ACT Government

REVIEW OF THE *LONG SERVICE LEAVE (PORTABLE SCHEMES) ACT 2009*

Discussion Paper

Workplace Safety and Industrial Relations Division
Chief Minister, Treasury and Economic Development Directorate

March 2019

CONTENTS

1. INTRODUCTION TO THE *LONG SERVICE LEAVE (PORTABLE SCHEMES) ACT 2009*

The *Long Service Leave (Portable Schemes) Act 2009* (the Act) provides portable long service leave for workers in certain industries. Under the Act, designated workers in the following four industries are covered by the scheme:

- building and construction;
- contract cleaning;
- community sector; and
- security.

The schemes allow designated workers to transfer their accrued long service leave entitlements between employers within a covered industry.

The Act is administered by the Long Service Leave Authority (the Authority) with oversight from its Governing Board. The Board consists of employer and employee representatives and independent members who may, as well as directing the affairs of the Authority, make recommendations to the Minister for Employment and Workplace Safety on matters including the determination of levies, the declaration of corresponding laws and any other function given under the Act or another Territory law.

2. BACKGROUND TO THE REVIEW

Since enactment of the portable long service leave legislation there have been a number of amendments made which have resulted in some administrative inconsistencies.

In 2016 the Board, with assistance from officers of the Workplace Safety and Industrial Relations Division, Chief Minister Treasury and Economic Development Directorate (CMTEDD), undertook a technical review of the operation of the Act (the review).

The review identified several areas of the Act that could be amended to facilitate a more contemporary regulatory approach and address omissions and inconsistencies. Recommended actions include:

> addressing the legal penalty regime to better encourage employer compliance;
> addressing financial arrangements applied to employers to encourage compliance with their lodgement of quarterly returns and payment obligations;
> reviewing the timeframes for which the Registrar can credit service for workers who have unrecorded leave to ensure they are not disadvantaged;
> improving the Authority's ability to pursue debts; and
> improving inspector powers.

The Workplace Safety and Industrial Relations Division and the Long Service Leave Authority Governing Board have collaborated to prepare this discussion paper. The purpose of the paper is to invite input from stakeholders on the issues identified in the 2016 review.

3. KEY DATES FOR CONSULTATION

Action	Date
Consultation start	27 March 2019
Consultation close	7 May 2019

4. MAKING A SUBMISSION

The closing date for submissions is 7 May 2019.

Written submissions should be directed to Regulatory Policy, Workplace Safety and Industrial Relations Division, GPO Box 158, Canberra City ACT 2601, or via email wsir@act.gov.au

Enquires may be directed to Mr Teo Findlay on (02) 6205 2835 or teo.findlay@act.gov.au.

5. TERMS OF CONSULTATION

The purpose of this paper is to invite input from stakeholders on options for addressing issues identified by the Review.

The industries covered for portable long service leave are not within scope of this consultation.

6. ISSUES FOR CONSULTATION

Better compliance and enforcement tools

The Act currently provides penalties which can be applied to employers who do not comply with their obligations to:

- register themselves or their employees under the Act;
- grant leave to an employee for the end of the prescribed period; and
- lodge quarterly returns and pay levies.

Registration of employees

An employer for a covered industry must apply to the Registrar to be included on the employers register not later than one month after becoming an employer for the industry or at the end of additional time the Registrar allows (the Act: section 31).

Failure to register is a strict liability offence with a maximum of 50 penalty units[1] applying in relation to non-compliance.

[1] Penalty unit rates are set under the *Legislation Act 2001*, section 133. The current value of a penalty unit is $160 (maximum of $8,000) for an individual and $810 (maximum of $40,500) for a corporation.

Granting leave to an employee

Employers for a covered industry must grant leave to an employee who has accrued leave before the end of the prescribed period. Refer to:

- schedule 1, section 1.7 for the building and construction industry;
- schedule 2, section 2.7 for the contract cleaning industry;
- schedule 3, section 3.8 for the community sector industry; and
- schedule 4, section 4.8 for the security industry.

Failure to grant leave is a strict liability offence with a maximum of 50 penalty units[2] applying in relation to non-compliance.

Lodgement of returns and the payment of levies

Registered employers under the Act must:

- submit a return for each quarter to the Authority, within the required time (the Act: section 49 (employers) and section 54 (contractors)); and
- pay the determined levy payable in relation to a quarter to the Authority, within the time required (the Act: section 50 (employers) and section 55 (contractors)).

The time for submitting a return and paying the determined levy is not later than one month after the end of the quarter or the end of any additional time allowed by the Registrar.

Penalties in relation the lodgement of returns and the payment of levies include:

- **Late fees:** the Authority has the ability to apply a late fee of $100 for each month or part of a month, up to a maximum of $300 for each failure of an employer to lodge a return and/or pay the levy.
- **Criminal sanctions:** failure of the employer to submit a return or pay the determined levy is a strict liability offence for which a maximum of 20 penalty units[3] applies.

Findings of the review

Application of the penalties mentioned above is intended to encourage employers to comply with their obligations under the Act. However, the Review identified that in practice the current penalty arrangements of applying a late fee or imposing criminal sanctions are not operating as an adequate disincentive for non-compliance.

Late fees

Levy payments can range from a few hundred dollars for smaller employers up to many tens of thousands for larger employers. However, late fees are not proportionate to the debt owed. The current fee schedule is a one size fits all approach which may not be a sufficient incentive for larger companies to comply.

In addition the fees do not take into consideration loss of investment earnings for the Authority as a consequence of failure to pay the levy on time.

[2] Refer footnote 1.

[3] Penalty unit rates are set under the *Legislation Act 2001*, section 133. The current value of a penalty unit is $160 (maximum of $3,200) for an individual and $810 (maximum of $16,200) for a corporation.

Enforcement

Under the current penalty arrangements for non-compliance, some employers who have been issued with a penalty notice for non-compliance refuse to pay the penalty and also fail to remedy their non-compliance.

Enforcing the payment of a late fee requires the Authority to make an application to the ACT Civil and Administrative Tribunal (ACAT) or apply to the Court in the case of criminal sanctions. This process takes time and increases the administrative costs of the Authority. In addition, the employer's debt may continue to increase while the penalties remain unpaid. In some circumstances, by the time an application is heard by ACAT (or the court), the employer's company may cease to exist resulting in the Authority being unable to recover its outstanding debt.

In other circumstances, particularly relating to small businesses where the amount owed to the Authority is small, the amount owed may be outweighed by the costs involved for the Authority to pursue payment of the penalty.

As a result, non-compliance with the Act has resulted in increased administrative costs to the Authority.

Further, long service leave entitlements for employees continue to accrue regardless of whether their employer has paid their levy or not. As a result, the shortfall from employers who fail to pay the levy is made up through additional levies on employers who regularly meet their obligations.

Options for consideration

Options for consideration in enhancing the effective use and deterrence effect of penalties under the Act include the introduction of:

- infringement notices by inspectors for non-compliance;
- an interest penalty that takes into account appropriate comparable financial penalties.

Infringement notices

The application of infringement notices, which may be used in relation to strict liability offences, would allow the Authority to impose an immediate criminal penalty on the employer for non-compliance without the need to go to court to seek an order in relation to criminal sanctions.
However, there are a number of advantages and disadvantages with applying infringement notices for non-compliance. These include:

- the benefit of having the option to impose an infringement notice penalty is that this criminal sanction is not required to be made by the court, rather inspectors would have ability to issue a notice immediately on non-compliance;
- similar to the current application of late fees, the non-payment of infringement notices must be pursued by the Authority in the court and consequently may still result in increased enforcement costs on the Authority;
- to mitigate the risk of non-payment of infringement notice penalties it will be necessary to consider what consequences might be applied to employers who do not pay an infringement notice penalty — for example, a subset of registered employers may also hold a secure local jobs code certificate (SLJC certificate)[4] which requires compliance with workplace standards, including the Act.

Interest Penalties

At present the interest penalties applicable for late payment and late lodgement of quarterly returns are not comparable to the outstanding debt. Further, they do not take into consideration loss of revenue or administrative costs incurred by the Authority in pursuing the outstanding debt or return.

[4] *Government Procurement Act 2001*, part 2B

Applying an interest regime for penalties may act as an incentive to encourage employers to lodge their return and pay their levies on time if either the penalty is of a comparable amount to the debt, or the interest is apportioned in accordance with the outstanding debt.

Issues for discussion:

- Do you have any views on introducing infringement notices or an interest regime for non-compliance with the Act? If so, please provide detail.
- Do you consider that there might be an alternate approach to ensuring employers meet their obligations to lodge returns and pay levies? If so, please provide detail.
- In relation to the application of infringement notices or an interest regime, what are your views on the appropriate consequences for non-payment of the notice?
- Other than the link to the recently implemented secure local jobs package, are there any other consequences available to ensure the payment of notices?
- Please provide any additional comments you would like to be considered regarding the penalty regime under the Act.
- Do you have any other suggestions for enhancing compliance with the Act?

Unrecorded service under the Act

Section 47 of the Act deals with how periods of unrecorded service are recorded for an employee under the portable long service leave schemes for the purposes of accruing leave. Under the Act, periods of service may be recorded for an employee no earlier than four years before the employee became a registered employee for the covered industry.

A number of scenarios have been identified as part of the Review that are not contemplated by the current drafting of the provisions of the Act which deal with crediting unrecorded service. These gaps have the potential to disadvantage employees in the following circumstances:

- the Registrar is unable to recognise unrecorded service for some employees post their registration date;
- a four year legislative cut-off on crediting unrecorded service even though an employer can provide a return and pay the levy in excess of four years prior service of the registered employee; and
- a one year legislative cut-off on crediting unrecorded service prior to registration, limits the Registrar's ability to credit additional service to the employee where the employer is unable to pay the levy.

There are two broad categories applying to the recording of unrecorded service:

- unrecorded service prior to registration of the employee under the Act; and
- unrecorded service after registration of the employee under the Act.

Dealing with employees unrecorded service post registration

Section 47 allows the Registrar to credit an employee's service in a covered industry no earlier than 4 years before they became a registered employee.

The Act does not contemplate the following scenarios where an employee lodges a claim for service after they became a registered employee.

When an employer ceases to exist following registration of an employee

In situations where a registered employee lodges a claim for service which occurred after their registration date, and the employer ceases to exist, or does not lodge a return, the Registrar cannot credit any service regardless of whether the registrar is satisfied that the person was employed in the industry.

When an employer goes into liquidation or administration following registration of an employee

Where a registered employee lodges a claim for unrecorded service which occurred after their registration date, and the employer is in liquidation or administration, the Authority, in certain circumstances, may still receive the required information to submit a quarterly return from the liquidators or administrators.

In these circumstances there is still the ability for the Registrar to record service for an employee, however in these circumstances it is very unlikely that any levy would be collected.

The maximum period the registrar can credit missing service where the employer is unable to pay the levy

The Authority has had a number of circumstances where a registered employee has identified that they have unrecorded service for a period greater than one year post registration, for which the registrar can credit unrecorded service (Section 49), and the employer is unable to pay.

Also, there are no discretionary powers under the Act for the Registrar to grant additional service over and above the one year in circumstances where the Registrar is satisfied that the person was employed and performing relevant work in the industry. As a result, the Registrar does not have the discretion to determine the appropriate period for which the service should be recorded.

Dealing with employees unrecorded service prior to registration

The maximum period the registrar can credit missing service where the employer is able to pay the levy

The Authority has had a number of circumstances where an employee has identified that they have missing service for longer than the four years for which the registrar can credit unrecorded service (Section 47). In these scenarios, the employer has been willing to pay the outstanding levy but are unable to do so because the Act does not permit the Registrar to record missing service in excess of four years.

As a result of the legislative restrictions placed on these workers have been disadvantaged and the additional service over and above the four year period was forfeited.

Issues for discussion:

- Do you have any views on providing the Registrar with unlimited discretion to credit unrecorded service of an employee? If so, please provide detail including if you believe there should be limits and what those may be.
- Do you believe there is an alternate approach to ensure that prior service is recorded so as not to disadvantage employees? If so, please provide detail.

Outstanding debts and phoenix behaviour

Circumstances may arise where a debt is owed to the Authority. The Authority currently has debt management guidelines which involve collection efforts by Authority staff and, if unsuccessful, referral to a debt collection agency.

If the debt collection agency is unsuccessful in collecting the outstanding debt, the Authority must then consider both the likely financial costs and the likelihood of success, of pursuing a debt through ACAT or the court.

As indicated earlier in this Paper, often once a matter has been finalised through ACAT, a business may have already been placed into administration/liquidation or be fully wound up. Once this occurs the Authority is unable to recover the debt regardless of the decision of ACAT.

In these circumstances, the Authority has sometimes later become aware that the same or similar directors have subsequently started up a new business with largely the same employees, however, the outstanding debt from the previous business is still unable to be recovered.

Case Study

A case example of circumstances where this has arisen is where a significant debt was incurred by an employer. This debt accrued within a short timeframe and the Authority appointed debt collectors within the first two quarters of non-compliance. Unfortunately the company went into liquidation in the third quarter and the Authority determined that it was unlikely to recover the debt. The Authority was subsequently advised that one of the directors of the company had started a new business with many of the same employees. Those employees were able to have their prior service credited however the levy contribution in relation to that service remained unpaid.

It is proposed that the Act be amended to better allow outstanding debts to be recovered in circumstances such as phoenixing by employers. In particular, consideration is being given to providing the Registrar with the ability to pursue company directors personally, in circumstances such as phoenixing and similar evasive conduct, for any outstanding debts.

Issues for discussion:

- Do you have any concerns with providing the Registrar with the ability and the discretion to pursue company directors personally for any outstanding debts owed to the Authority? If so, please provide detail.
- Do you believe there is an alternate approach to collecting outstanding debts in phoenixing circumstances? If so, please provide detail.

Improving inspector access to information

The Act currently provides the Authority's inspectors with the power to enter premises to inspect and examine records to ensure employers comply with their obligations under (the Act: Section 76).

It has been identified in that the requirement for inspectors to enter the premises before obtaining information is largely outdated in today's society. In the current age of technology and with many workplaces moving to paperless systems, the approach of physically entering a workplace to obtain or view physical documents may not be feasible, effective, time sensitive or cost efficient.

It is proposed that inspectors be given more general powers to request information from an employer, any director, associate of, or service provider to the employer, including but not limited to an electronic request for the information for the purposes of ensuring compliance with the Act.

In addition to inspector powers, other workplace laws give third parties such as unions powers in relation to entry and access to information, for example the *Work Health and Safety Act 2011*.

Issues for discussion:

- Do you have any concerns with providing inspectors the ability to obtain information electronically? If so, please provide detail.
- Is there anyone else, for example unions, who should have access to information collected under the Act? If so, please provide detail and reasons.

Decisions about a covered industry

Under the Act, employers for a covered industry must apply to the Registrar for registration on the employer register not later than one month after becoming an employer for the industry or at the end of additional time the registrar allows (the Act: Section 31).

Under section 32 of the Act, the Registrar must register the employer on the employer register for the covered industry if satisfied that they are an employer for a covered industry and if not, refuse the application. The refusal of an application for registration is a reviewable decision under the Act and may be referred to ACAT determination.

Circumstances may arise where the Registrar considers that an employer is an employer for a covered industry and should therefore be registered under section 31, but the employer disagrees. There is no mechanism under the Act for the employer to refer the matter to ACAT for review of the Registrar's decision.

Presently the only option for an employer to challenge the decision of the Registrar is by judicial review under the *Administrative Decisions (Judicial Review) Act 1989*.

Issues for discussion:

- Are the current appeal/review arrangements for decisions under the Act appropriate? If not, please provide detail.

Additional considerations

If you have any additional suggestions for amending the Act within the scope of this consultation please include these in any written submission made to the 2019 Review.

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Chief Minister, Treasury and Economic Development Directorate

March 2019