



MyLeave Submission

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

August 2023

myleave.wa.gov.au

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1 Executive Summary

It has been 38 years since the assent of the *Construction Industry Portable Paid Long Service Leave Act 1985 (the Act)*.

In May 2023, the Hon. Bill Johnston MLA, Minister for Industrial Relations, announced an Independent Review of the Act. As the Act matures into a fourth decade, the Act Review provides an opportunity to determine whether the overarching intent of the Act is being met for the contemporary construction industry and workers.

To date, MyLeave has delivered over \$550 million in long service leave payments to around 72,000 construction workers in Western Australia. In the 2022-23 financial year, 123,100 workers were registered with MyLeave. This equates to approximately 80 per cent coverage of the total Western Australian construction sector workforce, noting that a proportion of the total construction workforce are not eligible for registration.¹

It is considered that the intent of the Act is sound. Yet the Act intent is impeded by the Act provisions not keeping pace with the modern construction industry and changed employment practices. To provide perspective, when the Act was conceptualised, the construction workforce in Western Australia was estimated to be less than 25 per cent of the size of the current workforce.² Sector growth has come hand in hand with innovation, including the expansion of construction into new fields not envisaged in decades past, with new cohorts of employees and differing employer operating structures.

The growth of workers registered with MyLeave since commencement is illustrated in Figure 1 below.

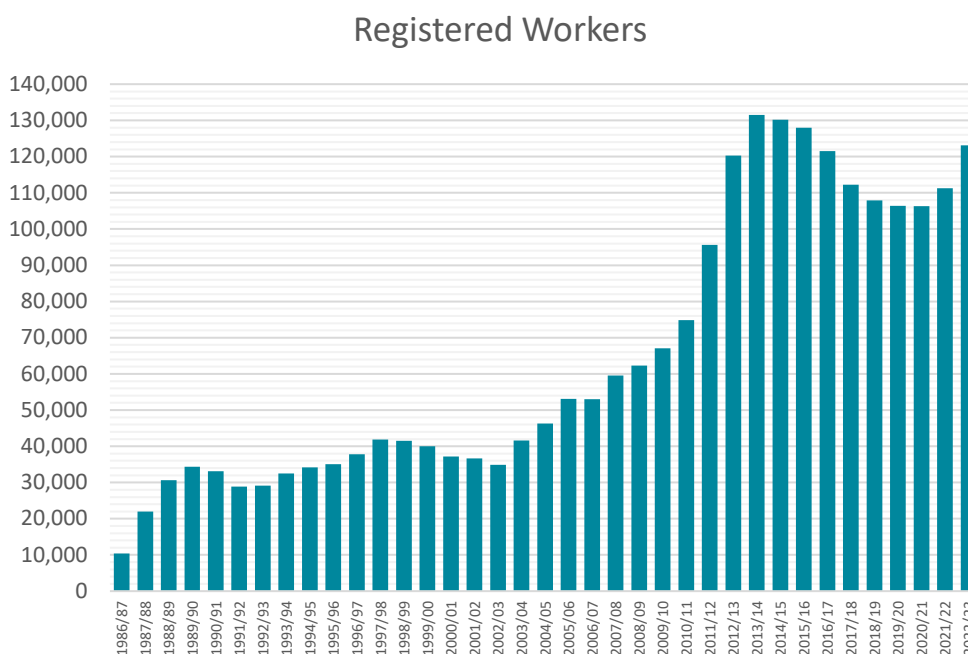


Figure 1. Growth of Workers Registered with MyLeave (1986/87 to 2022/23)

¹ As of March 2023, approximately 142,000 people were employed in the Western Australian construction industry under the definition of construction drawn from the Australian and New Zealand Standard Industrial Classification (ANZSIC) (Source: Based on Data from Australian Bureau of Statistics (ABS) (2023) Labour Force, Australia, Detailed (Quarterly)). The definition of construction work used in the Act differs from the ANZSIC definition used by the ABS: the ANZSIC construction classification incorporates roles not eligible for registration with MyLeave such as project managers.

² Based on historic Construction Industry Long Service Leave Payments Board Annual Reporting, the number of registered workers in the first operational year of 1986/87 was 10,441. The number of registered workers increased to 34,337 in 1988/89 as the Board focused on worker registration.

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This submission details MyLeave considerations on Act modernisation with summarised matters for consideration as part of the Review (see [Appendix G](#)).

Several ambiguous areas of the Act have been identified that impede the intent of the Act. An overarching concern of MyLeave is delineating the parameters of the modern construction industry and clarifying eligibility of worker cohorts. Expert knowledge of industry participants in conjunction with MyLeave's operational insights provides a solid platform for informing these parameters.

The need for the *Construction Industry Portable Paid Long Service Leave Act 1985* remains. The intent of the Act aligns to the modern policy agenda of the Western Australian Government, specifically the WA Labor Plan for Jobs³ which includes attracting and retaining the construction sector workforce necessary to build public infrastructure into the coming decades. The successful history of MyLeave has demonstrated a strong fidelity of process with workers accessing their entitlements, strong funds management and limited disputes given MyLeave's growth.

The Act Review provides a timely opportunity to examine how the administrative, regulatory and compliance mechanisms of the Act can be enhanced to further support the purpose of the Act.

³ WA Labor Plan for Jobs 2021, <https://www.parliament.wa.gov.au/publications/tables/papers>

2 About MyLeave

The Construction Industry Long Service Leave Payments Board (trading as MyLeave) is a Statutory Authority established pursuant to the provisions of the *Construction Industry Portable Paid Long Service Leave Act 1985* (the Act).

The primary mission of MyLeave is to manage in an efficient and effective manner, portable long service leave for eligible Western Australian construction industry employees, established by the Act. This is achieved by:

- 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 minimising the administrative costs.

MyLeave provides a significant benefit to employees in the form of a portable long service leave benefit which, due to the nature of the industry, would normally not be available. Over \$550 million has been provided in long service leave payments to around 72,000 construction workers in Western Australia. The historical context of the value of payments over time is shown in Figure 2 below. Some key statistics concerning MyLeave’s operations are detailed in [Appendix E](#).

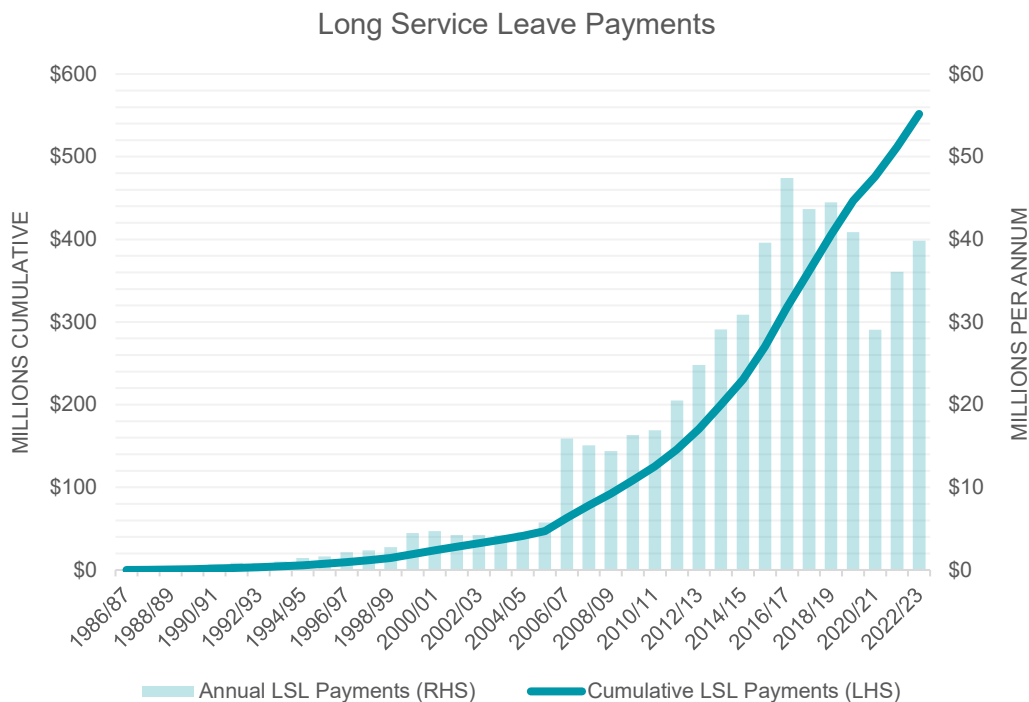


Figure 2. MyLeave Cumulative and Annual Long Service Leave Payments (1986/87 to 2022/23)

3 MyLeave Submission to the Act Review

This submission has been prepared by MyLeave management with Board members having the opportunity to review the submission. Board members noted the MyLeave submission, acknowledging that the Board, as the accountable authority, have not made a submission in their own right to the review.

3.1 Matters for Consideration

This submission responds to the key themes that KPMG, as the independent reviewer, have sought stakeholder feedback on consistent with the Act Review Terms of Reference. These themes are:

- Coverage - provide clarity on cohorts of workers that should be captured in the modern workforce;
- Treatment - delivering fair and equitable outcomes for a modern construction workforce;
- Compliance, enforcement and dispute resolution - ensure the Act is complied with and there are effective dispute resolution mechanisms; and,
- Administrative and regulatory considerations - efficient and effective administration and minimise regulatory burden.

MyLeave's submission to the Act Review is drawn from the agency role as the Statutory Authority administering the Act. This submission to the Act Review has been developed based on MyLeave's operational knowledge and experience gained over nearly four decades.

The submission raises issues and matters for consideration by KPMG, the independent reviewer, to assist in addressing the Terms of Reference approved by the Minister.

The issues raised in this submission are not necessarily conclusive or intended to limit MyLeave's position of any matters that are identified at any later stage of the Act Review. This submission is intended to only identify matters for consideration with KPMG responsible for the conduct and outcomes of the Act Review. MyLeave reserves its right to reconsider or expand on the matters detailed in this submission.

In its capacity of administering the Act, MyLeave has encountered technical difficulties as well as challenges with interpretations that are not prescriptive in the legalisation. This has led to ambiguity of some of the provisions and changes in interpretation over time, both because of judicial proceedings and detailed examination by MyLeave. There are also situations encountered in the contemporary construction industry that were not contemplated when the Act commenced.

The main difficulties are around eligibility for workers, the determination of entitlements and limited compliance options.

3.2 Purpose of the Act

To assist Act administration and guide industry participants, it would be beneficial to state a strong purpose and intent of the Act. This purpose and intent can act as an anchor guiding improvements to the way the legislation operates and provide sound rationale for making any changes with some guiding principles.

To move forward we need to reflect on the original intent of the Act. In the Second Reading speech of the *Construction Industry Portable Paid Long Service Leave Bill* in 1985 the Minister for Education, on behalf of the Minister for Minerals and Energy in introducing the proposed legislation stated:

“In proposing to Parliament that employees in the construction industry be enabled to participate in entitlements enjoyed by employees in other industries, Government is not advocating any change to standards which currently apply.

Indeed employees in the construction industry are already entitled to long service leave by virtue of either their award or the Long Service Leave Act. However, the nature of the industry is such that they are effectively denied the opportunity of enjoying that entitlement.

The entitlements to long service leave set out in the Bill for employees in the construction industry mirror those in industry in Western Australia generally. It is intended that they should be no better or no worse than the general standard. This, however, has to be modified in terms of the portable nature of the scheme.

The provisions of this 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.”⁴

The comments from the Minister centre on aligning entitlements to mirror those received by workers in other Western Australian industries to ensure neither cohort is advantaged or disadvantaged: *“they [construction workers] should be no better or no worse than the general standard.”*

The opposition of the day concurred with this sentiment of ensuring parity of entitlements. During the Second Reading of the *Construction Industry Portable Paid Long Service Leave Bill* in 1985, an opposition member stated:

“The Bill proposes entitlements of 13 weeks’ long service leave after 15 years’ continuous service within the building industry, irrespective of the number of employers that a person employed within the industry may have had during that 15-year period. Members will be aware that due to the very nature of the building industry workers are often required to move from job to job and, as a result, it is impossible to build up a 15-year continuous period of employment with any one employer. The building industry operates on a job-to-job, basis and by the very nature of the industry it operates on a short-term employment basis. The purpose of this Bill is to recognise the short-term nature of the industry and to provide workers within the industry the benefits that are already enjoyed by workers in similar industries where they can accumulate 15 years’ service working for one employer. The Bill basically recognises and provides for portability of long service leave within the building industry.

⁴ Hansard, Legislative Assembly, Second Reading, 17 September 1985, Mr Pearce, Minister for Education, pages 1026 to 1031.

The Opposition, in considering this Bill, recognises that it would be grossly unfair to discriminate between employees within similar industries, and it would be quite wrong to prevent an employee who, by the nature of his employment, is not able to accumulate 15 years' continuous service in the calling of his choice, from obtaining long service leave."⁵⁶

These comments from both sides of political spectrum confer the intent of the Act was to ensure workers had equal access to entitlements regardless of the industry they worked in and number of employers they worked for, albeit modified for the portable nature of the scheme.

During the Third Reading of the *Construction Industry Portable Paid Long Service Leave Bill* in 1985, an opposition member further reiterated this intent of the Bill as focused on recognising time worked, not length of period with a single employer:

"This Bill is in reality an extension of the Long Service Leave Act 1958, and it contains within it several matters.

The main purpose of the Bill is to recognise that a person is entitled to some long service leave after working within an industry for a period of time rather than just Working with a single employer."⁷

The content of the above speeches provided clear direction around the purpose and intent of the Act at that time and could be used to guide the contemporary approach.

It is also noted that the Act title page, assented to on 13 December 1985 (No.72 of 1985), stated (and still does) the purpose of the Act:

"An Act to make provision for paid long service leave to employees engaged in the construction industry and for incidental and other purposes."

Long service leave entitlements for workers in similar industries, as well as workers that are not covered under specific industry provisions, are covered in the general state provision under the *Long Service Leave Act 1958* (WA). Thus, the intent of the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA) could be conceptualised as extending existing entitlements to a group of workers that were missing out due to the nature of their work.

Given that prescribed awards were used to assist in determining worker eligibility under the *Construction Industry Portable Paid Long Service Leave Act 1985* (WA), the intent of this Act was to clearly capture workers that generally perform manual labour using their hands and physical abilities to perform their duties and whom are normally paid by the hour (blue collar) for project work.

Equally it could be said that the Act was not intended to cover employees in office settings in clerical, administrative, or management roles who would normally earn an annual salary (white collar). This later cohort of employees are generally higher salaried workers in purely supervisory, project management or management roles and are less transient (although not always true in the modern context of greater workforce mobility). However, these more senior employees generally, but not always, have greater autonomy and are more likely than project-based construction workers to be in control of their tenure.

⁵ Hansard, Legislative Assembly, Second Reading, 26 September 1985, Mr Cash, page 1676.

⁶ Note, prior to an amendment to the Act in 2006 the benefits were based on 15 years of service with 10 years pro rata. The 2006 Amendment provided for 10 years of service and 7 years pro rata.

⁷ Hansard, Legislative Council, Third Reading, 24 October 1985, Hon H.W. Gayfer, page 2931.

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It was noted in the Executive Summary that the policy agenda of the Western Australian Government, specifically the WA Labor Plan for Jobs⁸ includes attracting and retaining the construction sector workforce necessary to build public infrastructure into the coming decades.

The Act supports this policy position by providing an incentive for the attraction for workers in the construction industry for the wellbeing of a strong industry in Western Australia.

MyLeave Consideration

The term 'worker' is more synonymous to manual work than 'employee' which is a more generic term. 'Employee' is the basis of the terminology in the Act now. The language could be amended in the Act to refer to worker rather than employee to reinforce the target audience of the service.

In the contemporary context a possible purpose of the Act could be articulated as:

To recognise the transient nature of the construction industry generally applying to workers who undertake manual labour on sites and who may work with more than one employer, to be entitled to long service leave benefits aligned with the benefits that apply to workers under the *Long Service Leave Act 1958 (WA)* but modified in terms of its portable nature. Additionally, to contribute to the wellbeing of a strong construction industry in Western Australia by assisting to attract and retain workers.

The term 'aligned' is used in this purpose statement because the *Long Service Leave Act 1958 (WA)* focuses on single employer scenarios and does not cater for the portable nature of the construction long service leave provision. By necessity, not all the provisions contained in the *Long Service Leave Act 1958 (WA)* can be aligned to the *Construction Industry Portable Paid Long Service Leave Act 1985*, and there are key differences that would be customised accordingly.

⁸ WA Labor Plan for Jobs 2021, <https://www.parliament.wa.gov.au/publications/tabledpapers>

3.3 Submission Principles

Following on from the intent and purpose as described above, overarching principles can be considered for guiding the present Review of the Act and this submission.

Six principles have been formulated as follows:

1. Portability

Cater for transient workers with higher levels of job mobility across multiple employers.

2. Construction work coverage

Ensure coverage of workers who undertake manual labour on sites and 'construction industry work'.

3. Benefit alignment

Ensure workers are 'no better or no worse' comparative to benefits under the *Long Service Leave Act 1958 (WA)*, having regard to modifications necessary for the portable nature of the arrangements.

4. Clarity

Reduce ambiguity regarding worker coverage, eligibility, and entitlements.

5. Efficiency

Create efficiencies for all industry participants in the administration of the Act.

6. Pragmatic compliance

Adopt appropriate and proportional compliance mechanisms that are effective and pragmatic.

These six principles have been used for the identification of matters for consideration as part of the Review of the Act.

4 Coverage: Who's in and Who's out?

Eligibility and coverage are relatively well defined for many of the workers registered with MyLeave. However, there is some conjecture at the fringes where the boundaries of the construction industry are not so well defined. This is particularly so where work is: transitioning away from manual construction activity towards management duties associated with higher wages; the type of construction work is not defined in awards; or there are gaps in the definition of work that would generally fall within construction.

It would be beneficial for the review to clarify boundaries of what is construction industry work, and what is not.

Whilst the Act lists activities in the construction industry, there are deficiencies open to interpretation. This ambiguity may be avoided by defining what is not 'construction'. When combined, the 'in' and 'not in' definitions of construction industry work have the potential for enhancing clarification.

This section discusses the role, and need for prescribed awards, examines examples of how particular cohorts could be managed, suggests some guidance on jurisdiction and connection to Western Australia, considers terms that are not defined, and looks to the future as the industry evolves.

4.1 Defining Construction Work and Construction Industry

1. Prescribed Classifications of Work

To be eligible for registration with MyLeave, an employee must be employed "*in a classification of work referred to in a prescribed industrial instrument relating to the construction industry that is a prescribed classification*", as detailed in the definition of employee under section 3(1) of the Act.

Using prescribed classifications of work in an Award can provide clear parameters of which work roles are definitively included under the Act, and conversely which work roles are excluded. However, the occupations and classifications of work in the construction industry have changed significantly since the introduction of the Act.

In 2021, a review was undertaken of all Prescribed Awards listed in Schedule 1 of the Regulations. The list of awards was then modernised based on the results of the review. Despite the capacity to update prescribed classifications of work, modern industrial relations have to an extent moved away from prescribing occupations with modern awards classifying workers based on competencies rather than trades. In the modern construction sector workers are increasingly engaged under enterprise agreements and common law contracts, as opposed to being engaged under a prescribed classification of work.

The consequences of this shift in employment practices is that some employee cohorts within the construction sector that undertake hands-on and onsite construction work are ineligible for MyLeave registration.⁹ In the modern context, linking employee eligibility for MyLeave registration to prescribed classifications of work has created complexity and confusion for employers when they hire someone under one award or agreement however that employee's work is then re-categorised under another unrelated award or agreement to which their duties best align.

An example of this issue was where a company employed workers as 'electrical fitters' however these workers were not employed in the classification of electrical fitter in the award prescribed in the Regulations.¹⁰

⁹ See [section 4.2 of this submission](#)

¹⁰Construction Industry Long Service Leave Payments Board v Positron Pty Ltd 1990 WAIRC 13062

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In this matter of Positron Pty Limited before the WAIRC upon appeal (No. 759 of 1990) on 9 August 1990, the three Commissioners found:

“It is not relevant in my view whether such an employee is employed by an employer who is bound by that award or that the employee is bound by that award as the definition only uses the reference to the award to identify a classification of work related to the construction industry.”

This means that it does not matter what award an employee or employer is bound by. To be eligible for registration with MyLeave, it is only required that the classification of work of the employee be listed in the awards prescribed in the Regulations.

This can create confusion for both employers and workers concerning eligibility when a worker’s employment arrangement is not referenced, or explicitly linked with one of the prescribed awards. MyLeave is regularly referencing the Positron decision (from 1990) to inform employers regarding the eligibility of their workers. If Awards are maintained, this legal position should be codified in the legislation.

MyLeave Consideration

Consideration could be given to an alternative mechanism for defining or describing employee role eligibility for registration with MyLeave as opposed to relying on prescribed classifications of work. Expert knowledge from industry participants in conjunction with MyLeave’s operational insights provides a solid platform for informing these parameters.

Consider the ABS Australian and New Zealand Standard Industrial Classification (ANZSIC) and Australian and New Zealand Standard Classification of Occupations (ANZSCO) as components of a range of alternative options to assist defining roles in the construction industry.

Should prescribed awards be maintained as part of determining eligibility of workers, the legal position concerning the relationship with the prescribed awards should be more clearly articulated in the legislation.

2. Exclusions – What is Not Construction Work

The ambiguous nature of the ‘construction industry’ definition contained in the Act, along with limitations of using prescribed classifications of work, means that employees who fall within the definition of an award ‘grey area’ may miss out on registration and entitlements under the Act.

It is important to define not only what is eligible (what’s in), but it is equally important to have a clear definition of what is not eligible (what’s out). It may be helpful to observe how affiliated legislation defines, and outlines **exclusions** to, the definition of ‘construction industry’.

For example, the *Building and Construction Industry Training Fund and Levy Collection Act 1990* draws on the ‘construction industry’ definition in the CIPPLSL Act and then clarifies the forms of work that are *excluded* from construction work in the subsidiary Regulations.¹¹ In summary, these exclusions include:

- the forms of work which are not deemed as construction work;
- the allied sectors where periphery construction work may occur, but which is not deemed as core construction work; and
- the value of construction work deemed out of scope; and

¹¹ See section 3(1) of the *Building and Construction Industry Training Fund and Levy Collection Act 1990*

- where building work for foreign countries within Western Australia is excluded.^{12 13}

The terms raised in these exclusions are defined within the subsidiary Regulations of the associated Act.¹⁴ This approach assists in clarifying the scope of 'construction industry', as well as offering a process for updating definitions with less regulatory burden in the context of an evolving sector.

However, there is an issue with situating the exclusions within subsidiary regulations. This more agile process of altering provisions through placing them in the Regulations can shift legislation amendment away from the parliamentary-based decision process. A consequence being that easier ability to change legislation through regulation amendment may not provide employers with sufficient certainty about whether they are deemed to be operating in the construction sector i.e., definitions are potentially open to increased updating. As such, a regulated and transparent process of informing and consulting the industry would need to be considered before any amendments to Regulations are made.

MyLeave Consideration

Consideration could be given to the extent to which 'construction industry' exclusions (and subsequent definitions) could be clarified in the legislation.

4.2 Specific Cohorts

1. Supervisors: Blurred Role

There is confusion as to under what circumstances a supervisor is eligible for registration to accrue long service leave entitlements with MyLeave.

Supervisors, otherwise referred to as a Foreperson, manage other employees at construction sites and monitor projects. They are usually experienced construction workers principally employed for direct supervision of hands-on construction workers, also ensuring timelines are adhered to, trouble-shooting time-sensitive technical issues and overseeing employee health and safety.

Confusion arises as some employees perform the Foreperson role, which is eligible under the prescribed classifications of work listed in the *Construction Industry Portable Paid Long Service Leave Regulations 1986* (the Regulations). However, that employee may be hired under a supervisor job description, which is not specified under the prescribed classifications or work. As worker's actual duties can differ from their job title or job description and can change over time, worker eligibility for registration with MyLeave is based on the 'principal' or 'substantial' purpose of the worker's employment, being their actual duties and functions, not their job title.¹⁵

Further uncertainty arises when considering blended Supervisor roles. For example, some employees referred to as Supervisors may also perform higher-level project manager, Director or human resource functions. Some Supervisors can receive high levels of remuneration (over \$200,000 per annum) that may indicate that the role is more senior, akin to manager, and therefore not eligible.

¹² The Regulations specify exclusions on construction work undertaken at diplomatic missions and consulates.

¹³ The *Work Health and Safety (General) Regulations 2022 (WA)* also uses this approach for defining 'construction work'. Exclusions from construction work and 'meaning' of terms used in the definitions are situated within the Regulations (not the associated Act).

¹⁴ See section 3(1), 3A, 3B of the *Building and Construction Industry Training Fund and Levy Collection Regulations 1991*.

¹⁵ An extensive summary of Supervisor eligibility is provided on the [MyLeave website](https://myleave.wa.gov.au).

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This leads to a reliance on inconsistent, unquantifiable subjective assessment as to Supervisor eligibility for registration with MyLeave.

Outlined below are general considerations relied upon to delineate on a case by case basis between eligible and ineligible Supervisors (see extensive summary on [MyLeave website](#)):

Eligible Supervisor	Ineligible Supervisor
<ul style="list-style-type: none">• Principally employed to perform work that <i>aligns</i> with the role of Foreperson under the prescribed awards.• Substantive role is on one or more sites, directly overseeing the work of employees.• Ensuring the program of work is met, orders materials, is responsible for the quality control of the work being supervised.• A worker that is principally employed to work most of their time on-site (i.e., more than 50%).	<ul style="list-style-type: none">• Mainly administrative, project management related accountabilities and who are office based.• Mainly employed in roles such as site managers, superintendents, project managers, department heads, general managers, or engineers.• Have a high level of remuneration.• Employee duties are as a manager outweighing duties as an on-site Supervisor.

MyLeave Consideration

Supervisors are a crucial employee cohort to retain for the sustainability of the Western Australian construction sector. Reliance on ‘principal’ or ‘substantial’ purpose of the worker’s employment provides some clarity however these positions are arguable. Consideration could be given to how the Act can clarify employee eligibility for registration with MyLeave to centre on the Supervisor duties (principal purpose), not the job title.

Consideration should be given to the principals guiding this submission in that transient roles and roles directly involved in manual labour or overseeing such work are applicable for coverage. Whereas roles that are more removed from manual work and less transient should not qualify for cover. Indicators of less relevant roles are those that in addition to supervision have other management responsibilities, positions with the organisation hierarchy, and perhaps are more highly remunerated.

2. Working Directors

The Act does not define or reference a working director.¹⁶ The lack of guidance in determining working director eligibility for MyLeave registration and entitlement has led to an inconsistent application of the Act.

The *Corporations Act 2001* (Cth) defines a working director as:

“A working director is a person who executes work for or on behalf of a proprietary limited company, whose earnings, as a director of the company by whatever means, are in substance from their personal manual labour or services.”

Issue 1: Working Director Definition and Eligibility

- a. It is difficult to ascertain proof that a working director substantially carries out eligible work where that working director has control of the work they do.
- b. As the employer, working directors are not at ‘arm’s length’ from reporting employee activity: a working director could potentially manipulate the description and record of the work they undertake to ensure MyLeave eligibility.

¹⁶ Comparatively, some construction sector portable long service leave operations in other jurisdictions provide a clear definition of working director. See [Construction Industry Long Service Leave Act 1987 \(SA\)](#), Section 37A

- c. A working director may engage in project work however their role in the construction industry could be considered fundamentally different to other workers. As business operators intending to sustain long term trading, it could be assumed that they have capacity and autonomy to plan for their own annual or long service leave.¹⁷

Issue 2: Calculating ‘Fair and Equitable’ Payments

- a. Working directors are currently afforded more flexible parameters for defining ‘ordinary pay’, than employees who must be assessed against a stricter interpretation of ‘ordinary pay’.¹⁸ Reporting of ‘ordinary pay’ has implications for how much an employee is paid when they claim an entitlement ([see section 5.1 of this submission](#)).
- b. An issue for consideration is that working directors are not at ‘arm’s length’ as the employer when reporting employee wages: a working director could potentially manipulate their own reportable income to inflate a MyLeave claim.
- c. A working director can control the structure of their remuneration between wages and drawings and change these arrangements to be more beneficial to them, either when making contributions, or when making a claim for a long service leave payment. This is exacerbated if a working director has been in the industry a long time and accumulated multiple periods of long service leave entitlements.
- d. Large adjustments to wages become a compliance issue for MyLeave (as normal employees cannot adjust their own pay). Once wages are significantly adjusted, a working director would be deemed ineligible as an employee.
- e. When long service leave contributions are paid on behalf of a working director (as an employee) a tax deduction may be applicable to the business – which is owned by the working director. There would be no comparative tax concession for other employees.

See [Appendix A](#) for a case study illustrating the complexities of working director self-reported ‘ordinary pay’.

See [Appendix B](#) for a summary comparing working director and employee eligibility for registration with MyLeave.

MyLeave Consideration

It would provide clarity if working director was defined in the Act. Working directors are business proprietors and principally engaged in owning, operating, and growing a business enterprise, therefore their purpose is not only work in construction. The review of the Act should consider examining if working directors should be eligible for registration with MyLeave. It is considered that working directors should not be eligible employees.

If working directors are considered eligible for MyLeave registration, the Act Review could consider how their work records and wages could be verified and equitable entitlements could be calculated with accumulation of days of service and entitlements over time.

¹⁷ Generally, a small business owner would rely on revenue derived from other workers, savings, insurance policies (i.e., income protection, WorkCover) or other financial products and options to provide themselves with income while on leave.

¹⁸ For Working Directors, the ‘ordinary rate of pay’ is considered the amount that they receive as wages on a defined, regular, at least monthly basis, that they pay tax on a Pay As You Go (PAYG) basis, have wage records, can present an ATO payment summary, and evidence regular payment of wages into their personal bank account.

3. Sub-contractors

The issue of concern regarding sub-contractors is clarifying under what circumstances this cohort is eligible as an employee for the purpose of MyLeave registration and claim entitlement.

Construction projects typically involve a client hiring a building contractor who will then engage sub-contractors, also referred to as independent contractors or Australian Business Numbers (ABN) workers, to deliver on specific tasks across the construction project schedule. One cohort of workers may sub-contract to provide their labour in the service of the employer (commonly referred to as ABN workers).¹⁹

Comparatively, independent contractors are not deemed to be employees: Independent contractors work in their own independent business and, in the course of their business, contract to achieve a 'given result' for a principal.²⁰

As the construction sector has evolved, changes in work practices have blurred the traditional distinctions between the two forms of workers and their eligibility for MyLeave registration. MyLeave has followed the advice that there is no single test that can be relied on to define the employer-employee relationship, and it is the totality of the relationship which must be considered in reaching a determination.

MyLeave Consideration

There is an opportunity to consider how the Act can clarify the distinction between an employee that sub-contracts and independent contractors in reference to their eligibility for MyLeave registration and entitlements.

4. Building Trade Assistant or 'Peggy'

A building trade assistant, colloquially referred to as a 'Peggy', is a worker employed on a construction site providing general assistance to other construction workers. Duties may include cleaning worksites as well as maintaining equipment to ensure a worksite complies with work, health and safety standards. The role is adaptable depending on the needs of the construction site and can extend to general labouring duties and operating machines or power tools.

Various roles comparable to a building trade assistant are listed as prescribed classifications of work eligible to receive long service leave entitlements under the Act. However, as the role can extend to cleaning or other duties such as supply ordering, eligibility for MyLeave registration could be contested. There is no clear guidance in the Act as to whether this role should be considered eligible for registration with MyLeave.

There is another matter of the benefit of attracting workers to the sector through the building trade assistant role. There is a frequently expressed view in the construction sector that the role of building trade assistant provides under-employed entry level demographics such as younger and newly arrived migrant workers with a pathway into construction and apprenticeships. An additional view is that the building trade assistant role has traditionally been a position appropriate for older - near retirement workers that have skilled knowledge to share and mentor others, however these workers are no longer physically able to work 'on the tools'.²¹

¹⁹For further clarification of the employer/employee relationship used by MyLeave see: ['Checklist for determining whether and Employer/Employee Relationship Exists'](#)

²⁰ If the contract is not to achieve a "given result" but is really for the labour of the worker, MyLeave takes this as an indication that the relationship is one of employer/employee. An example of this type of arrangement would be where a worker provides "labour only" pursuant to a contract and is paid at an hourly rate, or set rate of pay, per pay period. See [MyLeave website](#) for further information on sub-contracting.

²¹ MyLeave does not currently retain data on employee demographic profiles and cannot validate the demographic breakdown of this cohort. Further research and industry stakeholder knowledge may provide more insights into the makeup of this cohort and the barriers to employment that they face.

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From an equity standpoint, building trade assistants could be considered a demographic of workers that face a level of comparative disadvantage. Like other construction workers they are working on a site and unable to accrue long service leave with a long-term employer due to the project-based nature of the work.

The broad remit of their work doesn't fit neatly into the prescribed classifications of work which can result in their eligibility for registration and entitlements with MyLeave being contested.

However, it is not viewed that workers more broadly classified as cleaners that do not work on construction sites, nor adding any cleaning awards in the prescribed awards is appropriate for inclusion as work in the construction industry.

MyLeave Consideration

Consideration should be given to clarifying that the duties performed by a building trade assistant are considered construction work and this employee cohort should be deemed as eligible for MyLeave registration and entitlements.

5. Commissioning

The MyLeave Board decided in March 2021 that the issue of commissioning trades doing construction activity be included as part of any future review of the Act. This was as a result of an assessment of commissioning technicians working on the Shell Prelude being deemed ineligible following a comprehensive job analysis. The Board decided (in part):

“to accept the conclusion in the job analysis report that “looking at the narrative in the data, its context and the substantial purpose of a Commissioning Technician's employment, ... has not employed them to “do work in the construction industry” as defined”;

“that job roles involving commissioning works of testing and monitoring as its substantial purpose are generally not within the construction industry as defined in the Act, however, each situation to be assessed on its circumstances and merits;

Notwithstanding the above, commissioning workers are often working alongside other workers that are eligible under the Act and employed on similar conditions. Further, whilst commissioning is mainly related to testing and monitoring, there are often substantial remediation and repair works required as part of the commissioning function which can be accurately described as construction activity. The issue is whether the worker is “substantially engaged” in construction actively which can vary from job to job.

Views expressed by industry participants is that the nature of commissioning work includes using tools and fixing things which is construction work. It was viewed that the commissioning trades did the same type of work as other workers. Ideally, construction work should cease and then commissioning activities commence, but this is now a grey area.

MyLeave Consideration

Workers undertaking commissioning should be considered as employees eligible for registration under the Act.

6. Traffic Controllers

A recent WAIRC decision (Contraflow) in 2022 clarified that traffic controllers are deemed to be employees eligible under the Act to register with MyLeave.²² However, there is a need to clarify within the legislation that this work role is considered eligible.

MyLeave Consideration

There is a need to specify that traffic controllers are employees eligible for registration with MyLeave under the Act.

7. Mobile Plant

As mobile plant is not a structure or fixture maintenance of these items is deemed ineligible as a construction work site. This was clarified by a WAIRC decision in 2020 with work to mobile plant being assessed as one step removed from construction.²³

MyLeave Consideration

There is a need to clarify that a mobile plant is not a structure or fixture and is ineligible as a site of construction work under the Act.

8. Construction Workers Who Work on Ships

Forms of construction work can occur on offshore rigs. Some offshore rigs can be classified as ships due to their ability to navigate the seas and can be self-propelled. This affects the eligibility of employees for MyLeave registration as 'ships' are excluded in the Act. However, 'ships' is not defined within the Act. Defining 'ships' would provide certainty as to employee eligibility for MyLeave registration.

Currently, workers engaged in the construction industry who work on ships are not eligible as the Act's definition of 'construction industry' does not include *'the carrying out of any work on ships.'*²⁴

This interpretation was upheld in a decision by the WAIRC in 2016²⁵ whereby an employee engaged as a rigger performed work on a vessel. It was concluded that the meaning of 'construction industry' excludes the carrying out of any work while located or positioned on board a 'ship'.

The work involved what would ordinarily be considered construction work and included the assembly of structural steel components on the deck of the vessel and transportation and installation of various items of subsea equipment (including cables and pipelines) for the purposes of extracting oil and gas.

As a result of the above decision a cohort of workers were excluded from coverage under the Act and lost entitlements.

The Act requires employers that engage employees in the construction industry to make long service leave contributions to MyLeave. Workers carrying on construction work on offshore rigs that are fixed or are not self-propelled are within the ambit of the scheme, but not if the work is performed on board a 'ship'. This is an anomalous situation that does not have any policy basis, rather it has arisen from changes in the way offshore rigs and related construction work now operate.

²² See [Appendix A: Case Studies \(Case Study 2\)](#).

²³ Glenn Wallis v The Construction Industry Long Service Leave Payments Board [209] WAIRC 845

²⁴ *Construction Industry Portable Paid Long Service Leave Act 1985*, Section 3(1) definition of *construction industry*, paragraph (d).

²⁵ *Ben Thompson v The Construction Industry Long Service Leave Payments Board* (2016) WAIRC 00054

Consequently, the Western Australian Government listed a proposed amendment to the Act in the 2021 pre-election industrial relations policy commitments as follows:

“Undertake to amend the Construction Long Service Leave Act to accommodate construction workers who work on ships and were excluded by the 2016 WAIRC decision.”

The proposed amendment to the Act would cover the cohort of workers excluded under the 2016 WAIRC decision, without otherwise expanding the coverage. The prescribed awards do not cover the maritime or shipping industry and it is not planned for maritime workers to be eligible. Aligned with this, it is not intended that work to ships (i.e. ship building, maintenance, and repair) be covered.

This amendment is under consideration with the Minister.

4.3 Jurisdiction (Extraterritorial Operation)

The jurisdiction covered by the Act is Western Australia as determined in the *Industrial Relations Act 1979* with employee eligibility for MyLeave registration considered if work is undertaken in Western Australia as well as within the defined offshore area (section 3A (1)).

The reference to the *Industrial Relations Act 1979* within the CIPPLSL Act is drawn on for defining jurisdiction. However, there is uncertainty as to how to assign a worker’s day of service when a worker is employed at an offshore *extraterritorial* scenario not accounted for in the *Industrial Relations Act 1979*.

For the Act to operate outside of Western Australia in addition to the offshore area, extraterritorial operation must be implied. The advice relied upon to guide worker eligibility for MyLeave registration is that for extraterritorial operation to be implied there must be a real and substantial connection between the circumstances in which the legislation operates and Western Australia. The following factors are taken into consideration in determining if a worker’s day of service, that takes place in an extraterritorial scenario, is still deemed eligible with MyLeave:

- a) the terms of the contract;
- b) the place where the contract was entered into;
- c) where the employer and employee are located;
- d) if the employee was working directly for their employer or through another party;
- e) the nature and extent of the work performed in Western Australia; and,
- f) the nature and extent of the work performed through the entire contract, including outside of Western Australia.

It would be beneficial for these positions to be incorporated in the legalisation to remove any possible uncertainty.

MyLeave Consideration

The approach in the *Industrial Relations Act 1979 (WA)* to define jurisdiction is sound. However, consideration could be given to additional provisions in the Act to clarify the parameters of when a worker’s day of service undertaken in Western Australian extraterritorial areas is deemed eligible for registration with MyLeave.

4.4 Terms Requiring Further Definition

Defining the below list of currently undefined terms used in the definition of 'construction industry' would assist in clarifying which employee and employer cohorts in the modern construction industry ought to be eligible for registration.

Term: *'installation'*

Issues arising:

- 'Installation' is not defined within the Act and therefore has been interpreted as the ordinary meaning when referenced in legal proceedings.²⁶
- As a result of this narrow interpretation of 'installation' there is a risk of excluding jobs such as **commissioning** which is an integral part of construction work. Under the current narrow definition of installation, commissioning work undertaken by an electrician could be interpreted as mainly testing and monitoring, which the Act does not separately cover.
- In comparison, the definition of 'construction work' in the *Work Health and Safety (General) Regulations 2022 (WA)* incorporates commissioning and decommissioning (289 (1)).²⁷
- Employees undertaking commissioning work should be eligible for MyLeave registration. The rationale is that construction contracts often incorporate a rectification period prior to completion of works. Commissioning work is integral to new project development and contract fulfilment.

Term: *'maintenance' and 'repairs'*

Issues arising:

- 'Maintenance' and 'repairs' are not defined within the Act.
- The definition of 'maintenance,' and exceptions to the definition of 'maintenance' have been points of consideration in several WAIRC decisions.²⁸
- Legal advice has had to be sought on several occasions to clarify 'maintenance,' and exceptions to 'maintenance.'

Term: *'routine' and 'minor'*

Issues arising:

- 'Minor' and 'routine' are not defined within the Act.
- The meaning of these terms has been interpreted in different ways and has led to difficulties in determining what constitutes maintenance or repairs of a routine or minor nature.²⁹
- For example, project maintenance is not considered as construction in the current definition.

Term: *'fixture'*

Issues arising:

- As fixture is referenced in section 3(a)(xvi) of the Act, but no explanation exists, it is open to interpretation and is therefore interpreted taken on its ordinary meaning when referenced in legal proceedings.³⁰

²⁶ See [Appendix D: Case Law](#)

²⁷ *Work Health and Safety (General) Regulations 2022* (r289)

²⁸ See [Appendix D: Case Law](#)

²⁹ See [Appendix D: Case Law](#)

³⁰ See [Appendix D Case Law](#)

- Confusion arises when determining what a fixture is and is not, and if the fixture is being installed in a building or works compared to a structure that is not within the scope of the definition of 'construction industry'.
- For example, the fitting of an air conditioning unit within a temporary demountable may not be considered as construction where the demountable is not yet wired or plumbed in (and therefore not yet considered a building under the definition of the construction).
- As discussed in section 4.2 of this submission, mobile plant is not deemed fixtures or structures (being one step removed from construction). This clarification would need to be outlined in the context of defining a fixture.

Term: 'site'

Issues arising:

- The term 'site' is not defined in the Act.
- The term 'site' has been extensively discussed and considered in WAIRC decisions.³¹
- The *Programmed Industrial Maintenance Pty Ltd v The Construction Industry Long Service Leave Payments Board [2021] WASCA 208* provided legal precedent on the definition of 'site'.
- Based on legal advice, 'site' has been interpreted as any location where construction work (as defined in the Act) is being carried out but does not include a location where workers are employed in an employer's own premises including their workshop, yard or factory. It also includes an office set up on site for the purpose of construction (e.g., dongas, demountable structures, caravans and any other structures used for the purpose of construction).
- Contention on the term 'site' continues where there is work carried out that may be deemed as construction work but taking place at an employer owned site. For example, the building of a transportable building such as a demountable at an employer's premise is not included under the Act. However, where that building is then transported to another site with installation and maintenance thereafter the work is included.
- [Section 4.5 of this submission](#) outlines complexities with limiting definitions of 'site' in the context of emerging technologies such as automation and pre-fabrication.

Term: 'substantially engaged'

Issues arising:

- The use of the term 'substantially engaged' without any qualification or guidance has resulted in subjective interpretation of employee eligibility for MyLeave registration.
- Comparatively, long service leave funds in other jurisdictions have quantified the extent of engagement in the sector by specific metrics including:
 - a percentage;
 - predominance test; or,
 - a set minimum number of days per reporting period.
- The notion of 'substantially engaged' in the construction industry should be quantified.

³¹ [See Appendix D: Case Law](#)

4.5 Future-Proofing and Emerging Trends

The Review is contemplating the contemporary construction industry. This should not only be limited to what is contemporary practice now, but also provide flexibility to adjust to what may arise over coming decades to reduce the likelihood of the Act quickly becoming out of date.

Any revised Act provisions could examine the scope of emerging technologies impact on the construction industry to pro-actively capture future forms of work. Consideration could be given as to whether definitions and legislative provisions will remain fit for purpose in the construction industry of the future.

Potential issues could include but are not limited to:

1. 'On-site' versus at the employer's premises

- The definition of construction industry activity references work being carried out on a site.
- However, operation of equipment from the employer's premises in the future may become more common in the construction sector.
- There have been shifts towards pre-fabrication of materials used in construction including the production of near to complete buildings at employers' premises.
- The use of remote-control operators has increased in sectors such as mining. This may be a future trend in construction, particularly with the labour shortage challenges of securing workers in northern and remote Western Australia.

2. Automation and disruptive technologies

- There have been significant advances and implementation of technology by industries i.e., artificial intelligence, augmented reality, robotics, 3D materials printing and programming.
- These forms of work may become more common in the construction sector and are not currently provided for under the Act.

3. Climate change

- With climate change impacting Western Australian communities, there is likely to be an increase in reconstruction and rehabilitation work undertaken by the construction sector following natural disasters.
- Mobilising the construction workforce to assist in rebuild would be a priority for any Western Australian Government.
- There may be a need for provisions that recognise the irregular nature of this work, in terms of ordinary hours, ordinary pay and extended work absences.
- Consideration could be given to what future-related reconstruction and rehabilitation work might not be defined in the Act, particularly under prescribed classifications, and how the Act accounts for hardship experienced by both employers and employees of the construction sector impacted themselves by natural disasters.

4. Shifts in Employment Practices

- Emerging employment practices such as the gig economy and work from home/ hybrid workplace arrangements have become increasingly common practice in many industries and may transfer into the construction sector.
- Proposed industrial relations legislative agendas around transient and casual forms of employment may also impact construction sector work practices and may be a material consideration for legislative drafting.

- Examples include the current proposals to offer permanency to regular casual employees focusing on defining sub-contracting compared to employee-employer relationships.

In contemplating these issues, the purpose and intent of the Act should be considered. A discussion of the Act purpose was articulated earlier in this submission. Eligibility of workers should be guided by the transient and insecure nature of their work (project based) and the direct relationship to actual construction work based on manual labour. Enhances in technology, automation and robotics in the future may result in less workers being eligible under the Act which may be a natural and acceptable transition into the future nature of construction work.

MyLeave Consideration

The Act review should take the opportunity to examine the scope of emerging technologies, environmental changes, and employment trends impact on the Western Australian construction industry. This review should examine how to ensure the Act remains relevant and fit for purpose into the future and able to adapt to emerging and new construction roles and practices without requiring substantial legislative change.

5 Treatment: Fair and Equitable Outcomes

5.1 Calculating Contributions and Entitlements

1. Ordinary Pay

'Ordinary pay' is a key term used in administering the Act. 'Ordinary pay' determines the employer contribution for an employee 'day of service'. Several issues arise from the definition of 'ordinary pay'.

Firstly, the ordinary pay for a reportable a day of service will vary depending on if the worker is entitled to paid leave or not. For workers entitled to paid annual leave (i.e., permanent/ fixed term workers):

"...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;" (section 3(1))

Under the Act, if a worker is not entitled to paid leave other than long service leave (i.e., casual workers and certain Fly in Fly Out and Drive in Drive Out workers):

"...ordinary pay of the person is the rate of pay to which the person is entitled for ordinary hours of work." (section 3(3a))

This is a different definition to the *Long Service Leave Act 1958 (WA)* definition of ordinary pay (see [Appendix C](#)).

MyLeave takes the position that the amount of ordinary pay a permanent and fixed term employee is entitled to is determined by their terms of employment.³² Ordinary pay for employees who are entitled to paid leave does not include annual leave loading but does include other amounts, such as rental allowance, utilities allowance, living away from home allowance etc., if these allowances are due to a worker when on paid annual leave.

However, determining ordinary pay continues to cause confusion when calculating claims for employees not entitled to paid leave i.e., casuals or certain rostered workers (i.e. certain FIFO or DIDO workers). It is not specified in the Act whether allowances are included or excluded in calculating ordinary pay for casual workers or rostered workers. MyLeave has interpreted that the ordinary rate of pay for casuals is whatever rate is payable to the casual worker in respect of hours worked. The ordinary rate of pay for casuals is interpreted as the all-inclusive rate including casual loading. Other allowances (site allowances, penalty rates or overtime) only apply if these are included in the all-inclusive rate of pay. The interpretations under the current Act are under review by the Board.

A second issue complicates the determination of ordinary pay: interpreting ordinary hours. The term ordinary hours is important because it is relevant to calculating long service leave entitlements for persons who are not 'entitled to paid leave (other than long service leave)'. The Act does not define ordinary hours leaving the term open to interpretation. This results in inconsistent calculation of employee long service leave.

As already highlighted, the amount of ordinary pay permanent or fixed/ term employees are entitled to is determined by their terms of employment.

³² Including but not limited to awards, agreements, contracts, letters of employment, and legislation.

It can be difficult to determine ordinary hours of casual employees. There is no guidance as to how to interpret ordinary hours of rostered shift workers such as a FIFO workers on-duty and off-duty periods as when the Act was legislated, work weeks were predominately a standard five days. Scenarios now arise where casual or rostered employees regularly work beyond standard or fixed hours (i.e., 12 hours) and this can be interpreted as the ordinary hours of an employee. In this scenario the casual employee could receive a higher rate of pay on long service leave which includes casual loading. This results in a disparity of pay between casual employees and permanent/ fixed term employees. The below example illustrates how a permanent employee on a base rate with no overtime or allowances may receive a lower long service leave payment than a casual employee:

Employee Type	Situation	# Hours Worked	Pay Rate	Payment
Permanent	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 casual regular & systematic basis	Salary of \$40 per hour plus casual loading = \$50per hour	60 x \$50 (per hour) x 3 weeks = \$9,000

As noted by the government of the day when the Bill was introduced to Parliament in 1985

“The entitlements to long service leave set out in the Bill for employees in the construction industry mirror those in industry in Western Australia generally. It is intended that they should be no better or no worse than the general standard. This, however, has to be modified in terms of the portable nature of the scheme.”

This approach has been considered as a principal for the preparation of this submission based on benefit alignment to ensure workers are ‘no better or no worse’ comparative to benefits under the *Long Service Leave Act 1958 (WA)* and having regard to modifications necessary for the portable nature of the arrangements.

Division 2 of *the Long Service Leave Act 1958 (WA)* details the definition of ‘ordinary pay’ in section 7, 7A, 7B, and 7C. An extract of these provisions is provided in [Appendix C](#). The key elements (paraphrased) are:

- (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.

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- (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, and taken by, the employee during the period of long service leave.

The *Long Service Leave Act 1958 (WA)* makes provision for all industries not covered by their own arrangements. Therefore paragraphs (c) above are not applicable for our purposes as construction workers are not usually paid piecework, commission, bonus work or percentage reward. Further paragraph (f) above relates to conditional application relating to board and lodging at the time long service leave is taken and cannot be the basis of ordinary pay accumulated progressively over the entitlement period under the Act and therefore a provision like this is not transferrable.

However, the other provisions listed above could be applied in the construction industry context to ensure that the benefits under the Act are no better or worse than the general long service leave provisions. This includes:

- Defining ordinary pay being the employee's remuneration for the employee's normal weekly number of hours of work calculated on the ordinary time rate of pay.
- The normal weekly number of hours of work of an employee whose hours have varied being the average weekly hours worked.
- Ordinary pay not including shift premiums, overtime, penalty rates, allowances or any similar payments. There may be challenges when all-up rates apply that cannot be separated out.
- A casual employee's ordinary pay includes the casual loading.

It would be necessary to adapt the *Long Service Leave Act 1958 (WA)* provisions, so they provide comparable benefits for construction workers due the portable nature of the construction long service leave.

MyLeave Consideration

The lack of clarity on ordinary pay and ordinary hours in the Act results in inconsistent interpretation when calculating both employer contributions and employee claim entitlements for employees who are not entitled to paid leave (e.g., casual workers). This is inconsistent with the original legislative intent of the Act which is to recognise and provide equitable portability of long service leave within the building industry. Consideration could be given to aligning the definition of ordinary pay with the *Long Service Leave Act 1958 (WA)* but adapted for the portable nature of the construction long service leave under the benefit alignment principle.

2. Day of Service

Current Definition

'Day of service' is a key term used in administering the Act. The number of days of service recorded by an employer for an employee is the basis for calculating when long service leave can be taken by an employee.

The Act defines '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;"

However, the definition for a day of service in the Act is problematic.

Issues Arising

Firstly, the definition stipulates three forms of paid leave days that are eligible to be counted as a day of service. However, the variety and forms of leave available to employees have evolved since the Act was introduced.³³ The modern interpretation adhered to by MyLeave is that all personal leave, including leave while on workers' compensation and parental leave, is considered as an eligible day of service. Yet, as these other forms of leave are not stipulated in the Act there is still confusion from many employers and employees around what constitutes a day of service. There is an opportunity to update the definition of day of service to clarify eligible forms of paid leave days.

Secondly, the Act does not specify minimum hours that an employee must work to qualify for a day of service. This creates the scenario where an employee can work as little as one hour and qualify for one day of service. Another employee can work a 12-hour day and will also accrue one day of service as per the below example:

	# Hours Worked	# "Day of Service"
Employee A	1 hour	1
Employee B	12 hours	1

Thirdly, the Act does not provide guidance for calculating a day of service outside of the standard five-day week i.e. no provision for rostered employees working over five days in one week. This scenario can result in inequitable accrual of 'days of service' for rostered workers. Such workers may work seven days in a row then have the next seven days off (or other rostered combinations). As a result, rostered workers may not accrue the full 220 days of entitlement over an annual period.

Fourth, the Act does not specify whether a day of service needs to be 'on-site'. This creates confusion as to whether work carried out at an employer owned site for example can be included as a day of service. There is an opportunity to clarify that once a worker is deemed to be eligible because they are substantially engaged in the construction industry and mostly carrying out their work onsite, that every day they receive ordinary pay is a day of service accrued.

³³ Examples include workers compensation, parental leave, family violence leave, stand down leave (such as enacted during the pandemic).

Lastly, there is confusion from employees when they have, without knowing, worked for an ineligible employer and are unable to claim days of service. The Act could clarify that a day of service will only accrue if there is an obligation on the employer to make contributions under the Act.

Alternative Model

In considering alternative methods for calculating a day of service, an option for further consideration is that a day of service is calculated by *actual hours* worked compared to the existing method of relying on employers to interpret a day of service to be recorded.

Employers would simply need to extract the hours worked during the quarter, provide the ordinary hours under the terms of employment (or if not identifiable in the terms of employment, 38 hours per week as per the National Employment Standards, and then hourly pay rate). MyLeave could then convert that information into a day of service by a formula as part of the return process. The gross pay for the quarter would also be determined and the contribution levy calculated on that amount.

In this proposed scenario employers would no longer have to record a day of service which their payroll systems do not capture. Instead, employers would be able to rely on the employee payroll data that they already capture. It is currently a burden on employers to interpret and then record the appropriate days of service under the existing method of days of service calculation.

A proposed model for calculating a day of service has been developed which is provided in [Appendix F](#).

The model demonstrates how the days of service calculation could be determined with various scenarios modelled (noting all inputs to the different scenarios are entered in the grey 'scenarios' section).

Alternative Model Assumptions

The model assumes that ordinary pay is based on the definition in the *Long Service Leave Act 1958* (WA) which includes averaging. Averaging will address anomalies with rosters and ensure days of service are allocated equivalent to working five days a week.

The model also allows part days to two decimal places so that the daily pay rate calculations are more accurate than whole days for part time workers. This will mean that part time workers that work a part day every day of the week will take longer to get to an entitlement than full time workers. However, under the *Long Service Leave Act 1958* (WA) the entitlement for a part time worker is a pro rata payment for actual hours work compared to a full time worker. Therefore, when a part time worker does reach an entitlement eligibility under the Act they will be paid at the same rate as a full time worker.

Accounting for Annual Leave

The first 20 days of annual leave are currently not counted as days of service. The proposed model follows this existing assumption with any annual leave days over 20 accounted for. This existing assumption however complicates the model calculations and is additional information for the employer to input. Also, the model works on a single quarter and the calculations must somehow accommodate 20 days over all four quarters in a year.

Given the additional reporting burden on employers caused by not counting the 20 days annual leave as service days and the added complications of accommodating for the 20 days of annual leave over all four quarters of the year, it would be more efficient and transparent if the Act was amended so that all annual leave was counted as a service day.

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Further, as the Act stands, only full time permanent workers that take over 20 days of annual leave receive a benefit. Under the current arrangements part time workers that take under 20 days annual leave are penalised because they will not accrue an annual leave service day until after they have taken 20 days of annual leave in a year.

Model Reporting Parameters

Based on this proposed model, employers would not need to provide days of service in their return and would only need to report on hours and hourly pay rates (which they can already extract from their payroll data). Under the model employers would need to report:

- (a) Hours Per Week (FTE employee)
Hours per week as per employment arrangements under an industrial instrument including a contract of service or average hours per week over a roster cycle for an FTE employee if on a roster. If the employee is a casual on variable hours and/or no FTE ordinary hours, use 38 hours per week as per National Employment Standards.
- (b) Hours on Annual Leave
If over 20 days on an FTE basis additional days are added to days of service. *Note:* this requirement could be removed if all annual leave days were recorded as a day of service for the employee. Employers still need to record and pay contributions on these days.
- (c) Other Hours in Quarter
Total hours entitled to ordinary pay excluding annual leave but including sick leave, workers compensation, parental leave etc. Other hours would not include overtime. Rostered workers reporting to include all hours worked on the roster cycle, except over cycle hours.
- (d) Hourly Rate (to four decimal places)
As per the ordinary pay definition in *Long Service Leave Act 1958*. Average hourly rate if changed between quarterly reporting (i.e. hours old rate/hours new rate). Most payroll systems record hourly rates of pay to four decimal places which aides in the accuracy of the calculations.

The MyLeave system would then automatically calculate:

- (a) Days of Service
For an FTE employee to two decimal places to enable accurate calculation of daily pay rate. The total hours worked in the quarter is divided by the FTE hours per week and then multiplied by 5 days to calculate the FTE days of service for the quarter.
- (b) Gross Pay in the Quarter
Total hours by hourly rate (averaged if changed in the quarter).
- (c) Daily Pay Rate
Gross pay divided by total hours converted to day rate for an FTE employee.
- (d) Contribution Levy
Gross pay in quarter by levy rate.

The above formula for calculating a day of service uses the average rate of pay of part time workers. This calculation will be more accurate than the current approach to calculation which does not currently capture part-time average rates of pay.

A formula such as that proposed above will allow averaging of the rate of pay for casuals in line with the *Long Service Leave Act 1958 (WA)*. This approach will account for workers that transition in and out of part-time and full-time work, and better capture the dynamic nature of rostered workers schedules. Significantly, this approach to calculating a day of service accords to the principal of “no better or no worse” than under the *Long Service Leave Act 1958 (WA)*.

MyLeave Consideration:

Calculating long service leave entitlement based on the current ‘day of service’ does not result in fair and equitable outcomes for all eligible employees. Consideration could be given to exploring other methodologies for calculating employee accrual of long service leave days.

An option for further examination could be calculation of long service leave based on hours worked, not days including part days of service rather than whole days. Another option to further explore is aligning to the *Long Service Leave 1958 Act (WA)* which allows for averaging of eligible employee work to calculate entitlements.

Consideration could be given to amending the Act so that all annual leave is counted as a service day to remove complexities in calculating service days and reducing the administrative burden on employers.

3. Day of Service - Stand Down

An anomaly was identified during the COVID-19 pandemic for employees in the construction industry that would be denied a day of service toward a long service leave entitlement if they are stood down. The Act does not allow an employee that is stood down to accrue service during a period of standing down.

The *Long Service Leave Act 1958 (WA)* provides that service is continuous when an employee is stood down. This means that employees in other industries are eligible for continuous service in circumstances when they have been stood down. This is unfair to construction workers that are not able to work due to being stood down, particularly as a result of the COVID-19 pandemic.

This anomaly became apparent at the time of legislation being passed by the Commonwealth to put in place the JobKeeper Scheme where employees that were stood down received a JobKeeper payment. The pandemic resulted in many employees, including construction workers, being stood down.

The anomaly is exacerbated as employers of those employees that are stood down are required to contribute to the MyLeave under the Act without the employee being eligible for service to be recorded towards their future long service leave entitlement.

An amendment to the Act, via the *Construction Industry Portable Paid Long Service Leave Amendment (COVID-19 Response) Bill 2020 (2020 Bill)*, was submitted to Parliament in October 2020 to (in part) rectify an anomaly for the recording of days of service for employees toward a long service leave entitlement if they are stood down.

The 2020 Bill was introduced into the Legislative Assembly on 15 October 2020, and passed on 10 November 2020, but did not commence passage into the Legislative Council prior to Parliament being prorogued before the March 2021 election.

As a result, an election commitment was made in 2021 to “*Rectify an anomaly whereby construction workers are not able to accumulate service if they are stood down.*”

This amendment is under consideration with the Minister.

4. Day of Service - Workers' Compensation

A similar anomaly to the accrual of days of service whilst being stood down also applies to the inability for workers to accrue days of service whilst they are receiving workers' compensation and remain employed.

Section 80(1) of the *Workers' Compensation and Injury Management Act 1981* allows employees to accrue and take long service leave while receiving workers' compensation.

To ensure workers are 'no better or no worse' comparative to benefits under *the Long Service Leave Act 1958 (WA)*, the Board has put forward a proposed Act amendment to allow days of service to be accrued for an employee that is receiving workers' compensation and remains employed whilst on workers' compensation.

This amendment will not penalise employers as the Act requires them to make contributions for the employees receiving workers' compensation and remain employed by them. This was determined in the RCR Resources decision by the WAIRC in 2015³⁴ where the employer is to make contributions for employees on workers compensation using rate of pay "payable".

This potential provision is under consideration with the Minister.

5. Entitlement Crystallisation

Employees can accrue a block of long service leave, and then with the approval of the Board, postpone taking their accrued leave.³⁵ However, even if the Board was to reject the employee's application for postponed leave, the employee could still postpone their leave through administrative loopholes i.e. not providing bank details. This renders the Board potentially unable to compel employees to take long service leave. In practice, employees do not make a request to MyLeave to postpone their leave, they simply do not make an application for payment when it is due.

Workers are increasingly waiting until they have accrued multiple blocks of long service leave before claiming their entitlement. This is evidenced by the 2022-23 financial year data that there was a 5.3 per cent increase in workers with vested long service leave benefits being held by MyLeave. It is vital for worker wellbeing that workers are encouraged to take their long service leave to ensure rest and respite, the sustainability of the sector, and as a protective mental health factor.

An unforeseen issue arising from this scenario is that these blocks of leave may have accrued based on differing pay rates. For example, an employee starts on an entry or apprentice wage increasing their wages gradually as they progress in the industry. The first period of their employment in the sector would have been under a lower income bracket than subsequent periods of accrued leave when they were earning more. However, when an employee claims long service leave, these two periods of accumulated leave are combined and calculated at the most recent pay rate.

MyLeave assumes the risk of wage escalation, and this increased cost, because workers are not claiming leave when it is due which is passed on through the contribution levy to all employers.

Combining long service leave periods in this way can result in a large lift in pay rates for the first block of long service leave which would have been earned at a potentially lower rate. Furthermore, an employer under the *Long Service Leave Act 1958 (WA)* can manage their employee's long service leave liability, however MyLeave cannot direct an employee to take leave.

³⁴ RCR Resources Pty Ltd v Construction Industry Long Service Leave Payments Board [2015] WAIRC 984.

³⁵ See section 25.

MyLeave Submission

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

This is supported by Section 7(3) of the *Long Service Leave Act 1958* (WA) which crystallises the pay rate of the leave at the time it is due unless there is an agreement between the employee and employer. This section provides that:

“...the rate of pay of an employee whose leave, or any portion of it, is postponed to meet the convenience of the employee by agreement between the employer and employee is the rate of pay applicable to the employee — (a) on the day on which the leave accrues; or (b) if the employer and employee agree — on the day on which the employee commences the leave.”

Under the principle of ‘no better or no worse’ than the *Long Service Leave Act 1958* (WA), a similar provision for crystallisation at the rate of pay when the entitlement falls due should be considered. Whilst mitigating against the risk of increased costs, the crystallisation will incentivise workers to claim their entitlement and take their leave as intended.

The capacity of workers to accrue multiple blocks of long service leave can also be detrimental to the current employer of the worker. The current experience is that some employers have to carry the absence of the worker for a prolonged period of time, even though the worker did not accrue the long service leave while in their employ.

MyLeave Consideration

Consideration should be given to compelling employees to take the leave entitlements when they fall due. To ensure fair payment, explore the potential to crystallise pay rates after a set period of years of postponed blocks of long service leave claims (i.e., partition the long service leave periods into 10-year blocks as entitlements accrue with pay rates for each block calculated separately).

6. Break in Service

Under the Act there is a two-tiered system of how long an employee can take a break in service for before that employee loses their long service leave entitlements. Under section 21(3) of the Act:

“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;”*

Interpreting the Act, if an employee has worked in eligible roles for under 1,100 days of service (approximately 5 years),³⁶ an employee is able to take a maximum of a **two**-year break from eligible construction work before being de-registered from accruing entitlements. However, where an employee has worked in an eligible role in the sector exceeding 1,100 days of service the employee can take up to **four** years break in service.

Employee Days of Service Worked	Maximum Break in Service
Up to 1,100 days (worked under 5 years)	2 years
Over 1,100 days (worked 5 years or more)	4 years

³⁶ Five years is calculated on a year of service days being 220 days (5 x 220 days of service = 1100 days of service).

Comparatively, many other state and territory jurisdictions work on a standard four-year rule regardless of how many prior days an employee has worked in an eligible role/s in the sector. Apart from creating consistency with other jurisdictions, changing the Act to a standard four years across all eligible employee cohorts 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. Standardising the break in service timeframe also makes the provision simpler for employees to understand, reducing the potential for employees to miss out on their entitlement.

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.³⁷ 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.³⁸

MyLeave Consideration

Consider standardising the break in service requirements from two years to four years to support emerging cohorts to retain entitlements i.e., workers returning from primary care roles.

³⁷ <https://www.wgea.gov.au/>

³⁸ [WA and Commonwealth Preschool Funding Agreement](#)

5.2 Other Entitlement Issues

1. Claiming Multiple Leave Periods

The Act stipulates an employee shall not take long service leave in more than three periods.³⁹ Comparatively there are no such restrictions on how many periods of long service leave an employee can take under the *Long Service Act 1958 (WA)*. Removing this restriction limiting taking of leave to three periods would enhance flexibility of leave options for construction employees and bring the Act into line with entitlements available to the broader Western Australian population. As the Act stands, it is difficult for MyLeave to manage these restrictions. If an employer agrees to their employee taking leave, MyLeave should not get involved in the employer/employee relationship.

MyLeave Consideration

Consider removing the requirement that long service leave cannot be taken in more than three periods.

2. Cashing Out and Lump Sum Payments

In certain situations, an employee can receive a lump sum payment on terminating their employment, or having their employment terminated.⁴⁰ There can be challenges for MyLeave to validate termination payments in situations where it is ambiguous whether employment is continuing or ceasing. The current phrasing in the Act does not provide any parameters if this termination payment refers to when an employee leaves employment or ceases being eligible under the Act.

The Act does not contain a provision for workers to cash-out their entitlement. Comparatively, an employee can cash-out their entitlement under the *Long Service Leave Act 1958 (WA)* (section 5) if agreed upon by an employer. This results in construction industry workers in Western Australia not receiving the same entitlements as other employees in Western Australia under the *Long Service Leave Act 1958 (WA)*. As already stated, MyLeave should not get involved in the employer/employee relationship.

MyLeave Consideration

Further examination of lump sum payment provisions could be undertaken to better understand if termination payments are being applied consistently. Consideration could be given to aligning the provision for an employee to cash out payments, if agreed upon by their employer, with the entitlements accessible to the broader Western Australian population under the *Long Service Leave Act 1958 (WA)*.

3. Serious Misconduct

Where an employee is terminated for misconduct, the employee is not entitled to a lump sum payment.⁴¹ Yet, the entitlement accrued by the employee accused of misconduct does not always align with the employer that terminated the employee. There is no guidance in the Act as to what constitutes serious misconduct leaving the meaning open to interpretation. An employee can commence work with another employer, continue to accrue days of service for long service leave entitlements, and then make a claim. Therefore, the penalty against an employee accused of serious misconduct has no significant bearing on actual claim entitlement and leaves a liability on the MyLeave ledger. MyLeave should not get involved in the employer/employee relationship. Furthermore, there is no capacity for MyLeave to verify that misconduct has occurred.

³⁹ Section 24(3).

⁴⁰ Section 22(1) An exception being where the employee is terminated for serious misconduct.

⁴¹ Section 22(1).

MyLeave Consideration

Consider examining the intent of the serious misconduct provision and explore ramifications of potentially removing the serious misconduct provision.

4. Early Access for Permanent Injury or Disablement, Terminal Illness, or Death

The Act does not contain a provision to allow 'early payouts' of long service leave entitlements prior to the seven years of service where there are medical and deceased claims by an employee registered with MyLeave. Having such a provision would provide a benefit to people in vulnerable situations.

A proposal endorsed by the MyLeave Board is under consideration with the Minister.

The proposal is aimed at circumstances where employees registered with MyLeave have not reached the minimum service period for a pro rata entitlement to long service leave, equivalent to seven years of service (1,540 service days) but have encountered a hardship that prevents the worker from accruing any further days of service in the construction industry. The hardship, through no fault of the employee, can be because of a permanent injury or disablement, terminal illness, or death.

As the Act stands, an employee in hardship will not achieve vesting of any benefits and the service accrued with MyLeave will be lost due to deregistration after a break of service for either two or four years (depending on the length of service). This means neither the worker, nor their beneficiaries, will receive any benefit for the days worked in the construction industry at a time when financial support is most needed.

The Act does not currently contain any hardship provisions and neither the MyLeave Board, or the Minister, can assist these workers and families where there are compassionate reasons for doing so.

It is important that hardship is clearly defined in any proposed provision to avoid interpretation issues and potential disputes which could result in appeals and legal challenges. Other issues that should be considered is the efficient administration of claims and the impact on the MyLeave funding position.

It is not proposed that financial hardship be considered for early access as obtaining the necessary evidence to substantiate a claim and consideration of merit could be subject to appeal and dispute.

The proposal is to amend the Act as follows:

1. to allow payment of accrued long service leave entitlements prior to achieving the minimum service period for matters related to hardship based on the following circumstances:
 - a) permanent injury or disablement that prevents a worker from returning to work in the construction industry;
 - b) terminal illness and less than twelve months to live from the date of the application for payment;
 - c) death of a worker paid to the worker's estate;
2. with the qualifying period to access long service leave entitlements detailed in (1) above after a period of 55 days of service; and,
3. the payment of long service leave entitlements detailed in (1) above be subject to satisfactory evidence being provided by a medical specialist in cases of terminal illness, or permanent injury or disablement.

The rationale for the qualifying period to be 55 days is that it is equivalent to one quarter of the 220 days that represent a year of service under the Act, which means that workers must have accrued service for at least one quarter, before a hardship on the above grounds could apply.

This potential provision is under consideration with the Minister.

5. Long-Term Employees – Entitlement (General LSL Act)

The intent of the Act is to provide for eligible construction sector employees that do not have continuous long-term employment with one employer and would therefore not be able to access long service leave under the *Long Service Leave Act 1958 (WA)*.

However, scenarios arise where an employer may become liable to pay long service leave entitlements to a long-term employee. If an employer has paid a long service leave entitlement to a worker,⁴² as well as having paid contributions on behalf of that same worker to MyLeave, the employer is entitled to recover from MyLeave, the amount MyLeave would have paid that employee.⁴³ The benefit of the employer, as opposed to MyLeave, paying the entitlement to the long-term employee is that if an employee is paid out long service leave by her or his employer, that employee is eligible for superannuation accumulation for the long service leave period. MyLeave comparatively is not able to pay superannuation as MyLeave does not employ the worker. This has been confirmed by an ATO Interpretative Decision ID 2005/33 for a similar portable long service leave scheme.

Returning to the intent of the Act that no employee should be ‘no better or no worse’ than under the *Long Service Leave Act 1958 (WA)*, where employees can claim their long service leave entitlement through their employer, this should be supported. There is no guidance in the Act clarifying when and under what circumstances MyLeave is to refund an employer so they can pay-out an employee with long service leave.

Difficulties would arise if the workers had accrued part of the entitlement with MyLeave via one or more earlier employees. However, consideration could be given as how to manage this scenario including that any residual long service leave entitlements from earlier employers held by MyLeave could be paid to the worker directly.

MyLeave Consideration

The intent of the Act was to ensure no employee would be ‘no better or no worse’ than if they were under the reach of the existing *Long Service Leave Act 1958 (WA)*. The *Long Service Leave Act 1958 (WA)* contains more generous entitlements to superannuation accumulation than the Act. Consideration could be given to clarifying within the Act that long-term employees reaching a long service leave entitlement under the *Long Service Leave Act 1958 (WA)* should be paid out long service leave via their employer so they can accumulate superannuation. Any residual long service leave entitlements from earlier employers held by MyLeave could be paid to the worker directly.

6. Reduced Involvement: Work on Leave

Currently MyLeave has the capacity to become involved in prohibiting employees to undertake work while on leave (section 28(3)). It was not the intent of the Act for the administrator MyLeave to interfere with employee and employer work arrangements. MyLeave should not get involved in the employer/employee relationship.

⁴² For example, under the *Long Service Leave Act 1958 (WA)* or an industrial instrument.

⁴³ This recovery is based on the average of the worker’s ordinary rate of pay for the last 220 service days in the industry as submitted by the employer.

MyLeave Consideration

Consideration should be given to removing MyLeave's capacity to interfere with employee/employer work arrangements.

7. Ineligible Workers - Deregistration

Workers may be registered with MyLeave and later it is found that they are not eligible. Further, employees may be eligible and then change job roles that are not in the construction industry. When these situations are identified and after an assessment for eligibility the workers will be deregistered, and any service days removed from their record for any period in ineligibility. There is no provision that specifically provides for deregistration in these circumstances although it is a practical approach if a worker is deemed not to be eligible. A provision should be provided to allow deregistration when a worker is deemed ineligible to remove uncertainty.

MyLeave Consideration

Consideration should be given to providing deregistration and removal of service days when a worker is deemed ineligible.

8. Employer Refunds

There are circumstances such as workers being deemed ineligible after being registered and having service recorded where employers have paid contributions, and adjustments in returns to correct inaccurate reporting or fixing past errors. In these circumstances refunds are paid to employers. There are no provisions that specifically provide for employer refunds in these circumstances although it is a practical approach if employers did not have a financial responsibility. A provision should be provided to allow employers refunds to remove uncertainty. It is arguable that in any court proceedings that where an employer is not financially liable that MyLeave would be ordered to return any monies that were not owed in the first instance.

MyLeave Consideration

Consideration should be given to providing a provision for employer refunds in circumstances where money has been paid to MyLeave and there is no financial responsibility on the employer.

6 Compliance, Enforcement and Dispute Resolution

6.1 Compliance and Enforcement

1. Assessment, Breach and Improvement Notices

Under section 45 of the Act, if an employer has not submitted a quarterly report, a notice is to be sent to the employer to provide information to assist in the assessment of employer contributions (section 34). As this process stands, an enforceable sanction is followed straight away, with potential for employers to incur fees, when there could be another way.

However, in practice MyLeave first attempts to engage the employer to prevent an enforceable sanction. This will include steps to gather information from the employer (i.e., spreadsheets on payroll data). MyLeave then uses this information to calculate an assessment. However, where employers have large numbers of employees MyLeave will be provided with large data sheets which adds to administrative burden and is time consuming for all involved.

An alternative approach could be explored to provide formalised prior step(s) to sanctions to assist employers calculate self-assessments. This would involve providing the employers with an assessment methodology, prior to notices for non-compliance being issued. This could provide a more graduated approach supporting self-compliance.

MyLeave Consideration

Infringements should exist to encourage compliance as an alternative to prosecuting a matter in court. Consideration could be given to exploring options within the Act that enhance MyLeave's authority to direct employers to make a self-assessment before enforceable sanctions have to be pursued. However, there is no provision to mandate methodology to assist employers' self-assessments therefore the administrative burden currently rests on MyLeave.

2. Proceedings

Under section 47 of the Act, the CEO can issue a certificate for the purposes of proceedings against an employer to recover contributions or a surcharge. The CEO certificate is admissible in evidence in proceedings against an employer in the absence of evidence i.e., where an employer has not submitted their quarterly returns however the employer alleges they have submitted their return. MyLeave has found this provision efficient and beneficial for providing evidence in proceedings.

Under section 47 of the Act, proceedings for an offence against the Act shall not commence without the consent in writing of the Board. However, the Board cannot always hold sufficiently regular meetings to allow members to deal promptly with resolutions to consent to commence proceedings.

MyLeave Consideration

The evidentiary provisions in the Act are an important enforcement tool used by MyLeave and should be retained. Consideration should be given to how prosecutions are approved and commence.

3. Public Register of Employers

The nature of construction sector project work results in high levels of job mobility. As employees frequently shift between employers, employees often do not know if a current, or even past employer, is registered with MyLeave.

Under Section 35 of the Act, MyLeave must maintain a register of employers. This register is not public. A publicly available list of employers registered with MyLeave would increase transparency. Point of contact information located alongside the public register would also assist employees on how to go about looking into missing service.

Several other long service leave operations in other states and territories maintain a public register of employers including the Victorian Portable Long Service Authority and ACT Leave.

MyLeave Consideration

Developing a public register of employers may increase MyLeave transparency assisting employee claims and employer compliance.

6.2 Dispute Resolution Pathways

Internal and External Dispute Resolution

Where an employee or employer raises a dispute regarding MyLeave, the only formal method of dispute resolution contained within the Act is legal proceedings.

Informally, MyLeave has a standard practice of internally reviewing disputes. The MyLeave Compliance and Advisory team currently assess disputes through interpretation of the Act. Any member of the public that has lodged a complaint, and who is not satisfied with the outcome of their interaction with MyLeave, can make a complaint via the [Ombudsman Western Australia](#).

If a disputing employer or employee disagrees with a decision reached regarding a determination about eligibility for registration, or related to proceedings brought under the Act, the affected party can also appeal through legal channels.

Under the Act, a person who disagrees with a reviewable decision can seek a decision from WAIRC within 21 days (section 50).⁴⁴ If the person misses the deadline, they cannot have the decision reviewed and there is no alternative approach. An interim step could be considered such as a right to have a review heard by the Board however, timeliness of such a provision should be considered.

Employers or employees are often unlikely to appeal a decision unless they are facing a substantial financial liability by not appealing. This is due to the potential to incur disproportionate legal costs, as well as the lengthy timeframe, of pursuing a legal decision ([see section 7.1 of this submission on Act interpretation](#)).

An alternative formalised dispute resolution pathway for reviewing decisions could be explored to assist employers and employees resolve complaints. Consideration could be given as to other courses of action, as a step before legal proceedings. The aim would be less involvement with courts for matters that could be dealt with through a less costly and administratively cumbersome process.

A complexity facing MyLeave, as per other long service leave government entities, is that the organisation's remit is as operational administrator as well as playing the role of regulator overseeing Act compliance and enforcement.

⁴⁴ See WAIRC Form 8C – Notice of Appeal or Referral. <https://downloads.wairc.wa.gov.au/forms/WAIRC/8c.pdf>

MyLeave Consideration

An alternative formalised dispute resolution pathway for reviewing decisions could be explored to assist employers and employees, as well as increasing interpretation transparency and administration accountability. A line of inquiry the Act review may consider is how similar statutory agencies approach dispute resolution.

7 Administration and Regulatory Considerations

7.1 Act Interpretation

1. Examination of Use of Remedial Power for Timelier Interpretation

As outlined in section 6.2 of this submission, the status quo process for clarifying statutory interpretations is costly and protracted: waiting until the rare occurrence when a complaint or non-compliance results in a determination via prosecution or appeal.

This scenario has resulted in occurrences where MyLeave has required more clarity of interpretation of the Act however years have passed before a decision is arrived at. [Appendix A](#) contains a case study of a dispute regarding traffic controllers illustrating the current rigid processes for clarifying MyLeave registration eligibility.

Furthermore, employers are often unlikely to appeal a decision made by MyLeave unless the employer is facing a substantial financial liability. This is because of the potential to incur disproportionate legal costs. This results in perpetuation of problems with interpretation impacting eligibility of particular employee cohorts.

Consideration could be given to exploring more flexible, cost-effective and equitable mechanisms for modern interpretation of the Act. An avenue for further exploration could be examining the feasibility and ramifications of the use of remedial powers by the MyLeave Board or CEO to modify, in limited circumstances, the operation of the Act to account for unforeseen outcomes of the Act that would otherwise require a legislation change.

An example to draw from is the Australian Taxation Office (ATO) Commissioner's Remedial Power (CRP). The Commissioner has limited powers to modify the operation of tax law in circumstances where taxpayers will benefit, or at least be no worse off, as a result of the modification.⁴⁵ The purpose of the CRP is timelier resolution of unforeseen or unintended outcomes in relation to taxation issues relevant to all taxpayers not particular individuals, or where taxation law is creating excessive compliance costs.

MyLeave Consideration

Consideration could be given to exploring more flexible, cost-effective and equitable mechanisms for modern interpretation of the Act other than a court in order to make binding decisions and review MyLeave's interpretive views. An option for further exploration is the feasibility and ramifications of remedial powers to bring forward an interpretive decision by MyLeave Board or CEO modelled on the Taxation Commissioner's Remedial Powers.

2. Determination without Affected Party

Consideration could also be given to exploring alternative processes for Act interpretation potentially available to MyLeave under the *Freedom of Information Act 1992 (WA)*.

Under section 78 of the *Freedom of Information Act 1992 (WA)*, the [Information Commissioner](#) may initiate a referral to the Supreme Court of any question of law that arises in the course of dealing with a complaint made against a Western Australian Government agency.⁴⁶

⁴⁵ More information on Commissioner of Taxation's remedial power: <https://www.ato.gov.au/General/ATO-advice-and-guidance/Commissioner-s-remedial-power/>

⁴⁶ See: [Section 78 of the Freedom of Information Act 1992](#)

Unlike when a determination is pursued through other legal mechanisms, a referral through this process does not require affected parties to appear, be represented or make submissions. Additionally, affected parties who do not participate in a referral of the matter through the Information Commissioner are not liable for any costs. This may reduce the burden on employers or employees that may not otherwise pursue an appeal due to costs potentially incurred.

MyLeave Consideration

Consider exploring the viability and ramifications of alternative approaches to seeking a definitive interpretation on systemic concerns.

7.2 Act Administration

1. Gendered Language

The Act contains frequent use of gendered language preferencing he/ him as the default worker, for example section 22(1):

“...an employee who for any reason terminates his employment in the construction industry...”

MyLeave Consideration

There is a need to update the existing gendered language contained within the Act with inclusive gender-neutral language particularly considering the systemic bias of underemployment of women, compared to men, in the Western Australian construction sector.⁴⁷

2. Data Collection

MyLeave is undertaking a significant IT upgrade and transformation. These upgrades extend to improving MyLeave’s capacity to collect and analyse data for the purposes of monitoring MyLeave effectiveness and reach. Approaches to data collection and sharing will be a material issue as MyLeave continues to operate in an increasingly digital environment.

MyLeave Consideration

Maintaining effective policies and processes around data sharing and analysis will be an ongoing material issue for MyLeave and the partner agencies that MyLeave interacts with in the course of business.

3. Board Governance

The MyLeave Board has identified several opportunities to modernise the Board’s approach to governance to ensure continuity during times of unforeseen disruption i.e., the pandemic. These opportunities for modernisation include provisions for an Acting Chairperson, remote meetings, circular resolutions and clarifying capacity for Board member remuneration to be paid to the Board member’s employer.

These potential provisions are under consideration with the Minister.

⁴⁷ <https://www.wgea.gov.au/>

4. Board – Not an Agent of the Crown

Section 5(3) of the Act stipulates that:

“The Board is not an agent of the Crown in right of the State.”

Traditionally, a body which was part of the Crown or represented the Crown was not legally liable for wrongful acts. This has changed in Australia with people now able to pursue damages against a State Government - however the Crown in right of a State or the Commonwealth are generally liable for criminal acts.⁴⁸ It is unclear what the implications of this provision of not being an agent of the Crown has for MyLeave Board Members and Officers. MyLeave understands that the State Solicitor’s Office cannot represent the Board.

MyLeave Consideration

Consider the implications of this provision on the operating and liability of MyLeave Board Members and Officers.

5. Employer Return Frequency and Extensions

All employers registered with MyLeave are required to complete and submit a Quarterly Return. The Act specifies due dates for employer returns with penalties for non-compliance. The Return forms are sent to all employers at the end of each quarter and must be completed and submitted with payment within 15 days after the end of each period.

The quarterly frequency of returns aligns with other interstate long service leave agencies. The quarterly frequency of returns also aligns with quarterly business activity statements for small to medium businesses which are the bulk of employers contributing to MyLeave. In the past, MyLeave had operated from a two-month frequency of returns model. The two-month frequency of return model was however amended as the short timeframe was difficult to adhere to due to the reasons outlined above, as well as administration inefficiencies faced by MyLeave.

A longer timeframe between employer returns is not supported. A longer than quarterly return frequency creates added risk to funds management for estimating and modelling expected leave accrual: the longer the timeframe for not assessing potential under-reporting days of service, the larger the potential increases in unaccounted for liabilities.

However, an issue with quarterly returns is that the prescribed dates of reporting 15 days after the end of each period, do not always align with modern payroll periods and reporting accuracy is sacrificed as a result. This results in employers requesting extensions on employer returns. Currently MyLeave cannot allow an extension of time to submit without contravening the Act.⁴⁹ This is despite employers being open to fines and surcharges for failure to comply with this reporting deadlines. Other reasons employers may seek an extension for a late return is their own financial hardship, IT system issues or unforeseen events such as the pandemic, industrial strikes or natural disasters.

Having the ability to alter the due date for an employer return would reduce regulatory burden and make compliance easier for employers.

MyLeave Consideration

The current quarterly frequency of employer returns is considered sufficient and does not warrant change on return frequency.

⁴⁸ Source: Victorian Law Reform Commission (2002) Workplace Death and Serious Injury in the Public Sector Report.

⁴⁹ Section 31(2)

Consideration could be given to the ramifications of a legislative provision to allow lawful extensions of the due date to assist employers who may require more time for reasons such as hardship and business disruption.

6. Records Retention and Historic Claims Limit

Under section 32(2) of the Act, an employer must maintain certain records of each employee as specified in the regulations for not less than seven years.

Comparatively, the Australian Taxation Office (ATO) requires retention of records for a smaller timeframe, five years.⁵⁰ The *Limitation Act 2005 (WA)* also sets a shorter general limitation period for record keeping related to commencing civil legal proceedings to six years.⁵¹ In MyLeave's experience, many employers do not retain documents for not less than seven years as currently stipulated under the Act.

While there is a seven-year timeframe specified for retaining records in the Act, the Act does not specify a time limit as to how far in the past MyLeave can request employer returns. This absence of guidance means that there is no cut-off for crediting an employee with historic missing days of service. Under the Act, MyLeave can request historic contributions from employers with no time cut-off, if the employee can substantiate the days of service. Employers are also able to request historic refunds from MyLeave as there is no time cut-off.⁵²

Having no definitive limit on historic contributions or refunds leaves both employers and MyLeave liable for unaccounted for payments.

MyLeave Consideration

Consideration should be given to reducing the number of years that employers are mandated to retain records for employees under the Act so that the timeframe is brought into line with requirements of other modern business record keeping legislation. At the same time, consideration should be given to scenarios for specifying a time limit, on how far back MyLeave can request employer returns, and the capacity and ramifications to potentially 'ring-fence' interpretations to correlate with the specific times those interpretations were in play.

7. Mandated Form of Certificate of Inspector

Under section 44(2) of the Act, each person engaged or appointed as an inspector is issued with a certificate of appointment in the prescribed form.⁵³ Inspectors must produce this certificate of appointment whenever requested to do so by any person whom the inspector is about to exercise any of their powers on under the Act (i.e. at on-site inspections).

There is no provision within the Act to modify the prescribed form of the certificate of appointment. As the prescribed form of the certificate is outdated, only fitting on an A4 sized page, and has long been surpassed by other formats, this leads to queries as to the legitimacy and authenticity of the inspector when onsite inhibiting the inspector to undertake her or his role.

⁵⁰ There are exceptions for business records to be kept over five years: if a record will be used in a future return/ amended return, depreciating assets, capital gains tax assets, or resources rent tax.

⁵¹ *Limitation Act 2005 (WA)*, section 13.

⁵² Disclosure: MyLeave is currently reviewing potential remediation of historic payment rates that are under review. Any changes to the Act in regard to time limits for historic contributions may impact this outcome.

⁵³ See Schedule 2, *CIPPLSL Regulations 1986*

The certificate could be modernised, with the potential to be updated into the future, into a format that is more recognisable as a government affiliated form of identification such as a card-sized certificate of identification.⁵⁴ An example is that of the Western Australian Police. The *Police Act 1892 (WA)* contains no reference to identification cards. Provisions for certificates of identification are solely found in the associated regulations with no format mandated.

MyLeave Consideration

Consideration should be given to enhancing inspector onsite credibility by removing the requirement of a prescribed form of certificate of appointment from the Act or amending the format of the prescribed form to a plastic card that can be carried on the person, or indeed electronic ID for the future.

⁵⁴ Providing capacity for more flexibility of the certificate format may also assist into the future where digital based forms of identification may become the workplace or worksite norm.

Appendix A: Case Studies

Case Study 1: Working Directors

Inflating Wages

The lack of clarity and absence of parameters surrounding the definition of working director entitlements for long service leave creates loopholes for working directors, particularly from larger businesses, to artificially inflate their income and claim disproportionate and unequitable long service leave payments compared to other employees. The following case study illustrates this scenario:

Frank a working director of a Pty Ltd company in Perth, was deemed eligible for registration with MyLeave. He registered with MyLeave in 2008. For the following 10 years he submitted regular employer returns paying consistent employer contributions on his average weekly wages.*

In 2019, 12 months prior to Frank making a claim for a long service leave payment, Frank began reporting that his average weekly wages had nearly doubled. Under the Act, long service leave payments are calculated based on the last 220 days of pay recorded. This sudden increase in Frank's wages would have resulted in a payment approximately twice what he would otherwise be paid.

Frank admitted that he had deliberately inflated his wages believing that payment was calculated only on the last 220 days of service regardless of how the wages were reported. Being his own employer, Frank was responsible for reporting his payments and therefore able to manipulate his income in anticipation of an increase to his long service leave entitlement. A scenario highly unlikely in a standard employer-employee relationship.

Frank declared and reported his income and produced the necessary paperwork to support his claim under the current MyLeave requirements. As a result, MyLeave determined that Frank was ineligible as an employee from when the wages were doubled as this decision was not at 'arm's length' and therefore Frank was not acting in the capacity of an employee. Contributions received after this were refunded to Frank's company and the entitlement paid out to Frank personally at the lower wages amount.

**Not his real name.*

Case Study 2: Rigid and Costly Interpretations

Two-years for clarification

The below summary of a MyLeave dispute illustrates how the ambiguous definitions contained in the Act, coupled with the current rigid processes for clarifying eligibility and claim entitlements, result in regulatory burden, administrative inefficiencies, and disproportionate costs for both employers and the MyLeave.

A company provides traffic management solutions in Western Australia, including traffic management for roadworks and surrounding building sites. In 2008, the company registered employees with MyLeave and made regular contributions for employees engaged 'in the construction industry'.

In 2019, following an ownership change, MyLeave received a letter from the traffic management company's legal representative asserting that their company was not covered by the Act, and that work carried out by their employees did not fall within the Act's definition of 'being in the construction industry'.

Due to the ambiguous definitions contained in the Act and no alternative mechanism for interpreting the Act other than through legal determinations, MyLeave sought advice on the matter. This advice was contingent on the outcome of another dispute MyLeave was engaged in with another employer also contesting eligibility under unclear definitions contained in the Act.⁵⁵

As a result, it took two (2) years for a decision to be made as to whether traffic management company's employees could be interpreted as being eligible for registration with MyLeave under the Act's definition of "being in the construction industry". WAIRC affirmed MyLeave's existing position.

Currently, MyLeave administrators interpret that employees are eligible for registration if they are undertaking traffic control work on sites within the definition of 'construction industry' in section 3 of the Act.

⁵⁵ See: *Wallis v The Construction Industry Long Service Leave Payments Board* [2020] WAIRC 00791

Appendix B: Working Director Comparison

Issues Arising	Working Director	Permanent Employee
Defined in the Act	No	Yes (section 3)
Verifying work role	Registration request submitted by working director on behalf of themselves	Registration request submitted by employer
Verifying 'ordinary pay'	Average weekly pay of past 220 days submitted by working director	Determined by annual leave rate in 'terms of employment' submitted by employer.
Tax concessions	Potentially - as the contributions are paid on behalf of a Working Director (who is an employee) a tax deduction may be applicable.	No
Alternative LSL options	Autonomy to plan and prepare being self-employed	Access to LSL after required period under employment with single employer (systemic barrier for construction sector workers)

Appendix C: Definition of Ordinary Pay – Long Service Leave Act 1958

An extract from Division 2 of *the Long Service Leave Act 1958 (WA)* detailing the definition of 'ordinary pay' follows:

7. Ordinary pay: general

- (1) Except as provided in subsection (4), 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 granted to the employee under this Act commences, or is taken to commence.
- (2) For the purposes of subsection (1), 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, excluding any period referred to in section 6A(2).
- (3) For the purposes of subsection (1), the rate of pay of an employee whose leave, or any portion of it, is postponed to meet the convenience of the employee by agreement between the employer and employee is the rate of pay applicable to the employee —
 - (a) on the day on which the leave accrues; or
 - (b) if the employer and employee agree — on the day on which the employee commences the leave.
- (4) The **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 ending on —
 - (a) if the employee is in employment and —
 - (i) takes long service leave — the day immediately before the day on which the employee commences the long service leave; or
 - (ii) takes payment instead of long service leave under section 5 — the day immediately before the day on which an agreement under section 5 is reached in relation to the payment;
 - or
 - (b) if the employee is not in employment — the day immediately before the day on which the employee was last in employment; or
 - (c) if the employee is dead — the day immediately before the day on which the employee died.
- (5) For the purposes of subsection (4), the following periods must be disregarded —
 - (a) any period of unpaid leave;
 - (b) any period during which there is a standing-down of the employee in accordance with the provisions of —
 - (i) an award, agreement, order or determination in force under the IR Act; or
 - (ii) the Fair Work Act 2009 (Commonwealth) or an enterprise agreement under that Act; or
 - (iii) any other enactment.

7A. Ordinary pay: shift premiums, overtime, penalty rates or allowances

Except as provided in section 7B, an employee's *ordinary pay* does not include shift premiums, overtime, penalty rates, allowances or any similar payments.

7B. Ordinary pay: casual employees' loading

A casual employee's *ordinary pay* includes any casual loading payable under any of the following —

- (a) an award, industrial agreement, employer-employee agreement or order of the Commission;
- (b) a modern award, enterprise agreement or national minimum wage order made by the Fair Work Commission under the Fair Work Act 2009 (Commonwealth);
- (c) a contract of employment;
- (d) an enactment.

7C. Ordinary pay: board and lodging

- (1) 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 —
 - (a) is provided to the employee by the employer; but
 - (b) is not provided to, and taken by, the employee during the period of long service leave.
- (2) For the purposes of subsection (1), the cash value of board and lodging provided to an employee is —
 - (a) if the value is fixed by or under the conditions of the employee's employment — that value; or
 - (b) if the value is not fixed by or under the conditions of the employee's employment — a value calculated by reference to a rate prescribed in the regulations.

Appendix D: Case Law

Contra-Flow Pty Ltd v The Construction Industry Long Service Leave Payments Board [2022] WAIRC 648

Programmed Industrial Maintenance Pty Ltd v The Construction Industry Long Service Leave Payments Board [2021] WASCA 208

Glenn Wallis v The Construction Industry Long Service Leave Payments Board [2020] WAIRC 791

Programmed Industrial Maintenance Pty Ltd v The Construction Industry Long Service Leave Payments Board [2020] WAIRC 758

Quantum Blue Pty Ltd v The Construction Industry Long Service Leave Scheme [2019] WAIRC 860

Programmed Industrial Maintenance Pty Ltd ACN 133892350 v The Construction Industry Long Service Leave Payments Board [2019] WAIRC 843

Mechanical and Electrical Services v The Construction Industry Long Service Leave Payments Board [2017] WAIRC 164

Paull & Warner Resources Pty Ltd v Construction Industry Long Service Leave Payments Board [2017] WAIRC 449

Ben Thompson v Construction Industry Long Service Leave Payments Board [2016] WAIRC 054

RCR Resources Pty Ltd v Construction Industry Long Service Leave Payments Board [2015] WAIRC 984

Cape Australia T/A Cape Marine and Offshore Pty Ltd v The Construction Industry Long Service Leave Payments Board [2014] WAIRC 00155, [2014] WAIRC 118, [2013] WAIRC 972

Brown & Root Energy Services Pty Ltd v Construction Industry Long Service Leave Payments Board [2001] WAIRC 2000










Aust-Amec Pty Ltd t/a Metlab Mapel and SRC Laboratories and Ors v Construction Industry Long Service Leave Payments Board [1995] 62 IR 412

Construction Industry Long Service Leave Payments Board v Positron Pty Ltd [1990] WAIRC 13062







Appendix E: MyLeave Performance Highlights

Performance activities for 2022/2023 are shown below with a comparison to last year as a percentage.







Workers


 4,540 LSL payments to workers ↑ 7.0%	 \$39.8 Million LSL payments to workers ↑ 10.4%	 \$8,774 Average LSL payment (gross) ↑ 3.1%
 123,100 Registered workers ↑ 10.6%	 6,558 Apprentices* *No charge to employers ↑ 7.3%	 4,592 Interstate Workers ↑ 61.5%
 20,340 Workers with vested LSL benefits ↑ 5.3%	 12.4 million Service days ↑ 9.0%	 1,423 Days of service queries ↑ 13.6%

Employers

 5,368 Registered employers ↑ 2.9%	 98.1% Average employer returns received ↔	 \$4.2 billion Industry wages ↑ 17.4%
 0.1% Levy ↓ -66.6%	 \$5.5 million Employer contributions* *Includes prior year adjustments ↓ -55.2%	 \$40 million Contribution levy below long term cost ↑ 60.0%

MyLeave Operations

 \$608 million Investment assets ↑ 2.0%	 \$445 million LSL liabilities ↑ 17.4%	 137% Liability cover ↓ -12.7%
 \$6.4 million Operational expenses ↑ 23.1%	 8.9% \$52 million Investment return ↑ 16.0%	 \$65.5 million Reduction in LSL liabilities ↑ 460%

 less than 1% change.

Appendix F: Days of Service and Rate of Pay Model

Column No.	Employer				MyLeave						Scenarios			
	a	b	c	d	e	f	g	h	i	j	Employment Type	Hours Per Week (FTE)	Days on Annual Leave in Quarter	Other Days in Quarter
	Hours Per Week (FTE)	Hours on Annual Leave in Quarter	Other Hours in Quarter	Hourly Rate (four decimal places)	Days of Service (FTE) (two decimal places)	Gross Pay in Quarter	Daily Pay Rate (FTE)	Weekly pay Rate (FTE)	Annualised Pay Rate (FTE)	Contribution Levy				
1	38.00	0.00	494.00	\$50.0000	65.00	\$24,700.00	\$380.00	\$1,900.00	\$98,800.00	\$247.00	Full time	38.00	0.00	65.00
2	42.00	0.00	546.00	\$50.0000	65.00	\$27,300.00	\$420.00	\$2,100.00	\$109,200.00	\$273.00	Full time	42.00	0.00	65.00
3	42.00	0.00	277.20	\$50.0000	33.00	\$13,860.00	\$420.00	\$2,100.00	\$109,200.00	\$138.60	Part time	42.00	0.00	33.00
4	37.50	0.00	487.50	\$50.0000	65.00	\$24,375.00	\$375.00	\$1,875.00	\$97,500.00	\$243.75	Full time	37.50	0.00	65.00
5	35.00	0.00	455.00	\$50.0000	65.00	\$22,750.00	\$350.00	\$1,750.00	\$91,000.00	\$227.50	Full time	35.00	0.00	65.00
6	35.00	0.00	231.00	\$50.0000	33.00	\$11,550.00	\$350.00	\$1,750.00	\$91,000.00	\$115.50	Part time	35.00	0.00	33.00
7	38.00	190.00	304.00	\$50.0000	45.00	\$24,700.00	\$380.00	\$1,900.00	\$98,800.00	\$247.00	Full time	38.00	25.00	40.00
8	38.00	0.00	304.00	\$50.0000	40.00	\$15,200.00	\$380.00	\$1,900.00	\$98,800.00	\$152.00	Casual	38.00	0.00	40.00
9	40.00	0.00	520.00	\$50.0000	65.00	\$26,000.00	\$400.00	\$2,000.00	\$104,000.00	\$260.00	Casual	40.00	0.00	65.00
10	36.00	0.00	468.00	\$50.0000	65.00	\$23,400.00	\$360.00	\$1,800.00	\$93,600.00	\$234.00	Full time	36.00	0.00	65.00
11	42.00	0.00	411.60	\$50.0000	49.00	\$20,580.00	\$420.00	\$2,100.00	\$109,200.00	\$205.80	Part time	42.00	0.00	49.00
12	38.00	0.00	539.60	\$50.0000	71.00	\$26,980.00	\$380.00	\$1,900.00	\$98,800.00	\$269.80	Full time	38.00	0.00	71.00
13	47.50	0.00	617.50	\$50.0000	65.00	\$30,875.00	\$475.00	\$2,375.00	\$123,500.00	\$308.75	Full time	47.50	0.00	65.00
14	38.00	0.00	152.00	\$50.0000	20.00	\$7,600.00	\$380.00	\$1,900.00	\$98,800.00	\$76.00	Part time	38.00	0.00	20.00
15	38.00	190.00	228.00	\$50.0000	35.00	\$20,900.00	\$380.00	\$1,900.00	\$98,800.00	\$209.00	Part time	38.00	25.00	30.00

	Column	Input / Formula	Description
Employer	a	Employer Input	Hours Per Week (Full Time Equivalent Employee). Hours per week as per employment arrangements under an industrial instrument including a contract of service or average hours per week over a roster cycle for an full time equivalent employee if on a roster. If a casual on variable hours and/or no full time equivalent ordinary hours, use 38 hours per week as per NES.
	b	Employer Input	Hours on Annual Leave - if over 20 days on an FTE basis additional days are added to days of service
	c	Employer Input	Other Hours in Quarter - Total hours entitled to ordinary pay excluding annual leave but including sick leave, workers compensation etc. Does not include overtime. Rostered workers to include all hours worked on the roster cycle except, overcycle hours.
	d	Employer Input	Hourly Rate (four decimal places) - average if changed in quarter (i.e. hours old rate/hours new rate). As per ordinary pay definition in <i>Long Service Leave Act 1958</i> .
MyLeave	e	=if(b/ax5>20,(b/ax5)-20,0)+(c/ax5)	Days of Service for an full time equivalent employee to two decimal places to enable accurate calculation of daily pay rate.
	f	=(b+c)x d	Gross Pay in Quarter - total hours by hourly rate (averaged if changed in the quarter)
	g	=f/((b+c)/ax5)	Daily Pay Rate - gross pay divided by total hours converted to day rate for an full time equivalent employee.
	h	=gx5	Week Pay Rate - daily rate for a full time equivalent employee for five days a week.
	i	=hx52	Annualised Pay Rate - weekly rate for a full time equivalent employee for 52 weeks.
	j	=fxLewy Rate (e.g. 1%)	Contribution Levy - gross pay in quarter by levy rate

Appendix G: Summary of Considerations

**Denotes proposed provisions currently under consideration with the Minister*

No.	Theme/ Issue	Consideration	Legislative Relevance
MYLEAVE SUBMISSION – Section 3			
1.	Purpose of the Act	To recognise the transient nature of the construction industry generally applying to workers who undertake manual labour on sites and who may work with more than one employer, to be entitled to long service leave benefits aligned with the benefits that apply to workers under the Long Service Leave Act 1958 (WA) but modified in terms of its portable nature. Additionally, to contribute to the wellbeing of a strong construction industry in Western Australia by assisting to attract and retain workers.	
2.	Refer to as Worker	The language could be amended in the Act to refer to worker rather than employee to reinforce the target audience of the service.	s3(1)
COVERAGE – Section 4			
3.	Prescribed Classifications of Work	Consideration could be given to an alternative mechanism for defining or describing employee role eligibility for registration with MyLeave, as opposed to relying on prescribed classifications of work. Consider the ABS Australian and New Zealand Standard Industrial Classification (ANZSIC) and Australian and New Zealand Standard Classification of Occupations (ANZSCO) as components of a range of alternative options to assist defining roles in the construction industry.	Regs. Schedule 1
4.	Exclusions	Consideration could be given to the extent to which ‘construction industry’ exclusions (and subsequent definitions) could be clarified in the legislation.	s3(1)
5.	Supervisors	Consideration should be given as to how Supervisor eligibility for registration with MyLeave can be clarified by focusing on duties (principal purpose), not the job title. Consideration should be given to the principals guiding this submission in that transient roles and roles directly involved in manual labour or overseeing such work are applicable for coverage.	Regs. Schedule 1
6.	Working Directors	‘Working director’ should be defined in the CIPPLSL Act. Further examination should be given as to whether the intent of the CIPPLSL Act was for working directors to be eligible for registration with MyLeave. It is considered that working directors should not be eligible employees. If working directors are considered eligible for MyLeave registration, the Review should consider how their work records and wages could be verified and equitable entitlements could be calculated.	s3(1) s3(1) s31(1)
7.	Sub-contractors	Consideration should be given as to how the CIPPLSL Act can clarify the distinction between an employee that sub-contracts and independent contractors in regard to their eligibility for MyLeave registration.	Regs. Schedule 1

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No.	Theme/ Issue	Consideration	Legislative Relevance
8.	Building Trade Assistant or 'Peggy'	Specify that building trade assistants are employees eligible for registration with MyLeave under the CIPPLSL Act.	Regs. Schedule 1
9.	Commissioning	Specify that workers undertaking commissioning are employees eligible for registration with MyLeave under the CIPPLSL Act.	s3(1), Regs. Schedule 1
10.	Traffic Controllers	Specify that traffic controllers are employees eligible for registration with MyLeave under the CIPPLSL Act.	Regs. Schedule 1
11.	Mobile Plant	Clarify that a mobile plant is not a structure or fixture and is an ineligible as site of construction work under the CIPPLSL Act.	s3(1)
12.	Construction Workers Who Work on Ships	'Ships' should be defined in the CIPPLSL Act. *	s3(1)
13.	Jurisdiction (Extraterritorial Operation)	The approach in the <i>Industrial Relations Act 1979 (WA)</i> to define jurisdiction is sound. Consideration could be given to additional provisions within the CIPPLSL Act to clarify when a worker's day of service, that has been undertaken in Western Australian <i>extraterritorial</i> areas, is deemed eligible for registration with MyLeave.	s3A
14.	Terms Requiring Further Definition	'installation' 'maintenance' and 'repairs' 'routine' and 'minor' 'fixture' 'site' 'substantially engaged'	s3(1)
15.	Future-Proofing and Emerging Trends	Consideration should be given to examining the scope of emerging technologies, environmental changes, and employment trends impact on the Western Australian construction industry.	s3(1), Regs. Schedule 1
TREATMENT – Section 5			
16.	Ordinary Pay	Clarification is required for the term 'ordinary pay' and definition of 'ordinary hours' in the CIPPLSL Act particularly in regard to entitlements for employees who are not entitled to paid leave (e.g. casual workers, rostered workers). Consideration could be given to aligning the definition of ordinary pay with the Long Service Leave Act 1958 (WA) but adapted for the portable nature of the construction long service leave under the benefit alignment principle.	s3(1), 21(3), 51(2)
17.	Day of Service	Consideration should be given to exploring other methodologies for calculating an employee 'day of service'. An option for further examination could be calculation of long service leave based on hours worked, not days including part days of service rather than whole days.	s3(1)

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No.	Theme/ Issue	Consideration	Legislative Relevance
		Another option to further explore is aligning to the Long Service Leave 1958 Act (WA) which allows for averaging of eligible employee work to calculate entitlements. Consider amending the Act so that all annual leave is counted as a service day to remove complexities in calculating service days and reducing the administrative burden on employers.	
18.	Day of Service - Stand Down	Rectify an anomaly whereby construction workers are not able to accumulate service if they are stood down*	s3(1)
19.	Day of Service – Workers’ Compensation	Allow days of service to be accrued for an employee that is receiving workers’ compensation and remains employed whilst on workers’ compensation. *	s3(1)
20.	Entitlement Crystallisation	Consideration should be given to compelling employees to take long service leave entitlements when they fall due. Consideration should be given to crystallising pay rates after a set period of years of postponed blocks of long service leave claims (i.e., partition the long service leave periods into 10-year blocks with pay rates for each block calculated separately).	s24, s25
21.	Break in Service	Consideration should be given to standardising the break in service requirements from two years to four years to support emerging cohorts to retain entitlements i.e. workers returning from primary care roles.	s21(3), s23(1)
22.	Claiming Multiple Leave Periods	Consideration should be given to removing the requirement that long service leave cannot be taken in more than three periods.	s24(3)
23.	Cashing Out and Lump Sum Payments	Further examination of lump sum payment provisions could be undertaken to better understand if termination payments are being applied consistently. Consideration should be given to aligning the provision for an employee to cash out payments, if agreed upon by their employer, with the entitlements already accessible to the broader Western Australian population under the <i>Long Service Leave Act 1958 (WA)</i> .	s22(1)
24.	Serious Misconduct	Consideration should be given to examining the intent of the serious misconduct provision and removing the serious misconduct provision.	s22(1)
25.	Early Access for Permanent Injury or Disablement, Terminal Illness, or Death	Amend the CIPPLSL Act to allow payment of accrued long service leave entitlements prior to achieving the minimum service period for matters related to hardship subject to specific circumstances. *	-
26.	Long-Term Employees – Entitlement (General LSL Act)	Consideration should be given to clarifying within the CIPPLSL Act that employees that reach a long service leave entitlement threshold, under one continuous period of employment with the same employer, should be paid out long service leave via their employer so they can accumulate superannuation.	-
27.	Reduced Involvement: Work on Leave	Consideration should be given to removing MyLeave’s capacity to interfere with employee-employer work arrangements.	s28(3)

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No.	Theme/ Issue	Consideration	Legislative Relevance
28.	Ineligible Workers – Deregistration	Consideration should be given to providing deregistration and removal of service days when a worker is deemed ineligible.	-
29.	Employer Refunds	Consideration should be given to providing a provision for employer refunds in circumstances where money has been paid to MyLeave and there is no financial responsibility on the employer.	-
COMPLIANCE, ENFORCEMENT AND DISPUTE RESOLUTION – Section 6			
30.	Assessment, Breach and Improvement Notices	Consideration should be given to exploring options within the CIPPLSL Act that enhance MyLeave’s authority to direct employers to make a self-assessment before enforceable sanctions have to be pursued.	s34(2), s34(3), s45(1), s45(3)
31.	Proceedings	The evidentiary provisions in the CIPPLSL Act are an important enforcement tool used by MyLeave and should be retained. Consideration should be given to how prosecutions are approved and commence.	s47, s48, s49
32.	Public Register of Employers	Develop a public register of employers to increase MyLeave transparency and aid employee claims and employer compliance.	s35
33.	Internal and External Dispute Resolution	Consideration should be given to an alternative formalised dispute resolution pathway for reviewing decisions to assist employers and employees, as well as increasing interpretation transparency and administration accountability.	s50
ADMINISTRATION AND REGULATORY CONSIDERATIONS – Section 7			
34.	Examination of Use of Remedial Power for Timelier Interpretation	Consideration should be given to exploring more flexible, cost-effective and equitable mechanisms for modern interpretation of the CIPPLSL Act other than a court in order to make binding decisions and review MyLeave’s interpretive views. An option for further examination is the feasibility and ramifications of MyLeave Board or CEO remedial powers similar to those exercised by the Taxation Commissioner for timely interpretive decisions.	s50
35.	Determination without Affected Party	Consideration could be given to exploring the viability and ramifications of alternative approaches to seeking a definitive interpretation on systemic concerns as per the option to initiate a referral for a legal determination under the <i>Freedom of Information Act 1992 (WA)</i> .	-
36.	Gendered Language	Update the existing gendered language contained within the CIPPLSL Act with inclusive gender-neutral language.	Through-out
37.	Data Collection	Consideration should be given as to how data sharing and analysis will be an ongoing material issue for administering the CIPPLSL Act in an increasingly digital operating environment.	-
38.	Board Governance	Modernise the Board’s approach to governance to ensure continuity during times of unforeseen disruption including provisions for an Acting Chairperson, remote meetings, circular resolutions and clarifying capacity for Board member remuneration to be paid to the Board member’s employer. *	s6 through to s10

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

No.	Theme/ Issue	Consideration	Legislative Relevance
39.	Board – Not an Agent of the Crown	Consideration should be given as to the implications of this provision on the liability of MyLeave Board Members and Officers.	s5(3)
40.	Employer Return Frequency and Extensions	The current quarterly frequency of employer returns is sufficient and does not warrant change. Consideration should be given to a provision to allow lawful extensions of the due date to assist employers who may require more time for reasons such as hardship and business disruption.	s31(1), s31(2)
41.	Records Retention and Historic Claims Limit	Consideration should be given to reducing the number of years that employers are mandated to retain records for employees under the Act so that the timeframe is brought into line with requirements of other modern business record keeping legislation. Consideration should be given to scenarios for specifying a time limit, on how far back MyLeave can request employer returns, and the capacity and ramifications to potentially 'ring-fence' interpretations to correlate with the specific times those interpretations were in play.	s32(2)
42.	Mandated Form of Certificate of Inspector	Consideration should be given to enhancing inspector onsite credibility by removing the requirement of a prescribed form of certificate of appointment from the Act or amending the format of the prescribed form to a plastic card that can be carried on the person, or indeed electronic ID for the future.	s44(2), Regs. Schedule 2



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