

31 May 2019

Industrial Relations Victoria
C/O Engage Victoria
delivered by email (enquiries@plsa.vic.gov.au)

RE: Portable Long Service Scheme – consultation on Draft Regulations.

Dear Industrial Relations Victoria,

Thank you for the opportunity to provide submissions regarding the draft Long Service Benefits Portability Regulations (**Draft Regulations**) pertaining to the *Long Service Benefits Portability Act 2018 (Portability Act)*.

PREAMBLE

Our submissions focus primarily on the effect on Community Health Centres (**CHCs**). Specifically, CHCs are unique in that most of their employees derive a long service leave entitlement from a federal instrument such as a pre-modern award (preserved by s. 113 of the *Fair Work Act 2009*) or enterprise agreement. Where this is the case, there is generally an existing portability of long service leave scheme. Further, where such entitlements exist, they are misaligned with a State-based entitlement under the *Long Service Leave Act 2018*, including in terms of quantum / rate of accrual.

To the best of our knowledge, those issues do not arise in other sectors subject to the Portability Act.

In previous correspondence, we stated that the 'double dipping' provisions could not operate successfully. Specifically, that the Portability Act and any regulations that followed would be unable to relieve CHCs of their long service leave payment obligations under their fair work instruments. That, in our view, it was inevitable that double-dipping would occur.

We sought that CHCs be excluded from the Portability Act, consistent with the treatment of health services with comparable long service leave obligations.

CHCs also made representations regarding the complexity, administrative burden and cost impacts of the Portability Act. We support those representations.

Our submissions are confined to two matters as follows:

- Double-dipping; and
- Clarity as to application.

We shall address each in turn.

DOUBLE-DIPPING

Double-dipping is only **partially** addressed in the Draft Regulations.

The Draft Regulations require an employer to pay the levy to the Authority for registered active workers until the employee becomes eligible to 'take' or 'get paid' their long service leave benefit under their fair work instrument. An employer can seek reimbursement for the levies paid to the Authority when the employee becomes eligible to 'take' or 'get paid' their long service leave benefit under their fair work instrument only if the Authority has not already made a payment to the employee.

That is, no reimbursement applies where the employee has already accessed a payment under the scheme.

The Regulatory Impact Statement (**RIS**) acknowledges that a risk of double-dipping still exists under the model in the Draft Regulations, describing the risk as 'low' given the scheme is prospective in nature.

With respect, we disagree with that assessment. The Draft Regulations do not meet the principles outlined in Sch 1, cl 15(2) of the Portability Act intended to stop double-dipping. In our view, it is not reasonable to characterise this as a 'low' risk simply because it does not occur immediately.

We acknowledge that the Draft Regulations seek to exclude some employees where a named modern award applies. In our view, this exclusion should be extended to include the following federal industrial instruments:

- fair work instruments;
- applicable-award derived entitlements; and
- any other instrument that has preserved long service leave entitlements as a result of section 113 of the Fair Work Act 2009.

Put another way, double dipping for CHCs only arises because they are subject, in effect, to two incompatible long service leave schemes. This should be avoided.

We note that Sch 1, cl 15(3) provides that the finalised Regulations may modify the operation of other provisions of the Portability Act for the purposes of giving effect to the principles in Sch 1, cl 15(2) of Schedule . As a result, we believe the finalised Regulations can give effect to the proposal outlined above.

COVERAGE OF THE SCHEME WITH RESPECT TO COMMUNITY SERVICES SECTOR

Listed Awards and Agreements that are excluded

Sub-regulation 9 of the Draft Regulations extends the list of exclusions by reference to various awards and agreements.

There are currently 151 modern awards in operation. The Draft Regulations identifies 7 additional modern awards leaving it open for the other 144 to apply.

For example, the modern awards that are not listed that may require exclusion are the <i>Aboriginal Community Controlled Health Services Award 2010</i> and <i>Clerks – Private Sector Award 2010</i> .

To eliminate the risk of unintended workers being subject to the Portability Act, the Regulations should deal with award exclusions in a manner that is clear and leaves no margin for error.

It would be more precise to state that all modern awards are excluded **except** those intended to be covered by the Portability Act such as the *Social, Community, Home Care and Disability Services Industry Award 2010*.

Further, the Portability Act states that the exclusion operates where the named modern awards 'apply'. Under the *Fair Work Act 2009* a modern award 'covers' an employer/employee, but it does not 'apply' when an enterprise agreement is in operation. It is unclear whether the exclusions are still intended to operate where an enterprise agreement applies.

For example, the *Health Professionals and Support Services Award 2010* is listed in the Draft Regulations as an excluded modern award.

CHCs have an enterprise-agreement that applies to Allied Health Professionals currently the *Victorian Stand Alone Community Health Centres, Health Professionals Multi-Employer Enterprise Agreement 2012 – 2016 (Allied Health Professionals Agreement)*.

Under the *Fair Work Act 2009*, in the above scenario the *Health Professionals and Support Services Award 2010* does not apply because of the Allied Health Professionals Agreement. That is, Allied Health Professionals in Community Health would not be excluded from coverage of the Portability Act.

Administrative Roles

The new exclusion regarding 'executive or management roles' that are:

- wholly administrative; or
- whose predominant activity is not the personal delivery of services or the personal performance of activities that are community service work;

provides employers with some clarity that executive and management roles are excluded. However, it does not adequately address administrative employees that are not employed in an 'executive or management role'.

For example, a support service for persons with a disability or carer requires appointments and/or referrals to be made for the clients. Instead of having a welfare worker complete these tasks, an organisation has a simple referral and booking system that can be and is completed by a clerical worker.

It is unclear if the work outlined in the above example is intended to be excluded. If it is intended that administrative work should be excluded (which we believe it should), the finalised Regulations require re-drafting so that the new exclusion is not specific to individuals that hold an 'executive or management role' only.

Definition of Health and Aged Care Work

The Draft Regulations specifically exclude Health and Aged Care Work (**HAW**) by reference to a definition of 'Health and Related Services' in the *Health Services Act 1998 (HSA)*.

The definition contained in the HSA lists types of employers (for example, registered community health centres) **AND** types of services (for example, aged care services, palliative care services, pharmaceutical services).

In addition to the above, a 'predominant activity' test has been included as follows (emphasis added):

if a service provides activities that are health or aged care work and activities that are not health or aged care work, the service provided is not community service work if the health or aged care work is the predominant activity provided by the service.

Given the definition of HAW includes types of employers and types of services the Draft Regulations remain unclear. Specifically, it is not clear if:

- particular 'employers' are excluded, and **no** 'predominant activity test' is required for those listed within cl 3(1)(a), (ab) or (ac) of the HSA;
- particular 'employers' are excluded by using the 'predominant activity test';
- particular 'employees' are excluded by using the 'predominant activity test'; or
- types of 'services' that are being delivered to a client/group of clients are to be excluded dependent on the 'predominant activity test'.

To ensure that unintended workers are not covered by the Portability Act and to reduce the administrative burden, any 'predominate activity test' should be conducted at the 'employer' level. A clear stand-alone definition of 'health and aged care work' should be included in the finalised Regulations. This would require an additional consultation period with employers.

In addition, the references to the various aged care Commonwealth Government funding packages and programs are outdated. We have been advised by members that:

- only a small number of community aged care packages, extended aged care at home packages and extended aged care at home dementia packages exist and will no longer apply from 1 July 2019 as they have been replaced with home care packages levels 1 – 4; and
- the national respite for carers program has been incorporated into the Commonwealth home support programme.

Amendments are required to provide clarity on the funding packages or programs covered by the HAW definition. The finalised Regulations should also deal with any further amendments to the funding package/program names.

Other Considerations

Consistency in language

The language used in the Portability Act and Draft Regulations is, at times, inconsistent. It remains difficult to assess who is or isn't in scope and what tests should or shouldn't apply especially for employers and CHCs that provide multi-faceted services.

Sch 1 4(2)(b) of the Portability Act excludes an individual employed at a CHC unless the individual's role is to carry out community service work (**first exclusion**). As outlined earlier, it is not clear if the pre-dominance test inserted into the Draft Regulations can be applied to the employee 'as a whole', or if it is just directly related to working out the predominant 'service' on a particular day.

In addition, Sch 1 4(2)(c) of the Portability Act excludes an individual whose primary role is to provide 'health services' to persons with a disability if they are employed by an employer who provides services for 'persons with a disability' (**second 'primary role' exclusion**).

It is unclear if the second 'primary role' exclusion still applies to CHCs that deliver services to 'persons with a disability' given CHCs are specifically referenced in the first exclusion.

The second 'primary role' exclusion is also unclear to the extent that:

- it only refers to 'services for persons with a disability' and does not refer to services for 'carers' of a person with a disability, yet services to persons with a disability **or** their carers is covered elsewhere in the Portability Act; and
- the term 'health services' is not defined, only 'health or aged care work' has been defined by the Draft Regulations.

It should be noted that a single employee may provide services that include both health services and community services. The proportions may vary from time to time. It is unclear when and how often such an assessment should be made for the purpose of coverage under the scheme.

Issues of coverage are further complicated by the following:

- multi-disciplinary roles; and
- employees with more than one role and contract of employment.

Other Matters

Introduction of the scheme for the Community Service Sector

We note that NDIS funded activities are excluded when the scheme first takes effect on 1 July 2019. It is suggested that NDIS funded activities are included from 1 January 2020. This could result in CHCs having two dates of effect. This should be avoided. We would suggest that the date of operation take into account the time necessary to resolve any issues with the scheme.

Thank you again for the opportunity to provide a submission. Please contact [REDACTED] if you have any further questions regarding this correspondence or wish to arrange a time to discuss our concerns further.

Yours sincerely,

VICTORIAN HOSPITALS' INDUSTRIAL ASSOCIATION