SUBMISSION

Long Service Benefits Portability Regulations

31 May 2019

About the VHA

The Victorian Healthcare Association is the not-for-profit peak body supporting Victoria's public health and community services to deliver high quality care. The VHA represents Victorian public hospitals, registered community health services, multi-purpose services, and bush nursing services.

On behalf of its members the VHA responds to system reform, helps shape policy and advocates on key issues. The VHA also supports the Victorian healthcare sector by providing sector development that builds capacity, governance and executive support as well as supporting innovation and collaborations that act as a catalyst for strengthening the Victorian health system.

The VHA welcomes the opportunity to provide feedback on the Portable Long Service Benefits Scheme (the scheme) Draft Regulations (regulations). Note, to maintain consistency with the *Long Service Benefits Portability Act 2018* (the Act) and the *Health Services Act 1988*, the VHA has used the term 'community health centre' to define the 29 registered community health services that it represents within its membership.

Introduction

The VHA and its members support the extension of long service leave portability to workers who have not had access to this entitlement, particular those in the community services sector, cleaners and security workers, many of whom are employed in registered community health centres.

The VHA offered considered feedback on the drafting of the the Act and its impact on community health centres, including outlining our concerns regarding the potential of the scheme to duplicate existing portable LSL entitlements available to employees through Fair Work instruments, and the flow-on impacts with regards to double payments of overlapping leave entitlements and the increased cost and administrative burden for employers.

While supportive of the extension of portability benefits to workers who previously did not have access to the entitlement, the introduction of this scheme will duplicate existing portability entitlements for the vast majority of workers in community health centres.

The duplicate schemes are complex and will require community health centres to invest heavily in human resources and payroll products in order to comply with the legal requirements of the scheme.

The VHA's submission is based on extensive consultation with members, industrial relations experts and auditors. It highlights gaps in the draft regulations and offers considered recommendations that would improve the operation of the Act for community health centres and employees.

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Administration and cost burden

The regulatory impact statement outlines the projected cost impact of the scheme, based on modelling completed by KPMG, which found that the scheme would increase overall costs by approximately 0.3 per cent of salary costs.

The VHA's members have conducted internal modelling that shows that one large metropolitan community health centre expects to be paying an additional $3 million over the first seven years of the scheme. These costs relate solely to levy payments of 1.65 per cent and would be subject to any uplift or discount in the levy in future years, however, they do not include the necessary investment in new parallel payroll systems and the recurrent costs related to staff time managing the significant administrative burden in complying with the scheme. Under the same model, a smaller rural community health centre with a large community services program has estimated that the levy cost per annum would represent almost 30 per cent of their surplus target.

In an increasingly challenging funding environment for community health centres, where the Victorian Auditor General's Office found, in 2018, that the unit price from the community health program had not been reviewed since 2007, and had been indexed at a sub-inflation rate of between 1.5 and 2.5 per cent,[1] this is a significant impost on the sector.

These figures represent potential investments into health and community service programs, upgrades to ageing infrastructure, and staff training and development that will be diverted to pay for a scheme that duplicates a benefit already enshrined in covered workers' enterprise agreements.

It is essential that the cost of implementing and administering this duplication is recognised by the Victorian Government and, if community health centres are required to participate, that funding grants are made available to support the rollout and compliance with the scheme to negate impact to service provision for some of the state's most vulnerable.

Industrial Relations Victoria consultation questions

1. Is the prescribed additional information appropriate?

The additional information prescribed in the regulations is appropriate.

The VHA notes, however, that the prescribed information does not sufficiently take into account the likely variations of role and scope experienced in community health centre settings, where staff may work across health, aged care and community service programs.

The draft regulations do not sufficiently make clear how inclusion in the scheme is objectively tested and, until such a test is set out, the VHA foresees a significant challenge for employers when tracking changes in a worker's role into and out of 'community service' work. For example, it is unclear how the scheme will be administered for workers who undergo short-term changes

[1] Victorian Auditor General. *Community Health Program.* Melbourne: Victorian Government Printer, 2018.

to their role, such as when covering maternity leave into or out of an in-scope 'community service' role, or into a management role, where participation in the scheme does not apply.

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

Employers will be in a position to provide the information proposed in the draft regulations, once new HR and payroll systems are in place and employers can clearly define which workers are covered by the scheme.

The VHA notes that recording and submitting additional information about days and part-days worked in in-scope services would represent a significant uplift in administrative requirements, with little benefit to community health centres outside of compliance with the requirements of the scheme.

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

The VHA notes that as it is the Authority that is proposing to share workers' information with third party entities, any responsibility for obtaining consent from registered workers must lie with the Authority, not employers.

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 of the sector?

The draft regulations do not provide sufficient clarity for community health centres regarding which of their services and employees should be considered in-scope for coverage by the scheme.

The definitions of community service work are clear, however, the attempt to specify which activities would exclude an employee or service from consideration as 'community services' are contradictory and introduce further confusion to the community health sector.

There are concerning inconsistencies between the Act and the draft regulations regarding whether community health centres are intended to participate in the scheme. Under the Act's test for employers, community health centres satisfy the requirements as non-profit entities employing one or more individuals performing 'community service work', which the VHA interprets as an intention to include community health centres in the scheme.

However, the Act allows for the Regulations to prescribe certain classes of work that are not community service work for the purpose of the scheme.

Regulation 7(4) states that 'health and aged care work' is not community services work for the purposes of the Act. 'Health and aged care work' is then defined in regulation 7(6)(a) to mean "a health or related service within the meaning of section 3(1) of the *Health Services Act 1988.*" The

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Health Services Act 1988 names registered community health centres as a health or related service at section 3(1)(ab).

Accordingly, the VHA interprets this section as providing that a registered community health centre 'is not' community services work, which is ambiguous, given the conflation of entity and activity.

Given this conflation, the VHA assumes that the intent is to provide that the *work of* a registered community health centre (rather than the registered community health centre itself) is not 'community services work', which is consistent with regulation 7(5), and Schedule 1, clause 4(2)(b), both of which focus on the relevance of 'activities' or 'work' performed at the service, rather than the service entity itself.

On this reading, a community health centre cannot satisfy the definition of an employer for the purposes of the scheme, as any individuals it employs are employed to perform the work of a registered community health centre, which is not 'community services work' for the purposes of the Act.

Case study
A case worker employed full time at a registered community health service has been promoted to cover the maternity leave of his manager, who worked part time at 0.8 FTE.

Prior to the promotion, all of his work was considered in-scope for the purposes of the Act, and his employer was accounting for his long service leave benefit under a fair work instrument, accruing at one week of leave for every 30 weeks worked. In addition to the accrual of leave on his employer's balance sheet, his employer was paying a levy of 1.65 per cent of his wage to the Authority.

The employee's role is now shared, with four days per week in a management position, but due to his experience he has been asked to continue to work the fifth day in his substantive role as a case worker.

The community health centre is now required to report and pay the levy on the single day of in-scope activity to the Authority, while the four days in management would be considered out-of-scope.

While the reporting and payment of benefits to the Authority has changed, the employee continues to accrue long service leave under the fair work instrument for the entirety of their hours at the community health service.

As a whole, the Act and regulations are reasonably clear when applied to a single service-type worker and employer. It is when they are read and applied in the context of a community health centre, however, that the contradictions and lack of clarity begin to cause confusion.

The draft regulations should include a clear predominance test, with a hierarchy through which the test can be applied. For example, the regulations must establish:

- Which employers are considered in-scope and out-of-scope; and
- Which workers are considered in-scope and out-of-scope; and
- Which activities or services are considered in-scope and out-of-scope.

The following scenarios outline the complexity of the scheme from the perspective of community health centres:

- An employee who works in an in-scope activity (e.g. case management) but has a background in allied health or nursing. *Are they excluded from the scheme because of their qualification in allied health or nursing, or included because of their work as a case manager?*

- An employee has dual roles with separate and distinct contracts. For example, one contract for three days as an allied health professional, and another contract for two days as a social worker. *Is this worker included by virtue of their work as a social worker? Are they excluded by virtue of their work as an allied health professional? How should the employer define the predominance of their weekly workload?*

- An employee may have a single contract to work as an allied health professional, but may provide services across a number of distinct programs and funding streams, requiring different work on certain days (or part-days). For example, an allied health professional delivers NDIS-funded care for three days per week, and care funded by Home Care Packages for the remaining two days per week. *Is this worker included in the scheme by virtue of delivering an NDIS-funded activity? Are they excluded from the scheme by virtue of this activity being a 'health service'? If they are included in the scheme, is the employer expected to pay the levy for the three days of in-scope activity under the NDIS* ***OR*** *is the employer required to pay the levy for all ordinary hours because the predominant activity is the NDIS activity?*

- An employee whose role as an NDIS coordinator is administration-based, involving coordinating clients and local providers in their region. Their role does not involve any of the activities prescribed in schedule 1, clause 2(1) of the Act; however, it is wholly funded under the NDIS. *Is this worker considered in-scope for the purposes of the scheme by virtue of their role being funded by the NDIS? Or is this worker considered out-of-scope for the purposes for the scheme due to their role being wholly administrative and not satisfying the tests set of in sch. 1 cl 2(1) of the Act?*

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?

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The draft regulations propose an approach where specific awards and agreements are excluded from the scheme, on an assumption that any award or agreement not specifically named is considered to be included.

Given there are 151 distinct modern awards, this approach is unwieldy and places too great an onus on determining which awards and agreements are excluded.

We believe this would be significantly improved if the base assumption was that all modern awards and agreements are excluded from the scheme, and to then specify which awards and agreements should be considered to be included.

For example:

Who is excluded as an employee?

An individual to whom any of the following awards or agreements apply:

1. *any modern award **except** for the:*
    - *Social, Community, Home Care and Disability Services Industry Award 2010;*
    - *Supported Employment Services Award 2010; and*
    - *Children Services Award 2010.*
2. *any enterprise agreement that applies to employees covered by the awards excluded by 1.*

6. Whilst it is proposed that the Regulations operate and on 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 VHA notes that compliance with a commencement date of 1 July 2019 is not feasible, given that employers are as-yet unable to determine which workers are covered by the scheme and that this represents a significant administrative burden that is not currently funded and, due to practical vendor considerations, will not be able to purchase the required upgrades to their payroll systems to manage the duplicate leave payments and reporting to the Authority by the time the draft regulations are finalised and the new financial year begins.

The proposed commencement date of 1 January 2020 for the disability sector is an acknowledgement of the challenges faced by those employers in particular, however commencing the scheme halfway through the financial year adds a further administrative burden that is wholly preventable, in addition to the significant complication for community health centres of having a significant part of their in-scope workforce begin with the scheme on 1 July 2019, while workers in the centres who provide NDIS services begin on 1 January 2020.

This situation is further complicated when considering that many of the workers in community health centres would be providing services that bridge both standard 'community services' activities, and those funded under the NDIS.

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Given the delay in provision of information regarding the scheme, the complexity and lack of clarity provided by the draft regulations and the administrative burden which will require additional resourcing that is not already in place, the current commencement date of 1 July 2019 for community health centres must be delayed and, at a minimum, match the date for NDIS services.

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

The VHA holds concerns regarding the risk of double dipping and submits that the draft regulations do not address these concerns.

The VHA concludes:

- The draft regulations do prevent some double-dipping by employees where the long service leave entitlement is derived from a fair work instrument.
- The draft regulations do not protect employers from having employees access accrued long service leave under a fair work instrument in instances where they have already been paid a long service benefit by the Authority.
- The draft regulations do not prevent double-dipping by employees or protect employers where the long service entitlement comes from the *Long Service Leave Act 2018*.

As currently drafted, regulation 11(1) excludes employees with an entitlement to long service leave or benefits under a fair work instrument from the operation of section 5 of the Act, with the practical impact of preventing the Authority from making any payment to these employees. It is not clear if this is intentional, as it appears to contradict the point of the scheme, and brings into question why employers would be required to pay a levy contribution for these workers.

The 'double payment' of the levy to the Authority and the accrual of leave under a fair work instrument is a primary concern for the VHA and community health centres, particularly given the risks associated with double-dipping and the difficulties protecting employers.

The VHA respects that the intent of the scheme is to extend portability to those workers currently not able to access it.

Accordingly, an alternative approach is proposed that includes the recording and accrual of long service leave for registered workers that maintains the intent of the scheme, protects workers' long service leave and portability, and protects employers from paying a long service entitlement to a worker who has already claimed a benefit from the Authority for the same period.

This would entail:

1. Community health centres registering all in-scope employees with the Authority;
2. Community health centres providing the Authority with evidence that the employees have an applicable award- or enterprise-derived long service leave entitlement, and that long service leave has been accrued for that employee; and
3. Where termination of employment occurs and the award- or enterprise-derived continuous service is broken, the employer will then make the relevant payments to the Authority for the service period reported but not paid by the employer.

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Introducing this approach, or an equivalent, would resolve some of the concerns of community health centres and, at a practical level, would alleviate the considerable risks associated with the duplicate accrual of leave and risk of double-dipping.

Further information

[redacted]

[redacted]