

27 June 2020

Industrial Relations Victoria

C/O Engage Victoria

delivered by email (enquiries@plsa.vic.gov.au)

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)*.

Our submissions are confined to two matters as follows:

- Coverage of the scheme with respect to Community Services Sector; and
- Double-dipping.

We shall address each in turn.

COVERAGE OF THE SCHEME WITH RESPECT TO COMMUNITY SERVICES SECTOR

Changes to the Employers covered

The exclusion of health or related services (through a predominance test for some employers related to health or aged care work) is proposed to be deleted and replaced by a new proposed regulation 9(d) as follows:

a health or related service within the meaning of section 3(1) of the Health Services Act 1988, except for –

- a registered community health centre referred to in paragraph (ab) of that definition; and*
- a women's health service, referred to in paragraph (ac)*
- a person, body, or organisation that delivers, funds, facilitates, access to or provides insurance in relation to health services being services that include but are not limited to disability services, referred to in paragraph (b)(iii) of that definition;*

The purported effect of regulation 9(d) is to ensure that the following employers falls within scope of the scheme in respect of employees carrying out community services work:

- a registered community health centre as defined in section 3(1)(ab);
- a women's health service as defined in section 3(1)(ac); or
- a disability service defined in section 3(1)(b)(iii);

The inclusion of registered Community Health Centres

The inclusion of registered Community Health Centres within the scheme is problematic.

We continue to advocate that registered Community Health Centres are unique when compared to other in-scope employers in that most 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 long service leave portability 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.

A survey of Community Health Centres indicates that approximately 87% of employees within Community Health have access to existing portability arrangements.¹ The percentage reduces to 79% when taking into account only those that may fall within the scope of the long service portability benefits scheme.² This data shows a significant portion of Community Health Centre employees already have access to portable long service leave.

If registered Community Health Centres are to be included in the scheme, we support other submissions made for funding to assist with the financial impact of Community Health Centres inclusion within the scheme.

Other health and related services

Aged care services, palliative care services, pharmaceutical services, ambulance services, health services in association with correctional services and residential care were previously included in the definition of 'health or aged care work'. They are no longer excluded as a result of regulation 9(d)(iii).

It is unclear from the consultation documents if this is intentional and may have unintended consequences including additional costs.

The proposed drafting of regulation 9(d)(iii) should be reviewed further and, where necessary, additional consultation with employers should occur.

Changes to the definition of Community Service Work

Inclusion of home care support services provided in a private residence (irrespective of age)

The interim regulation 8(1)(b) excludes aged care services from falling within the definition of home care support services by reference to health or aged care work and reliance on the *Health Services Act 1998* (subject to the predominance test).

The current exclusion is consistent with previous drafts of the regulations which excluded several Commonwealth aged care funding packages.

The proposed variation to regulation 8(1)(b) removes the existing exclusion notwithstanding the change is being categorised as 'further clarification'. This will result in additional costs for employers.

¹ Head count data received from 28 Community Health Centres according to all industrial instruments.

² Based on VHIA's assessment of current in-scope employees.

There also remains a risk of inconsistent approaches for home care employees. For example, although the predominance test has been deleted within the Proposed Regulations, there remains an individual “primary role” test at Schedule 1,4(2)(c) of the Portability Act in respect to employers that provide services for persons with a disability.

For those employers, the Portability Act excludes individuals whose primary role is to provide health services to those persons. The term ‘Health services’ remains undefined. Home care employees commonly undertake duties that some employers would assess as “health services” (for example, personal care work) regardless of the age of the client.

Support Services for Community Service Work

The interim regulation 10(3) excludes individuals whose substantive role is not the personal delivery of services or the personal performance of activities that are community service work.

The deletion of regulation 10(3) and inclusion of “*services that support the provision of any of the services referred to in paragraphs (a) to (n)*” at regulation 8(1)(o) amends the existing exclusion notwithstanding the change is being described as ‘clarifying’ all award covered workers in the community services sector, who are performing community services work, either directly or indirectly, are eligible for the portability scheme.

This will result in additional costs for employers.

Further to the above, the references to paragraphs (a) to (n) of the regulations has the effect of excluding support services for community service activities relevant to Schedule 1,2(1)(a)-(d) of the Portability Act such as training and employment support as well other activities relevant to regulation 8(2) & (3) such as NDIS funded activities.

It is unclear from the consultation documents if this is intentional. The proposed change should be reviewed further and, where necessary, additional consultation with employers should occur.

Changes to Excluded Employees

Schedule 1,4(2)(d) of the Portability Act excludes individuals covered by the *Aged Care Award 2010*. The interim regulations 10(1) extends the list of excluded employees by reference to awards as follows:

- *Ambulance and Patient Transport Industry Award 2010,*
- *Amusement, Events and Recreation Award 2010,*
- *Educational Services (Schools) General Staff Award 2010,*
- *Fitness Industry Award 2010,*
- *Medical Practitioners Award 2010 and*
- *Pharmacy Industry Award 2010.*

Regulation 10(2) confirms employees are engaged under the awards even if an enterprise agreement applies to the employee’s workplace.

The existing exclusions are proposed to be extended and applied in a different manner. It is proposed to list the awards individuals must be employed under to be covered by the scheme. The awards listed are:

- *Social, Community, Home Care and Disability Services Industry Award 2010,*
- *Children’s Services Award 2010,*
- *Educational Services (Teachers) Award 2010, and*
- *Labour Market Assistance Industry Award 2010.*

This has the effect of excluding award free employees and individuals employed under any other awards or equivalent agreements (for example, the *Nurses Award 2010*, *Health Professionals and Support Services Award 2010* and *Clerks – Private Sector Award 2010*).

The proposed change significantly improves the clarity of coverage and VHIA supports the change. However, we make the following observations:

- in some cases, the Portability Act and Regulations uses terminology that is broad or not adequately described by the award classification descriptors (for example, assessment of individual or family needs). Therefore, consistency across the sector is unlikely;
- awards often cover similar classifications, for example support services are covered by the *Health Professionals and Support Services Award 2010*, *Social, Community, Home Care and Disability Services Industry Award 2010* and *Clerks – Private Sector Award 2010*. Therefore, consistency across the sector is unlikely;
- some employees have dual roles which are separate and distinct and covered by different awards. Some work will be covered by the scheme and other work will not; and
- Schedule 1,4(2)(d) of the Portability Act is no longer contemplated by the Proposed Regulations which may have effect of including employees covered by *Aged Care Award 2010* to whom an enterprise agreement may apply who were previously excluded.

DOUBLE DIPPING

Fair Work Instruments

The Proposed Regulation 12 conflicts with the principles outlined in Schedule 1,15(2) of the Portability Act intended to stop double-dipping.

The Proposed Regulations do not stop double-dipping. Rather it provides employers with a reimbursement option where an employee “chooses to take” an entitlement to long service leave under their Fair Work Instrument versus when the employee is “entitled” to long service leave under a Fair Work Instrument.

“Choses to take” should be amended to when an employee “takes or is paid long service leave on termination of employment”. Further, there is no entitlement to long service leave under the Portability Act for Community Service Employees so there will never be a circumstance where an employee will be entitled to “long service leave” under both. This technical drafting should be corrected. Further, consistency in language between regulation 12(3) and 12(4) may also be appropriate.

The regulatory impact statement identifies that it would be problematic to exclude employees who have long service leave entitlements under fair work instruments from coverage of the Portability Act because employers could use enterprise agreements to ‘opt out’ of the scheme.

We respectfully disagree; employers should be able to opt out of the scheme through enterprise bargaining so that employers (who choose to do so) can ensure the principles outlined in Schedule 1,15(2) of the Portability Act are achieved and that no double-dipping occurs.

If this does not occur, the Portability Act will act as a disincentive for employers to participate in enterprise bargaining.

Long Service Leave Act 2018

VHIA supports ensuring that a reimbursement model is made available to employers where the *Long Service Leave Act 2018* is relevant once this can be achieved through variations to the Portability Act.

Other Matters

Given the proposed changes have additional cost impacts for employers any changes to the interim regulations should only apply prospectively.

Thank you again for the opportunity to provide a submission. We would be happy to discuss any of these concerns with you further and can be contacted on [TEXT REDACTED].

Yours sincerely,

Victorian Hospitals' Industrial Association