Australian Services Union

Submissions in response to draft Regulations for the Portable Long Service Scheme

31 May 2019

Introduction

The Australian Services Union covers workers throughout the community services sector in Victoria. These submissions address the questions for which feedback has been specifically sought.

A reference in these submissions to:

- 'the Act' means the *Long Service Benefits Portability Act 2018*;
- 'the ASU' or 'Australian Services Union', is a reference to the Australian Municipal, Administrative, Clerical and Services Union – Victorian & Tasmanian Authorities and Services Branch;
- 'CHC' is a reference to Community Health Centre;
- 'CSS', is a reference to the community services sector;
- 'the Regulations' or similar means the exposure draft Regulations for the *Long Service Benefits Portability Act 2018*, or part thereof; and
- 'the RIS' mean the Regulatory Impact Statement prepared by KPMG.

Quarterly returns

1. Is the prescribed additional information appropriate?

The ASU submits that additional information should be required. Specifically:

- The name of the Fair Work Instrument under which any of the following applied:
  - Long service leave granted or taken by the worker
  - Payments in lieu of long service leave made to the worker
  - Any other long service benefits paid or given to the worker

2. Will employers be in a position to provide this additional information?

The ASU foresees no difficulty for employers in providing the suggested additional information.

Disclosure of information

3. Are there any specific matters about privacy of information that you wish to raise as part of this proposed regulation?

The ASU makes no submissions in relation to this question.

Community services sector

4. Do the exposure draft Regulations provide clarity as to the scope of the community services sector, what is community service work, and who is an employer, and an employee for the sector?

The ASU submits that the draft Regulations do not provide sufficient clarity about the scope of the community services sector, community services work and who is an employer and employee for the sector.

Clarifications on scope

The ASU submits that insertions should be made into draft Regulation 7. Highlighted sections in yellow are suggested amendments to provide further clarity on scope:

(1) *For the purposes of clause 2(1)(j) of Schedule 1 to the Act, the provision of any of the following services is prescribed to be community service work—*

(a) *social work, welfare work and youth work services;*

(b) *home care support services for aged persons (other than health or aged care work).*

(new) family support services, youth services, housing and homelessness services, community mental health, family violence prevention and response, neighbourhood houses, drug and alcohol services, migrant and refugee support;

(new) *peak-body organisations for the community services sector*

…

The ASU submits that clarity would also be enhanced by including a more comprehensive list (suggested below) of examples of the type of activities that fall within the scope of CSS. This is not intended to be an exclusive list and is therefore drafted in terms of activities that community services can include, and not as a definitive range of activities. The ASU asserts it best be added to draft Regulation 7(1).

(c) Community service work can include a range of the following activities as activities that provide:

- Collection and provision of information related to benefits and services and community resources available to clients;
- Supportive and/or crisis counselling and intervention;
- Emergency material relief for persons suffering financial hardship;
- Custodial or supportive care and social welfare support for people in residential accommodation, day and occasional care facilities and/or settings; for people who are unable to live independently; and for people who are not living in a family setting, (excluding nursing and/or medical services);
- Assessment of individual, family group or community needs;

- Development, implementation and assessment and/or maintenance of individual casework programs;
- Referral and liaison with other workers and professionals, agencies, community groups, government and other organizations;
- Co-ordination of activities and/or facilities for the development and/or maintenance of independent living skills and/or social skills;
- Research and analysis of social, welfare and/or community issues, needs or problems;
- Development and maintenance of community resources;
- Community campaign development, organisation, civic and advocacy activities;
- Development, maintenance, implementation and evaluation of family, group and community programs;
- Social welfare and community planning, policy development, interpretation and/or implementation;
- Community law and legal activities;
- Representation, advocacy, negotiation and mediation within and between communities, agencies, institutions and governments, and with individuals;
- Counselling and/or social welfare support (not including nursing or medical services) for people living at home and who are unable to live independently;
- Social and community development, education, advocacy, resource management, cultural awareness and other relevant areas within the community;
- Clerical and administrative tasks associated with the work described above.

Exclusion of health or aged care work

Regulation 7(4) creates a carve-out from the definition of community service work. It carves out work that provides a service that is an activity that is health or aged care work. That definition determines the scope of the CSS, as defined in clause 1 of Schedule 1 to the Act. In turn, the scope of the CSS affects which employers are employers for the CSS and which workers are employees for the CSS.[1] Essentially, an employee will not have any entitlements under the Act if their employer does not employ individuals to perform community service work.

The carve-out is narrowed somewhat by Regulation 7(5), which provides that where 'a service' provides both activities that <u>are</u> health or aged care work, and activities that <u>are not</u> health or aged care work, then it will only fall within the carve-out if the health or aged care work is the predominant activity.[2]

Respectfully, the ASU submits that Regulation 7(4) is poorly drafted. This is apparent when one tries to read Regulation 7(4) with clause 2 of Schedule 1 of the Act. When one does so, the carve out operates on all 'work that provides a service that is an activity that

[1] *Long Service Benefits Portability Act 2018* (Vic) Sch 1 cl 3 – 4.

[2] Note that, as presently drafted, cl 7(5) does not include the word 'only' as I have used above. That appears to be a drafting error. If the word 'only' remains omitted, then there would be no room for cl 7(5) to operate: obviously a service providing activities that are health or aged care work (among others) falls within cl 7(4).

is health or aged care work', but only where the health or aged care work is the predominant activity provided by the service. The focus appears to shift from the work performed by workers, to the service received by clients of employers, and back again to the activity performed by workers.

The meaning of 'predominant' for the purpose of the Regulations is undefined. The Oxford English Dictionary online defines 'predominant' as "present as the strongest or main element".

How such a standard will be applied in practice is uncertain, and that is just one element of the convoluted carve-out.

The carve-out is especially difficult to make sense of, because it is not really correct to say that services provide activities to clients. Moreover, one can imagine an employer who provides services that are health or aged care services, and those services are the majority of the services provided by the employer, but the majority of the activities performed by its employees are not health or aged care work. The ASU submits that the difficulty in determining whether such an employer would be an employer for the purposes of the CSS demonstrates the need for re-drafting.

One kind of 'activity that is health or aged care work' under Regulation 7(6)(a) is 'health or related service within the meaning of section 3(1) of the *Health Service Act 1988* (Vic)', which includes 'any other person, body or organisation that provides, delivers, funds, facilitates access or provides insurance in relation to health services, being services that include, but are not limited to' a range of kinds of services. That is an extremely wide definition. It would include, for instance, work performed for a health insurer. It is not appropriate.

It is even less appropriate when considered in light of the exclusions to the definition of employee set out in Regulation 9(1)(a) – (g). Those provisions exclude workers covered by certain modern awards, most of which relate to the health industry.

The ASU does not profess expertise in the coverage of the modern awards set out in Regulation 9(1)(a) – (g), but they appear to be relatively clear (or at least sufficiently clear) and to the extent that they are appropriate carve outs in their own right, they appear sufficient to exclude workers in the health industry from coverage by the Act.

Home care support service aged care carve-out

The delivery of home care support services are often integrated with broader community services. It is estimated that of the 301 non-government, not-for-profit organisations in Victoria delivering home care support services, only 38 also deliver aged care services. The majority of those providing home care support services also provide other community services that fall within the scope of the scheme.

The excision of home care support services would create considerable administrative complexity for the large number of organisations that deliver home care support services and other eligible community services. As a result, staff employed by community service organisations that provide home care support services should all remain within the scope of the scheme.

Home care support workers that deliver services to a range of clients are included in the scheme. These workers will be employed by community services organisations that deliver services to people with disabilities and/or other special needs.

The ASU's position is that Regulation 7(1)(b) could be too restrictive in confining the scope of 'community services work' to exclude home care support services that is 'health or aged care work', which picks up the wide definition of 'health or aged care work' addressed in the above section of this submission. The ASU is concerned that this could exclude home care support services workers when they provide home care support services only to aged care clients. The ASU submits this can occur to a worker who is in fact properly understood to be within the CSS. Therefore, to the extent that Regulation 7(1)(b) does exclude such workers from the scheme, amendments should be made to ensure they are included.

Community Health Centres

In respect to Community Health Centres, the Act provides:

> *Schedule 1*
>
> *(4)(2)The following are not employees for the community services sector—*
>
> *…*
>
> *(b) if the employer is a community health centre registered under section 48 of the* **Health Services Act 1988***—an individual employed by the employer unless the individual's role is to carry out community service work at the community health centre;*
>
> *…*

The ASU understands this is intended to capture only those workers who work in a program that happens to be under the auspice of a CHC, but in other circumstances, could be employed by another CSS agency in the same or similar role.

This should be made clearer in the Regulations.

The ASU submits that the relevant workers are those who are employed in CHC *"*registered under section 48 of the *Health Services Act 1988"* and to whose employment is covered by the *Social, Community, Home Care and Disability Services Award 2010*.

Additional wording for the regulations, to be inserted at Division 7(1):

> NEW (d) work performed within a community health setting that is typically provided by workers whose employment is covered by the *Social, Community, Home Care and Disability Services Award 2010*.

Executive or management exclusion from scope at Regulation 9(2)

Regulation 9(2) carves-out from the scheme "executive or management" in certain circumstances. The only explanation for the exclusion is set out in the RIS, which says, at several points, that:

> "Without this exclusion, there is a chance of unintended employees being granted access to PLS."

The ASU disagrees with this assertion.

In the CSS context, there are numerous small workplaces, such as neighbourhood houses or women's health organisations, where employee numbers may range from 2 to less than 20. The impact of Regulation 9(2) is that the most senior position in some of these

workplaces would be excluded from scope of the scheme. The ASU submits that outcome is contrary to the intention of the Act.

Similarly, medium sized organisations hold many long serving staff in management roles that may be deemed administrative in nature. Many of these are long standing community sector employees who do not enjoy the job security, nor receive rates of remuneration or other conditions, in line with 'executive' or 'management' employees in other sectors. This cohort should not be excluded from the scheme and the ASU rejects the suggestion that granting them access to the scheme is unintended.

The ASU submits that Regulation 9(2) should be removed.

In addition, and without deviating from the ASU's position that it should be entirely removed from the Regulations, the scope of Regulation 9(2) is extremely unclear. The clause introduces three new concepts that are left undefined: 'executive', 'management' and 'administrative'. This introduces unnecessary complexity.

5. Is the list of awards and agreements at clause 9 of the exposure draft Regulations comprehensive? Should any of those awards or agreements be excluded? Should any other awards or agreements be included?

The awards listed from 9(a) to (g) are specifically named modern awards with scopes of coverage identifiable by the terms within each of the awards. The intent of the inclusion of these awards appears to be to exclude workers who are not in the community services sector. It is unclear why this is necessary in light of the parameters otherwise provided for by the Act and the draft regulations.

Unlike the items at 9(a) to (g), the items at 9(h) to (k) are types of instruments. The specific scope of any given instrument of the relevant type is unclear. This is self-evidently problematic.

Even were the scope of items 9(h) to (k) clearly identifiable, the rationale for excluding from the coverage of the Act any person employed under any of these types of instrument is unclear. Unlike the awards listed at 9(a) to (g), the items listed at 9(h) to (k) do not even appear to have the intent of setting or confirming parameters of the community services sector.

The exclusions in cl 9(1)(h)-(k) of the Exposure Draft of the Long Service Benefits Portability Regulations (Draft Regulations) are exclusions from the definition of employee for the CSS.[3] An employee who is not an employee for the CSS does not cause their employer to have to remit a levy, cannot be registered by the Authority and cannot accrue recognised service. They could have no entitlements under the Act.

The RIS prepared explains the rationale for these provisions. It says:

> *In addition to the potential inclusion of unintended workers, the current composition of schedule 1 of the LSBP Act leaves open the possibility of aspects of the scheme's coverage becoming invalid due to inconsistency with the Fair Work Act 2009.*
>
> *The current definition of 'employee' provides coverage for employees by reference to the types of work they do. The implication of this is that the*

[3] *Long Service Benefits Portability Act 2018* (Vic) Sch 1 cl 4(2)(d)(ii).

> *LSBP Act is purporting to provide long service benefits to some workers on federal awards. This is acceptable for federal awards which **do not** cover long service leave (which is most modern awards – those created after 2009).*[4] *However for certain enterprise agreements which **do** provide for long service leave, the LSBP Act is invalid to the extent of inconsistency with those instruments. Depending on the legal construction of this situation, the 'extent of inconsistency', may not only be those federal instruments which cover long service leave, but also those which do not do so directly but may be subject to the transitional provisions of the Fair Work Act 2009 where those provisions act to preserve LS benefits from pre-reform instruments (if the LSBP Act does not define which instruments it is limited to).*
>
> *The proposed Regulations seek to address the above problems through providing a more comprehensive definition of who is (and isn't) an employer, who is (and isn't) an employee, and what community services work is (and isn't).*

The RIS goes on to explain that the rationale for the specific exclusion of employees to whom the clause 9(1)(i)-(k) is because they 'present a risk of meaning the Act is constitutionally invalid'.[5]

The rationale is misconceived.

The nature of the benefit conferred on registered workers for the community services sector is designed to address any potential for constitutional invalidity. As explained by Minister Hutchins in the second reading speech for the Long Service Benefits Portability Bill 2018:

> *There were several Awards and Enterprise Agreements in place across the community services sector that prescribed long service leave entitlements when the FW Act came into operation and those entitlements were preserved under the terms of the FW Act. Pursuant to section 109 of the Commonwealth Constitution, where employees have an award-derived or agreement-derived entitlement to long service leave preserved as part of the national employment standards under the Fair Work Act, any state law that is inconsistent with these awards or enterprise agreements is inoperative to the extent of any inconsistency between state law and commonwealth law. The practical effect of this is that some employees in the community services sector would not be able to benefit from a Victorian government portable long service leave scheme.*
>
> *The problem was recognised in the Community Services Long Service Leave Bill 2010. In the explanatory memorandum to clause 2 of the Bill (the commencement provision), it was noted that the Bill had no commencement date. For the Bill to operate in respect of all employees it was necessary for the commonwealth government to amend the operation of the Fair Work Act. The Bill therefore could not commence until after the necessary amendment to the federal Act.*

[4] *Fair Work Act 2009* (Cth) ss 29(2)(b), 27(1)(d)(iii), 27(2)(g), 113(2)(b).
[5] Long Service Benefits Portability Scheme, KPMG, April 2019, 30, 57.

It is now apparent that the Commonwealth has no intention of providing a legislative solution to this problem.

A solution is for the Victorian Government to legislate a scheme that provides for a payment to workers, in lieu of leave. This is the arrangement in the construction industry CoINVEST scheme.

This model has been found to be constitutionally valid. [6]

As alluded to by the second reading speech, the High Court considered a similar question arising in relation to the Victorian Portable Long Service Leave scheme for the building industry, Co-Invest in Jemena Asset Management (3) Pty Ltd v Coinvest Ltd (2011) 244 CLR 508. The Co-Invest scheme was found not to be inconsistent with Federal instruments conferring entitlements to take LSL on employees because it did not provide for the taking of LSL. Rather, it provided only for payments to be made to employees. Those payments could coincide with the taking of LSL under a Federal instrument, and employers who paid employees in respect LSL taken under a Federal instrument could be reimbursed from the Co-Invest fund.[7]

The Act so far as it concerns CSS workers is similar to the Co-Invest scheme in all respects relevant to the question of constitutional invalidity. It confers an entitlement to a payment, but not to leave.[8] It contemplates entitlements arising under the Federal scheme.[9] And it provides for employer reimbursement where the employer pays the employee under a Federal entitlement.[10]

Coverage of employees by the instruments mentioned in cl 9(1)(i)-(k) of the Draft Regulations could not give rise to constitutional invalidity. There is no rationale for excluding employees to whom those instruments apply, and the exclusions should be removed.

6. Whilst it is proposed that the Regulations operate on and from 1 July 2019, the Regulations bringing children's services, and disability services within the scope of the scheme only operate on and from 1 January 2020. This will enable businesses in those sectors adequate time to prepare for the legislation. Are these appropriate commencement dates?

The ASU's position is that children's services, and disability services, ought to be in the scheme from commencement.

No double-dipping

7. Does the proposed Regulation adequately address any risk of double-dipping?

The ASU has no concerns with the draft Regulations pertaining to double-dipping.

[6] Accessed online at: https://www.nataliehutchins.com.au/parliament/long-service-benefits-portability-bill-2018-2/
[7] *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508, [51] – [60].
[8] *Long Service Benefits Portability Act 2018* (Vic) Sch 1 cl 8(1).
[9] *Long Service Benefits Portability Act 2018* (Vic) Sch 1 cl 15.
[10] *Long Service Benefits Portability Act 2018* (Vic) Sch 1 cl 15.