprocal scheme operating in the ACT does not include reference to work being conducted 'on a site' and by its operation captures some activities that might be regarded as traditionally the domain of manufacturing. The ACT legislative framework draws the 'line' of capture based on whether the work (which includes the building or manufacture of certain goods) has been *customised* for a particular construction site. If the work is customised for a particular construction project, it will be captured by the portable long service leave scheme.

When considering the term 'on a site' the jurisprudence highlights that the term has typically received broad interpretation. The matter involving *Programmed Industrial Maintenance Pty Ltd*[114] clarified that the terms 'on a site' and 'site' are to be considered with the ordinary dictionary meaning of the term. Scott CC held that a 'site' refers to the location or place the types of work named in the definition of 'construction industry' occurs stating:

[113] Note that s 3(c) of *The Act* (n 33) contemplates some scenarios where work may not need to be 'carried out on site'.
[114] *Programmed Industrial Maintenance Pty Ltd v the Construction Industry Long Service Leave Payments Board* [2019] WAIRC 843.

> *'Therefore, the preliminary words in the definition of the construction industry mean that of the industry of carrying out,* at a position area, location, place or situation*, a range of activities being construction, erection, installation, reconstruction, re-erection, renovation, alteration demolition or maintenance of or repairs to a range of buildings, structures, works etcetera, and for specified purposes of work.'*[115]

On appeal to the WAIAC the court clarified the term was not to be interpreted to reference a construction site or building site.[116] That decision provided precedent for the decision in *Quantum Blue Pty Ltd v The Construction Industry Long Service Leave Scheme (Quantum Blue).*[117] Based on the decision upheld in *Programmed Industrial Maintenance Pty Ltd* and *Aust-Amec*, Kenner SC held that work is 'on a site' if it is away from the employer's premises:

> *'First, work must be carried out on a 'a site'. This refers to a physical location or place at which work is performed. The word 'site' is not prefaced by the word 'construction', thus it is not necessary for the relevant work to be performed on a building site or construction site, as those phrases are commonly understood, as long as it is performed away from the employer's premises.'*[118]

In its deliberations the Review has considered locations of work, the utility of drawing distinctions between industries, the adoption of new technologies, and relevant jurisprudence. It is likely that the retention of the term 'on a site' will continue to challenge the flexibility of the Act to respond to the changing nature of work and industries and requires a decision to be made as to where the boundaries of the construction industry begin and end.

In the absence of broad stakeholder support to depart from use of the term, there are two key options that may reduce ambiguity in the short-medium term. Firstly, adopting a targeted approach to legislative reform it is possible to retain the existing definition for construction industry and insert further guidance as to what is 'on a site'. A solution may be to codify the current common law and incorporate examples into the legislative drafting.

If the term 'on a site' is defined in the Act it would be sensible to simultaneously clarify the coverage outcome for work performed on a 'mobile plant', a term that is presently not defined in the Act. The decision of the WAIRC in the matter of *Glenn Wallis v the Construction Industry Long Service Leave Payments Board*[119] is instructive, and clarifies that work performed on mobile plants, while related to construction, does not fall within the definition of pertaining to the 'construction industry'.

Alternatively, adopting a longer-term view there may be merit in removing the term 'on a site' from the construction industry definition if industry support can be garnered. Currently, a direct correlation still exists in the construction industry between the location at which work is performed and the degree of transiency in employment (because the supply of labour (and therefore employment) is driven by the fluctuating nature of construction projects), however it is foreseeable that in the future advancements in technology may mean that the nature of some construction work may change and that human oversight of robotics for example, could occur at a location away from the construction site. Construction robotics is developing and for example, now includes robotics that can undertake some bricklaying activities.

The removal of the term 'on a site' would involve a clear view of how to best delineate between ancillary industries, most relevantly mining and manufacturing. Manufacturing and mining industry stakeholders should be included in any consultation process concerning where to best draw the boundaries between the construction industry and ancillary industries.

5.2.3.5 Uncertainty relating to additional undefined words including 'substantially engaged'

In addition to the key terms used in the Act to determine coverage, several other words are used within the definition of 'construction industry' that are not defined. These include 'installation', 'maintenance and repairs', 'routine and minor', 'structures, fixtures or works' and what it means to be 'substantially engaged' in the industry. In its submission, MyLeave has indicated that the absence of definitions for these words has at times caused uncertainty which has hindered efforts to administer the Act efficiently.

It is not uncommon for many words within legislation not be defined and other reciprocal schemes do not necessarily provide guidance on concerns that may manifest as WA-specific, as the legislation in ACT and Victoria for example operate differently and are underpinned by policy decisions to include certain works, including installation, maintenance and repairs in some circumstances. The Review considers a balance needs to be struck between overly prescriptive drafting which will provide certainty at the expense of flexibility, and the quantum of operational

[115] Ibid 68.
[116] *Programmed Industrial Maintenance Pty Ltd v The Construction Industry Long Service Leave Payments Board* [2021] WASCA 208.
[117] *Quantum Blue Pty Ltd v The Construction Industry Long Service Leave Scheme* [2019] WAIRC 860.
[118] Ibid 16.
[119] *Glenn Wallis v the Construction Industry Long Service Leave Payments Board* [2020] WAIRC 791.

issues being caused by the absence of defined terms. In this circumstance, policy can play a role in supporting the application of legislation, and may offer a useful compromised position to improve the administration of the Act.

With respect to the words 'substantially engaged', having regard to the totality and intersection of reform measures being recommended in this Review, there is merit in defining the term 'substantially engaged' in the legislative framework. Consideration could be given to inserting the amendments into the revised definition of 'worker' (currently, 'employee') or retaining the current reference within the definition for the 'construction industry'. Reciprocal schemes have used a variety of measures to clarify what it means to be engaged substantially in an industry, including numerical tests (for example the "Two-Thirds Rule is applied in Victoria" or defined minimum number of days per reporting period) or predominance tests. When choosing between the policy options available, it would be prudent to consider the option that can be assessed objectively. Ultimately, if an individual is assessed as being 'substantially engaged' in the 'construction industry' the individual should be covered by the Act and should accrue entitlements based on all work performed (regardless if, on occasion, the work is performed off site). The assessment of being 'substantially engaged' should be capable of review, to test changes in circumstances and permit employees (and their respective employers) to exit the operation of the Act.

Term of Reference Matter 2

Finding 2

The Review finds that the key terms 'employee' and 'employer' do not provide sufficient certainty.

With respect to the term 'construction industry', there is a current lack of consensus between stakeholders as to where the boundaries of the construction industry begin and end. The current definition does not provide sufficient guidance on what it means to be 'on a site' or 'substantially engaged' in the construction industry. The operation of the Act could be improved by defining both terms.

Recommendation 2A – amend the definitions for 'employee' and 'employer'

The Review recommends revising the current definitions of:

(a) 'employee' to 'worker', to reflect the contemporary construction workforce and to align language with other comparable schemes; and

(b) 'employer' by:

i. simplifying the term to mean any entity that engages a 'worker' as defined under the Act (retaining existing exceptions for a Minister, authorities or local government prescribed under existing provisil4(c) of the Act); and

ii. de-coupling the link of employer from the definition of the 'construction industry' (so as to rely on the workers engagement in the WA construction industry as the primary test).

Implementation consideration

The term 'worker' could be developed alongside any reforms to the use of prescribed industrial instruments.

Careful drafting of the 'worker' definition (to capture all those workers who provide specified services to the construction industry) would allow the definition of 'employer' to be simplified (to capture only those persons or entities who engage 'workers' as defined). Current exclusion contained in the definition of 'employer' could remain.

Recommendation 2B – amend the definition for the 'construction industry'

To reduce current ambiguity surrounding the distinction between work performed 'on a site' and work performed off-site, the Act should be amended to provide further guidance as to what it means to be 'on a site' and what it means to be 'substantially engaged' in the construction industry.

Over the longer-term, the retention of the term 'on a site' should be tested again to re-assess whether there is utility in maintaining the term having regard to the views of industry and technological advances.

Implementation considerations

There are several implementation considerations relevant to amending the definition of 'construction industry'.

- Noting a current divergence in stakeholder views concerning the boundaries of the construction industry, a short-medium term solution would be to insert further clarity into the current definition as to what 'on a site means'. Given the matter has received judicial consideration, guidance is available and could be codified into the existing legislative framework.
- Note that the CTF uses the MyLeave definition of 'construction industry' in its legislation and should be kept informed of any proposed changes.
- Any amendments to the 'construction industry' definition should simultaneously clarify that work on a mobile plant is to be excluded from coverage.
- Over the longer-term, a location-based test may become less relevant and retention of term 'on a site' should be tested again. MyLeave should look to the arrangements in the ACT as an example of a reciprocal scheme that provides an alternative to using the term 'on a site'.
- When inserting clarity into the legislative framework concerning what it means to be 'substantially engaged' in the construction industry, the policy position should have regard to a method that can be assessed objectively and reduce the regulatory burden associated with undertaking an assessment.

5.2.4 Mechanisms for the effective capture of workers in the construction industry

The prescription of industrial instruments in the Regulations have been the core mechanism of determining eligibility, in combination with consideration of key terms since the Act's introduction. The impact of using prescribed industrial instruments as a mechanism has been to limit inclusion to workers performing classifications of work covered by a limited number of awards historically associated with the construction industry.

Schedule 1 of the Regulations contains a list of 49 prescribed awards, including both awards under the *Fair Work Act 2009* (Cth) and awards pursuant to the *Industrial Relations Act 1979* (WA), which in turn contain classifications of work. Section 2 of the Regulations provide the 'awards mentioned in Schedule 1, whether or not in force, are prescribed under section 3(4)(b) of the Act'. Section 3(1) of the Regulations prescribes 'all classifications of work referred to in an award mentioned in Schedule 1, whether or not the award is in force, are prescribed under section 3(4)(a) of the Act, subject to limitations set out in section 3(2)'.

Classifications of work are contained within awards and have historically provided a structured framework for organising and regulating employment conditions across different job roles within an industry. Classifications are designed to ensure that employees receive fair treatment, appropriate pay, and consistent standards within their respective roles, while also considering factors such as skill level, qualifications, and responsibilities.

A mechanism exists to update the prescribed list of awards in Schedule 1 of the Regulations from time to time, as required, however, it is pertinent to consider whether the current mechanism, which indirectly targets classifications of work through the selection of certain awards is the most effective method of defining coverage, having regard to the need for clarity and certainty for both employers and employees.

In its written submission, MyLeave highlighted that while a review and update of the prescribed awards took place in 2021 the shift in employment practices and the approach taken in modern awards to focus on competencies (rather than trades) means that complexity has arisen, particularly when an employee is hired to perform a role that is subsequently re-categorised under a different award or agreement. [120] MyLeave noted it is regularly required to assist employers understand the position established by the WAIRC in *Positron*, to provide guidance to employers when assessing eligibility for entitlements under the Act.[121] The reliance on case law to assist employers understand their obligations is undesirable, suggesting the legislation requires greater clarity to assist employers comply with their obligations under the Act. MyLeave has suggested that as an option, if coverage of the Act continues to be derived from a link with prescribed awards, that the position enunciated in *Positron* be adopted,[122] to promote greater clarity for all scheme stakeholders.

When asked during consultations, most stakeholders had not considered alternatives to the use of prescribed industrial instruments. An employer representative commented that the definitions used in the Act should continue

[120] Written Submission from MyLeave to the Review, 18 August 2023, 11.
[121] Ibid 12.
[122] Ibid 12.

to be linked to the award system, and in particular to the Building and Construction General On-site Award [MA000020], adopting the view it provided good coverage and that considerable effort had been invested in its development. Other employer representatives generally agreed, although noted limits to the Building and Construction General On-site Award [MA000020] and suggested that it alone would result in missing cohorts of workers that should be covered by the Act.

In its written submissions, the CFMEU acknowledged a movement by employers away from the award and by extension, classifications of work.[123] MyLeave proffered a similar view, considering that industrial instruments have less relevance in the modern construction industry and indicated that other mechanisms may be available to provide greater clarity as to eligible employees.

Accordingly, while awards are an effective method of distinguishing between award-covered and award-free workers, a reduced reliance on the award system suggests that continuing to use awards as a method of defining coverage could result in continued ambiguity and limit the legislation's ability to 'flex' to respond to developments in the construction industry and broader industrial relations shifts.

Table 5 provides a summary of the mechanisms used by comparable construction industry long service leave schemes. Of the seven other state and territory portable construction industry schemes, the Long Service Leave Corporation (NSW) together with NTBuild and the Portable Long Service Leave Scheme (SA) continue to use prescribed awards as a mechanism to assist define coverage. Victoria's 1983 scheme legislation contained links to prescribed awards that were augmented in the design of the 1997 legislative amendments and corresponding Rules, although the current mechanism still effectively provides scopes of work. TasBuild has adopted the use of the Australian and New Zealand Standard Industrial Classification (ANZSIC) system.

[123] Written Submission of the Construction Forestry Maritime Mining Energy Union to the Review, 14 July 2023, 2.

Table 5: Comparable use of prescribed instruments

Jurisdiction and scheme name	Year of current enabling legislation	Use of prescribed instruments	Summary of mechanism used to determine coverage
ACT Leave	2009 (amended in 2023)	✗	Defines coverage using terms 'covered industry', 'building and construction work' and 'building and construction industry'.
QLD: Qleave	1991	✗	The definition of an 'eligible worker' is not tied to an award or industrial agreement but rather to the definition of 'building and construction work' in the legislation. The legislation contains express examples of what constitutes an 'eligible worker'.
NSW: Long Service Leave Corporation	1986 (Regulations amended in 2022)	✓	The definition of 'building and construction work' requires work carried out under a contract of employment for which a rate of pay is fixed by an award prescribed by the Regulations.
NT: NTBuild	2005	✓	Section 10 of the legislation permits a person to be registered as an employee if the person carries out construction work in the Territory and the person's work description or classification is covered by the Building and Construction Industry (Northern Territory) Award 2002 (as amended) or as specified in a Determination.
SA: Portable Long Service Leave	1987	✓	Section 5 of the legislation operates to define coverage having regard to a person who works under a contract of service in the construction and where an applicable award prescribes a weekly rate of pay for work of that kind (among other criterion).
TAS: TasBuild	1997 (Rules last published in 2021)	**Other**	Defines the 'Construction Industry' having regard to the Australian, New Zealand Standard Industrial Classification (ANZSIC) Code. Notably, Part 8 of the Rules provide the Trustee with discretion to determine whether specific work is 'Construction Work' and the prescribed form considers work under an Award as a form of evidence an applicant may tender.
VIC: LeavePlus (formerly CoInvest)	1997 (Rules amended in 2023)	**Other**	Section 7 of the legislation (1997) references 'an award prescribed for the purposes of the Fund' however the Rules (2023) contain no express link to prescribed awards. Rather, the Appendices to the Rules contain scopes of work and classifications for Building Trades, Electrical Trades and Metal Trades. Definitions contained within the Rules also include 'Construction Industry' and 'Construction Work' to define coverage of the scheme. Notably, the coverage provisions of the earlier Victorian scheme legislation (1983) did contain links to prescribed awards.

5.2.4.1 Understanding classification systems

The Australian Bureau of Statistics (ABS) has developed and published the Australia and New Zealand Standard Classifications of Occupations (ANZSCO) and the ANZSIC systems.

The ANZSCO is used primarily in Australia and New Zealand to categorise and organise different occupations for various purposes, including statistical analysis, research and reporting, workforce planning, migration and visa programs, skills assessments, job matching and recruitment. The ANZSCO system defines occupations according to their attributes and groups them on the basis of their similarity. A search for a particular occupation within the ANZSCO system will highlight the indicative skill level (including qualifications) that a person should hold to assume that occupation, in addition to offering guidance on the types of tasks an incumbent of the occupation will typically perform. The ANZSCO system was last updated in 2021. A visual illustration of the ANZSCO structure with examples relating to the construction industry is contained at ***Appendix E***.

The ANZSCO classification system is broadly comparable to the International Standard Classification of Occupations (ISCO), developed by the International Labour Organization primarily to provide a basis for international comparisons across member countries and to assist member countries develop national occupation classification systems.

The ANZSIC, by contrast, provides a mechanism for individual business entities to be assigned to an industry based on the businesses predominant activity. The ANZSIC system is used for various administrative, regulatory, taxation and research purposes. Relevantly to this review, Division E of the ANZSIC relates to Construction. TASBuild currently refers to the ANZSIC classification system for the purposes of determining coverage.

Relevantly for this Review, the ANZSIC system is directed towards industries and businesses as employers, whereas the ANZSCO classification system is focussed on the skill level and tasks to be performed by the worker in a particular occupation. The approach adopted by the TASBuild scheme is to define the 'construction industry' having regard to Divisions C and E of the ANSZIC system[124], that is by *industrial* classification, rather than *occupational* classification. The TASBuild *Fund Rules* further narrow the field of eligibility in its scheme, through introducing the additional terms of 'relevant work' (which further introduces the notion of 'on the site'), 'work' and 'construction work', to target coverage towards 'blue collar' roles.

5.2.4.2 Alternatives to prescribing industrial instruments

Option A: Maintain the existing system but update to reflect the position adopted in *Positron*

The option exists to maintain the existing system of prescribing select awards as industrial instruments and making an amendment to include the position established by *Positron* (in essence, that an employee does not need to be employed in a classification under a prescribed award, but rather that the work they do is within a classification of work in a prescribed award to be captured by the Act) to provide greater clarity for employers and employees.

The Review has considered whether there would be merit in maintaining this approach and adding relevant enterprise agreements to the list of prescribed industrial instruments. The addition of enterprise agreements would better reflect the nature of engagement of a growing number of workers in the construction industry. While it is difficult to quantify the number of enterprise agreements covering WA construction workers currently, it is realistically a large number that would be unwieldy to administer. On balance, the Review considers that the gains realised from including enterprise agreements as prescribed industrial agreements would be outweighed by the effort expended to administer their inclusion and updating within the Regulations.

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

The design and use of an occupation list could be an alternative to the use of prescribed industrial instruments under the Act. Occupation lists have been historically used in the federal immigration system to specify eligibility for certain visa programs in Australia. The occupation lists used by the Department of Home Affairs are legislative instruments prescribed pursuant to the *Migration Act 1958* (Cth) and associated regulations, which are reviewed regularly and updated subject to the advice of the National Skills Commission and stakeholder feedback. The occupation lists are a direct link to the ANZSCO classification for any listed occupation. Applied to the Act, it is conceivable that the Regulations could be amended to remove reference to prescribed industrial instruments and to instead translate existing classifications of work captured by the Act to an occupation list, using an occupational classification system.

The benefits of using an occupation list includes creating a direct link to the tasks performed by a worker and reduces reliance on an award system that may no longer be the foundation of modern employment arrangements. The list could be updated as needed, using a similar method to that used to update Schedule 1 of the Regulations.

[124] *Construction Industry (Long Service) Act 1997* (TAS) s 3.

There are two key drawbacks with respect to the use of occupation lists. Firstly, the updating of occupation classifications by the ABS is subject to time lags, which means that as technology advances or roles change, there may be delays to having new occupations added to the classification system. Secondly, there may also be variations in how the Australian Government, through the ABS classification system *considers* a role is performed and the duties it includes, in contrast to the *reality* of how the occupation is performed in the construction industry. To have confidence that adoption of the ANZSCO classification system is a better alternative than the current use of prescribed industrial instruments it would be prudent to take a sample of common construction industry occupations and compare how the classification of work as detailed in a relevant prescribed award differs from the ANZSCO classification for that occupation.

Finally, for completeness, at the time of publication the Review is aware that changes are forthcoming in the Australian immigration system that may reduce reliance on the use of occupations lists in the future, although reference to ANZSCO is likely to be retained. If adopting Option 2, the Review considers it pertinent to use the ANZSCO classification system (as distinct from the ANZSIC system) in keeping with the adoption of reform efforts centred on the employee. In the opinion of the Review, the ANZSCO system may offer a greater degree of granularity compared to other options, and assist draw distinctions between workers performing construction work, as distinct from managerial or office-based roles in the construction industry, consistent with the original intent of the Act. The use of ANZSCO, rather than ANZSIC may also reduce the need for the Act to introduce additional terms to further narrow the cohort of employee eligible to receive entitlements under the Act.

Option C: Cease to use prescribed industrial instruments and use refined legislative drafting with additional terms

The current legislation administered by ACT Leave and QLeave do not prescribe industrial instruments and adopt a different approach that incorporates additional definitions, particularly for 'building and construction work' and 'building and construction industry'. QLeave's legislation goes further to incorporate examples into the drafting of the term 'eligible worker', to clarify the specific types of work captured and excluded from the use of the term. Additionally, ACT Leave's legislation empowers the Minister to 'declare' work or an activity to be building and construction work, or not to be building construction work.[125] Both methods represent an alternative to the use of prescribed instruments or occupation lists. ACT Leave assisted the Review with its enquiries and indicated that since departing from the use of prescribed awards for the construction industry it considers its current definitions for 'construction industry' combined with 'building and construction work' provide a fit-for-purpose basis for capturing relevant workers and excluding those outside the ambit of the construction industry.

While preliminary enquiries were made as part of the Review, it would be pertinent for MyLeave, prior to adopting this alternative to liaise with ACT Leave and QLeave to gain expertise from the respective scheme administrator to discuss the details and how the approach may be best customised for the nuances of the WA construction industry.

If the Act were to be amended to include an additional definition of 'construction work', we note that the term is currently defined in the *Building and Construction Industry (Security of Payment Act) 2021* (WA) and recommend that to encourage harmonisation between legislation that the existing definition be leveraged, to the extent possible. We note a similar approach is adopted in the Northern Territory (NT), where 'construction work' for the purposes of NT Build is defined with reference to the *Construction Contracts (Security of Payments) Act 2004* (NT).

An assessment of the attributes of each alternative, including relevant advantage, disadvantages and implementation considerations is available at Table 6. Ultimately, no single option provides a perfect alternative, however Option 3 does address most of the key attributes required and has the benefit of previously being implemented by a reciprocal scheme administrator which provides some confidence about its use and potential.

Further tools to determine coverage - the use of Ministerial declarations

The Review observes that the addition of a further power to enable the Minister to make declarations could assist the operation of the Act and MyLeave's administration of the scheme, particularly with respect to determining coverage. By way of example, in the ACT, sections 12 and 13 of the *Long Service Leave (Portable Scheme) Act 2009* (ACT) provides powers for the Minister to make declarations to expand and limit coverage. Through liaison with ACT Leave the Review understands these powers are not used frequently and have been limited to use in the community sector, however do provide an additional tool to determine coverage especially in circumstances where sustained efforts to encourage employer registration have been unsuccessful, or at the request of an employer or employee who seeks clarity as to coverage.

[125] *Long Service Leave (Portable Schemes) Act 2009* (ACT) Schedule 1.2(1).

Table 6: Prescribed industrial instruments - comparison of alternatives

A green rating refers to the attribute being met much of the time

An orange rating refers to the attribute being met some of the time.

Attributions	Option A – Maintain prescribed industrial agreements with some amendments	Option B – Introduce an occupation list coupled with a classification system	Option C – No prescribed industrial instruments and capture achieved through alternative legislative drafting
Ability to specifically capture construction workers (as distinct from other workers)			
Flexibility			
Ease of use & certainty for stakeholders			
Description	*Indirectly* targets classifications of work through connection to awards.	Can *directly* target specific occupations (except Supervisors).	Would involve a definition for the 'construction industry' and a further definition for 'construction work' or similar.
Advantages	• Has historical appeal noting stakeholders are familiar with this approach and maintains a connection to the awards • Can be updated from time to time, as required.	• The ANZSCO system contains both sub-major groups and minor groups that could assist MyLeave focus on construction workers, as distinct from Construction Managers and other office-based positions. • The occupation list could take form as a legislative instrument pursuant to the Regulations, which allows MyLeave some flexibility to update the list from time to time, to account for newly emerging occupations.	• Legislative drafting provides flexibility to capture specific types of work, consistent with the object of the Act. • Has been previously implemented by ACT Leave and 'lessons learnt' are available. • According to feedback received from ACT Leave, the approach provides a reasonable balance between flexibility for the scheme administrator and certainty for stakeholders.

Disadvantages	• The *Positron* decision has increased the complexity of assessment. • Stakeholders generally agree that less reliance is now placed on the award system.	• The ANZSCO classification system can be subject to time-based lags in updating for new occupations. • Will not assist capture 'supervisors' in the construction industry. • Certain roles, especially those performed within smaller businesses, may not neatly 'fit' within the ANZSCO description, where a worker may do a variety of different tasks not necessarily directly associated with their 'primary' occupation. • Will require a de-coupling from awards, which may pose some transitional issues.	• The level of flexibility to amend the drafting will depend on whether the detail is contained in the Act, Regulations or legislative instruments. • Will require a de-coupling from awards, which may pose some transitional issues.
Implementation considerations		It would be prudent to map existing classifications of work captured by the current prescribed awards and translate those to the occupations list in the first instance.	Further consultation should occur with ACT Leave to explore 'lessons learnt' from introducing this approach.

Term of Reference Matter 5

Finding 3

The use of prescribed industrial instruments has historically provided an indirect method of targeting classification of work to capture employees eligible for entitlements under the Act however is unlikely to provide sufficient flexibility in the Act to respond to developments in the construction industry and industrial relations in the future.

Recommendation 3 – alternatives to the use of prescribed industrial instruments

There are three key options available:

(a) maintain the existing system of prescribing of industrial instruments and update Schedule 1 of the Regulations to codify the position established by *Positron*;

(b) cease to use prescribed industrial instruments and design and implement an occupation list in conjunction with a classification system; or

(c) cease to use prescribed industrial instruments and use refined legislative drafting with additional terms.

According to analysis in Table 6, Option (c) appears to address the features required to deliver on the overarching intent of the Act and has the benefit of being implemented in a reciprocal jurisdiction.

An additional opportunity exists for a further tool to be added to the legislative framework (in combination with any of the three options) to permit the Minister to make declarations to determine coverage.

Implementation considerations

In considering Option (b), a sample of common construction industry occupations should be compared with the classifications of work as detailed in a relevant prescribed award.

In considering Option (c), MyLeave could liaise with ACT Leave to draw from lessons learnt about the use of the approach.

With respect to inserting powers to permit Ministerial Declarations, the *Long Service Leave (Portable Schemes) Act 2009* (ACT) provides an example of how such powers could be designed.

5.3 Treatment

5.3.1 Terms of Reference matters considered

Terms of Reference matter 3:

Assess whether the core terms of 'days of service', 'ordinary pay' and 'ordinary hours' reflect the contemporary construction workforce and result in fair and equitable application of portable long service leave entitlements having regard to differing employment arrangements.

Terms of Reference matter 4:

Review whether the current method of accruing entitlements using 'days of service' reflects contemporary workforce models.

Terms of Reference matter 6:

Consider if there is sufficient flexibility in the Act to provide for absences and allow workers flexibility in accessing portable long service leave entitlements having regard to the high-risk nature of the construction industry.

Terms of Reference matter 7:

Assess whether there are any deficiencies or anomalies in the operation of the Act in terms of the equitable and fair payment of contributions by employers and the payment of long service leave entitlements to workers.

5.3.2 Do the core terms in the Act result in fair and equitable application of long service leave entitlements?

To assess whether fair and equitable outcomes are achieved having regard to differing employment arrangements, it is first relevant to set out the current approach to calculate the accrual and payment of entitlements to employees covered by the Act.

Section 21 of the Act establishes an employee's entitlements:

> ***Section 21 Entitlement to paid long service leave and pay***
>
> *(1) Notwithstanding any other Act or any industrial instrument but subject to this Act, a person registered as an employee under this Act is entitled to the following long service leave in respect of service in the construction industry –*
>
> *(a) 8 2/3 weeks after completing 10 years of service; and*
>
> *(b) 4 1/3 weeks after completing 5 years of service subsequently to completing the period of service referred to in paragraph (a),*
>
> *and is entitled to be paid ordinary pay for such leave in accordance with this Act.*

Accordingly, section 21(1) provides that a registered employee must reach 10 'years of service' to access their full long service leave entitlements of 8 2/3 weeks, to be paid out at the rate of 'ordinary pay'. Therefore, there are two distinct elements that arise from the operation of section 21:

- **Accrual:** calculation of the accrual (or credits) of a registered employee's long service leave entitlements; and
- **Payment:** calculation of the amount payable to a registered employee when they exercise their long service leave entitlements.

As discussed in section 4, stakeholders who participated in the Review broadly agreed that the terms 'days of service' and 'ordinary pay' are problematic and cause significant issues when interpreting the Act. These terms will be considered as follows.

5.3.2.1 'Days of service'

When calculating an employee's years of service, section 21(2) clarifies that:

> *(2) For the purposes of calculating entitlement of an employee to long service leave under subsection (1) the following provisions apply –*

(a) 220 days of service shall be regarded as 1 year of service;

(b) No more than 220 days of service shall be credited to an employee in a period of 12 months whether or not he has been employed as an employee during that period.

In effect, a registered employee must accrue 2,200 'days of service' to access their full long service leave entitlements (10 years x 220 days of service). According to section 3(1) of the Act, the term 'days of service' is defined as follows:

***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.

Accordingly, where a registered employee is entitled to receive 'ordinary pay' for a particular day, it will count towards the employee's accrual of 'days of service'.

Issues arising from the term 'days of service'

Through consultation and analysis of the Act, the Review has noted the following issues arise from the current formulation of 'days of service':

1. **Hours**: The definition of a day of service does not specify a minimum number of hours that must be worked on a particular day. As a result, as little as 1 hour of work may count towards an employee's accrual days of service. This stands in contrast to an employee who works a compressed roster, such as a FIFO/DIDO arrangement, where it is common for a shift to comprise of up to 12-hours. In this scenario, both employees would accrue 1 day of service for that particular day, despite the latter employee having worked 11 hours more than the former. Therefore, a level of unfairness exists which may be particularly perverse in considering an employee's accruals across their career working in the construction industry.
2. **Leave and absences**: The definition of 'day of service' currently accounts for three types of leave; long service leave, paid sick leave and annual leave in excess of 4 weeks. This approach is not consistent with the approach adopted in the LSL Act, which explicitly permits accrual for the following types leave and absences:
   (a) annual leave;
   (b) leave for illness or injury, or carer's;
   (c) long service leave;
   (d) compassionate leave;
   (e) bereavement leave;
   (f) family and domestic violence leave;
   (g) public holidays; and
   (h) any other form of leave provided as part of the employee's employment.[126]

   Accordingly, a disparity exists with employees covered under the Act being treated less favourably than employees covered by the LSL Act.
3. **Employees who work on compressed rosters**: Employer representatives consulted indicated that employees who work a non-traditional roster, such as FIFO and DIDO workers, are prevented from accruing entitlements at the same pace as a traditional employee working a 5-day week. This issue will be considered in further depth at section 5.3.3.
4. **On a site**: As discussed in section 5.2, while the definition of 'construction industry' requires that an employee's work is performed 'on a site' to be eligible and covered by the Act, the Act does not clarify whether the same test applies for the accrual of 'days of service' i.e. must work be performed 'on a site' for that particular day to be counted towards an employee's accruals? Accordingly, it is unclear whether

[126] *LSL Act* (n 8) s 6(1).

all of an employee's days of service, whether on a site or not, will count towards their accruals, provided that they are eligible and covered by the Act.

Lessons may be learnt from the Victorian scheme, whereby LeavePlus administers the 'Two Thirds Rule'. Under this rule, if an employee works at least 66 per cent of their days undertaking covered work (for example, 43 days covered work), and no more than 33 per cent of their days performing non-covered work (for example, 22 days non-covered work), the total accrued days will be rounded to the total days worked (totalling 65 days accrued).

5.3.2.2 'Ordinary pay'

Ordinary pay is relevant for the purposes of calculating payment of long service leave with respect to section 21 of the Act and is defined in three separate provisions in the Act. Section 3(1) defines ordinary pay as follows:

> ***ordinary pay,*** *of a person, means the 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.*

For the purposes of the definition of 'ordinary pay', section 3(3a) clarifies, for particular relevance of casual workers and some FIFO / DIDO workers, that:

> *… if the person is not entitled to paid leave (other than long service leave), the ordinary pay of the person is the rate of pay to which the person is entitled for ordinary hours of work.*

Thirdly, section 21(3) defines 'ordinary pay' as follows for the purposes of calculating an employee's long service leave payment:

> ***ordinary pay*** *means the average ordinary pay of the person over the period in which the person completed his or her most recent 220 days of service in the construction industry.*

In its written submission, MyLeave clarified that it has taken the position that 'ordinary pay' for a permanent and fixed term employee is determined by their terms of employment, including but not limited to, awards, agreements, contracts, letters of employment and legislation.

Issues arising from the term 'ordinary pay'

Through consultation and analysis of the Act, the Review notes the following issues arising from the current definition of 'ordinary pay':

1. **Inclusions and exclusions**: The Act does not expressly clarify the particulars of an employee's remuneration that counts, or does not count towards their 'ordinary pay' for the purposes of the Act. This impacts both their accrual of entitlements and the rate at which they are paid long service leave.

   In *Cape Australia T/A Cape Marine and Offshore Pty Ltd v The Construction Industry Long Service Leave Payments Board* (2013) WAIRC 00972, the WAIRC held that an employee's 'ordinary pay' is their rate of pay whilst on annual leave. Further, Acting Senior Commissioner Scott stated:

   > *'payment for annual leave is calculated by reference to the employee's total earnings per annum which includes allowances as if at work.'*

   To improve the operation of the legislative framework, the Review considers it appropriate to clarify the specific inclusions and exclusions to the rate of 'ordinary pay'. Examples that require clarification include allowances, casual loading, overtime, and penalty rates.

2. **Ordinary hours**: For an employee who is not entitled to paid leave (including a casual employee), section 3(3a) of the Act stipulates that 'ordinary pay' is calculated based on the rate of pay with respect to 'ordinary hours of work'. However, the Act does not define the term 'ordinary hours'.

   It is unclear why a definition was not included, however, it may be indicative of the policy challenge of defining 'ordinary hours' for casuals and other cohorts of workers who by the nature of their engagement, may work irregular hours.

   Stakeholders generally agreed that the lack of an expressed definition for 'ordinary hours' creates ambiguity, particularly when considering the treatment of casual and other varieties of rostered workers included in the modern construction workforce.

In its written submission, MyLeave raised that problems arise in interpreting and applying the term 'ordinary hours' to calculate a casual employee's entitlements. In particular, where a casual employee and a permanent employee may work the same actual hours, although receive payment of long service leave based on different rates. This issue is considered in greater detail at section 5.3.5.

LSL Act: The Review noted that the definition of 'ordinary pay' in the Act departs from the position in the LSL Act which, in summary, provides more comprehensive guidance as to the meaning of 'ordinary pay':

(a) Generally, ordinary pay is based on an employee's remuneration for their normal weekly numbers of hours calculated on the ordinary time rate of pay applicable as at the time their long service leave is granted;[127]

(b) For employees who work a varied number of hours during a period, their normal weekly number of hours is calculated as the average weekly hours worked during the period, calculated based on ascertainable hours worked during the period;[128]

(c) Ordinary pay does not include shift premiums, overtime, penalty rates, allowances, or any similar payments;[129]

(d) For causal employees, ordinary pay includes casual loading.[130]

Differing definitions of 'ordinary pay' between the Act and the LSL Act can result in less favourable treatment for employees covered under the Act engaged in modern rostering arrangements.

5.3.2.3 'Week' and 'year'

The Act often refers to periods of time, for example, 'day', 'year', and 'week'. While the Act defines the term 'year' to constitute 220 days,[131] and a 'day' of service as any day on which an employee is entitled to ordinary pay,[132] it does not define the terms 'day' or 'week'.

The term 'week' is used throughout the Act, for example, with respect to determining the period of long service leave an employee is entitled to contained in section 21(1).

The following quotes from the Hansard on 26 September 1985 discuss whether the Act is to operate on a five-day or seven-day week.

> *'Mr TAYLOR: …It is calculated on the basis of 52 weeks of five days, which gives 260 days, less normal annual leave period of 20 days, which leaves 240 days, less allowances for sick leave and public holidays of a further 20 days, which leaves 220 day.*
>
> *Mr CASH: Would you please clarify that. You have said it is based on a five-day week – does that mean Saturdays and Sundays are out of it*
>
> *Mr TAYLOR: A person may work a seven-day week, but the maximum he can accumulate in terms of days of service each year is 220 days. So if he works seven days a week for the first 32 or 33 weeks of the year, every day he worked after that would not contribute towards the accumulation.'*[133]

Therefore, it appears that while the Act was designed on the maximum accrual possible for an employee working a traditional five-day week for a full year, the Act should permit accruals for any day of a seven-day week so that employees who work weekends or seven-day weeks are not disadvantaged, to reflect modern rostering arrangements.

The Review considers that clarity could be improved by defining the term 'week' to avoid any future doubt or confusion in the calculation of entitlements and general application of the Act. The Review noted that guidance is not available from the LSL Act nor does the *Fair Work Act 2009* (Cth) define the term, although it does cap the maximum weekly hours of work at 38 hours and permit reasonable additional hours above 38 hours per week.[134]

Three options may be taken in defining the term:

[127] *LSL Act* (n 8) s 7(1).
[128] Ibid s 7(2).
[129] Ibid s 7A.
[130] Ibid s 7B.
[131] *The Act* (n 33) s 21(2).
[132] Ibid s 3(1).
[133] *Parliamentary Debates, 26 September 1985* (n 1) 1698.
[134] *Fair Work Act 2009* (Cth) s 62.

- a week means five-days;
- a week means seven-days; or
- a week is the equivalent of 38 hours within a 7-day period.

Term of Reference Matter 3

Finding 4

To reduce ambiguity, the Review found that amendments are required to the following core terms relating to treatment of employees under the Act:

(a) 'days of service' does not reflect the modern types of absences permitted under the LSL Act;

(b) 'ordinary pay' does not align with the equivalent definition contained in the LSL Act;

(c) 'ordinary hours' is referred to with respect to casual employees, although is undefined in the Act; and

(d) 'week' is not defined by the Act either by a five-day or seven-day week.

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

Amend the Act to revise the term 'days of service' to reflect the types of leave permitted under the LSL Act.

Implementation consideration

Any amendment to the definition of 'days of service' should be progressed in tandem with Recommendation 5 in section 5.3.3, with respect to moving to an 'hours worked' accruals calculation mechanism.

The drafting should include examples of how a definition is applied to reduce ambiguity.

Recommendation 4B – align 'ordinary pay' with the LSL Act

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.

Implementation consideration

The definition of 'ordinary pay' should take into consideration the nuances of the construction industry, in particular, compressed roster arrangements and the treatment of overtime and penalty hours.

Recommendation 4C – define 'ordinary hours of work'

Insert a definition for 'ordinary hours of work'.

Implementation consideration

A definition of 'ordinary hours' should be considered carefully given that casual employees may not have 'ordinary' hours due to the irregular nature of some casual work. The Review notes that the *Fair Work Act 2009* (Cth) defines a regular casual employee as a casual employee who is 'employed by the employer on a regular and systematic basis'.[135] A similar concept could be used to formulate the definition of ordinary hours of a casual employee.

Recommendation 4D – define 'week'

Amend the Act to insert a definition for 'week'.

[135] Ibid s 12.

5.3.3 Does the current method of accruing entitlements using 'days of service' reflect contemporary workforce models?

When the Act first came into effect, the typical model for paid employment involved a permanent or fixed-term employee working from Monday to Friday, 9:00am to 5:00pm and the term 'day of service' was created in that era. Forty years on, construction industry work patterns have evolved, and current work practices do not fit neatly within the historical notion of a 'day of service'.

As identified with respect to coverage, the types of employment arrangements and workforce models relevant to the modern construction industry and the operation of the Act include:

- construction workers who may work on a full-time, part-time or casual basis;
- construction apprentices (and the group training organisations); and
- construction contractors;

While the current method of accruing entitlements using 'days of service' is generally effective for those workers engaged using traditional work patterns, it is less effective for contemporary workforce models and can result in inequities. This section will particularly focus on the treatment of employees engaged under modern rostering patterns.

5.3.3.1 Contemporary working arrangements

As discussed in section 5.3.2, the term 'days of service' is used to determine the accrual of entitlements for registered employees.

A key issue raised by employee representatives concerns the treatment of construction workers who undertake work on a modern rostering arrangement, in particular, employees working a FIFO/DIDO roster, often associated with resource projects undertaken in remote and regional areas.

In its written submissions, the CFMEU and the ETU indicated that employees who work on compressed rosters are often unfairly treated under the Act because they are unable to accrue a yearly maximum of 220 days of service despite working the equivalent number of days in a compressed schedule.

In its written submission, the ETU provided the below example to demonstrate the issue:

> **Extract from the ETU written submission[136]**
>
> A worker on this roster works 14 days and has 14 days off. This equates to a total of 13 swings per year and 182 actual days worked.
>
> Despite this, a worker on this roster only receives a maximum of 10 days portable long service leave accrual per swing or 130 days per year.
>
> On a 2/2 roster a worker needs to work for 11.85 years to attain the same 7-year 1540-day service accrual as other workers.
>
> On this roster it works out as an extra 4.85 years (252.7 weeks) of work or an additional 63.17 swings beyond 7 years
>
> For the 10-year accrual, 2200 days; a worker would need to work this roster for 16.92 years or an additional 360 weeks totalling 90.25 swings extra.
>
> If this same worker was able to accrue days of service on any day worked, the worker would be able achieve the same portable long service leave days of service as other workers in 8.46 years for 1540-day accrual and 12.09 years for 2200 days.

The Review note that it is not clear from the ETU's submission whether the above example assumes the worker is entitled ordinary pay for Monday to Friday only, and overtime / penalty rates for Saturday and Sunday.

During consultations, MyLeave clarified that it takes the position that an employee's hours are determined by the terms of their employment, therefore if an employee's employment terms express that their ordinary hours are from Monday to Friday, and that they are entitled to ordinary pay for those days, all of those days will be counted as valid service for the purpose of long service leave accruals. MyLeave has indicated a willingness to explore the individual

[136] Written Submission from Electrical Trades Union WA Branch to the Review, 27 July 2023, 3.

circumstances of the workers to whom the ETU's examples relate, to ensure the days of service are recorded correctly. MyLeave has indicated that the confusion often arises in circumstances where an employee is engaged under an enterprise agreement which stipulates a 38-hour week, and the relevant employer then uses that metric to calculate contribution days.

During consultations, the Review observed that stakeholders may not have a complete understanding of how 'days of service' is calculated under the Act with reference to 'ordinary pay'. This suggests that the Act requires greater clarity to assist employers and employees understand their obligations and rights under the Act. This could be achieved through the recommended legislative changes, supported by case study examples that demonstrate how terms are to be applied.

In summary, unfairness arises for employees engaged on contemporary work patterns given the Act does not prescribe a minimum number of hours required to qualify for a day of service. In effect, this permits an employee to be granted a day of service after only an hour of work, so long as they are entitled ordinary pay for that hour. When compared to an employee who works a compressed roster of up to 12-hours per day, this appears to create an inequitable outcome whereby time and effort of service is not rewarded.

5.3.3.2 Alternative methods of accrual

To address the anomaly described above, employee representatives have suggested using 'hours worked' to calculate 'days of service' accruals, on the basis that it would:

- better reflect the time and effort of a worker; and
- resolve legacy issues for the treatment of employees engaged on contemporary roster arrangements.

MyLeave also raised that an 'hours worked' method would better align with employer payroll systems (that typically operate on hours worked) thereby reducing the regulatory burden of compliance with the Act on employers.

No employer representatives raised or commented on the idea of an 'hours worked' method of accrual, although one stakeholder raised the suggestion that calculation of accruals may be better tied to ordinary hours or the average of ordinary hours across a certain period e.g. average 38 hours across a four-week period.

In its written submission, HIA raised only a preference for 'simplicity' in the calculation process. However, generally employer representatives did not appear to take a firm position on a preferred approach to calculating accruals. Generally, employers are likely to value an approach that is easy to implement and would minimise administrative burden, without increasing the financial costs on businesses.

Comparable schemes

The Review considered reciprocal interstate schemes across Australia and the metrics used to calculate accruals. As shown in Table 7, all comparable interstate schemes use a 'day' of service as the metric by which entitlements are calculated.

Therefore, to maintain harmony across the state and territory schemes, the Review suggests the metric of a 'day of service' should remain in the Act, however, be calculated based on an alternative model that recognises 'hours worked'. The solution provides a better reflection of actual work hours and does not disturb reciprocal arrangements.

Table 7: Comparable scheme accrual mechanisms

Jurisdiction	Scheme	Summary of accrual mechanism	Leave entitlement after 10 years of service
ACT	ACT Leave	'Recognised days of service' where 1 'day of service' is each day a worker carries out building and construction work. A yearly maximum accrual of 220 days of recognised service applies.	13 weeks
QLD	QLeave	'Days of service' based on the performance of full-time building and construction work within the financial year. A yearly maximum accrual of 220 days of recognised service applies.	8.67 weeks
NSW	Long Service Leave Corporation	220 'days of service' credited to a registered worker employed on a full-time basis under a contract of employment in the performance of building and construction work for the whole financial year. A yearly maximum accrual of 220 days of service applies.	8.67 weeks

NT	NT Build	Accrual of 6.5 days of 'long service leave credit' for every 220 days of service. Each of the following is a 'day of service': • A workday throughout which the worker carries out construction work in the Territory; • A public holiday or day of paid absence for the worker (other than long service leave) whilst employed or engaged to carry out construction work; and • A day of service worked out in accordance with the Determinations. A yearly maximum accrual of 220 days of service applies.	13 weeks
SA	Portable Long Service Leave	Credit of 1 'day of effective service' for each day the worker works as a construction worker, and for each day of a period of allowable absence. However, a worker cannot be credited more than 5 days of effective service in any week. A yearly maximum accrual of 260 days of effective service applies.	13 weeks
TAS	TasBuild	Credit of 1 day worked for each day the worker works as a construction worker, and for each day of a period of allowable absence. However, a worker cannot be credited more than 5 days of effective service in any week. A yearly maximum accrual of 260 days of effective service applies.	8.67 weeks
VIC	LeavePlus (formerly CoInvest)	A day on which a worker has performed construction work will constitute a day of service, where the day of work occurs: • for Workers whose days of work are fixed by the'Worker's Terms of Employment, on one of the days of work so fixed; or • for Workers whose days of work are not fixed by the'Worker's Terms of Employment, on any day of the week. A yearly maximum accrual of 220 days of service applies.	13 weeks

Note: This table does not detail the intricacies of each scheme, rather it focuses on the high-level of the metric (e.g. days of service) used to calculate accruals or credits to a worker's entitlement under each scheme.

Accrual mechanism – options modelling

The Review has assessed various methods of accrual and suggest three options (with sub-variations) that may be considered. These options are explored below.

Option 1 – Current approach (status quo)

The current approach whereby MyLeave places reliance on employers to calculate the 'days of service' for each employee based on entitlement to receive ordinary pay. Days of service expressly includes long service leave, paid sick leave and annual leave in excess of 4 weeks. Although does not include annual leave up to 4 weeks or other types of leave not expressly mentioned.

Advantages	***Disadvantages***
• Well known by employers and employees and has been followed for the past forty years. • Consistent with approaches used by reciprocal interstate schemes. • Reduced administrative burden for MyLeave as employers are responsible for calculating days of service.	• Issues arise in calculating the entitlements employees engaged on contemporary work patterns. • No minimum number of hours required to accrue a 'day of service', therefore, an employee working part time will be entitled to a day of service for a particular half day worked, while a full-time employee will also be entitled to the same accrual of a day, despite working a shift twice as long. • Does not reward time worked.

Option 2 – Hours based approach

The Review has considered a model which calculates accruals based on actual 'hours worked' and translates into 'days of service' to maintain consistency across reciprocal interstate schemes for the purposes of reciprocal arrangements. Three sub-options have been considered in determining how to best translate 'hours worked' to 'days of service'.

Option 2A – Averaged ordinary hours variation

This approach is detailed by MyLeave in its submission and is premised on translating hours worked during the quarter to an equivalent days of service based on an employee's ordinary hours for the week. This approach is based on the LSL Act definition of 'ordinary pay' which permits the use of averaging. Adopting this approach, an employer will only be required to provide the ordinary hours worked during the quarter, and the employee's ordinary hours per their employment terms, and MyLeave will use these inputs to automatically calculate days of service accruals.

The types of absences that will be included in the model will depend on the formulation of 'days of service'. The Review suggests for all modern types of leave to be included under this accrual model including parental leave, family and domestic violence leave, and all days spent on annual leave, as well as days when an employee is absent from work and in receipt of workers compensation. However, overtime is not included.

Advantages	*Disadvantages*
• Addresses anomalies that arise for the treatment of rostered workers by allowing the accrual of entitlements based on all ordinary hours worked. • Accruals based on hours worked rewards the time and effort spent working by employees, reducing unfairness where an employee may work more or less than another and be credited the same day of service. • Reduces the administrative burden on employers as payroll systems are typically based on hours worked inputs. This data can be exported and provided to MyLeave for automatic calculation.	• MyLeave may experience preliminary challenges in the roll out as employers become familiar with the changes to their reporting responsibilities. • Part time employees and casuals who work reduced hours across the week will take longer to accrue the same entitlements. • Employers who engage rostered workers (e.g. FIFO/DIDO rosters) may need to make comparatively more contributions on behalf of those employees (although, note this situation would be consistent with treatment under the LSL Act).

Option 2B: 'Standard' working week variation

This approach is similar to Option 2A, however, translates ordinary hours worked during the quarter to days of service as an average based on a standard 38-hour ordinary week, as opposed to what is stipulated in the relevant employment terms. This approach reflects the 38-hour ordinary hour week as expressed in the NES and the Building and Construction General On-site Award [MA000020].

Similar to Option 2A, it is preferred that all modern forms of leave and absences permitted under the LSL Act are included. However, overtime is not included in the calculation of this variation.

Advantages	*Disadvantages*
• Addresses anomalies that arise for the treatment of roster workers by allowing them to accrue entitlements based on all ordinary hours worked. • Accruals based on hours worked rewards the time and effort spent working by employees, reducing unfairness where an employee may work more or less than another and be credited the same day of service. • Standardises the accrual for all employees in the construction industry as an average based on the same metric.	• MyLeave may experience preliminary challenges in the roll out, whilst employers become familiar with the changes to their reporting responsibilities. • Part time employees and casuals who work reduced hours across the week will take longer to accrue the same entitlements. • May be more or less favourable for certain employees depending on the ordinary hours provided in their employment terms.

Option 2C: Overtime inclusion

This option exists to include overtime in the calculation of 'hours worked' as has received support from CFMEU in its written submission.

The Review notes that given overtime is not included in the LSL Act, inclusion of overtime in the calculation of days of service under the Act may result in employees being 'better off' than employees not working in the construction industry. This option would create inconsistency with the LSL Act.

It is also noted that while employees who often work overtime hours are not rewarded for that extra time in their long service leave accruals, they are otherwise rewarded with the penalty rates that are typically tied to overtime work e.g. double time pay. Accordingly, this is a natural levelling out of the entitlements made out to an employee in a broader context.

Advantages	*Disadvantages*
• Employees who work overtime will accrue long service leave at a faster rate compared to those who do not typically work overtime.	• Employers will be required to pay a greater sum towards their contributions. • Result in greater costs and pressures on employers, particularly small business, making contributions on behalf of employees. • May require an increase to the levy rate to cover a possible increase to the payment of long service leave to employees.

Option 3: Hybrid Approach (two formulas to address different work patterns)

This option seeks to address unfairness between different employment models by offering two formulas: the selected formula for those working a standard week and an additional formula for application for workers on compressed rosters. As a matter of principle, while the hybrid approach will result in different outcomes for different work patterns, it seeks to reduce the current disparity and not significantly advantage, or disadvantage either group of workers.

The alternative formula would:

- adopt an 'hours worked' approach;
- not count non-working days (days between swings) towards accruals;
- only count hours that attract ordinary pay and exclude hours worked on overtime;
- limit accruals to a cap of 220 days of service for each year.

Advantages	*Disadvantages*
• Addresses anomalies that arise for the treatment of roster workers by providing those employees with a tailored formula for accruals.	• While seeking to reduce disparity, it will require different treatment between employee cohorts covered by the Act. • May cause confusion for employers in calculating the entitlements of employees under two different formulas. • Added level of complexity for MyLeave to monitor the information submitted in employer returns and detect non-compliance.

Conclusions on options modelling

The Review carefully considered the various options and possible variations. In returning to the guiding principles expressed in section 5.1, it appears that option 2A offers the best balance of the various interests, and results in greater fairness between cohorts and workforce models.

The Review considers Option 2A described at section 5.3.3.2 to be preferable because it would:

- more accurately tie the accrual of long service leave to the time and effort expended by an employee at work;
- reduce the inequity for those workers engaged in modern rostering arrangements; and

reduce the administrative burden on employers.

Term of Reference Matter 4

Finding 5

The current method of accrual does not reflect modern workforce models and precludes employees engaged on contemporary work patterns, such as FIFO / DIDO rosters, from accruing entitlements at the same pace of an employee working a traditional work pattern (i.e. Monday – Friday).

Recommendation 5 – adopt an 'hours worked' approach to accruals

Amend the Act to adopt an 'hours worked' approach to calculate 'days of service'. The Review considers option 2A may best meet the needs of the contemporary construction workforce.

Implementation consideration

It would be prudent to present the preferred 'hours worked' approach to stakeholders, including employers, to provide an opportunity to comment and to identify and address any unintended ramifications prior to implementation.

5.3.4 Does the Act provide sufficient flexibility for workers to access their entitlements?

To understand where the Act requires greater flexibility, it is necessary to highlight the nature and needs of the modern construction industry. Safe Work Australia (SWA) reported that in 2020-21, the construction industry at a national level recorded the third highest proportion of fatalities (14 per cent of worker fatalities across selected industries),[137] and a total of 142 fatalities in a five-year period between 2017 to 2021.[138] While these statistics represent the extreme of the industry's risk profile, SWA also reported that in 2020-21 the construction industry had the second highest proportion of serious workers compensation claims (12.3 per cent with a total of 16,088 serious claims during the year.[139]

Suicide and suicidal ideation continue to be a significant concern in the construction industry with around 190 employees in the construction industry taking their own lives each year nationwide.[140] Research suggests that construction workers are six times more likely to die from suicide than by accident at work, young construction workers are two times more likely to take their own lives that other young Australian men.[141]

In this context, work in the construction industry should be acknowledged as high-risk and recognise that the industry places physical demands on workers not encountered in other industries and styles of work. As such, construction workers are more likely to have more frequent absences from work, due to workplace injury or the need to rest and recover from the physical demands of the work.

[137] Safe Work Australia, *Work-related Traumatic Injury Fatalities, Australia* (Report, 2021) 11 <https://www.safeworkaustralia.gov.au/sites/default/files/2022-11/work-related_traumatic_injury_fatalities_australia_2021.pdf>.
[138] Ibid 19.
[139] Safe Work Australia, *Australian Workers' Compensation Statistics 2020-21* (Report, 2021) 13. <https://www.safeworkaustralia.gov.au/sites/default/files/2022-12/australian_workers_compensation_statistics_2020-21.pdf> 13.
[140] 'Why MATES Exists: The Problem', *MATES in Construction* (Web Page, 2023) <https://mates.org.au/construction/the-problem>.
[141] Ibid.

5.3.4.1 Leave and absences

This section examines the likely scenarios where flexibility is required, including the provision for absence, having regard to the high-risk nature of the construction industry.

To assess whether the Act results in treatment that is 'no better or no worse' than treatment under the primary LSL Act, it is relevant to highlight the types of absences permitted under the LSL Act.

Provision for absences under the LSL Act

Per section 6 of the primary LSL Act, 'continuous employment' includes the following forms of absence:

(a) annual leave;

(b) leave for illness or injury, or carer's leave;

(c) long service leave;

(d) parental leave;

(e) compassionate leave;

(f) bereavement leave;

(g) family and domestic violence leave;

(h) public holidays;

(i) any other form of leave provided as part of the employee's employment.

By contrast, the Act provides for fewer forms of absences that will count towards long service leave:

- on long service leave under this Act;
- on annual leave in excess of 4 weeks in any period of 12 months;
- on paid sick leave.

Stakeholders generally expressed shared views calling for clarification of whether additional forms of leave recognised under the LSL Act may be included for the purposes of accruals under the Act. For example, in its written submission, the CFMEU commented that the current definition is 'inflexible' and suggested the Act be amended to include other types of leave or absences, specifically:

- worker's compensation;
- paternity leave;
- job keeper (or relevant scheme);
- rostered days off; and
- stand down.

Similarly, the ETU suggested that the types of leave under the NES be recognised under the Act as valid 'days of service'. This position is also observed in HIA's submission, which raised that it may be appropriate for 'days of service' be amended to include contemporary leave arrangements, such as leave without pay and parental leave.

Table 8: Flexibility scenarios

Scenarios where further flexibility may be required
1 Annual leave Currently under the Act, the first 4 weeks of annual leave taken by a registered employee will not count towards their 'days of service' accruals by virtue of the calculation formula. This is different to the approach used in LSL Act, which allows accrual of entitlements for all days on annual leave.[142]

[142] *LSL Act* (n 8) s 6(1)(a)(i).

To promote parity with LSL Act, the Review considers the Act should be brought into alignment with the LSL Act, to allow the accrual of days of service whilst an employee is absent from work on annual leave. This is supported by MyLeave in its written submission, whereby it suggests for the 4-week rule to be removed and for all annual leave to count towards an employee's accruals.

2 Public holidays

The Act is currently silent on whether a public holiday shall count towards a 'day of service' of an employee. In contrast, the primary LSL Act expressly states the following will count towards the calculation of 'continuous employment' under the Act:

> *'public holidays or half-holidays, or, where applicable to the employment, bank holidays.'*[143]

The Act should be brought into alignment with the primary LSL Act with respect treatment of public holidays to promote consistency and greater clarity for employers and employees.

3 Workers compensation

Workers compensation is an important consideration, particularly having regard to the high-risk nature of construction work and has bearing on the operation of both sections 21 and 34 of the Act.

The Act currently does not expressly address the treatment of employees absent from work and in receipt of workers compensation, however, MyLeave offers guidance on its website that states that workers will continue to accrue their entitlements whilst on workers compensation as 'days of service'.[144]

In its written submission, MyLeave highlighted that section 80(1) of the *Workers Compensation and Injury Management Act 1981* (WA) provides that an employee's accrual of, or right to take, long service leave is not affected by the receipt of workers compensation. It would reduce uncertainty if the Act reflected the position expressed in the state workers compensation legislation.

4 Parental leave and family and domestic violence leave

Employee representatives that participated in the Review indicated a desire for the definition of 'days of service' to be expanded to include other types of leave recognised by the NES. Types of leave suggested for inclusion were family and domestic violence leave and parental leave.

It is understood that parents are increasingly electing to access their parental leave entitlements to care for their children. The protection of victims of family and domestic violence is also a primary focus for Australian governments, with the introduction of 10 days paid family and domestic violence leave for full-time, part-time and casual employees per year under the NES.[145]

It is also acknowledged that the LSL Act expressly includes both parental leave and family and domestic violence leave as permissible types of leave which will count towards an employee's 'continuous service.'[146]

To this end, the Review recognises the need to update the Act to reflect modern leave arrangements and recommends the Act should be amended to include parental leave and family and domestic violence leave in the definition of 'days of service' to ensure consistency with the LSL Act.

5 Rostered days off

The Fair Work Ombudsman (FWO) defines a rostered day off as follows:

> *'A rostered day off (RDO) is a day in a roster period that an employee doesn't have to work … An employee's day off can be paid or unpaid, depending on how RDOs an award or registered agreement.'*[147]

[143] Ibid s 6(1)(a)(iii).
[144] 'Definitions', *Government of Western Australia* (Web Page, 19 April 2023) <https://www.wa.gov.au/organisation/myleave-construction-long-service-board-wa/definitions>.
[145] 'Family and domestic violence leave', *Australian Government Fair Work Ombudsman* (Web Page, 2023) <https://www.fairwork.gov.au/leave/family-and-domestic-violence-leave>.
[146] *LSL Act* (n 8) s 6.
[147] 'Rostered days off', *Australian Government Fair Work Ombudsman* (Web Page, 2023) <https://www.fairwork.gov.au/employment-conditions/hours-of-work-breaks-and-rosters/rostered-days-off>.

While the particulars of RDO arrangements will depend on an individual, the Building and Construction General On-site Award [MA0000020] provides that full-time employees are entitled to accrue 1 paid RDO during a roster period of 4 weeks. FWO provide the following example of an RDO arrangement:

> *'Levi is a full-time carpenter. He works 40 hours per week with a monthly RDO arrangement.*
>
> *This means that he works 8 hours per day but is only paid for 7.6 hours per day, as the remaining 0.4 hours accrue towards an RDO.*
>
> *After working 19 days, Levi has accrued a 7.6 hour paid day off.'* [148]

Given a worker who takes a paid RDO is entitled to, and in receipt of, 'ordinary pay' for that day, it could be interpreted that this will qualify as a 'day of service' per section 3(1) of the Act. It also appears from guidance published on MyLeave's website that RDOs qualify as a 'reportable service day'.[149] However, the Act's failure to expressly address RDOs within the definition of 'days of service', creates ambiguity and confusion for employers and employees when interpreting their rights and obligations under the Act.

The Review suggest that the Act be amended to expressly include RDOs in the definition of 'days of service', codifying what is merely MyLeave's current practice to avoid any further ambiguity or confusion.

6 Stand down periods

An employer may decide to stand down an employee or a cohort of employees working on a construction project for a variety of reasons. Under the Act, a registered employee is not be entitled to accrue a day of service if they are stood down.

In response to the COVID-19 pandemic, the WA government's introduced the Construction Industry Portable Paid Long Service Leave Amendment (COVID-19 Response) Bill 2020 (2020 Bill) which proposed to amend the definition of 'days of service' to permit employees to continue accrual of their entitlements during stand down periods. The Legislative Assembly passed the Bill on 10 November 2020, however, it was never introduced to the Legislative Council.

In its written submission, MyLeave have noted that the Australian Labor Party has undertaken to rectify the anomaly whereby construction workers are not able to accumulate service if they are stood down, and that this matter is currently under consideration with the Minister.

In expanding the types of absence and leave permitted under the Act, it may be useful to consider the approach adopted in SA. The *Construction Industry Long Service Leave Act 1987* (SA) specifies that a person will be credited with a 'day of effective service' for 'each day that he or she works as a construction worker' and 'for each day of a period of allowance absence'. The types of 'allowable absence' are contained in section 4 of the *Construction Industry Long Service Leave Regulations 2018* (SA). The Minister may consider whether it is preferable to expand the definition of 'days of service' within the Act itself or refer to subordinate legislation, which is more amenable to future change. The outcome should be to record a 'day of service' or each day a person is employed, including allowable absences once a worker is determined to be 'substantially engaged' in the 'construction industry'.

5.3.4.2 Hardship

Section 21 provides that a registered employee becomes entitled to their full long service leave entitlements (8 2/3 weeks) once they reach 10 years of service. In 1989, an amendment to the Act inserted section 24A, which permitted an employee to access a pro-rata sum of their entitlements after 7 years of service was completed, stating:

> ***Section 24A Proportional leave in advance after 7 years of service***
>
> *(1) An employee with at least 7 years of service in the construction industry may, with the consent of his employer, take advance long service leave for not longer than the period which bears the same proportion to the length of his service then completed as the period of 8 2/3 weeks bears to 10 years, and where leave is so taken, the employee is not entitled to further long service leave or a payment under section 22(1) for the period of service in respect of which advance long service leave has been taken.*

[148] Ibid.
[149] 'Definitions', *Government of Western Australia* (Web Page, 19 April 2023) <https://www.wa.gov.au/organisation/myleave-construction-long-service-board-wa/definitions>.

Employee representatives called for improved flexibility under the Act to permit employees facing hardship early access (i.e. prior to completing 7 years of service) to their entitlements. For example, in its submission, the CFMEU suggested the adoption of greater flexibility where certain conditions were satisfied:

Extract from the CFMEU written submission[150]

In circumstances where workers do not qualify for long service leave entitlements (either for 10 years 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 cater 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.

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

The Review also received a written submission from the family of a former construction worker who was previously a registered employee under the Act. The following story shared by the family provides an insight into the existing inflexibility of the Act and the impact it can have on families and workers suffering terminal illnesses.

Case study: Terminal illness

Whilst registered under the Act, the employee was diagnosed with a life-threatening illness which required him to stop work in the construction industry to receive medical treatment. The employee sought support from MyLeave, then his union to liaise with MyLeave on his behalf, to seek early access to his long service leave entitlements citing reasons of financial hardship.

On the information provided, it appears the employee fell short of the requisite 7 years of completed service by a number of weeks and as a result, despite the compassionate circumstances, was unable to access any of the entitlements accrued under the Act.

In its submission to the Review, the family indicated that access to the long service leave payment would have assisted with the financial hardship the family was experiencing at the time. Neither the spouse nor the employee were able to work, due to the spouse acting as a full-time carer for the employee. At the time, the employee had significant medical expenses to pay, in addition to providing for the children.

In this scenario, MyLeave was unable to lawfully disburse the entitlements requested by the family and the Review is informed that the employee's union came to the assistance of the family and made a payment to the family, equivalent to the value of the entitlement held by MyLeave.

[150] Written Submission from Construction Forestry Maritime Mining Energy Union WA Branch to the Review, 14 July 2023, 8-9.

The family expressed a desire for legislative reform to accommodate greater flexibility for MyLeave to consider the facts of individual cases and to exercise powers in response to compassionate circumstances.

The Review considers that while this family received some financial relief from the employee's union, it is undesirable for a grieving family to need to rely on a third party to provide assistance in difficult times, especially in circumstances where reciprocal schemes offer the flexibility to access entitlements.

The Review considers it appropriate to consider three categories of hardship, separately:

(a) Incapacity;

(b) Death; and

(c) All other hardships.

With respect to incapacity and the unfortunate event of death, there is a trend in modern schemes (i.e. those who underwent legislative reform in the mid-2000s), towards more employee-family friendly policy settings that can support pro rata payments.

Examples

- **Incapacity –** If an employee becomes incapacitated, they may apply for early access to their entitlements so long as certain conditions are met. In the ACT, NSW, and Tasmania a minimum of 55 days of service must be accrued, and necessary documentation produced to as evidential proof.
- **Death –** If an employee passes away, the family or estate may apply for access to their long service leave entitlements so long as certain conditions are met. In the ACT, NSW, Victoria, and Tasmania a minimum of 55 days of service must have been accrued by the employee, and in the NT a minimum of 34 days of service must have been accrued. Documentation may be required as proof of death.

While the LSL Act does not permit any early access to entitlements prior to reaching 7 years of service, the Review considers it more appropriate that the Act is aligned with contemporary approaches to hardship as observed in reciprocal interstate schemes such as the ACT, NSW, Victoria, Tasmania and the NT. Accordingly, the Act should be amended to permit early access to entitlements with respect to incapacity or death of a registered employee.

As highlighted above, employer representatives, particularly the CFMEU and ETU, expressed a strong preference for reforms to go even further for employees facing hardship.

The Review acknowledges that Unions WA suggested that hardship claims could be addressed through a ministerial power whereby an employee or their family may make an application for early access. The Review agrees that this is one option, subject to legal advice. However, the larger question remains as to whether it is appropriate for a statutory authority, charged with collecting and protecting levy payments, to provide payments on the basis of need. If there is agreement that a broader object is appropriate, it could be legislated, however, it would result in a deviation from the current settings contained within the LSL Act, and other reciprocal schemes. MyLeave would also need to be empowered to make such payments. Whether MyLeave should perform a role in supporting employees through other forms of social and financial challenges is an ideological question that can be considered when clarifying the Object of the Act.

5.3.4.3 Breaks in service

Currently, the Act permits an employee to take a break in service within the parameters prescribed by section 21(3) of the Act:

(3) In this section –

***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 1 100 days of service – a 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 1 100 days of service – a period within which the person is not so engaged of 4 years or more commencing from the last day of that engagement.

In practical terms, registered employees are permitted either of the following maximum breaks in service:

Employee days of service worked	Maximum break in service
Up to 1,100 days (< 5 years)	2 years
Over 1,100 days (> 5 years)	4 years

It is most relevant to consider the break in service requirements across reciprocal interstate schemes. The Review noted that construction industry schemes in NSW, the ACT, VIC, QLD, Tasmania, and Northern Territory generally permit a standardised 4-year break in service (with some variations between schemes). Currently, only SA and WA use a tiered break in service system.

In its submission, MyLeave suggested a standard 4-year rule 'would support diverse cohorts of employees to return to work in the sector after a period of absence i.e., after working in another industry, parenting or other reasons and offered the following example:

> **Example: Primary carers returning to work**
>
> An example of an employee cohort that would benefit from extending the break in service period to a standard four years is young primary carers, particularly women who still have the bulk of primary caring responsibility. The construction sector has the highest rate of under-employment of women compared to any other industry and Western Australia has the highest gender pay gap of all Australian states or territories.[151] A standardised four-year absence from work for employees also aligns to Western Australian Government and Australian Government policies of supporting parents returning to work i.e. increased childcare subsidy, four-year-old subsidised kindergarten.[152]

An alternative position was offered in the ETU and CFMEU written submissions, both of which suggested the Act keep the tiered system, but to implement a relative increase to both break periods. The ETU suggested for the permitted breaks in service be increased to 3 and 5 years respectively. Similarly, the CFMEU proposed an increase to the break of service period to 4 and 6 years respectively.

On balance, the Review considers it appropriate to vary the maximum break in service periods to a standardised 4-years to align with comparable schemes.

Term of Reference Matter 6

Finding 6

The Review finds that the Act does not provide sufficient flexibility for employees to access entitlements or manage absences, particularly:

(c) the Act provides no opportunity to access entitlements prior to reaching seven years of service, even when hardship exists; and

(d) the current tiered approach to breaks in service does not align with reciprocal schemes, and may also discourage certain cohorts of workers from returning to the construction industry.

Recommendation 6A – early access in response to hardship

Amend the Act to permit early access in circumstances of hardship, specifically incapacity and death of a registered employee, subject to certain conditions (e.g. at least 55 days of service accrued, consistent with reciprocal schemes).

Recommendation 6B – standardise breaks in service

Amend the Act to standardise a break in service to be four years irrespective of the number of days of service accrued consistent with reciprocal schemes.

[151] 'Welcome | WGEA', *Workplace Gender Equality Agency* (Web Page, 2023) <https://www.wgea.gov.au/>.
[152] 'Agreement with Commonwealth secures $190 million preschool funding for WA families', *Ministers' Media Centre* (Web Page, 18 February 2022) <https://ministers.dese.gov.au/robert/agreement-commonwealth-secures-190-million-preschool-funding-wa-families>.

5.3.5 Are there deficiencies or anomalies in the operation of the Act in terms of equitable and fair payment of contributions by employers and the payment of long service leave entitlements to workers?

5.3.5.1 Differential treatment

The other key aspect of treatment pertains to the calculation of monies to be paid to a worker who elects to access their accrued long service leave entitlements. Section 21(1) states that an employee:

> … is entitled to be paid ordinary pay for such leave in accordance with this Act.

Noting that the definition for 'ordinary pay' is provided for at section 3(1) and section 3(3a), a further clarification for the meaning of 'ordinary pay' is provided for at section 21(3) which states for the purposes of section 21:

> ***Ordinary pay*** *means the average ordinary pay of the person over the period in which the person completed his or her most recent days of service in the construction industry.*

Therefore, a registered employee will have their long service leave entitlements paid out at the rate averaged across their most recent 220 days of service.

Issues arise between the treatment of casual employees in comparison to an ongoing permanent employee. While a casual employee's long service leave entitlements is to be calculated based on their 'ordinary hours' per section 3(3a), the term 'ordinary hours' is not defined anywhere in the Act. This causes confusion and difficulty in determining the ordinary hours of casual employees.

The interplay between the definitions of 'ordinary pay' and the term 'ordinary hours' appears to result in differential treatment between permanent and casual employees when calculating the payment of long service leave entitlements. In its written submission, MyLeave put forward the following examples that demonstrate this disparity:

Employee type	Situation	# Hours worked	Pay rate	Payment
Permanent employee	Based on the pay that they receive on leave (generally base rate of pay with no overtime or allowances)	12-hour day, 7.6 hours are ordinary 4.4 hours of overtime	Salary at approximately $40 per hour	38 x $40 (per hour) x 3 weeks **= $4,560**
Casual employee	Based on ordinary pay for ordinary hours of work	12-hour day on a causal regular and systematic basis	Salary of $40 per hour plus casual loading = $50 per hour	60 x $50 (per hour) x 3 weeks **= $9,000**

The example above demonstrates that the operation of the Act currently results in a more favourable outcome for casual workers in monetary terms, despite working the same job and hours as a colleague working on a permanent basis. Noting calculation of entitlements is based on the average of the most recent 220 days (or 1 year) of service prior to cashing out, the principal of disparate treatment remains.

Ordinary pay under the primary LSL Act

The LSL Act similarly uses 'ordinary pay' as the basis to calculate the amount payable to an employee who elects to take their long service leave entitlements. The LSL Act defines 'ordinary pay' in sections 7, 7A, 7B, and 7C as:

(a) 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 was granted to the employee.

(b) 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.

(c) Ordinary pay of an employee employed on piecework; commission, bonus work, percentage reward, or any other system of payment, wholly or partly by results, is the employee's average weekly rate of pay earned over a period totalling 365 days.

(d) An employee's ordinary pay does not include shift premiums, overtime, penalty rates, allowances or any similar payments;

(e) A casual employee's ordinary pay includes any casual loading payable.

(f) An employee's ordinary pay includes the cash value of board and lodging during a period of long service leave if the board and lodging – is provided to the employee by the employer; but is not provided to, or taken by, the employee during the period of long service leave.

As observed above, the LSL Act's definition of 'ordinary pay' is comprehensive, leaving little room for ambiguity. In order to provide greater clarity and minimise the level of advantage or disadvantage for particular cohorts, there may be benefit in achieving greater alignment between the definition of 'ordinary pay' under the Act with the primary LSL Act.

5.3.5.2 Workers compensation

Two cases have been litigated since the Act's commencement concerning the interaction between long service leave accruals and workers compensation: *Kirfield Engineering Pty Ltd v Construction Industry Portable Paid Long Service Leave Payments Board*[153] and *RCR Resources v Construction Industry Portable Paid Long Service Leave Payments Board.*[154]

In both instances, the WAIRC held that periods of workers compensation will not absolve an employer from their responsibility to make contributions under section 34 of the Act with respect to their employees. In considering the proper construction of section 34(1) and the definition of 'ordinary pay' contained in section 3(1), Commissioner Kenner commented at [22]-[23]:

> *'The reference to 'ordinary pay' under section 34(1), refers to that which is 'payable', and not that which is 'actually paid', on the ordinary and natural meaning of the words used in the subsection.*
>
> *In s 3, set out above, 'ordinary pay' makes reference to a rate of payment 'to which a person is entitled' for leave. Whilst the definition is not elegantly drafted, again, there is no reference to any actual payment of wages, salary or other benefits.'*

While these cases concern liability to make contributions on behalf of registered employees, it highlights the ambiguity that arises under the Act with respect to workers whilst absent from work and in receipt of workers compensation. Per discussion in section 5.3.4.1, it would reduce ambiguity if the Act were to expressly align with the *Workers Compensation and Injury Act 1981* (WA).

5.3.5.3 Claiming long service leave across multiple periods

Currently, section 24(3) states:

> *(3) An employee shall take long service leave in one continuous period unless the employer consents to the leave being taken in more than one period but in any event –*
>
> *(a) the leave shall not be taken in more than 3 periods;*
>
> *(b) a period of leave shall be not less than one week.*

In effect, this unfairly limits an employee's autonomy in exercising their entitlements under the Act, while no such limit is observed under the LSL Act.

5.3.5.4 Cashing out

Cashing out an entitlement provides an employee with greater flexibility over the application of their entitlements. The primary LSL Act permits an employee to cash out their entitlements upon agreement between the employer and employee:[155]

[153] (1993) 63 WAIRG 2670.
[154] (2015) WAIRC 984.
[155] *LSL Act* (n 8) s 5.

Cashing out of accrued long service leave

(1) An employer and an employee may agree that the employee may forgo the employee's entitlement, or part of the employee's entitlement, to long service leave under section 8(2)(a) or (b) if –

(a) the employee is given an adequate benefit instead of the entitlement; and

(b) the agreement is in writing, signed by the employer and the employee.

The Act does not provide an equivalent opportunity to cash out, other than if an employee is terminated where they may receive a lump sum payment.[156] This creates unfairness and inflexibility; whereby registered employees are not provided equal opportunity under the Act with respect to cashing out early.

5.3.5.5 Serious misconduct

Section 22(1) provides that an employee who is terminated due to 'serious misconduct' will be precluded from receiving a lump sum termination payment of their long service leave entitlements. A similar position is adopted in the LSL Act. While the preclusion applies to termination payments, the operation of the Act permits the employee's service to continue should the employee remain in the construction industry – thereby creating an anomaly.

In its submissions, MyLeave provided examples of challenges associated with administering this provision, noting 'serious misconduct' is not defined in the Act.

Notwithstanding the alignment between the Act and the LSL Act, the Review considers the preclusion of entitlements due to serious misconduct are dated and less common in contemporary long service leave legislation.

On balance, the Review recommends the preclusion be removed from the Act and that the Act be aligned with the operation of reciprocal schemes and to remove the scheme administrator from a determination that occurs within the employee-employer relationship.

5.3.5.6 Interstate scheme split payments

In its written submission, the statutory authority for the SA scheme, Portable Long Service Leave, noted that the Act does not permit 'split payments' for employees with accruals with more than one interstate schemes. Portable Long Service Leave provided the following case example to demonstrate its concern.

> **Example: Split payments – a scenario provided by the SA portable scheme administrator**
>
> A worker has accrued 2 weeks of leave in SA and is currently working in SA, and the worker also has 8 weeks of leave accrued in WA and they make a claim for 4 weeks of long service leave.
>
> In this instance, the worker is required to claim their full 8 weeks of entitlements even though the worker may want to claim 2 weeks at a particular point in time.

The Review has considered the example and notes the Act does not expressly provide for the *payment* on a portion of an employee's entitlement in circumstances the employee has relocated interstate. MyLeave advised that as a matter of practice it permits an employee who relocates interstate to access entitlements accrued during their service in WA through a lump sum termination claim under section 22 of the Act.[157]

There are policy reasons for and against the use of split payments. The Review considers that adopting consistency with reciprocal schemes should be a key consideration as part of the policy deliberations.

5.3.5.7 Long-term employees

In its written submission, MyLeave highlighted an anomaly in the operation of the legislation as it applies to employees with long term service to a single employer. A registered employee who accrues at least seven years of service with a single employer is eligible to access accrued long service leave entitlements under both the Act and the LSL Act.

If an employee accesses long service leave under the LSL Act, the payment will attract the payment of superannuation, and the employer may then seek reimbursement from MyLeave for long service leave MyLeave would have paid to the employee.[158] If the employee accesses accrued long service leave under the Act, the payment

[156] *The Act* (n 33) s 22(1).
[157] Email from MyLeave to the Review, 27 October 2023.
[158] *The Act* (n 33) s 51(1).

will not attract superannuation.[159] This is because there is no employment relationship between MyLeave and the employee, which is a requirement under the superannuation legislative framework. MyLeave considers that in those circumstances it is disadvantageous for an employee with long term service with a single employer to access entitlements under the Act (noting the payment will not attract superannuation).

In quantifying the number of employees impacted, MyLeave has shared that as at September 2023, there were:

- 2,008 employees currently registered with entitlements over 7 years accrued with the one employer;
- 378 employees currently registered with over 6 years, but less than 7 years accrued with the one employer; and
- 651 employees currently registered with over 5 years, but less than 6 years accrued with the one employer.

Accordingly, employees with long term service to a single employer constitute approximately 10 per cent of all employees with an existing entitlement, with this percentage likely to grow in future years. MyLeave has indicated it is currently addressing its concerns by assessing cases individually and liaising with impacted employees, however notes this process is time consuming. The Review considers the current operation of the Act also means MyLeave may be perceived as 'advising' employees on how to best maximise their entitlement, which is undesirable, although generally supports the notion that employees should be permitted to make an informed choice as how they prefer to access their entitlements.

The perceived deficiency in the operation of the Act may be viewed as inherent characteristic of any portable long service leave schemes where an administrator disburses long service entitlements (rather than the employer). The alternate view, adopting the guiding principles noting that the Act was designed to offer a safety-net to prevent employee disadvantage, is that the concurrent operation of the Act and the LSL Act may produce disadvantage to some long-term employees who access their long service leave entitlement under the Act.

To avoid inequity between the current operations of the Act and the LSL Act and ensure the Act is positioned to supplement, rather than replace, the operation of LSL Act, the Review considers that legislative amendment could occur to direct eligible employees under the Act who accrue long service leave entitlements with a single employer to access their accrued entitlements through the LSL Act only. A statutory amendment would remove the need for employees to negotiate the outcome with their employers, noting that employers will typically prefer eligible employees to use the MyLeave scheme.

Assuming a legislative amendment was pursued to require an employee with long term service to access entitlements via the LSL Act, the scenario would involve the employer needing to pay the employee entitlements and seek a refund for levies paid to MyLeave. Section 51 of the Act already provides a mechanism for an employer to recover an amount from the Board proportionate to the ordinary pay that would have been payable that could be leveraged and adjusted as necessary.

5.3.5.8 Rates of pay and postponing of long service leave

Currently, section 25 of the Act permits the Board to postpone payment of accrued long service leave entitlements where a registered employee elects to postpone the taking of leave. The Act in its current form contains no stipulation concerning the rate at which the long service leave will be paid at the time it is taken – which permits some employees to actively postpone the taking of long service leave for a time in the future when they are earning higher rates. The current operation of the Act requires MyLeave to manage the increased cost and to potentially pass on the additional costs through increases to all covered employers by increases to the levy, which the Review considers is undesirable on the basis it imposes a further burden on employers.

Comparatively, section 7(3) of the LSL Act also permits the postponing of the taking of accrued long service leave, although addresses the question of the rate of pay by stipulating that the leave will be paid at the rate applicable on the day on which leave accrues, or by agreement between the employee or employer.

The Review considers that a number of valid policy reasons exist to encourage employees to take leave as it is accrued, and suggest that legislative reform include a provision to address pay rates relevant to those employees who elect to postpone leave, in alignment with section 7(3) of the LSL Act.

[159] 'ATO Interpretive Decision', Australian Taxation Office (Web Page, 2019) <https://www.ato.gov.au/law/view/document?docid=AID/AID200533/00001>.

Term of Reference Matter 7

Finding 7

Several anomalies arise from the operation of the Act with respect to treatment of employees under the Act.

Recommendation 7A – resolve anomalies and deficiencies

Amend the Act to:

(e) remove constraints on the number of periods that an employee may take their long service leave;

(f) permit the cashing out of entitlements *by agreement* to employees (similar to the approach adopted in the LSL Act and customised for suitability to a portable scheme);

(g) remove the current preclusion in section 22(1) related to instances of 'serious misconduct'; and

(h) create further alignment with the LSL Act by inserting guidance on the rates of pay applicable to the taking of leave in circumstances where an employee elects to postpone the taking of accrued entitlements.

Recommendation 7B – reduce disadvantage to employees with long-term service with a single employer

Consistent with the overarching intent of the Act, make necessary legislative changes to:

(c) require eligible employees with long-term service with a single employer to access their accrued entitlements through the LSL Act only; and

(d) permit MyLeave to refund an employer levy payments made in circumstances where the respective employee will access, or has accessed, accrued entitlements under the LSL Act (per recommendation 7B (a)).

Implementation consideration

New legislative provisions will be required, and possible consequential amendments to the LSL Act, to channel eligible employees with long-term service to a single employer to access their accrued entitlements through the LSL Act only.

"Time of claim" criteria might assist, although other legislative drafting options may also achieve the desired effect. Section 51 of the Act provides a useful starting point to consider how appropriate refund arrangements for employers could be implemented. When implementing Recommendation 7B (b), drafting should contemplate the timing of refunds and permit MyLeave to make early refunds to employers where employees have confirmed they will access entitlements via the LSL Act. The timing of refunds will be particularly important for small business employers and other employers with low cash flow who have contributed levy payments under the Act and then need to pay the employee long service leave per the LSL Act.

As an interim measure, educational and guidance materials may help educate employees with long-term service about the implications of accessing long service leave entitlements under the Act.

5.4 Compliance, enforcement, and dispute resolution

5.4.1 Terms of Reference matters considered

Terms of Reference matter 10:

Review the statutory compliance and enforcement mechanisms with the objectives of:

(a) ensuring that workers are paid their correct entitlements;
(b) providing effective deterrents to non-compliance;
(c) updating the Board's powers and tools of enforcement to ensure the Board is able to effectively perform its statutory functions; and
(d) provide timely and cost-effective dispute resolution mechanisms.

5.4.2 How effective are the existing statutory compliance and enforcement mechanisms exist under the Act in ensuring workers are paid their correct entitlements?

The Act provides MyLeave with limited statutory compliance and enforcement mechanisms, including:

- **an obligation** imposed on all applicable employers **to register**;[160]
- the imposition of **penalties on employers making late payments** (per the Board's determination);[161]
- the **engagement and appointment of inspectors** for any purpose made necessary under the Act;[162]
- the ability to **obtain information and evidence** to ascertain a liability or entitlement under the Act and establishes a **civil penalty** for non-compliance per the IR Act;[163]
- **access to books**;[164] and
- the ability to **commence proceedings** for an offence under the Act.[165]

These powers complement the functions of the Board and provide the basis for MyLeave to enforce compliance. Additionally, to mitigate the need to rely on powers provided under the Act, MyLeave adopts a proactive approach to securing voluntary compliance. In 2022-23, proactive compliance efforts included identifying and contacting 660 employers who were not yet registered with MyLeave.[166]

The high compliance rate of employer reporting (98.1 per cent in 2022-23)[167] indicates that MyLeave's approach to managing non-compliance may be effective. However, some members of MyLeave's compliance team raised that some aspects of the approach are time intensive to administer. For example, MyLeave is often responsible for processing large amounts of data in conducting contribution assessments under section 34. Further, the number of inspections initiated in 2022-23 was 704, with 691 being completed internally by the MyLeave compliance team.[168]

As the construction industry grows, it is foreseeable that MyLeave will be required to continue analysing large data sets, in addition to the inspection duties also required of the MyLeave compliance team.

[160] *The Act* (n 3) s 30.
[161] Ibid s 35A.
[162] Ibid s 44.
[163] Ibid s 45.
[164] Ibid s 46.
[165] Ibid s 48.
[166] *Annual Report 2022-23* (n 2) 10.
[167] Ibid 11.
[168] Ibid 11.

5.4.3 Do the existing statutory mechanisms provide an effective deterrent to non-compliance?

The effectiveness of any deterrence mechanisms is often linked to the level of stakeholder knowledge and engagement. During consultation workshops, the Review found that there was a general lack of awareness regarding the details of the compliance and enforcement framework, especially amongst small business owners.

During the government stakeholder workshop, representatives expressed potential benefit from cross-agency collaboration, such as to further educate and inform small business owners of their obligations under the Act.

In 2022-23, MyLeave reported that 98.1 per cent of employers were compliant with reporting requirements under the Act,[169] indicating that non-compliance is only an issue amongst a few employers. This data appears consistent with the views expressed by stakeholders, who indicated that MyLeave is usually able to resolve most non-compliance matters through communication with employers.

Through the lens of deterrence, the Act provides penalties for:

(a) fees for the late submission of quarterly reports;[170] and

(b) civil penalty provisions being for:

  (i) failure to register under the Act;[171] and

  (ii) failure to comply with requirement to provide information and evidence to MyLeave.[172]

During consultation, employee representatives called for increased penalties to deter non-compliance and to ensure that workers covered by the Act have their entitlements accurately reported on by their employers, with one stakeholder likening employer non-compliance to wage theft. Other stakeholders indicated that they did not have the requisite knowledge of the compliance framework to comment, although employer representatives expressed that the evidence-base appeared to be lacking to support an increase in penalties.

The Review has considered current data, which indicates that less than 1.9 per cent of employers are non-compliant with reporting obligations.[173] For completeness, the Review has also considered the penalties imposed by the Act in contrast to comparable schemes considering the two most common metrics, being the penalty for an employers' failure to register, and the application of late fees.

Table 9: Penalties in comparable jurisdictions

Jurisdiction	Current charge per penalty unit	Comparison – Penalty for failure to register	Charge for late fees
WA (MyLeave scheme)	Does not use penalty units metric.	• For a 'serious contravention' - $130,000 for an individual, or $650,000 for a body corporate.[174] • For a 'non-serious contravention', $13,000 for an individual, or $65,000 for a body corporate.[175]	An amount determined by the Board.[176]
WA (LSL Act)	Does not use penalty units metric.	Not applicable. Other penalties under the LSL Act are also linked to Section 83E of the IR Act as civil penalty provisions.	Not applicable. Late or non-payment of entitlements gives rise for a person to bring proceedings in an industrial magistrate's court.[177]

[169] Ibid 11.
[170] *The Act* (n 33) s 35A.
[171] Ibid s 30.
[172] Ibid s 45.
[173] *Annual Report 2022-23* (n 2) 11.
[174] *IR Act* (n 6) s 83E.
[175] Ibid s 83E.
[176] *The Act* (n 33) s 35A.
[177] *LSL Act* (n 8) s 11.

SA	Does not use penalty units metric.	$1,000 maximum penalty[178]	An amount determined by the Board.[179]
ACT	$160 for an individual[180] $810 for a corporation[181]	50 penalty units[182] $8,000 for an individual $40,500 for a corporation	$200 per month after end of quarter, up to 3 months at which point the fee becomes an infringement notice of $640 for individuals and $3,200 for corporations.[183]
Vic	$192.31[184]	20 penalty units[185] $3,846.20 penalty	Outstanding amount in addition to the current penalty interest (10 per cent per annum).[186]

Table 9 demonstrates that penalties imposed under the Act are generally higher than comparable schemes. On that basis, having regard to the low non-compliance rates and the settings of comparable schemes, the Review finds that there does not appear to be sufficient evidence to support an increase in penalties.

5.4.4 Enforcement powers and interaction with the IR Act

The Review has considered the current operation of the enforcement mechanisms, in particular the ability to enforce civil penalty provisions through the IR Act. Specifically, the Review has considered whether there would be merit in the civil penalty provisions being self-contained in the Act, rather than adopting the powers of the IR Act.

On this issue, MyLeave provided examples of its experience using the IR Act mechanisms to enforce compliance and commented that the existing mechanism between the Act and the IR Act operates effectively.

On balance, the Review considers that it is not necessary to disturb the existing IR Act mechanism which is working as intended and aligns the compliance and enforcement framework with the LSL Act.

5.4.5 Does MyLeave require updated powers and tools?

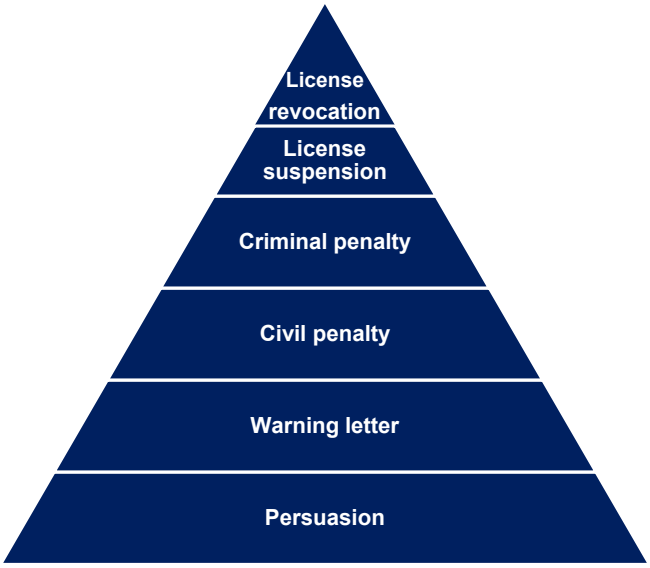
Stakeholders generally demonstrated a low to medium level of understanding of the compliance powers under the Act. During consultation, MyLeave noted that it was often constrained by the lack of graduated powers provided under the Act.

Unlike modern administrators, who often have a range of powers available, MyLeave's existing statutory mechanisms are limited and ungraduated, with few tools between imposing a late fee and instituting proceedings.

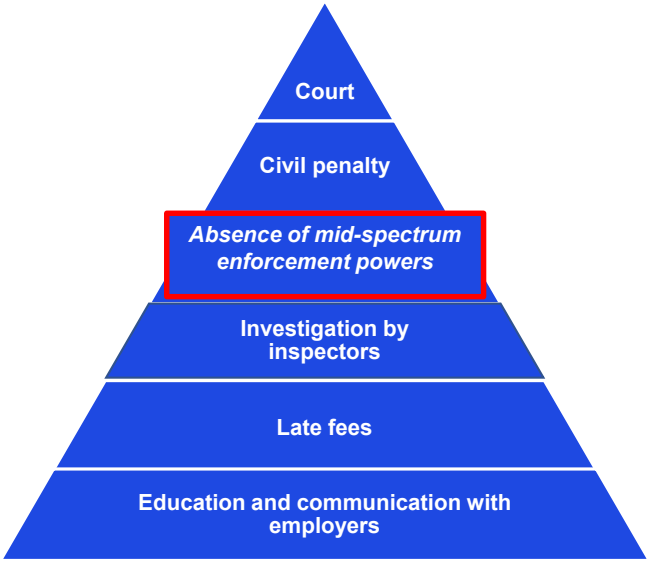
Figure 15 provides a visual representation of the powers available to MyLeave under the Act, as compared to academic models, the LSL Act and ACT Leave, as a comparable portable scheme with a contemporary enforcement framework. The MyLeave pyramid illustrates the absence of 'middle ground' powers. This creates difficulty for MyLeave to apply a proportionate response based on the nature and gravity of non-compliance.

[178] *Construction Industry Long Service Leave Act 1987* (SA) s 46(2)(a).
[179] Ibid s 29(1)(b).
[180] *Legislation Act 2001* (ACT) s 133(2)(a).
[181] Ibid s 133(2)(b).
[182] *ACT Act* (n 126) s 31(1).
[183] Ibid s 49A(2).
[184] *Monetary Units Act 2004* (Vic) s 1; 'Penalty units', Victoria Legal Aid (Web Page, 7 July 2023) <https://www.legalaid.vic.gov.au/penalty-units>.
[185] *Construction Industry Long Service Leave Act 1997* (Vic) s 8(1)(a).
[186] *Penalty Interest Rates Act 1983* (Vic) s 2.

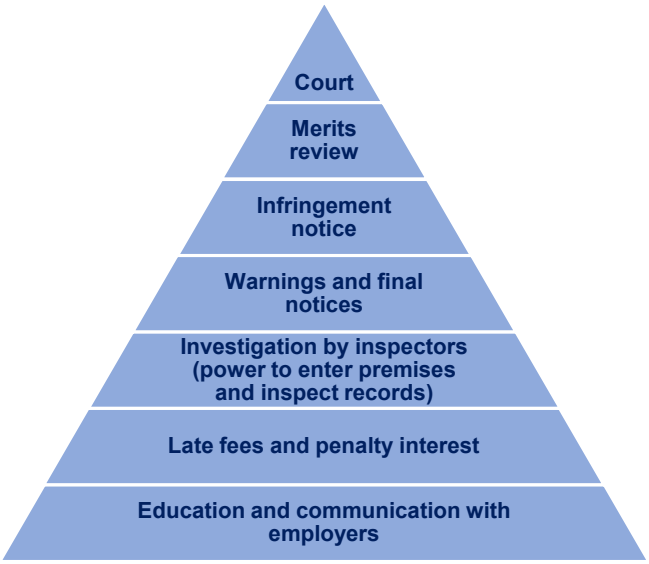
Figure 15: Comparable enforcement pyramids[187]



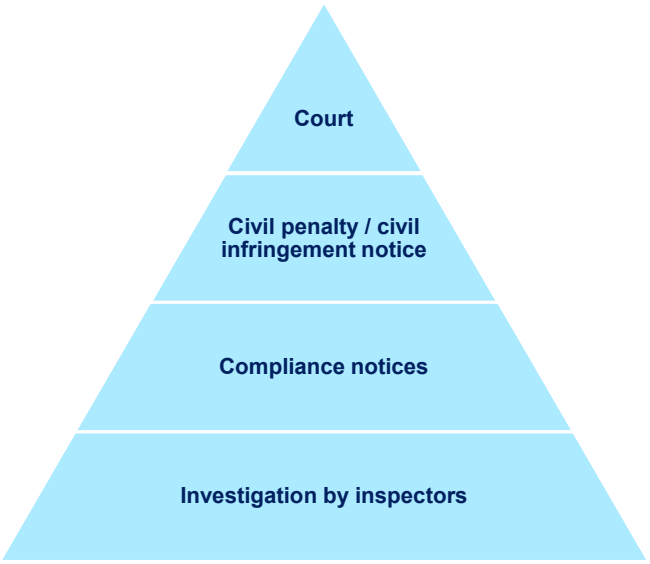
Ayres & Braithwaite, Enforcement Pyramid



MyLeave's current powers



Comparative example: ACT Leave



Long Service Leave Act 1958

Term of Reference Matter 10

Finding 8

The current statutory mechanisms substantially support an effective compliance regime through:

(e) the current penalty framework providing an effective deterrent to non-compliance; and

(f) the IR Act providing a sufficient basis for the enforcement of civil penalties.

The Review finds a small number of areas for improvement, including:

[187] *The Act* (n 33); *LSL Act* (n 8); *IR Act* (n 6); *ACT Act* (n 126); Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, 35.

(g) the need for an enhancement of mid-spectrum enforcement powers available to improve the efficiency of compliance outcomes;

(h) increased educational campaigns to raise awareness of compliance obligations within the industry.

Recommendation 8 – legislate mid-spectrum enforcement powers

Amendments should be made to the Act to empower MyLeave with mid-spectrum compliance and enforcement powers, including the ability to:

- issue warning letters;
- issue compliance/improvement notices;
- issue infringements; and
- provide payment plans, especially to assist small businesses.

Implementation consideration – enhance educational initiatives within the industry

In addition to any statutory reform, MyLeave should continue to undertake awareness raising initiatives, particularly in partnership with the Small Business Development Corporation, to target small businesses and increase awareness of obligations under the Act.

5.4.6 Do the existing mechanisms provide a timely and cost-effective resolution of disputes for stakeholders under the MyLeave scheme?

The Review has considered the adequacy of the current dispute resolution pathways available under the Act. When assessing the 'adequacy' of a remedy, the Review has considered the effort expended, timeliness and the cost effectiveness of dispute resolution methods as central factors to the ability of complainants to have their concerns satisfactorily addressed.

The Review also notes that litigation under the Act has been relatively low, with 37 cases brought between 1989 and 2022, equating to one or less matters per year during the Act's operation.

Stakeholders were asked to consider whether additional dispute resolution pathways should be provided. Ultimately, stakeholders agreed that further measures, such as an independent ombudsman or tripartite panel, would not be necessary if there was a strong internal resolution mechanism in operation. The Review agrees that there may not be merit in introducing an additional pathway, noting the small volume of disputes and comments from employer representatives that suggested they rarely, if ever, received complaints from their membership.

During stakeholder consultation MyLeave commented that the current statutory timeframe under the *Industrial Relations Commission Regulations 2005* (IRC Regulations) frustrates its ability to conduct an internal review processes. The IRC Regulations provide that:

> *'A reviewable decision may be referred for review to the Commission under the Construction Industry Portable Paid Long Service Leave Act 1985 section 50 by lodging, within 21 days from the date of that decision, a notice of referral in the approved form.'*[188]

The impact of this provision is that a complainant is required to file a matter with the WAIRC within 21 days of MyLeave's decision, thus creating only a short window of time for the Board to conduct an internal review process.

In comparable schemes, the ACT's *Long Service Leave (Portable Schemes) Act 2009* (the ACT Act) expressly provides complainants the opportunity to apply to the governing board for internal review of their decision under Part 9.[189] The inclusion of an internal review process in the ACT scheme provides an alternative dispute resolution pathway which may offer a faster and more cost-effective avenue to resolving complaints.

The Review has considered how a similar internal review mechanism could operate in harmony with the statutory timeframes of the IR Act, to offer complainants a reduced-cost and quick alternative dispute pathway. The Review has considered whether different appeal pathways exist, including whether the WA State Administrative Tribunal (SAT) might provide a preferable mechanism to the current review process offered by the WAIRC.

[188] *Industrial Relations Commission Regulations 2005* (WA) s 102A.
[189] *ACT Act* (n 126) s 80A(2).

Both the WA SAT and the WAIRC operate as merits-based review bodies. The WAIRC has been designed and operates with expertise in industrial relations and seeks to '[resolve] disputes about industrial matters, including any matter relating to the work, privileges, rights or duties of employers or employees in industry'.[190] In contrast, the WA SAT has a broader remit to consider a range of government decisions, and does not specialise in industrial relations matters. The Review has compared other factors including filing fees and timeframes in Table 10 below.

Table 10: Filing timeframes and fees in the WA SAT and WAIRC

	WA SAT	WAIRC
Filing timeframes	28 days from the date of the decision[191]	21 days from the date of the decision[192]
Application fee	Amount depends on the status of a person; however, application fees commence at $100 and further hearing fees may be applicable.[193]	$50.00[194]

While the SAT offers a slightly more generous filing timeframe, it is also more expensive, and does not specialise in industrial relations matters. On balance, the Review considers that, on its face, there does not appear to be sufficient benefit to warrant changing the current pathway to the WAIRC.

Term of Reference Matter 10(d)

Finding 9

The current statutory timeframe imposed by the IRC Regulations does not permit a credible internal review process to occur prior to a complaint being filed in the WAIRC.

Recommendation 9 – legislate an internal review process

Amend the legislative framework to provide for an internal review process.

Implementation consideration

Reforms to the legislative framework may be achieved by a number of methods, including by amendment to:

a) the statutory timeframe under section 102A of the *Industrial Relations Commission Regulations 2005* (WA); or

b) the meaning of 'reviewable decision' under section 50(1) of the Act to mean a decision that has been internally reviewed (by the Board).

[190] 'Western Australian Industrial Relations Commission', *Western Australian Industrial Relations Commission* (Web Page, 2023) <https://www.wairc.wa.gov.au/#:~:text=The%20Western%20Australian%20Industrial%20Relations%20Commission%20is%20established%20by%20the,employers%20or%20employees%20in%20industry>.
[191] State Administrative Tribunal, *Practice Note 2: Review Proceedings*, 1 July 2023, para 5.
[192] *Industrial Relations Commission Regulations 2005* (WA) s 102A(2).
[193] *State Administrative Tribunal Regulations 2004* (WA) reg 9.
[194] *Industrial Relations (General) Regulations 1997* (WA) sch 1.

5.5 Administration and regulatory considerations

5.5.1 Terms of reference matters considered

Terms of Reference matter 8:

Assess whether the Act provides flexibility to allow for the efficient and effective administration of portable long service leave.

Terms of Reference matter 9:

Consider provisions to ensure the intent of the Act is consistently achieved and minimise the regulatory burden on participants.

5.5.2 Does the Act provide sufficient flexibility for the efficient and effective administration of the portable long service leave?

Both MyLeave and its stakeholders have requested the Act be amended to offer MyLeave additional flexibility in its administration of the Act in certain circumstances. The Review notes that a tension exists between providing MyLeave with greater flexibility and providing stakeholders with certainty about how rules will be applied.

On balance, the Review recommends that certainty should take priority with respect to coverage (being one of the most disputed matters relating to the operation of the Act), whereas greater flexibility is warranted in how MyLeave is permitted to administer the Act.

5.5.2.1 Discretionary powers

Discretionary powers permit administrators and regulators to apply judgement in exercising decision-making powers.

During consultations, MyLeave raised the following points regarding its power to administer the Act:

- a preference to increase discretionary powers to flexibly administer the Act; and
- that there are difficulties for some larger employers to submit returns on time, as their payroll processes do not align with timeframes for compliance with the Act.

The Review has considered the merits of providing greater flexibility for MyLeave to:

- grant extensions of time for employers to comply with the Act;
- waive fees in certain circumstances; and
- determine how the application of late fees may be administered.

The Review finds that it is desirable, and not uncommon, for administrators to be empowered to exercise judgement in those circumstances. For example, ACT Leave has the power to waive late fees and grant extensions of time.

Comparable scheme example – ACT Leave discretionary powers

The application of late fees and the power to waive late fees is set out in section 49A:

(1) This section applies if an employer for a covered industry fails to give the authority a quarterly return mentioned in section 49(1) within the later of—

(a) 1 month after the end of the quarter; and

(b) any additional time the registrar allows.

(2) The employer is liable to pay to the authority a late fee of $200 for each month or part of a month, up to a maximum of $400, that the employer fails to give the authority the quarterly return after the later of the periods stated in subsection (1).

(3) However, the registrar may waive all or part of a late fee if satisfied that the circumstances for the failure—

(a) were not caused by the employer; or

(b) *make it unfair or unreasonable to charge the late fee.*

The Registrar also has a discretionary power to grant extensions for quarterly returns, as set out in section 49(5):

> *(5) The registrar may allow additional time under subsection (2)(b)(ii) before or after the end of the 3-month period mentioned in subsection (2)(b)(i).*

5.5.2.2 Interpretation of the Act

In its submission, MyLeave raised the need for a flexible and cost-effective mechanism to obtain assistance to interpret the Act. MyLeave suggested that the legislative framework could be amended to expand remedial powers of the Board or CEO, or to seek comparable powers to those that exist in in section 78 of the *Freedom of Information Act 1992* (WA), to refer a matter of law to the Supreme Court. The Review acknowledges that the mechanism provided by the *Freedom of Information Act 1992 (WA)* is appealing in so far as it permits a final determination without necessarily requiring affected parties to appear and permits a court to resolve other matters relevant to the matter before the court.

The Review considers that if its recommendations are adopted and amendments are made to clarify the operation of the Act, especially coverage matters including through the adoption of powers to permit Ministerial Declarations, that the need for further assistance in interpreting the Act may be redundant, however MyLeave may wish to consult with the Department of Justice to explore the appropriateness and availability of such powers as part of the broader legislative reform efforts.

5.5.2.3 Delegations

As provided by the Act, a significant number of decisions sit with the Board for its approval, for example to commence legal proceedings (section 47), to appoint inspectors (section 44) and to cause an assessment of the contributions payable by an employer (section 34).

The Board also maintains a broad power to delegate decisions and powers under the Act consistent with section 14(3) which states that:

> *'The Board has power to do all such things as are necessary or convenient for or in connection with the performance of its functions.'*

The Board has delegated several decisions to the CEO as detailed in a delegation schedule.

The Board should continue to delegate decisions where appropriate to efficiently administer the Act through providing timely decisions.

5.5.2.4 Board governance

Strong governance supports efficient and effective decision making and public accountability. Governance practices have evolved significantly since the Act first came into effect, especially as a result of the pandemic which saw many contemporary boards augment their practices to use technology to convene remote meetings and adopt circular resolutions to promote timely decision making.

The Review noted that board governance was not an issue raised by external stakeholders, although the Review has considered it as an important feature of administrating a public scheme.

Board composition

The composition of the Board is stipulated by section 6 of the Act, which provides:

> ***6. Membership of Board***
>
> *(1) Subject to this Act the Board shall consistent of 7 members appointed by the Minister as follows –*
>
> *(a) one person who shall be chairman;*
>
> *(b) 2 persons appointed from among persons whose names are on a panel of 4 names comprised of –*
>
> *(i) 2 names submitted by Master Builders Association of Western Australia; and*
>
> *(ii) 2 names submitted by the Chamber of Commerce and Industry of Western Australia (Inc);*
>
> *(c) 2 persons appointed from among persons whose names are on a panel of 4 names comprised of*
>
> *(i) 2 names submitted by Unions WA; and*
>
> *(ii) 2 names submitted by The Building Trades Association of Unions of Western Australia (Association of Workers);*
>
> *(d) one person who in the Minister's opinion represents the interest of employers in the construction industry;*

(e) one person who in the Minister's opinion represents the interests of employees in the construction industry.

Modern boards should be composed of a diversity of skills to manage modern risks. MyLeave has indicated that the Board has recently adopted a matrix of 14 skill domains, including experience with the construction industry, technology, governance and behavioural skills. The Review noted that the use of a skills matrix is not a legislated requirement.

In September 2023, the Board refreshed its appointments, requiring incoming members to assess themselves against the skills matrix. A further change was made to the appointment process, whereby appointments are 'staggered' to assist with retention of corporate knowledge and introduce fresh perspectives.

Board governance arrangements

Part 2 of the Act provides how the Board shall operate, including appointment of acting members, Board meetings, and its statutory functions.

In its submission, MyLeave suggested opportunities to modernise the Board's approach, particularly by permitting a greater level flexibility to respond to unforeseen disruptions, as highlighted by the impacts of the COVID-19 pandemic and relevant restrictions. Opportunities include amending to the Act to permit:

- appointment of an acting Chairperson;
- remote meetings; and
- circular resolutions.

Section 47 of the Act requires the Board to provide its consent prior to commencing legal proceeding for an offence against the Act. If remote meetings and circular resolutions are permitted under the Act the Board will be enabled to make decisions on initiating proceedings efficiently.

Term of Reference Matter 8

Finding 10

In many regards the Act provides MyLeave with the ability to effectively administer the scheme, however a limited expansion in discretionary powers and additional flexibility for Board functions would improve efficiency.

Recommendation 10A – expand discretionary powers

Amend the Act to provide MyLeave with limited discretionary powers to administer the Act. Specifically, the Act should provide powers for the:

(a) granting extensions of time for the submission of levies and quarterly returns;

(b) waiving penalties and late fees in certain circumstances; and

(c) determining how the application of late fees may be administered.

Implementation consideration

Legislative drafting of discretionary powers should be modelled on comparable interstate legislation. In particular, powers should not be unfettered and should require the decision maker to exercise judgment against a legislated criteria.

Recommendation 10B – modernise Board governance

Amend the Act to modernise existing Board governance arrangements, particularly to permit:

(a) the appointment of an acting Chair;

(b) remote meetings; and

(c) circular resolutions.

5.5.3 Does the Act impose an unreasonable regulatory burden on participants and how could it be improved?

There was broad consensus amongst stakeholders that MyLeave adopts a reasonable and proportionate approach to administer the Act, although some improvements could be made to:

- clarify limitation periods and historic claims limits;
- streamline processes using data and technology; and
- improve data collection relating to contribution assessments.

As raised by the CCI WA in its written submission, any amendment to the Act must be considered in the context of the impact and pressures on employers and the burden on businesses.[195]

5.5.3.1 Frequency of returns

Section 31 of the Act provides the requirements for returns to be made by employers:

> ***31 Return to be made by employer***
>
> *(1) A person who is registered under this Act or required to be registered as an employer shall lodge with the Board in respect of each prescribed period, within 15 days after the end of that period –*
>
> *(a) A statement in the approved form giving the information required by the form; and*
>
> *(b) An amount equal to the total amount that is required to be paid under this Act to the Board, in respect of each employee whose name appears on the statement referred to in paragraph (a).*

For the purposes of section 31, section 6 of the Regulations provide that the prescribed period is quarterly with the periods ending on the last days of March, June, September, and December.

Stakeholders consulted expressed diverging views as to the preferred frequency of employer returns. Employee representatives proposed a monthly return frequency, while employer representatives expressed a preference for annual returns.

The Review noted that the return frequency varies across comparable interstate schemes:

- monthly returns are required in Tasmania;
- bi-monthly returns are required in SA;
- quarterly returns are required in the ACT, Victoria and WA;
- biannual returns are required in the NT; and
- annual returns are required in NSW and QLD.

Therefore, there appears to be no standard practice across reciprocal schemes, although three schemes require returns on a quarterly basis. The Review notes that the timing of quarterly returns also aligns with the required lodgement of quarterly business activity statements – which offers businesses some uniformity in timeframes for broader compliance activities.

Additionally, in its written submission, MyLeave raised that the due dates for quarterly returns (i.e. the 15th day following the end of the quarter) often do not align with modern payroll periods (i.e. generally the 7th day following the end of each month).[196]

Therefore, on balance, a quarterly frequency appears to be reasonable so as to promote ongoing compliance whilst minimising the regulatory burden for employers. The Review recommends that the timing of each period end should be aligned to the timing of industry payroll practices (i.e. after the 7th day of the month in which the quarterly return falls due), to permit sufficient time for employers to compile data and submit returns to MyLeave, limiting the need for extensions of time.

5.5.3.2 Systems, data, and technology

During consultations, some government stakeholders suggested updates could be made to the technology and portal used to support the operation of the Act. In particular, automating tasks previously undertaken manually, reduces

[195] Written Submission from Chamber of Commerce and Industry WA to the Review, 7 July 2023, 2.
[196] 'Returns: Payroll Tax Employer Guide', *Government of Western Australia* (Web Page, 13 December 2022) <https://www.wa.gov.au/government/multi-step-guides/payroll-tax-employer-guide/returns-payroll-tax-employer-guide>.

administrative burden on staff and provides greater capacity to exercise a higher level of skill in targeting problem areas.

In its written submission, the NFIA advised that while they had no issues regarding the achievement of the Act's overarching intent, it had received feedback from its members and suggested that 'improvements to MyLeave portal functionality and useability would be helpful for portal users'.[197]

The Review acknowledges that MyLeave has pursued significant upgrades and transformation of its IT infrastructure, with a particular focus on improving data collection and analysis capability. As reported in its 2021-22 Annual Report MyLeave had incurred $731,000 for an IT transformation project to replace existing core systems.[198] With respect to this ICT transformation project, MyLeave reported that:

> *'The objective is to transform MyLeave's business to a fully digital, secure, cloud-based operation that is cost effective, focuses on meeting the business needs whilst providing its customers with the best possible user experience. The transformation will involve replacing a very complex legacy system and redesigning processes to achieve more reliable and efficient business activities.'*[199]

A mature data framework and IT infrastructure will assist position MyLeave to evaluate its performance, quantify the magnitude of issues and better inform its decision making.

5.5.3.3 Historic claims limit

In its written submission, MyLeave raised that the Act currently does not expressly provide the limitation period for an employer's contribution liability. Although, there is some indication as to the length of time an employer must retain their employee records:

> ***32. Employer to maintain record of employees***
>
> *(1) An employer shall establish and maintain a record of each employee employed by him showing such information as is required under the regulation.*
>
> *(2) An employer shall retain any record established and maintained under subsection (1) for a period of not less than 7 years.*

Similar to section 32 of the Act, section 26 of the LSL Act requires employer records to be kept not less than 7 years.

In its written submission, MyLeave raised the seven-year limit for records sits in contrast to other legislation, notably the ATO requirement, which is currently five years from the date a return is lodged,[200] and the *Limitation Act 2005* (WA), which sets a limitation period of six years for record keeping relating to civil legal proceedings.[201]

Currently, the Act does not specify a timeframe within which MyLeave may request historical records from employers which causes operational challenges for MyLeave. Historic claims limits should be clarified and further consideration is required to determine the optimal legislative alignment and details.

5.5.3.4 Contribution assessments

Section 34(2) of the Act provides that, in certain circumstances, including where an employer fails to submit a return, the Board has the power to:

> *… cause an assessment to be made of the amount of long service leave contributions which in its judgment ought to be paid by the employer and the employer shall be liable to pay the long service leave contributions and any surcharge as so assessed by the Board.*

Currently, neither the Act nor the Regulations provide an express power for MyLeave to mandate a methodology for calculating assessments. In its written submission, MyLeave noted that the process to undertake an assessment can be burdensome, requiring significant effort from MyLeave to request, collate, and analyse data to determine an employer's liability. MyLeave suggested that the legislative framework could mandate a methodology and permit self-assessments by employers, to provide a more graduated approach to supporting self-compliance. The Review has considered how improvements could be made to reduce the impost on employers and MyLeave.

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[197] Submission of the National Fire Industry Association to the Review, 4 July 2023, 1.
[198] *Annual Report 2022-23* (n 2) 30.
[199] Ibid 10.
[200] 'Records you need to keep', *Australian Taxation Office* (Web Page, 26 April 2023) <https://www.ato.gov.au/individuals/income-deductions-offsets-and-records/records-you-need-to-keep/#:~:text=or%20retain%20records.-,How%20long%20to%20keep%20your%20records,records%20or%20record%20keeping%20exceptions>.
[201] *Limitation Act 2005* (WA) s 13.

The Review considers that if an alternative 'hours worked' accrual model is adopted (as recommended), all registered employers will be expected to provide payroll data for MyLeave to calculate days of service based on pre-determined formulas. Noting most businesses use digitised payroll systems, the task of extracting payroll data is now largely automated, such that the impost will be reduced by virtue of the accrual method reflecting hours worked. Alternatively, MyLeave could advance its technology transformation to include measures to facilitate the calculation of days of service by employers.

The Review recognises that some variables are at play, and that in the context of broader legislative reforms it presents an opportunity for the MyLeave Board to be empowered to mandate a methodology for the calculation of assessments to reduce administrative impost on both the employer and MyLeave in the future.

Term of Reference Matter 9

Finding 11

The Review finds that:

(a) the legislative framework strikes an appropriate balance and does not impose undue regulatory burden by requesting employers complete returns on a quarterly basis;

(b) clarifying limitation periods would assist improve the administration of the Act and continuing to modernise the use of technology, systems, and data will further reduce the regulatory burden on employers and employees; and

(c) a mandated methodology would assist the process of calculating assessments and support a self-compliance framework for employers.

Recommendation 11A - Clarify limitation periods

Amend the Act to clarify the applicable limitation periods with respect to an employer's contribution liability and MyLeave's power to request historical records.

Implementation consideration

MyLeave should seek legal advice as to whether a limitation period applies to an employer's contribution liability, and if so, the time period that applies prior to advancing legislative amendments.

Recommendation 11B – mandate a methodology for contribution assessments

Amend the legislative framework to empower the MyLeave Board to mandate a methodology for use when calculating assessments of contributions.

5.6 Other incidental matters

5.6.1 Terms of reference matters considered

Terms of Reference matter 12:

Other matters incidental or relevant to the Reviewer's consideration of the preceding terms of reference.

5.6.2 Clarifying the object of the Act

MyLeave and a range of external stakeholders have called for the Act to contain greater detail as to the Object of the Act. The Review agrees an Object provision would be helpful in providing guidance on matters of coverage and treatment in particular.

Object provisions are common in modern drafting and provide a distinct purpose and objective for that piece of legislation. An Object provision would assist statutory interpretation and improve the operation of the Act.

While the drafting of the Object provision is a matter for the Parliamentary Counsel's Office the following matters should be included for consideration:

- the current long title of the Act provides that the Act 'make[s] provision for paid long service leave to employees engaged in the construction industry and for incidental and other incidental matters' and should be retained as a starting point;
- the Act has been designed to operate as a 'safety net' for construction workers who would otherwise not be able to access entitlements under the LSL Act due to the transient nature of work in the construction industry;[202]
- the Act should be designed *to align* entitlements with the general standard provided by the LSL Act to ensure construction workers covered by the Act are treated 'no better and no worse'[203] than other employees in WA;
- where alignment with the LSL Act is not appropriate given the portable nature of the scheme, the Act should *modify* the provision of entitlements from the LSL Act and seek to *promote harmony* with reciprocal schemes to create *fair access* to entitlements for construction workers;
- the Act is designed to capture construction workers who generally perform manual labour using their physical abilities who were historically covered by awards ('blue collar workers'), as distinct from workers performing tasks in an office environment or professional, managerial or internal-facing business functions; and
- that the Act plays an important role in attracting and retaining workers in the construction industry, for the benefit of the industry.

Further to discussions in section 3.4.4, the Review has considered whether it is appropriate for Act to go further than its current mandate, and for example, to respond to calls from some external stakeholders that its Board be permitted greater flexibility to 'give back' to the WA construction community. While the submissions were not detailed, it appears this would require providing greater flexibility to MyLeave to expend resources and funds. While MyLeave may elect to include this topic in further deliberations arising as part of any reform implementation strategy, the Review suggests caution be exercised in expanding powers to permit discretionary payments, noting that the Act was specifically created to provide entitlements to employees in return for long service to the industry.

Unlike other entities operating in the construction industry that offer direct investment, charitable and other benevolent services, MyLeave differs in its construct as a statutory authority that is constrained to operate strictly in accordance with its statutory functions. Any expansion of MyLeave' s current mandate would need to be accompanied by a proportionate strengthening in governance arrangements, to ensure resources were being expended appropriately. While it is outside the scope of the Review to discuss MyLeave's financial performance or levy rates, in response to some stakeholder calls that levy rates be increased[204], the Review observes that any future increase of levy rates would need to be consistent with the focus on reducing regulatory burdens to the extent necessary to achieve objectives.

[202] *Parliamentary Debates, 17 September 1985* (n 28) 1028.
[203] Ibid 1029.
[204] Written Submission from Construction Forestry Maritime Mining Energy Union WA Branch to the Review, 14 July 2023, 11.

Term of Reference Matter 12

Finding 12

The regulatory framework would be improved through the inclusion of an Object provision, especially to determine how the coverage and treatment provisions apply to an employee and employer.

Recommendation 12 – insert an Object provision

Amend the regulatory framework to insert an Object provision into the Act. Relevant policy considerations are considered in section 5.6.2.

Implementation consideration

Drafting should clarify that the Act is designed to capture construction workers undertaking transient work on construction projects, as distinct from managerial, administrative and professional staff also working in the construction industry.

5.6.3 Modern drafting and discontinuing use of gendered language

The Review has identified that the Act uses outdated and gendered language. The use of male gendered pronouns such as 'his', 'he' and 'him' is present throughout the legislation, for example:

- Section 6(3): A member shall hold office for such period not exceeding 5 years as is specified in **his** instrument of appointment.
- Section 10(2): The chairman shall preside at any meeting of the Board at which **he** is present.
- Section 32(1): An employer shall establish and maintain a record of each employee employed by **him** showing such information as is required under the Regulations.

The Australian Government Office of Parliamentary Counsel's Drafting Manual, which provides an overview of national legislative drafting standards, outlines that gender-neutral language should be used when drafting legislation, and submits that this approach does not make provisions more cumbersome.[205] Furthermore, the Review proposes that this language is not reflective of the gender makeup of the modern WA construction industry, and that any gendered language should be replaced with gender neutral terms.

Term of Reference Matter 12

Finding 13

The regulatory framework uses outdated gendered language.

Recommendation 13 – adopt gender neutral language

Amend the regulatory framework to remove male-centric references and replace with gender neutral terms.

5.6.4 Are there beneficial changes to be drawn from comparable schemes or harmonisation opportunities available?

Ongoing efforts to promote uniformity across jurisdictions may strengthen mutual recognition relationships and support the experience of workers moving between jurisdictions. A national program for harmonising portable long service leave was previously considered by the Commonwealth in 2015-2016, which culminated in a Senate Committee Report ultimately recommending that all levels of government in Australia review the current LSL system to consider developing a nationally consistent scheme.[206]

The Review has considered opportunities to harmonise the Act with better practices adopted by comparable interstate schemes across all themes of inquiry. The Review has identified that approaches for determining capture

[205] Office of Parliamentary Counsel, Parliament of Australia, *OPC Drafting Manual Edition 3.2* (Parliamentary Paper, July 2019) 14 <https://www.opc.gov.au/sites/default/files/2023-01/s05pq37.v27.pdf>.
[206] *Feasibility Report* (n 49).

(through terms of 'employee', 'employer' and 'construction industry' together with powers provided to administer and enforce compliance with the Act to be the key areas where beneficial changes may be drawn from reciprocal schemes, especially those who have adopted recent legislative reform.

Term of Reference Matter 11

Consideration of Terms of Reference Matter 11 has been considered throughout the entirety of the Review.

5.6.5 Other operational matters to be enhanced

As part of the Review's stakeholder consultation process, MyLeave tendered a written submission which highlights a variety of areas where the current operation of the Act is either dated or is producing suboptimal operational outcomes. When advancing a process of legislative reform to modernise the Act and Regulations, the Review considers it appropriate to use the opportunity to also address the following matters.

Deregistration

MyLeave has indicated it would like the ability to deregister employees when an assessment of eligibility has occurred, and the employee is no longer eligible to access entitlements under the Act. [207]

The Review considers it legitimate to offer employees a method of entering and exiting the scheme, and that a power to permit MyLeave to deregister ineligible employees will assist in the orderly operation of the Act.

Any amendments to provide for deregistration should consider relevant review rights, and provide an employee with the ability to seek an assessment at a time in the future should their circumstances change.

Employer Refunds

MyLeave have indicated that from time-to-time circumstances arise that warrant MyLeave refunding employers for contributions paid. Examples include instances where an employee is later deemed ineligible or where errors need to be corrected.[208] There is no express provision in the legislation that provides for MyLeave to make a refund to the employer.

From a governance and financial management perspective, the Review recommends that an express provision be inserted into the Act to provide MyLeave limited powers to provide refunds to address the operational circumstances it has raised.

Certificates for Inspectors

Section 44 (2) of the Act requires the CEO to issue a certificate to each inspector appointed under the Act using the prescribed form. Schedule 2 of the Regulations provides the prescribed form. MyLeave advises that the form appears as dated and stakeholders have questioned the authenticity of the certificate. [209]

The Review considers the issue identified by MyLeave relates less to the instrument of appointment and more to the need for a modern identification card. The Review considers that there is merit in issuing inspectors with an identification card.

An example of a modern approach to the requirement for inspectors to hold an identity card is available in s157 of the *Work Health and Safety Act 2020* (WA) and regulation 700 of the *Work Health and Safety (General) Regulations 2022* (WA).

[207] Written Submission from MyLeave to the Review, 18 August 2023, 37.
[208] Ibid.
[209] Written Submission from MyLeave to the Review, 18 August 2023, 44.

Term of Reference Matter 12

Finding 14

The operation of the Act could be improved through legislative amendments to address operational matters relating to the deregistration of employees, refunds for employers and the provision of inspector identity cards.

Recommendation 14 – Incorporate legislative amendments to improve the operation of the Act

Amend the regulatory framework to:

(a) provide a mechanism to deregister employees (including an ability for employees to have the decision reviewed);

(b) permit MyLeave to refund contributions to employers where the contribution has been made in error or where the contribution relates to an employee who has subsequently been determined ineligible for entitlements under the Act; and

(c) provide for each inspector to hold an identity card.

6 Options for reform

6.1 Implementation options

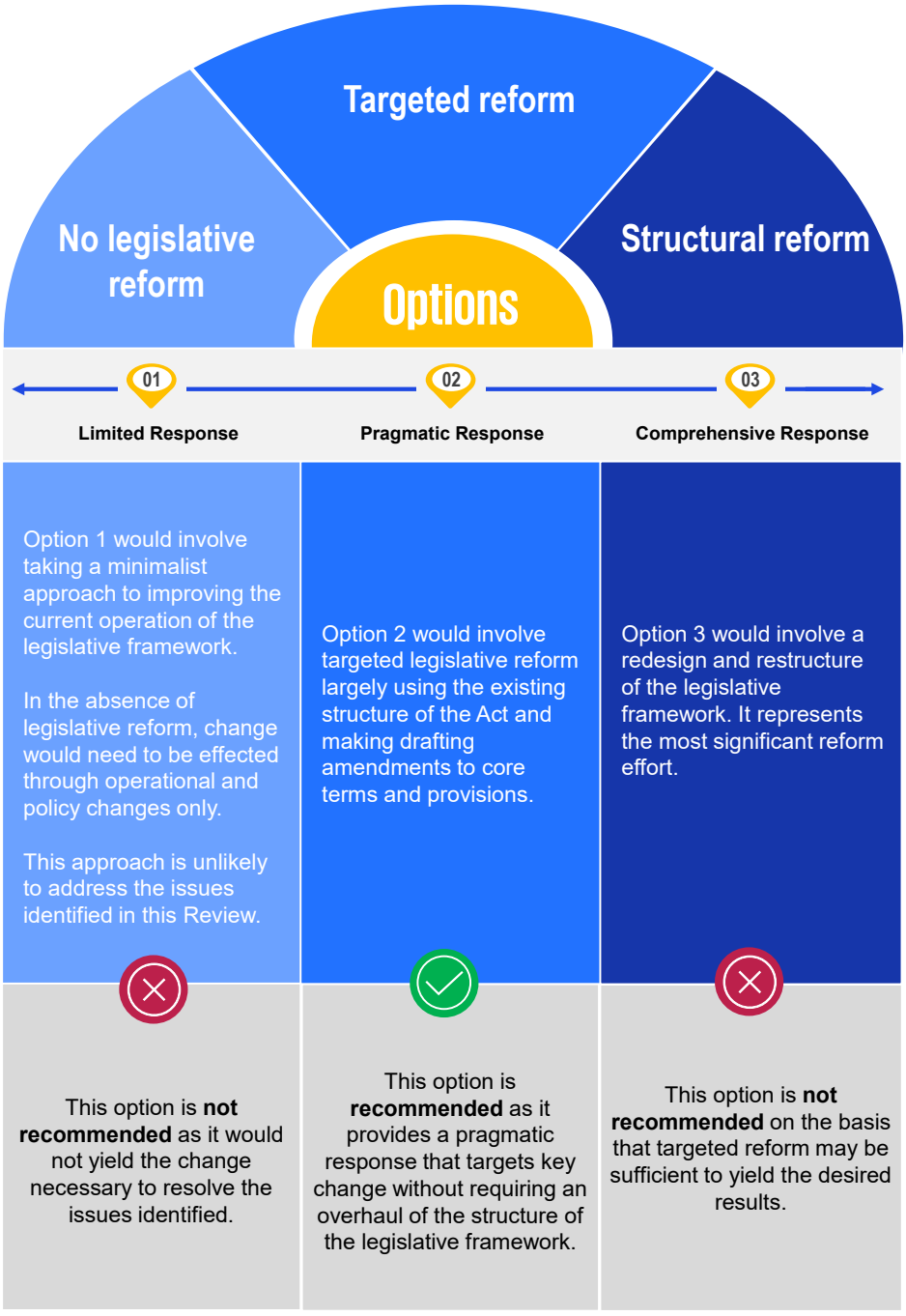
6.2 Implementation roadmap

6.1 Implementation options

When pursuing regulatory reform a spectrum of reform options are often available. We provide a summary in Figure 16.

While ultimately a matter for government, having regard to the findings and the nature of the recommendations. The Review considers the Act could be improved by adopting a targeted approach to reform, with most measures requiring modest legislative amendment. The Review considers it would not be feasible to undertake no reform, and nor do the recommendations warrant structural reform to fundamentally alter the architecture of the existing legislative framework.

Figure 16: Spectrum of reform options



6.2 Implementation roadmap

Ministerial consideration and government response

Figure 17 provides a high-level approach to reform which assumes that the Minister and Government will agree to some or all of the recommendations of the Review. As such, the nature and contents of the reform journey will be subject to further consideration and the Review suggests an implementation strategy be developed pending the views of Government.

Figure 17: Reform implementation roadmap

1. Determine priorities based on government response

Based on the government's response, consider recommendations holistically to determine priorities and the optimal sequence of implementation.

2. Map stakeholder interests

Identify stakeholders who have an interest in the legislative reform, including:

- stakeholders who participated in the Review;
- stakeholders who did not participate in this review (i.e. employers);
- CTF (who use the Act's definition of the 'construction industry'); and
- government agencies responsible for other legislation where consequential amendments may be required.

3. Test and validate specific reform measures

Arising from the recommendations, test and validate specific reform measures with stakeholders to settle outstanding policy positions.

4. Commence engagement with PCO

Liaise with PCO to commence the legislative reform process, including developing Cabinet submissions and drafting instructions.

5. Preparation of drafting instructions

Prepare drafting instructions based on settled policy positions and progress Cabinet and other parliamentary processes.

Appendices

Appendix A: Terms of Reference

GOVERNMENT OF WESTERN AUSTRALIA

My Leave CONSTRUCTION INDUSTRY LONG SERVICE LEAVE SCHEME

TERMS OF REFERENCE FOR THE REVIEW OF THE *CONSTRUCTION INDUSTRY PORTABLE PAID LONG SERVICE LEAVE ACT 1985*

The *Construction Industry Portable Paid Long Service Leave Act 1985* (the Act) was enacted by Parliament to make provision for paid long service leave to employees engaged in the construction industry and for incidental and other purposes.

The purpose of the Act was to recognise the short-term nature of the construction industry and provide workers within the industry the benefits that were already enjoyed by workers in similar industries where they can accumulate 15 years' service working for one employer by providing for the portability of long service leave within the industry.

The Construction Industry Long Service Leave Payments Board, trading as MyLeave, is a statutory authority established to carry out the administration of the Act, inclusive of regulating and managing long service leave entitlements on behalf of eligible employees in the construction industry in Western Australia.

Since the commencement of the Act, the industrial relations environment in Western Australia has evolved to an extent that a range of issues illustrate the disconnect between the Act and the contemporary construction industry.

The Review is being commissioned to determine whether the overarching intent of the Act is being met for the contemporary construction industry and its workers.

The Review of the Act is to consider, report and make recommendations with respect to the following matters inclusive of any potential legislative amendments.

1) Review whether the Act contemplates the modern construction workforce to ensure all cohorts of construction workers can access portable long service leave.

2) Consider if definitions of the Terms used in the Act provide certainty and consistency for employers and workers.

3) Assess whether the core terms of 'days of service', 'ordinary pay' and 'ordinary hours' reflect the contemporary construction workforce and result in fair and equitable application of portable long service leave entitlements having regard to differing employment arrangements.

4) Review whether the current method of accruing entitlements using 'days of service' reflects contemporary workforce models.

5) Examine whether industrial relations instruments and prescribed classifications of work incorporated within the Act and Regulations is an effective method of capturing workers in the construction industry, and if not, propose alternatives.

6) Consider if there is sufficient flexibility in the Act to provide for absences and allow workers flexibility in accessing portable long service leave entitlements having regard to the high-risk nature of the construction industry.

7) Assess whether there are any deficiencies or anomalies in the operation of the Act in terms of the equitable and fair payment of contributions by employers and the payment of long service leave entitlements to workers.

8) Assess whether the Act provides flexibility to allow for the efficient and effective administration of portable long service leave.

9) Consider provisions to ensure the intent of the Act is consistently achieved and minimise the regulatory burden on participants.

10) Review the statutory compliance and enforcement mechanisms with the objectives of:
    a) ensuring that workers are paid their correct entitlements,
    b) providing effective deterrents to non-compliance,
    c) updating the Board's powers and tools of enforcement to ensure the Board is able to effectively perform its statutory functions, and
    d) provide timely and cost-effective dispute resolution mechanisms.

11) Consider the varying arrangements of portable long service leave schemes applying in other states and territories of Australia, and any beneficial changes or harmonisation opportunities resulting from that review.

12) Other matters incidental or relevant to the Reviewer's consideration of the preceding terms of reference.

Appendix B: Legislation

Legislation
Construction Industry Portable Paid Long Service Leave Act 1985 (WA)
Building and Construction Industry (Security of Payment Act) 2021 (WA)
Building and Construction Industry Training Fund and Levy Collection Act 1990 (WA)
Coal Mining (Long Service Leave) Administration Act 1992 (Cth)
Construction Contracts (Security of Payments) Act 2004 (NT)
Construction Industry Long Service Leave Act 1987 (SA)
Construction Industry Long Service Leave Act 1997 (Vic)
Construction Industry Long Service Leave Regulations 2018 (SA)
Construction Industry Portable Paid Long Service Leave Amendment Act 1989 (WA)
Construction Industry Portable Paid Long Service Leave Regulations 1986 (WA)
Corporations Act 2001 (Cth)
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)
Fair Work Act 2009 (Cth)
Freedom of Information Act 1992 (WA)
Industrial Relations (General) Regulations 1997 (WA)
Industrial Relations Act 1979 (WA)
Industrial Relations Commission Regulations 2005 (WA)
Industrial Relations Legislation Amendment Act 2021
Industrial Relations Legislation Amendment Act 2021 (WA)
Labour Relations Legislation Amendment Act 2006 (WA)
Legislation Act 2001 (ACT)
Limitation Act 1969 (NSW)
Limitation Act 2005 (WA)
Local Government (Long Service Leave) Regulations 2021 (WA)
Long Service Leave (Portable Schemes) Amendment Act 2023 (WA)
Long Service Leave Act 1958 (WA)
Long Service Leave (Portable Scheme) Act 2009 (ACT)
Migration Act 1958 (Cth)
Minimum Conditions of Employment Act 1993
Monetary Units Act 2004 (Vic)
Penalty Interest Rates Act 1983 (Vic)
State Administrative Tribunal Act 2004 (WA)
State Administrative Tribunal Regulations 2004 (WA)
Superannuation Guarantee (Administration) Act 1992 (Cth)
Work Health and Safety (General) Regulations 2022 (WA)
Work Health and Safety Act 2020 (WA)
Workers Compensation and Injury Management Act 1981 (WA)
Workplace Relations Act 1996 (Cth)

Appendix C: Key terms

The following key terms appear in section 3 of the Act:

employee means —

(a) a person who is employed under a contract of service in a classification of work referred to in a prescribed industrial instrument relating to the construction industry that is a prescribed classification; or

(b) an apprentice;

employer means —

(a) a natural person, firm or body corporate who or which engages persons as employees in the construction industry; or

(b) a labour hire agency which arranges for a person who is a party to a contract of service with the agency (person A) to do work in the construction industry for another person (person B), even though person A is working for person B under an arrangement between the agency and person B,

(c) but does not include a Minister, authority or local government prescribed under section (4)(c).

construction industry means the industry —

(a) of carrying out on a site the construction, erection, installation, reconstruction, re-erection, renovation, alteration, demolition or maintenance of or repairs to any of the following —

(i) buildings; and

(iia) swimming pools and spa pools; and

(ii) roads, railways, airfields or other works for the passage of persons, animals or vehicles; and

(iii) breakwaters, docks, jetties, piers, wharves or works for the improvement or alteration of any harbour, river or watercourse for the purposes of navigation; and

(iv) works for the storage or supply of water or for the irrigation of land; and

(v) works for the conveyance, treatment or disposal of sewage or of the effluent from any premises; and

(vi) works for the extraction, refining, processing or treatment of materials or for the production or extraction of products and by-products from materials; and

(vii) bridges, viaducts, aqueducts or tunnels; and

(viii) chimney stacks, cooling towers, drilling rigs, gas-holders or silos; and

(ix) pipelines; and

(x) navigational lights, beacons or markers; and

(xi) works for the drainage of land; and

(xii) works for the storage of liquids (other than water) or gases; and

(xiii) works for the generation, supply or transmission of electric power; and

(xiv) works for the transmission of wireless or telegraphic communications; and

(xv) pile driving works; and

(xvi) structures, fixtures or works for use on or for the use of any buildings or works of a kind referred to in subparagraphs (i) to (xv); and

(xvii) works for the preparation of sites for any buildings or works of a kind referred to in subparagraphs (i) to (xvi); and

xviii) fences, other than fences on farms;

(b) of carrying out of works on a site of the construction, erection, installation, reconstruction, re-erection, renovation, alteration or demolition of any buildings or works of a kind referred to in paragraph (a) for the fabrication, erection or installation of plant, plant facilities or equipment for those buildings or works;

(c) of carrying out of work performed by employees engaged in the work referred to in paragraph (a) or (b) and that is normally carried out on site but which is not necessarily carried out on site,

but does not include —

(d) the carrying out of any work on ships; or

(e) the maintenance of or repairs or minor alterations to lifts or escalators; or

(f) 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 described in this interpretation.

industrial instrument means —

(a) an award, industrial agreement or order made under the Industrial Relations Act 1979 ; or

(b) an award, determination, enterprise agreement or order made under the Fair Work Act 2009 (Commonwealth); or

(c) an award, determination or agreement given continuing effect under the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Commonwealth),

irrespective of whether or not the instrument has, since it was made or given continuing effect, ceased to be in force;

ordinary pay *, of a person, means the 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;*

prescribed means prescribed by regulations made under this Act;

year of service means a year of service as determined in accordance with section 21(2);

For the purposes of the definition of ***ordinary pay*** in subsection (1), if the person is not entitled to paid leave (other than long service leave), the ordinary pay of the person is the rate of pay to which the person is entitled for ordinary hours of work.

Appendix D: Glossary

Glossary	
ACT	Australian Capital Territory
Act	*Construction Industry Portable Paid Long Service Leave Act 1985* (WA)
ACT Leave	Administrator of construction industry long service leave in the Australian Capital Territory
Amendment Bill	Construction Industry Portable Paid Long Service Amendment Bill (no. 2) 2020 (WA)
ANZSCO	Australia and New Zealand Standard Classifications of Occupations
ANZSIC	Australian and New Zealand Standard Industrial Classification
ATO	Australian Taxation Office
BCC Committee	WA Building and Construction Consultative Committee
Bill	Construction Industry Portable Long Service Leave Bill
CCI WA	Chamber of Commerce and Industry WA
CFMEU	Construction, Forestry, Maritime, Mining and Energy Union (WA Branch)
Coal LSL	Coal Mining Industry (Long Service Leave Funding) Corporation
CTF	Construction Training Fund
DIDO	Drive-in-drive-out
DMIRS	Department of Mines, Industrial Regulation and Safety
ETU	Electrical Trades Union WA Branch
FW Act	*Fair Work Act 2009* (Cth)
FW Act	*Fair Work Act 2009* (Cth)
FIFO	Fly-in-fly-out
HIA	Housing Industry Association
IRC Regulations	*Industrial Relations Commission Regulations 2005* (WA)
IRLA Act	*Industrial Relations Legislation Amendment Act 2021* (WA)
ISCO	International Standard Classification of Occupations
LeavePlus	Administrator of construction industry long service leave in Victoria
Long Service Corporation	Administrator of construction industry long service leave in New South Wales
LSL Act	*Long Service Leave Act 1958* (WA)
MUA	Maritime Union of Australia
NES	National Employment Standards
NFIA	National Fire Industry Association
NSW	New South Wales
NT	Northern Territory
NTBuild	Administrator of construction industry long service leave in the Northern Territory
Portable Long Service Leave (SA)	Administrator of construction industry long service leave in South Australia

QLD	Queensland
QLeave	Administrator of construction industry long service leave in Queensland
Regulations	*Construction Industry Portable Paid Long Service Leave Regulations 1986* (WA)
Review	This independent review of the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA)
SA	South Australia
TAS	Tasmania
Tas Build	Administrator of construction industry long service leave in Tasmania
VIC	Victoria
WA	Western Australia
WAIAC	Western Australia Industrial Appeal Court
WAIRC	Western Australian Industrial Relations Commission
1989 Amendment	*Construction Industry Portable Paid Long Service Leave Amendment Act 1989* (WA)
2006 Amendment	*Labour Relations Legislation Amendment Act 2006* (WA)
2011 Amendment	*Industrial Legislation Amendment Act 2011* (WA)

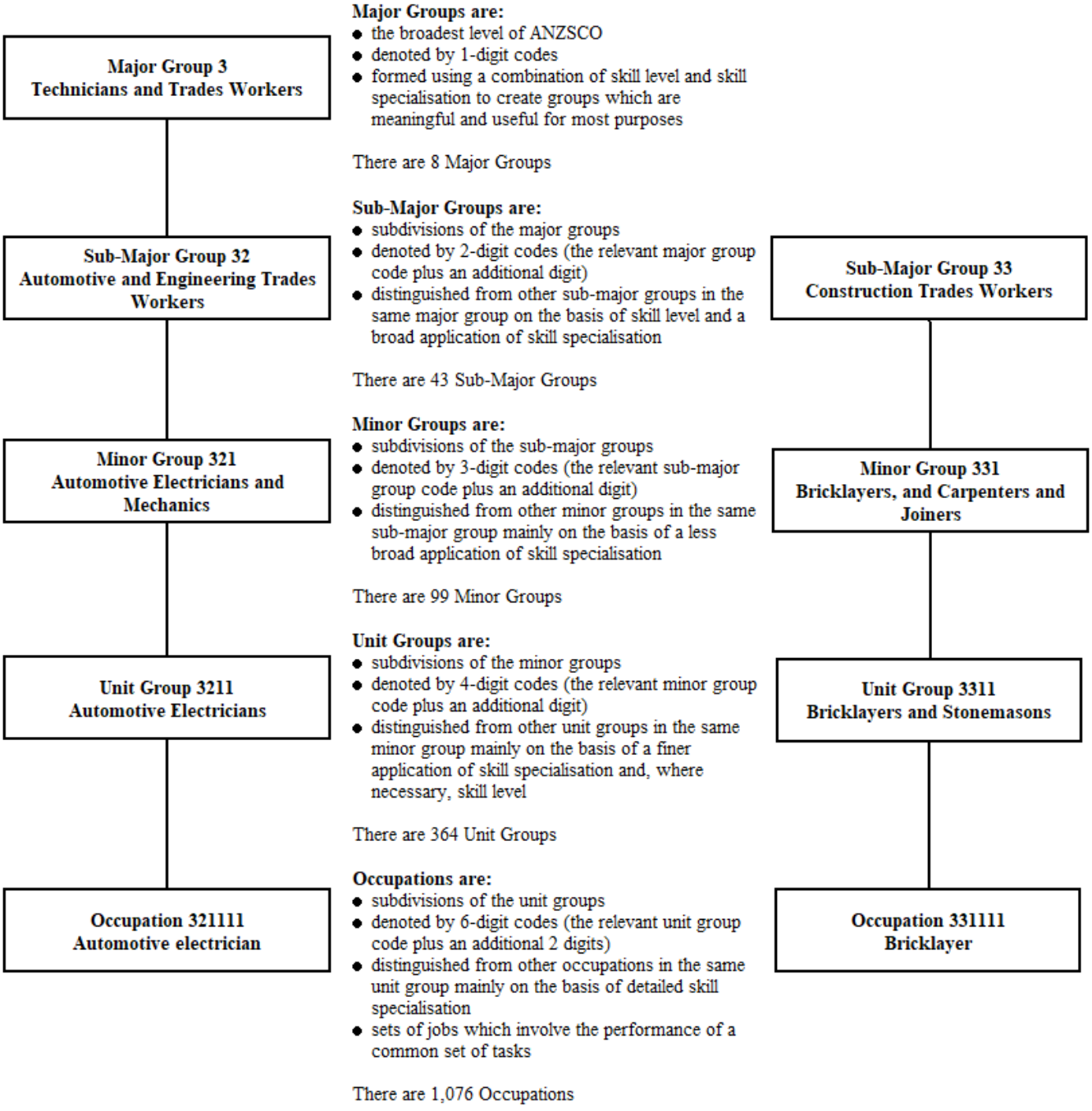
Appendix E: ANZSCO structure

The structure of ANZSCO has five hierarchical levels - major group, sub-major group, minor group, unit group and occupation. The categories at the most detailed level of the classification are termed 'occupations'. These are grouped together to form 'unit groups', which in turn are grouped into 'minor groups'. Minor groups are aggregated to form 'sub-major groups' which in turn are aggregated at the highest level to form 'major groups'.

The following is a profile of the ANZSCO structure with hierarchy descriptions and examples. The complete listing of the major, sub-major, minor and unit groups and occupations can be found under the Browse Classification section.[210]

[210] Australian Bureau of Statistics, 'Classification Structure | Australian Bureau of Statistics', *Australian Bureau of Statistics* (Web Page, 22 November 2022) <https://www.abs.gov.au/statistics/classifications/anzsco-australian-and-new-zealand-standard-classification-occupations/2022/classification-structure>.

Figure 18: Breakdown of ANZSCO structure



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 dated 24 March 2023. 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 desktop research and 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 dated 24 March 2023 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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