



Discussion Paper

Further consultation with respect to
policy positions following the Review
into the *Construction Industry Portable
Paid Long Service Leave Act 1985*.

23 July 2024
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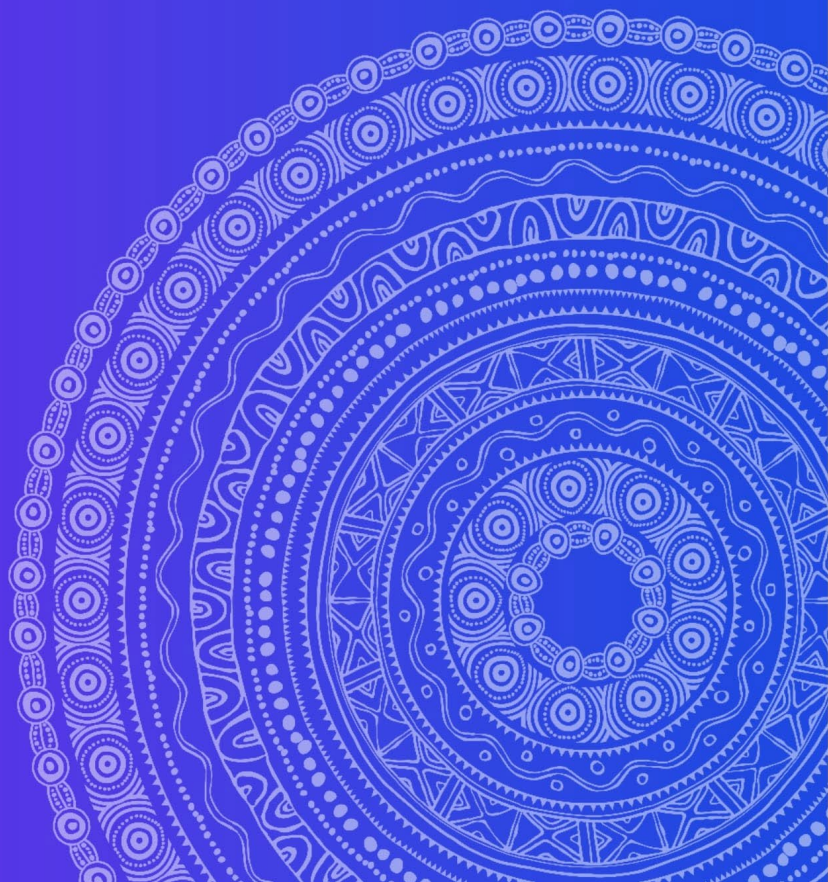
Acknowledgement of Country

KPMG acknowledges Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia. We pay our respects to Elders past, present, and future as the Traditional Custodians of the land, water and skies of where we work.

At KPMG, our future is one where all Australians are united by a shared, honest, and complete understanding of our past, present, and future. We are committed to making this future a reality. Our story celebrates and acknowledges that the cultures, histories, rights, and voices of Aboriginal and Torres Strait Islander People are heard, understood, respected, and celebrated.

Australia's First Peoples continue to hold distinctive cultural, spiritual, physical and economical relationships with their land, water and skies. We take our obligations to the land and environments in which we operate seriously.

We look forward to making our contribution towards a new future for Aboriginal and Torres Strait Islander peoples so that they can chart a strong future for themselves, their families and communities. We believe we can achieve much more together than we can apart.



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Discussion Paper

1. Purpose

This Discussion Paper is intended to prompt further dialogue with MyLeave stakeholders concerning specific findings of the 2023 Review into the *Construction Industry Portable Paid Long Service Leave Act 1985* (the **Review**). The Review made 14 high-level recommendations to improve the operation of the *Construction Industry Portable Paid Long Service Leave Act 1985* (the **Act**). An extract of the recommendations is available at **Appendix A** for reference.

Of the 14 recommendations made by the Review, KPMG recommended that further stakeholder consultation occur with respect to six specific findings. In KPMG's view, further stakeholder consultation was required to consider how the policy positions could be best crafted and implemented for the WA construction sector. These six matters will be the substance of this Discussion Paper and further stakeholder consultation occurring in mid-2024.

MyLeave scheme participants and stakeholders who are interested in participating in this further consultation dialogue are asked to consider the questions posed in this Discussion Paper and to respond either in writing through an online portal, or to attend a stakeholder consultation session. Information about both consultation methods is available on the MyLeave website.

2. Background and update on the Review

On 18 May 2023, the Minister for Mines and Petroleum; Energy; Corrective Services; Industrial Relations (the **Minister**) announced an independent review of the Act. KPMG was engaged to conduct the Review in accordance with the Terms of Reference and was asked to determine whether the overarching intent of the Act meets the needs of the contemporary construction industry and its workers. As part of its deliberations, the KPMG Review team undertook a stakeholder consultation process in 2023 and considered stakeholder views as part of making its findings. The Final Report of the Review was released by the Minister on 18 June 2024.

In summary, the Review found the Act, which is nearing 40 years of operation, has been historically effective in providing benefits for the construction workforce, however developments in WA's industrial relations environment means the Act requires amendment to reflect the modern construction workforce. More specifically, the industry has evolved considerably, however, the Act has undergone limited legislative reform. The composition of the industry has shifted from a smaller number of large employers to a much larger number of small businesses. Employment types have also evolved, to include casual workers and contractors in addition to permanent employees. The advancement of technologies and construction methods mean that some work is now performed off-site, prior to being transported to a construction site for assembly or installation. Finally, the size of the workforce captured by the Act has grown from 9,000 to 10,000 employees at commencement¹ to over 135,700 registered employees on 30 June 2024.

The Review made 14 high-level findings and recommendations and suggested that legislative reform could be 'targeted' in its approach, with many measures requiring modest legislative amendment, for example making drafting amendments to core terms and provisions, rather than a wholesale restructure of the existing legislative framework. In the Final Report of Review KPMG noted that it was not engaged to provide legal advice and that any future amendments would be progressed by MyLeave in collaboration with the Office of Parliamentary Counsel.

In a media statement issued on 18 June 2024,² the Minister announced that priority amendments to the Act will be introduced to Parliament, which relate to:

- construction work being performed on ships,
- early access to entitlements for workers due to permanent injury or disablement, terminal illness or death;
- permitting days of service to accrue in circumstances where a worker is stood down or while receiving workers compensation; and
- improving the effective and efficient operation of the Board.

KPMG has been engaged to carry out an additional stakeholder consultation process to seek further stakeholder views on the outstanding policy positions to be settled, prior to further legislative reform being implemented.

The further stakeholder consultation process will occur in July – August 2024.

¹ Western Australia, *Parliamentary Debates*, Legislative Assembly, 26 September 1985, 1678 (*'Parliamentary Debates, 26 September 1985'*).

² Minister for Mines and Petroleum; Energy; Corrective Services; Industrial Relations, *Media Statement*, 18 June 2024, <[Construction industry long service leave review released | Western Australian Government \(www.wa.gov.au\)](https://www.wa.gov.au/government/media-statements/construction-industry-long-service-leave-review-released)>.

3. Overview: The outstanding policy matters to be settled

The Minister and MyLeave are committed to working in collaboration with MyLeave scheme participants and stakeholders to settle the following six outstanding policy positions. This Discussion Paper seeks to test and validate reform recommendations and to ensure that future legislative change best serve the WA construction industry. This Discussion Paper is designed to be read alongside the Final Report of the Review. The Final Report of the Review is available on the [MyLeave website](http://www.myleave.wa.gov.au) (www.myleave.wa.gov.au).

A summary of each of the **six policy matters** is outlined below, with further details available in section 4.

Section 4.7 of this Discussion Paper provides all stakeholders with the opportunity to share with MyLeave any other views on the findings and recommendations of the Review, including any relevant implementation considerations.

Scheme Coverage

- | | | |
|---|---|------------------|
| 1 | clarify the capture of specific cohorts of construction workers | Finding 1 |
| 2 | revise current definitions used in the Act | Finding 2 |
| 3 | the use of alternatives to prescribed industrial agreement | Finding 3 |

Treatment of Scheme Participants

- | | | |
|---|--|------------------|
| 4 | revisions to core terms to reduce ambiguity | Finding 4 |
| 5 | adoption of an 'hours worked' approach to accruals | Finding 5 |
| 6 | treatment of employees with long-term service with a single employer | Finding 6 |

4. Discussion questions

4.1 Clarifying the capture of specific cohorts of construction workers

The Review made the following Findings and Recommendations:

Finding 1

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

- a) address anomalies caused by existing exclusions;
- b) clarify ambiguity surrounding coverage for specific cohorts of workers (discussed in Table 4).

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

Recommendation 1B – clarify ambiguity for specific cohorts of workers

Amend the legislative framework to:

- (a) exclude working directors from coverage (per Table 4);
- (b) clarify the capture of specific cohorts of construction workers including subcontractors, supervisors, construction cleaners (peggies), traffic controllers and electrical trade workers who conduct commissioning, de-commissioning, and testing) to reflect the proposed capture expressed in Table 4; and
- (c) insert further clarity concerning coverage for workers engaged offshore in circumstances not accounted for in the *Industrial Relations Act 1979* (WA).

Background and relevant considerations

Section 5.2 of the Final Report of the Review considered the issue of capture in the scheme. In summary, Table 4 of the Final Report of the Review proposed the following:

Scenario	Proposed Future Capture
Working Directors	All Working Directors to be excluded from the scheme
Supervisors	Amend the legislative framework to provide greater certainty
Subcontractors	Amend the legislative framework to provide greater certainty
Building Trade Assistants and Construction Cleaners (Peggies)	Included (if substantially engaged in the construction industry)
Traffic Controllers	Included (if substantially engaged in the construction industry)
Electrical trade workers conducting commissioning, decommissioning, and testing*	Included (if substantially engaged in the construction industry)

**Note: While the Final Report of the Review focussed on Electrical Trade Workers involved in commissioning, MyLeave wishes to hear stakeholder views concerning the capture of all trade workers involved in commissioning activities.*

Discussion Question 1

- (a) Do you agree with the proposed capture of specified cohorts of workers in Table 4 of section 5.2.2.2 (page 39) of the Final Report of the Review? If not, please specify why, or your areas of concern.
- (b) Per section 5.2.2.1 (page 38) of the Final Report of the Review, as part of the earlier consultations conducted in 2023 some stakeholders advocated for additional occupations to be included within scheme coverage. Do you agree that additional occupations need to be added to the coverage of the MyLeave scheme, in particular:
 - i. divers, drone operators, specialist in wind farm turbines, tower and blade installations;
 - ii. other specified work covered by the Hydrocarbons Industry (Upstream) Award.

If you do not agree, please explain why.

4.2 Definitions that relate to coverage in the scheme

The Review made the following Findings and Recommendations:

Finding 2

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

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

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

The Review recommends revising the current definitions of:

- (a) 'employee' to 'worker', to reflect the contemporary construction workforce and to align language with other comparable schemes; and
- (b) 'employer' by:
 - i. simplifying the term to mean any entity that engages a 'worker' as defined under the Act (retaining existing exceptions for a Minister, authorities or local government prescribed under existing provision 4(c) of the Act); and
 - ii. de-coupling the link of employer from the definition of the 'construction industry' (so as to rely on the workers engagement in the WA construction industry as the primary test).

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

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

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

Background and relevant considerations

The Review was asked to consider whether the terms used in the Act provide certainty and consistency for employers and workers. In particular, the Review focussed on the key terms of 'employer', 'employee' and 'construction industry'.

Section 5.2.3 (page 43) of the Final Report of the Review sets out the current challenges associated with the key terms and stakeholders are encouraged to read this section of the Report to engage with Discussion Question 2. To achieve certainty in coverage of this scheme, this further consultation process invites stakeholder views on the boundaries of the construction industry (with respect to the manufacturing and mining sectors especially), having regard to worker mobility, work being performed 'on a site' and what it means to be 'substantially engaged' in the construction industry. The relevant legal tests are included in summary in section 5.2.3 of the Final Report of the Review.

Discussion Question 2

- (a) With respect to Recommendation 2A (a), do you have any concerns about the proposal to alter the term 'employee' to 'worker'?
- (b) With respect to Recommendation 2A(b), do you foresee any unintended consequences arising from the proposal to change the definition of 'employer'?
- (c) With respect to Recommendation 2B which recommends amendments to the definition of 'construction industry' to clarify what it means to be 'on a site' and 'substantially engaged':
 - i. would you support a move to codify the existing common law understanding of what work 'on a site' means into the *Construction Industry Portable Paid Long Service Leave Act 1985 (WA)*? If not, please explain why. (A summary of the current common law position is available in section 5.2.3.4 (page 45) of the Final Report of the Review).
 - ii. what test do you consider is the most objective method for assessing whether a worker is "substantially engaged" in the construction industry? (Section 5.2.3.5 (page 46) of the Final Report of the Review provides examples of the tests that are used in other comparable schemes for consideration).

4.3. Alternatives to Prescribed Industrial Instruments

Finding 3

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

Recommendation 3 – alternatives to the use of prescribed industrial instruments

There are three key options available:

- (a) maintain the existing system of prescribing of industrial instruments and update Schedule 1 of the Regulations to codify the position established by *Positron*;
- (b) cease to use prescribed industrial instruments and design and implement an occupation list in conjunction with a classification system; or
- (c) cease to use prescribed industrial instruments and use refined legislative drafting with additional terms.

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

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

Background and relevant considerations

Section 5.2.4 (page 48) of the Final Report of the Review considered whether prescribed industrial instruments (Awards) and prescribed classifications of work is an effective method of capturing workers in the construction industry.

Discussion Question 3

The Review was asked to consider alternatives to the use of prescribed industrial instruments as an effective means of capturing workers in the construction industry. Finding 3 and Recommendation 3 offer three key options (above). In selecting a preferred option, we seek your views on:

- a) What do you consider are the key issues (if any) with **option a** (maintaining the existing system and update Schedule 1 to codify the position established in *Positron*)?
- b) What do you consider are the key issues (if any) with **option b** (implementing an occupation list in conjunction with a classification system)
 - i. With respect to **option b** only, do you foresee any unintended consequences or concerns about the use of an occupation list in combination with a classification system?
 - ii. when choosing a classification system do you have any comments concerning the Review's proposal to rely on ANZSCO (being an employee/occupation focus) rather than ANZSIC (being a focus on the employer and broader industry) as a means of capture?
 - iii. do you consider the ANZSCO occupation classifications are sufficiently similar to the occupation classifications provided by the relevant prescribed award? Would you have any concerns about adopting the ANZSCO occupational classification to determine coverage under the scheme?
- c) What do you consider are the key issues (if any) with **option c** (using refined legislative drafting with additional terms)?
- d) Of the three options proposed by the Review, which option do you prefer and why?
- e) Ministerial Declarations: Page 52 of the Final Report of the Review considers the use of Ministerial Declarations as an additional means to determine coverage. Do you support the notion of including Ministerial powers as an additional means of determining coverage? In what circumstances would you support Ministerial intervention and what limits, if any, do you consider appropriate to place on the use of such powers?

4.4 Core terms

The Review made the following Findings and Recommendations:

Finding 4

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

- (a) 'days of service' does not reflect the modern types of absences permitted under the LSL Act;
- (b) 'ordinary pay' does not align with the equivalent definition contained in the LSL Act;
- (c) 'ordinary hours' is referred to with respect to casual employees, although is undefined in the Act; and
- (d) 'week' is not defined by the Act either by a five-day or seven-day week.

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

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

Implementation consideration

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

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

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

Amend the Act to align the definition of 'ordinary pay' to the equivalent definition in the LSL Act and refined to reflect the nuances of the construction industry.

Implementation consideration

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

Recommendation 4C – define 'ordinary hours of work'

Insert a definition for 'ordinary hours of work'.

Implementation consideration

A definition of 'ordinary hours' should be considered carefully given that casual employees may not have 'ordinary' hours due to the irregular nature of some casual work. The Review notes that the *Fair Work Act 2009* (Cth) defines a regular casual employee as a casual employee who is 'employed by the employer on a regular and systematic basis'.³ A similar concept could be used to formulate the definition of ordinary hours of a casual employee.

Recommendation 4D – define 'week'

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

Background and relevant considerations

Section 5.3.2 (page 56) of the Final Report of the Review considers whether the core terms of the Act result in a fair and equitable application of long service leave entitlements.

As part of its deliberations, the Review considered the level of harmony between the operation of the Act and the operation of the *Long Service Leave Act 1958* (WA) (the **LSL Act**).

To assist consideration and discussion, the definition of 'ordinary pay' as set out in the LSL Act is extracted at **Appendix B**.

³ Ibid s 12.

Discussion Question 4

Finding 4 of the Final Report of the Review made recommendations to amend the Act to revise core terms.

- a) Do you foresee any unintended consequences arising from Recommendations 4A-4D.
- b) **'Ordinary Pay'**: what refinements, if any, do you consider are required to make the definition of Ordinary Pay that appears in the *Long Service Leave Act 1958 (WA)* (extracted below) appropriately nuanced for the WA construction sector (in particular, compressed roster arrangements and treatment of overtime and penalty hours)?
- c) **Ordinary Hours of Work**: How do you consider 'ordinary hours of work' should be defined in the Act?

4.5 Accrual mechanism

The Review made the following Finding and Recommendations:

Finding 5

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

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

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

Background and relevant considerations

Section 5.3.3.2 (page 62) of the Final Report of the Review considered alternative method of accrual and provides an overview at Table 7 of the approach used in comparable schemes interstate. Additionally, section 5.3.3.2 contains Options Modelling of the various alternatives, which includes:

Option1 – maintain the current approach which involves MyLeave placing reliance on each employer to calculate the 'days of service' for each employee based on an entitlement to receive ordinary pay.

Option 2 – shift to an 'hours worked approach', being either:

- Option 2A - An averaged ordinary hours variation (preferred);
- Option 2B – standard working week variation; or
- Option 2C – Overtime inclusion.

Option 3 – Hybrid approach which adopts 'hours worked' as method of accrual however contains variations to cater for those working a standard week and an additional formula for application for workers on a compressed roster.

Discussion Question 5

The Review was asked to consider whether the current method of accruing entitlements using 'days of service' reflects contemporary workforce models.

The Review considered three broad alternatives and ultimately recommended a shift towards an 'hours worked' approach (specifically, option 2A) as the best alternative to balance the various interests and result in greater fairness between cohorts and workforce models.

- a) Do you foresee any unintended consequences related to the adoption of Option 2A?
- b) Do you have other comments relevant to the effective implementation of Option 2A?
- c) Would you prefer to see another option implemented? If so, which option and why?

4.6 Employees with long-term service to a single employer

With respect to eligible employees with long-term service to a single employer, the Review recommended:

Recommendation 7B:

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

- (a) require eligible employees with long-term service with a single employer to access their accrued entitlements through the LSL Act only; and
- (b) permit MyLeave to refund an employer levy payment made in circumstances where the respective employee will access, or has accessed, accrued entitlements under the LSL Act (per recommendation 7B (a)).

Background and relevant considerations

The Review considered anomalies in the operation of the Act in term of equitable and fair payments, including a focus on employees with long term service with a single employer.

In summary, in section 5.3.5.7 (page 75) of the Final Report the Review identified an anomaly in the operation of the Act in so far that when an employee with long term service to a single employer accesses long service leave under the LSL Act the payment will attract the payment of superannuation, however, if the employee accesses accrued long service leave under the Act, the payment will not attract superannuation. Section 5.3.5.7 of the Final Report of the Review considered this issue and formed a view in Recommendation 7B.

Recommendation 7B was informed by the principle of promoting parity with the LSL Act and a desire to create a 'level playing field' between workers accessing long service leave entitlements between the Act and the LSL Act.

MyLeave is currently considering how this recommendation may be implemented, including options for MyLeave to refund an employer an amount (either the levy amount or worker entitlement sum) with interest at a prescribed rate – the underlying rationale being that an employer should not be in a worse financial position as a result of having paid the levy.

Discussion Question 6

With respect to employees with long-term service with a single employer the Review recommends that legislative amendments occur to require those employees to request their long service leave payment through the LSL Act only, and for a refund mechanism to be available for employers (to seek a refund for levies paid to MyLeave).

- a) Do you foresee any unintended consequences associated with requiring employees with long term service with a single employer to seek their LSL payment through the LSL Act;
- b) What do you consider is the best method of implementing this recommendation in a manner to reduce the administrative and regulatory burden on employers?
- c) Do you have other comments relevant to the effective implementation of Recommendation 7B?

4.7 Other Comments

MyLeave invites stakeholders to share their perspectives on all recommendations made by the Review.

Discussion Question 7

- a) Do you have any other comments with respect to the recommendations made by the Review?
- b) Do you have any suggestions on how recommendations could best be implemented to be fit-for-purpose for the WA construction industry?



Appendices

APPENDIX A

Extract of Findings and Recommendations from the Review

Term of Reference Matter 1

Finding 1

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

- (a) address anomalies caused by existing exclusions;
- (b) clarify ambiguity surrounding coverage for specific cohorts of workers (discussed in Table 4).

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

Recommendation 1A – address anomalies caused by current exclusions

The ‘construction industry’ definition should be amended to:

- (a) remove the current exclusion relating to construction work performed on a ship; and
- (b) clarify that construction work on a ship is captured by the Act.

Recommendation 1B – clarify ambiguity for specific cohorts of workers

Amend the legislative framework to:

- (a) exclude working directors from coverage (per Table 4);
- (b) clarify the capture of specific cohorts of construction workers including subcontractors, supervisors, construction cleaners (peggies), traffic controllers and electrical trade workers who conduct commissioning, de-commissioning, and testing) to reflect the proposed capture expressed in Table 4; and
- (c) insert further clarity concerning coverage for workers engaged offshore in circumstances not accounted for in the *Industrial Relations Act 1979 (WA)*.

Term of Reference Matter 2

Finding 2

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

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

Recommendation 2A – amend the definitions for ‘employee’ and ‘employer’

The Review recommends revising the current definitions of:

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- (a) 'employee' to 'worker', to reflect the contemporary construction workforce and to align language with other comparable schemes; and
- (b) 'employer' by:
 - i. simplifying the term to mean any entity that engages a 'worker' as defined under the Act (retaining existing exceptions for a Minister, authorities or local government prescribed under existing provision 4(c) of the Act); and
 - ii. de-coupling the link of employer from the definition of the 'construction industry' (so as to rely on the workers engagement in the WA construction industry as the primary test).

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

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

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

Term of Reference Matter 5

Finding 3

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

Recommendation 3 – alternatives to the use of prescribed industrial instruments

There are three key options available:

- (a) maintain the existing system of prescribing of industrial instruments and update Schedule 1 of the Regulations to codify the position established by *Positron*;
- (b) cease to use prescribed industrial instruments and design and implement an occupation list in conjunction with a classification system; or
- (c) cease to use prescribed industrial instruments and use refined legislative drafting with additional terms.

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

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

Term of Reference Matter 3

Finding 4

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

- (a) 'days of service' does not reflect the modern types of absences permitted under the LSL Act;
- (b) 'ordinary pay' does not align with the equivalent definition contained in the LSL Act;
- (c) 'ordinary hours' is referred to with respect to casual employees, although is undefined in the Act; and
- (d) 'week' is not defined by the Act either by a five-day or seven-day week.

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

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

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

Amend the Act to align the definition of 'ordinary pay' to the equivalent definition in the LSL Act and refined to reflect the nuances of the construction industry.

Recommendation 4C – define 'ordinary hours of work'

Insert a definition for 'ordinary hours of work'.

Recommendation 4D – define 'week'

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

Term of Reference Matter 4

Finding 5

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

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

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

Term of Reference Matter 6

Finding 6

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

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

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

Recommendation 6A – early access in response to hardship

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

Recommendation 6B – standardise breaks in service

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

Term of Reference Matter 7

Finding 7

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

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Recommendation 7A – resolve anomalies and deficiencies

Amend the Act to:

- (a) remove constraints on the number of periods that an employee may take their long service leave;
- (b) permit the cashing out of entitlements *by agreement* to employees (similar to the approach adopted in the LSL Act and customised for suitability to a portable scheme);
- (c) remove the current preclusion in section 22(1) related to instances of ‘serious misconduct’; and
- (d) create further alignment with the LSL Act by inserting guidance on the rates of pay applicable to the taking of leave in circumstances where an employee elects to postpone the taking of accrued entitlements.

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

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

- (a) require eligible employees with long-term service with a single employer to access their accrued entitlements through the LSL Act only; and
- (b) permit MyLeave to refund an employer levy payments made in circumstances where the respective employee will access, or has accessed, accrued entitlements under the LSL Act (per recommendation 7B(a)).



Term of Reference Matter 10

Finding 8

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

- (a) the current penalty framework providing an effective deterrent to non-compliance; and
- (b) the IR Act providing a sufficient basis for the enforcement of civil penalties.

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

- (c) the need for an enhancement of mid-spectrum enforcement powers available to improve the efficiency of compliance outcomes;
- (d) increased educational campaigns to raise awareness of compliance obligations within the industry.

Recommendation 8 – legislate mid-spectrum enforcement powers

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

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



Term of Reference Matter 10(d)

Finding 9

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

Recommendation 9 – legislate an internal review process

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

Term of Reference Matter 8

Finding 10

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

Recommendation 10A – expand discretionary powers

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

- (a) granting extensions of time for the submission of levies and quarterly returns;
- (b) waiving penalties and late fees in certain circumstances; and
- (c) determining how the application of late fees may be administered.

Recommendation 10B – modernise Board governance

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

- (a) the appointment of an acting Chair;
- (b) remote meetings; and
- (c) circular resolutions.

Term of Reference Matter 9

Finding 11

The Review finds that:

- (a) the legislative framework strikes an appropriate balance and does not impose undue regulatory burden by requesting employers complete returns on a quarterly basis;
- (b) clarifying limitation periods would assist improve the administration of the Act and continuing to modernise the use of technology, systems, and data will further reduce the regulatory burden on employers and employees; and
- (c) a mandated methodology would assist the process of calculating assessments and support a self-compliance framework for employers.

Recommendation 11A - Clarify limitation periods

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

Recommendation 11B – mandate a methodology for contribution assessments

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

Term of Reference Matter 12

Finding 12

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

Recommendation 12 – insert an Object provision

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



Term of Reference Matter 12

Finding 13

The regulatory framework uses outdated gendered language.

Recommendation 13 – adopt gender neutral language

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



Term of Reference Matter 12

Finding 14

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

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

Amend the regulatory framework to:

- (a) provide a mechanism to deregister employees (including an ability for employees to have the decision reviewed);
- (b) permit MyLeave to refund contributions to employers where the contribution has been made in error or where the contribution relates to an employee who has subsequently been determined ineligible for entitlements under the Act; and
- (a) provide for each inspector to hold an identity card.

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APPENDIX B

Definition of 'ordinary pay' under Division 2 of the Long Service Leave Act 1958 (WA)

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.

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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. Au

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