

Tuesday, 29 August 2023

Independent Review  
Construction Industry  
*Portable Paid Long Service Leave Act 1985 (WA)*  
KPMG  
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To whom it concerns,

## **UNIONSWA REVIEW SUBMISSION**

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

UnionsWA welcomes the opportunity to make a submission to this Review about whether the current version of the *Construction Industry Portable Paid Long Service Leave Act 1985 (the Act)* is achieving its overarching intentions. We have consulted with our affiliated unions for this submission, particularly the AMWU's, ETU's and CFMEU's WA Branches. We refer the Review to the written submission of the CFMEU for a detailed discussion of industry issues.

Our submission addresses the following selected Terms of Reference:

*ToR 1: Review whether the Act contemplates the modern construction workforce to ensure all cohorts of construction workers can access portable long service leave.*

The Construction industry is one of the largest in the world, and certainly in Australia. It is increasingly adopting innovative technologies and ways of working and will play the significant role in the transition to a low carbon and renewables-based economy. With a changing industry comes a changing mix of occupations and the need for the Act to have adequate scope and flexibility to adapt to the changing nature and roles in the construction sector. As the CFMEU states in its submission:

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

### **Recommendation:**

UnionsWA proposes the inclusion of new occupations within the definition of 'Construction Work,' such as drone operators and specialists in wind farm turbine, tower, and blade installation. These occupations, particularly in renewables, deserve recognition within the construction industry, and companies employing workers in these roles should be in the MyLeave scheme.

*ToR 2: Consider if definitions of the Terms used in the Act provide certainty and consistency for employers and workers.*

UnionsWA, in consideration of WA's diverse workforce, urges the inclusion of 'Commissioning, de-commissioning, and testing' within the definitions of 'Construction Work' in the Act.

Workers engaged in the construction industry face disparities in accruing Portable Long Service Leave (PLSL) credits due to inconsistent categorization of 'commissioning' work. This omission can result in unfair situations where employees lose existing LSL credits upon changing employers, leading to further disparities and uncertainties.

Additionally, there is a discrepancy between the Act and the *Work Health & Safety Regulations 2022*, which defines 'dismantling', 'commissioning', 'de-commissioning', and 'testing' as integral components of construction work<sup>1</sup>. This inconsistency raises concerns about fairness and alignment between the two Acts, both governing the construction industry.

**Recommendation:**

The Review endorses the inclusion of 'commissioning', 'de-commissioning', and 'testing' within the definitions of 'Construction Work' in the Act.

*ToR 4: Review whether the current method of accruing entitlements using 'days of service' reflects contemporary workforce models.*

The CFMEU submission describes how

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

...

*Each of these developments have had an effect on the accrual of workers long service leave entitlements within the Scheme.*

Currently, the Act allows for a yearly maximum LSL credit accrual of 220 days based solely on ordinary hours worked, excluding overtime and penalty rate hours. This practice disadvantages construction workers engaged in 'swing' work now common in the industry.

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

UnionsWA notes the significant complexity of resolving this issue considering the substantial variance in rostering arrangements and unsettled legal interpretation of terms currently

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<sup>1</sup> r289, Meaning of Construction Work. *Work Health and Safety (General) Regulations 2022*

referenced in the Act. With this level of complexity, it is possible that a solution to provide equity to one group of workers will disadvantage those on different employment arrangements or most workers invested in the scheme.

**Recommendation:**

The Review should provide a range of options to the Minister to resolve the discrepancy between 'hours' and 'days' created by the current Act. When developing these options UnionsWA encourages the reviewer to consult with WA unions from all impacted industries to identify unintended consequences when applied to modern contracting arrangements.

*ToR 5: Examine whether industrial relations instruments and prescribed classifications of work incorporated within the Act and Regulations is an effective method of capturing workers in the construction industry, and if not, propose alternatives.*

As previously mentioned, a changing industry such as Construction needs schemes such as MyLeave to be up to date as possible to reflect the actual workers within it. In the Australian industrial relations system that means MyLeave's list of Awards must be regularly reviewed.

**Recommendation:**

UnionsWA supports the inclusion of the *Hydrocarbons Industry (Upstream) Award 2020* as a relevant Award for determining Awards used for reference to the 'construction industry' within MyLeave and the Act.

*ToR 6: Consider if there is sufficient flexibility in the Act to provide for absences and allow workers flexibility in accessing portable long service leave entitlements having regard to the high-risk nature of the construction industry.*

In a high-risk and dynamic industry such as Construction, workers will regularly find themselves moving in and out of employment while remaining within the sector. Length of service considerations within the Act should reflect this situation.

**Recommendation:**

To reflect the modern construction industry's dynamics and workers' mobility, UnionsWA recommended amending Clause 21 (3) (a) to change the period from '2 years or more' to '3 years or more' and Clause 21 (3) (b) to change the period from '4 years or more' to '5 years or more.'

During the COVID-19 crisis workers would have benefitted from easier and expanded access to scheme entitlements to respond to the industry-wide downturn in work. Due to the specificity of the Act, it was not possible for the Minister to consider options for access and provide an appropriate response.

While enshrining access arrangements in the Act provides a strong safeguard to the scheme; it has proved inflexible to responding to the needs of workers and the industry.

During COVID many workers experienced job losses or difficulty finding work. In the Construction industry it did involve some workers risking a break in service exceeding two years, which leads to an extinguishment of entitlements.

UnionsWA strongly supports the reviewer taking time to consider and propose solutions which with appropriate stringent safeguards, hold the balance of interest between flexibility and responsiveness to future-proof the scheme against future industry-wide dislocation.

**Recommendation:**

The Review should recommend improved terms for LSL Recipients Enduring Hardship through drafting which allows for expanded decision-making power to Ministerial level.

*ToR 10: Review the statutory compliance and enforcement mechanisms with the objectives of:*

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

In documented cases of Wage Theft around Australia, unions have often found theft thriving when there are lax rules around the timing of payments, and the differential treatment of credits during other periods of leave. The Construction industry is unfortunately no different.

**Recommendation:**

To ensure timely payments and prevent circumvention by companies in financial distress, UnionsWA proposes that monthly payments to MyLeave by registered employers. Modern accounting technology makes this feasible and a safer option for recipients of their rightful LSL accruals.

**Recommendation:**

UnionsWA recommends the continuance of full MyLeave credits during periods of parental leave, family & domestic violence leave, and improved payment terms during periods on workers' compensation, in alignment with other state/territory PLSL schemes and the National Employment Standards.

The current system for ensuring compliance and imposing penalties for non-payment/non-registration of companies with MyLeave lacks clarity in terms of stated monetary penalties. These issues should be aligned with equivalent regulatory regimes across the state.

However, as formal findings of non-compliance are difficult to achieve, the primary issue is not monetary penalties, but securing findings which bring consistently non-compliant employers in scope of existing and developing contracting debarment regimes at a state and federal level.

The current process which allows for elongated legal proceedings which function as a warning notice allow employers to be knowingly non-compliant for significant periods of time.

The Act and subsequent policy should allow MyLeave to seek formal prosecution for known failure to comply, even instances where payment is made. This model would strengthen compliance by ensuring employers who flout the Act are subject to the intended consequences of state and federal contracting regulation.

**Recommendation:**

UnionsWA recommends the establishment of a tripartite committee consisting of employer representatives, union representatives, and an independent person with industry experience as an early intervention step before issuing fines or disqualifications. Followed by greater scope for the board or Minister to seek a formal finding.

**Recommendation:**

The Review should endorse an expansion of the scope of who is considered a relevant stakeholder. in the modern construction industry. This should include Group Training Organisations (GTOs), casualized workers, and labour hire companies.

Some of these entities fail to register with MyLeave, denying employees rightful LSL credits, amounting to wage theft.

*ToR 12: Other matters incidental or relevant to the Reviewer's consideration of the preceding terms of reference.*

The CFMEU Submission makes the following points regarding the investment of surplus funds:

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

*The value this reinvestment brings to the construction industry is significant.*

**Recommendation:**

UnionsWA supports the Review recommending that the Board be enabled to directly invest in the construction industry, to promote well paid jobs in a prosperous and sustainable construction industry.

Thank you for the opportunity to contribute to this Review.

UnionsWA appreciates your consideration of these recommendations and looks forward to the *Construction Industry Portable Paid Long Service Leave Act 1985* becoming fairer and more equitable in ways that reflect the evolving nature of the construction industry. We believe these changes will contribute to a more just and inclusive framework for all workers involved in construction activities.

Please contact me directly on 08 9328 7877 or [owen.whittle@unionswa.com.au](mailto:owen.whittle@unionswa.com.au) if you wish to discuss matters further.

Yours sincerely



**Owen Whittle**  
Secretary