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FEEDBACK ON THE PORTABLE LONG SERVICE BENEFITS SCHEME EXPOSURE DRAFT REGULATIONS

SUBMITTED BY ONCALL PERSONNEL & MANAGEMENT SERVICES PTY LTD 31 MAY 2019

ONCALL Personnel and Management Services Pty Ltd (ONCALL) write in response to the request for feedback on the establishment of the Portable Long Service Benefits Scheme (PLSBS) for the Community Services Sector Exposure Draft Regulations, planned to include the disability services within Victoria.

ONCALL remains concerned with the lack of consultation to date with both providers and our national peak body, National Disability Services (NDS), regarding this legislation. Whilst there were earlier discussions about portable long service leave schemes in 2010 and 2015, these occurred prior to the introduction of the National Disability Insurance Scheme (NDIS) which has transformed our environment.

The financial impost of the blanket 1.5% to 3% contribution of employee's wages, payable to the new Authority will have a direct impact on providers financial sustainability across Victoria. Financial modelling of the NDIS did not factor in such local financial burdens from State Governments upon organisations. As such, there is no avoiding the fact that the introduction of the Scheme will have a direct impact on organisations' risk vs return and ultimately have the potential to impact investment in service delivery.

Although we appreciate the drivers for this legislation – enabling workers in disability and other nominated sectors, who remain in the sector but change employers over time, to have extended leave based on their accumulated service – this is a change to the historic definition and purpose of LSL – longevity of employment with *one* employer.

The Bill comes at a time when disability service providers are transitioning to a national scheme under the NDIS, a very complex and costly process with many providers struggling to operate – a situation which was noted in the recent Independent Pricing Review conducted by McKinsey and Co and released by the National Disability Insurance Agency (NDIA).

As the NDIS is a national scheme with capped prices for services, disability service providers have no way to recoup additional State-imposed costs and nor will future NDIS prices take account of Victorian-specific costs.

Further observations/concerns regarding the proposed changes include:

1. ONCALL has less than 20% of its workforce tracking toward LSL eligibility. Sector-wide observations are that the transition to the NDIS is resulting in higher turnover of staff across all organisations. This anomaly is anticipated to continue for the foreseeable future.
2. The introduction of compulsory contributions to a Portable LSL fund would introduce a significant 'new' operating cost to the entire sector, reducing at best reinvestment into services and at worst organisations to incur operating deficits/losses.
3. Current practice by organisations/companies in regard to meeting their LSL liabilities, is to establish a provision account that is drawn on as and when staff become eligible for LSL.

4. Where staff resign prior to working the required number of years necessary to receive their LSL entitlement, provisions remain within the organisation/company. The Portable LSL fund requires these provision amounts to be paid to an external entity – no longer under the control of the organisation/company. If a worker leaves the sector prior to becoming eligible for LSL, the funds remain with the external entity.

Should the Bill be passed, it will have a profound impact on our organisation. The proposed scheme is costly, will be administratively complex to implement, and is likely to significantly impact the financial sustainability of our organisation. The implementation of a 1.5% levy this financial year would add approximately $800,000 to our expenses, decreasing our expected surplus for 2018/2019 by 9%. It is also likely to place greater stress on our capacity to supervise and train staff, both of which are already under pressure with NDIS prices, and yet are critical to the provision of high-quality services.

ONCALL continues to support the NDS position which seeks for NDIS-funded disability services to be exempted from the Bill.

The following provides ONCALL's responses to specific questions issued by Industrial Relations Victoria:

Please provide your written feedback by email to irv.info@dpc.vic.gov.au
by 5:00pm on 31 May 2019. Emails must be no greater than 25 megabytes in size.

List of Questions and Request for Responses

Quarterly returns
Section 27(1) of the Act states that registered active employers must submit a return each quarter to the Authority. Section 27(2) of the Act prescribes the information to be included in the quarterly return. Section 27(2)(c) also allows for further information to be prescribed as required information.

Clause 5 of the exposure draft Regulations prescribes the following additional information with respect to each of the employer's workers:
- any long service leave granted to, or taken by, the worker; and
- payments for, or in lieu of long service leave made to the worker; and
- any other long service benefits paid or given to the worker; and
- the time at which the benefits were given; and
- the service period to which the benefits relate; and
- for each worker who ceased to be employed by that employer during the quarter, the date they ceased employment.

The additional information will allow the Authority to better manage the employee's entitlements under the scheme, recognising that the worker may have long service entitlements under other schemes (for example, a federal industrial instrument). Further, if the worker has left the employer's employment, the Authority will not need to separately contact the employer to seek an explanation as to why that worker is no longer recorded as in service with the employer.

Questions

1. Is the prescribed additional information appropriate?
ONCALL RESPONSE: ONCALL believe, information should be limited to that necessary to accurately calculate sector worker entitlements. In principle, the information listed seems to meet this criterion.

2. Will employers be in a position to provide this additional information?
ONCALL RESPONSE: As outlined in the opening statements, any tasks beyond that currently performed by employers will result in some impact upon their productivity and sustainability.

Disclosure of Information
Section 51 of the Act allows the Authority to disclose information with specified other Victorian and Commonwealth bodies. It should be noted that this does not impose any obligation on those prescribed bodies to share information with the Authority.

Clause 6 of the exposure draft Regulations prescribes two additional bodies:
- the Australian Tax Office (ATO); and
- the Labour Hire Licensing Authority.

The Authority will be required to deduct tax from any long service benefits paid to a worker. This is common practice for other portable long service benefit schemes (for example, the Building and Construction Industry Portable Long Service Leave Scheme (CoINVEST). For this reason, it is necessary for the Authority to provide information to the ATO to ensure that the correct tax is deducted.

The Labour Hire Licensing Authority is established under the *Labour Hire Licensing Act 2018*. That Authority is responsible for ensuring that providers of labour hire services obtain a licence, and that host employers use only a licensed provider. The licensing scheme applies across all industries, including the covered industries for the portable benefits scheme. An exchange of information between the Labour Hire Licensing Authority and the Authority will enhance the enforcement of both schemes.

Questions

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

ONCALL RESPONSE: ONCALL does not believe any information beyond whether a Labour Hire Service has a current license is needed to be shared with the Authority.

Community services sector
Part 1 of Schedule 1 of the Act defines what is the "community services sector", and defines who is an employer, and who is an employee, for that sector.

Under the exposure draft Regulations, certain matters can be prescribed in relation to those definitions.

It is proposed to prescribe the following work as community services work (clause 7):
- social work, welfare work and youth work; and
- home support services for aged persons (other than health or aged care work); and
- on and from 1 January 2020, an activity that is funded by the National Disability Insurance Scheme within the meaning of the *National Disability Insurance Scheme Act 2013* (Cth); and
- on and from 1 January 2020 a service provided by a licensed children's service under the *Children's Services Act 1996* or an approved provider under the Education and Care Services National Law (Victoria) (except an entity that is also a registered school within the meaning of the *Education and Training Reform Act 2006)*.

It is proposed to prescribe the following work not to be community services work:
- an activity that is health or aged care work.

Where a service provides activities that are health or aged care work, as well as activities that are not health or aged care work and are community service work, if the predominant activity is health and aged care work, then the service provided is considered not to be community service work.

It is proposed to prescribe the following persons and classes not to be employers for the community service sector (clause 8):
- an aged care service operated by a hospital; and
- bush nursing centres and bush nursing hospitals specified in Schedules 1 and 2 of the Regulations.

Clause 4(2)(d) of Schedule 1 of the Act provides that individuals employed under certain Commonwealth awards or agreements are not employees for the community services sector.

Clause 9 of the exposure draft Regulations prescribes a number of other awards and agreements. The intention is that a person employed under any of these instruments is not an employee for the community services sector.

In addition, a person employed in an executive or management role is prescribed not to be an employee for the community services sector if:

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

Clause 10 of the exposure draft Regulations prescribes how the benefit of an employee is to be calculated, when that employee is leaving the community services sector, or on their death.

Questions

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?
ONCALL RESPONSE: ONCALL believes that organisations funded directly/indirectly by the NDIS should be treated consistently with other Federally funded services – such as health or aged care work and not be defined as "community services sector/work".

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?
ONCALL RESPONSE: No comment.

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?
ONCALL RESPONSE: Beyond the position that NDIS funded services should be excluded. The significance of change upon the disability sector cannot be underestimated. This was recognised within the Independent Pricing Review released by the NDIA. ONCALL believe that if the implementation proceeds, it should be delayed until at least 1 July 2020.

No double-dipping

The Act has a clear intention to prohibit double-dipping. Clause 15 of Schedule 1 of the Act states that where a registered active worker for the community service sector has an entitlement to long service leave or benefits under a fair work instrument, Regulations may be developed setting out the obligations of the Authority, and of the employer, in such circumstances. Clause 15 then sets out certain principles upon which any Regulations are to be based.

Clause 11 of the exposure draft Regulations provide that for the purposes of clause 15 of Schedule 1 of the Act, a registered active worker who is entitled to long service leave under a fair work instrument is not also entitled to a long service benefit under the Act in respect of the same service period, and the Authority is not required to pay a long service benefit. In other words, the worker cannot claim more than one entitlement for the same work. "Entitled" in this context refers to a situation where a worker has reached the minimum period of service under their relevant Fair Work instrument (i.e. seven years, or in some cases, 10 years). The employer of that worker is not required to pay a levy under the Act for that worker in respect of the same service period to which an entitlement to long service leave under

a fair work instrument applies. The employer is entitled to seek to recover any levy paid for that worker from the Authority.

Questions

7. Does the proposed Regulation adequately address any risk of double-dipping?
ONCALL RESPONSE: We believe, at this point in time, the proposed Regulation addresses the risk of double-dipping.

ONCALL ADDITIONAL COMMENTS

ONCALL's Primary Position

ONCALL believes that organisations funded directly/indirectly by the NDIS should be treated consistently with other Federally funded services – such as health or aged care work and not be defined as "community services sector/work".

The PLSBS and Workers Leaving the Sector

Where workers leave the sector and their time has elapsed for a return to the sector and continuance of their LS Benefit accrual - ONCALL believes employer contributions for these employees should be returned.

The collation of individual worker information to track their contributions and status would make this possible by the Authority. If this were not to occur, all lapsed sector worker LSL provisions would continue to accumulate within the Authority. If this ongoing accumulation of funds were to occur, the Scheme would not be a Portable Long Service Benefit Scheme – but rather an additional payroll tax.

Compensation

If the Scheme is to proceed with disability services, in recognition that the NDIS is under Federal jurisdiction, and does not provide for the Victorian PLSBS, it is recommended the state government compensate disability organisations for this additional cost impost.