

Saturday, 27 June 2020

By email: irv.info@dpc.vic.gov.au

Industrial Relations Victoria
Department of Premier and Cabinet
1 Spring Street, Melbourne Victoria 3000

Dear Sir/Madam

Portable Long Service Scheme – consultation on Permanent Regulations

I write to provide comment on the Exposure Draft of the Long Service Leave Portability Regulations (**Exposure Draft Regulations**) and the related Regulatory Impact Statement (**RIS**).

Consumer Action Law Centre is strongly supportive of the intent of the Portable Long Service Leave Scheme (**PLSLS**), in that it seeks to benefit employees who work long-term in the community services sector. Indeed, our organisation has long incorporated a form of portability of long service leave in contracts of employments.

The main concern we have is that the PLSLS appears to needlessly disrupt community organisations' existing employment arrangements as the double-dipping provisions do not recognise the terms of individual employment agreements. Despite previously raising this issue with the Portable Long Service Leave Authority (the **Authority**) and Industrial Relations Victoria (**IRV**), neither the Exposure Draft Regulations nor the RIS appears to deal with this problem.

This submission also responds to changes to the predominance test for determining who is not a community services sector employee.

The problem: individual employment agreements

Consumer Action Law Centre, like many other small community organisations, enters into individual employment agreements with its staff. The Centre has chosen not to adopt the Community Legal Centre Multiple Business Agreement (**MBA**), which is a registered Fair Work Instrument, for a number of reasons including that it is not regularly updated. However, we do ensure employee conditions meet or exceed industry standards, including those set out in the MBA. For example, employment agreements provide for greater long service leave entitlements than the statutory minimum.

The *Long Service Leave Portability Act 2018* (the **Act**) appears to have a policy objective of reimbursing employers for double-dipping claims in the community services sector. However, the Act and regulations limit the



implementation of this policy to situations where an employee's entitlement is pursuant to a fair work instrument, and not where it is pursuant to an individual employment agreement. We don't understand the reason for this distinction, and it has a number of consequences for affected small community services organisations, including:

- The organisation may have to pay the long service levy to the Authority as well as having to provide for, and meet, employee's contractual entitlements – this is likely to have an impact on organisation's ability to meet funding requirements and their public interest purpose. While we acknowledge that employers can generally set-off contractual entitlements against legislative entitlements that are for the same purpose, there is some uncertainty about the application of this rule.
- Even if set-off can be achieved, it appears that employers would still be required to run multiple leave systems should it maintain beneficial long service leave provisions for staff. For example, where an employee claims long service leave, the employer would be able to seek reimbursement from the scheme for the statutory entitlement but would have to provide for, and meet, any additional contractual entitlement. There is a significant compliance cost of doing this, given the complexity of the scheme provisions, state legislation and employment agreement obligations.

It might be suggested that organisations could seek to formalise their employment agreements through fair work arrangements, so that they are considered fair work instruments. While this is indeed possible, it is an impost on organisations and it is hard to understand the benefit in doing so for organisations or staff, where the organisation is committed to strong employment standards and conditions. Furthermore, it was not the policy intent of the PLSLS to require this or, at least, not overtly.

We note that the RIS suggests that legislative changes are required to allow employers who pay entitlements under the *Long Service Leave Act 2018* (the **LSL Act**) to be entitled to reimbursement from the Authority for any levy paid once an employee accesses an entitlement under the LSL Act. We urge that amendments are also made in relation to employers who pay entitlements under provisions of individual employment agreements, separately to entitlements under the LSL Act.

Other consultation questions

We support the proposed change to Regulation 10 of the Exposure Draft Regulation which replaces the predominance test for determining who are not employees for the purposes of the community services sector. Assuming that all staff of community legal centres can be considered covered by the relevant Modern Awards, adopting such awards to determine coverage is likely to be and simpler to apply.

Please contact me on [TEXT REDACTED] if further information is required.

Yours faithfully,

CONSUMER ACTION LAW CENTRE



Gerard Brody

Chief Executive Officer

