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Recruitment, Consulting and Staffing Association (RCSA) Response to the Portable Long Service Leave for the Community Services Sector Discussion Paper

February 2024

Introduction

RCSA welcomes the opportunity to make a submission to SafeWork SA on its *Portable Long Service Leave for the Community Services Sector Discussion Paper* and the accompanying Draft *Portable Long Service Leave Bill* 2024.

RCSA is the peak industry body for the recruitment and staffing industry in Australia, representing over 1,500 corporate and individual members who source, place, and manage permanent and temporary workforces across almost every industry in the country, supporting both private and public organisations with their professional, skills and labour demands.

The recruitment and staffing industry is a critical and part of Australia's employment landscape, employing over 700,000 people nationwide. Permanent placement recruitment agencies are pivotal intermediaries between employers and job seekers, offering invaluable insights and expertise in attracting and retaining diverse and specialised talent. Members providing on-hire / labour hire services provide vital support for workers, business and the economy, particularly throughout disruptive and uncertain periods. The speed and efficiency of the on-hire industry in mobilising Australia's workforce in response to labour market shifts in the past few years has kept hundreds of thousands of Australians in work. It also ensured that business had access to fast and flexible skills and labour to recover more quickly from the economic impacts of Covid 19. In addition to providing support for business to innovate, grow and create jobs, in many sectors on-hire services fill a need that cannot be met with a permanent workforce.

For job seekers, the on-hire model is one that offers opportunity to build skills and professional experience across various industries, occupations, and workplaces. Not only does this enhance an individual's employability, but also their confidence to take on roles that they might not have previously considered, or in new and emerging industries that they may not have been exposed to.

The on-hire industry is the sixth largest employing sector in Australia. This reflects the growing popularity of on-hire as a way of working, with over half a million Australians choosing it for the autonomy and flexibility it affords, the opportunities and career pathways it creates, and the ability to manage employment around other commitments.

Relevance of portable long service leave

While RCSA understands the rationale for South Australia pursuing a portable long service leave scheme for certain workers, in the same way that a number of other jurisdictions have already done, RCSA does not, at the conceptual level, agree that long service leave should be portable and managed across multiple employers.

RCSA recognises that some industries do have higher movement between employers and agrees that sometimes that is paired with a higher proportion of vulnerable workers. Nonetheless, long service leave exists as payment by employers to employees as an incentive to stay working with them, rather than move to a competitor or to a role outside of the industry. It has not traditionally applied to industry or types of work, but to employment relationships.

To that end, RCSA is of the view that there remain many opportunities for long-term, ongoing employment which would qualify for long service leave entitlements across both direct hire and labour hire arrangements within the community services sector.

The bulk of movement between employers in the sector tends to be concentrated most heavily in the independent contracting space, and this scheme does not automatically cover those workers anyway. The likelihood of an independent contractor operating in the community services sector voluntarily signing up to pay a levy to support long service entitlements – as opposed to just managing the arrangements themselves- is extremely small. To that end, this scheme is unlikely to cover the most transient and mobile elements of the community services workforce anyway.

RCSA contends the strong demand for community service workers meant there is already huge incentive in the current labour market for employers to actively work to incentivise employees to stay working with them, as opposed to moving elsewhere.

RCSA remains a strong advocate for the concept of opt-in portable sick and annual leave scheme for casual workers. We appreciate the value and support that would stem from creating an opportunity for workers to elect to have their casual loading directed toward a scheme that would then pay them a wage for annual and sick leave. Essentially, an option to outsource management of their casual loading. While not everyone would choose this pathway, having it available would be beneficial for some and employers would be happy to re-direct monies they are already paying to support workers who choose it.

We do not believe that long service leave entitlements are something that should have the same opportunity for portability, nor that workers can justify a need for support with portability in the same way.

If the ambition is to keep workers within a particular industry, RCSA believes there are far better mechanisms to achieve the aim than a portable long service leave scheme. We do harbour concerns that the appeal of these schemes is enhanced as much by the fact that they are low-profile fund pools for unclaimed employee entitlements, as they are for delivering outcomes for the sectors they support.

Scope of the Scheme

RCSA is extremely concerned by the uncertainty, lack of clarity and unintended breadth the legislation as currently drafted creates in relation to coverage.

The discussion paper indicates an intent to limit coverage to workers engaged under the *Social, Community, Home Care & Disability Services Industry Award* (SCHADS Award) to provide clarity and consistency to both employers and workers.

The Bill itself makes no reference to the SCHADS Award, instead stating application of the scheme applies to people who are engaged in work to 'perform community services' or to 'support the provision of community services'.

As definitional terms for scheme coverage, this drafting provides no clarity or certainty for employers who are doing their best to comply with their legal obligations. Moreover, it opens coverage of the scheme enormously across almost every industry and sector of the economy. As drafted in the Bill currently, the schemes application is extraordinarily vague. Is an aged care worker providing services in a community run facility or providing in-home care services performing 'community services', and if so, does that differ to residential care or is all aged care support work a 'community service'? Is hospital work a 'community service' and if so, is only work performed in public hospitals relevant under this classification or is all work performed in all hospital covered? GPs and doctors sometimes perform in-home support work, are medical services 'community service' in some settings or in all settings? Is childcare and associated activities deemed 'community service' and if so, at what age do education services move from community services to 'teaching', or is teaching also a community service? Are council services, including amenity, rubbish collection and white-collar office and policy workers in council all providing and supporting the provision of 'community services'? What if I perform work that is not really community services but at time involves supporting or providing a service to the community? ….

The scenarios above are not intended to be addressed specifically here, rather they are raised to make a point. As proposed, the legislation's coverage is extraordinarily vague and that makes this change extremely complex and difficult for businesses to navigate. While we appreciate the intent might be to more clearly define scope through the Industry Boards themselves, given the obligations imposed on employers under the proposed scheme RCSA believes government has an obligation to clarity legislatively who is covered and who is not. Should government wish to extend coverage beyond community services in the future, it can – and should – do so legislatively. To leave specifics around scope and coverage to industry boards presents far too great a risk and liability for businesses subject to stringent new obligations under this change.

RCSA's experience with schemes in other jurisdictions has been extremely challenging when scope and coverage are not specifically and clearly defined. In Victoria, a broad 'community services' definition led to a range of perverse outcomes and confusion which resulted in a move to limit coverage in line with an award (SCHADs) for clarity.

The confusion around broadly defined scope is usually exacerbated by non-traditional forms of work, such as labour hire, which challenge scope in ways that are usually either ill-considered or not considered by policy makers when developing schemes.

It is extremely common for on-hire workers to be placed across multiple different sectors on any given week, or on any given day. How then, is their 'work' defined? Without a specific link to an award, it is very difficult for employers to make a clear delineation between what shifts in a given week were 'community service' and what were something else for that worker. A link back to an Award will relate directly to an employees engagement for particular work and be clearly recorded and is easily administered for the purposes of a portable leave scheme.

This link back to a specific industrial instrument will also be important for helping employers determine who provides 'support' for a community service. As drafted in the Bill, is a recruitment consultant placing a community support worker into a facility or home a person providing 'support' for a community service or a recruitment consultant? If the former, what portion of their role is providing 'support for community services' versus other activity, especially if they are placing some workers into community support facilities and others into building and construction roles or engineering services?

Linking clearly to an industrial instrument in the Act will provide the certainty employers need to navigate administration of the scheme and ensures that coverage – and therefore employer liability - is not determined by unelected industry boards.

The discussion argues that the premise of this scheme is to support vulnerable workers in industries where short periods of service with different employers is more common, and where the community will benefit from incentivising people to remain working within those industries because of the need for their services.

A broad application of what is 'support for community services' threatens to bring in a far wider cohort than intended to be captured under the premise of the scheme. In turn, creates the potential for the scheme to become a 'collection agency' for a far broader group of workers. It is important this scheme remain focussed on supporting and incentivising those identified as its core focus and not on revenue raising from the broadest cohort of activity possible, especially given a substantial number of workers will never access the funds being collected on their behalf.

RCSA recommends the Bill be amended to specify coverage be limited to the Social and Community Services Sector group under the Social, Community, Home Care & Disability Services Industry Award (SCHADs award).

The SCHADs Award encompasses a broad range of services that extend beyond 'community services' to crisis and accommodation services, family day care and home care employees. For that reason, we recommend defining coverage to the Social and Community Services group, which aligns best with the intended coverage of workers outlined in the discussion paper.

This level of clarity in legislation will provide certainty for workers and employers, while ensuring the scheme remains focussed on its core purpose and does not develop into a broad-based revenue collection agency for workers who may not be aware they are covered by the scheme and may never access funds collected on their behalf.

Multi-sector work and accrual of entitlements under the scheme

The scheme as proposed does not fully reflect the complexities of modern employment arrangements and appears to give little consideration to the experience of workers engaged across multiple industries, which is commonplace in the labour and on-hire sectors.

Multi-sector working arrangements are one of the many reasons RCSA believes it is necessary to clearly define the scheme's coverage in legislation. If the definition is unclear, both employers and workers will find it extremely challenging to track accrual and coverage under the scheme accurately, especially when their employment may involve a combination of roles and responsibilities across different sectors. This confusion will lead to confusion are assessment of entitlements, not just for employers but for the workers covered by the scheme.

In addition to the scope and administrative challenge posed multi-industry workers, there is a distinct lack of consideration around how shift work across multiple industries is recognised and credited in this scheme compared to workers' other long service leave arrangements.

The proposal to accrue entitlements on a daily (as opposed to hourly) basis will result in many workers accruing long service leave entitlements in multiple places at the same time. For example, an on-hire worker doing a 2-hour community service placement in the morning, followed by 4 hour shift in an aged care facility in the afternoon will accrue a full day of long service leave under the proposed scheme, as well as 4 hours of long service leave under their arrangements with their own employer. The decision to equate 2 consecutive hours work as a full day for the purposes of accrual of entitlements under the scheme fails to consider the experience of workers who move in and out of industries on an hourly, as opposed to daily, basis.

Indeed, under the scheme as proposed, it is unclear whether a worker who has worked with the same employer for 9 years (in a non-designated industry for the bulk their placements but with a regular weekly 2-hour shift in a designated industry) having accrued long service leave entitlements on an hourly basis would now have to have that accrual adjusted for a full day per week retrospectively and paid on the basis of that revised accrual for whole period of service once the worker becomes eligible to claim ? That shift in entitlements is not something that on-hire firms can claim back from previous clients and placements and would amount to a retrospective levy or 'hit' on the industry that would have significant commercial implications.

Given the shift-based nature of engagement for many workers in the community services sector, it makes sense to accrue entitlements on an hourly as opposed to a daily basis. For full time engagements, employers and record keeping systems are accustomed to recording accruals and entitlements for a full day of work on an hourly basis.

Worker eligibility and levies

Another area where the approach of the scheme applies a very traditional lens on employment is around eligibility and levy payments. We note that while it appears all designated workers must be registered, it indicates that no levy is payable by an employer for a designated worker who is employed by the employer for less than 3 days in a month.

The draft legislation is not completely clear on whether that worker needs to be employed in a designated sector for 3 days in a month, or simply employed for 3 days in a month.

(4) No levy is payable by an employer in respect of— (a) a designated worker who is employed by the employer for less than 3 days in a month; or (b) subject to an exception prescribed by the regulations—an apprentice.

There will be many cases where on-hire firms have employees engaged regularly on significant hours every month, but perhaps doing 1-2 shifts per month in a designated industry.

If it is just a designated worker (as opposed to a worker in a designated sector), as indicated in the drafting, that would require an employer to pay a levy into the scheme for a one-off placement of a week into a designated sector. That could realistically mean a 1-week placement in a designated sector over a 10 year career in a non-designated sector would be required to be administered completely differently, even where that worker never intends to take up a role in a designated sector ongoing.

If, however, if it is that no levy applies to less than 3 days work per month in a designated sector, does that mean the employer accrues long service leave for the 1-2 shifts that worker performs in a designated industry? Are the 3 days per month calculated on the basis of a 2-hour shift equating to a full day? If so, we would argue here again that activity should be calculated on an hourly rather than a daily basis, as it fails to accurately assess workers who move in and out of a designated sector when performing work with a single employer. Finally, if the levy requirement is calculated on the basis of work in a designated sector (as opposed to a designated worker) is the 3 days per month an assessment on a monthly or an average annual basis? There may be a scenario where someone who works in a non-designated sector 3 days per week but regularly works 2 days per month in a designated sector. If they were called to do an additional 2 days to support in a designated sector one month, would the employer pay a levy for just that one month (because the employee worked beyond 3 days that month) or not at all because on average that year they worked less than 3 days per month. Paying levies to the scheme for a single month here and there and then calculating that back when an employee wishes to claim entitlements seems unnecessarily burdensome from an administration perspective.

No exclusions for government agencies, councils or prescribed employers.

RCSA does not understand the rationale for excluding public sector agencies, councils or prescribed employers from the scheme. If the purpose of the scheme is to support and incentivise workers in the sector to stay working within the sector, public sector agencies, councils and other prescribed classes are very much relevant employers in relation to the ambitions of the scheme.

It seems incongruous that this cohort of community service workers, of which there are a large and growing number, would be left without coverage of the scheme when their peers employed by other businesses are. Surely the rationale and ambition for this scheme applies to all workers within the designated sector equally?

The public sector, councils and other organisations are playing a substantial and growing role as employers of people and deliverers of community services. To preclude employees who perform community service activity for these organisations from the scheme seems fundamentally counter intuitive to its ambition and stated purpose. Not to mention the impact exclusions like these will have upon the ability of public and council run community services to attract and retain talent.

Every eligible individual, regardless of their employer, should be afforded the same rights and entitlements under the law. RCSA strongly urges these exclusions be removed to ensure equitable treatment and uphold principles of fairness and justice across the scheme.

RCSA challenges the government to commit to covering all workers in designated sectors equally and on the same terms under the scheme, irrespective of their employer.

Registration fees

RCSA does not support the charging of fees to employers for registering with the scheme. Registration is a requirement under the Act and administration of the scheme should be funded by government and the levy contributions of employers under the scheme.

To require payment to register is unnecessary and affronting. RCSA strongly believes if a government is imposing a compulsory registration process on employers, which is accompanied by levies, administration of processing registrations should be funded by government.

Moreover, a fee associated with registration has the potential to dissuade employers from registering in circumstances where they are unsure if a worker is covered. For the scheme to be as successful as possible, we believe cost-free registration will support greater sign up, with employers more likely to opt to register as a conservative measure where coverage of a worker is not clear. That in turn, will support enforcement and assessment of eligibility of employees (and removal if necessary) once in the scheme, as opposed to the resources that will be required to identify unregistered employees and bring them in.

Appointment and powers of Authorised Officers

The Act gives authority to the Minister to appoint officers as fit for the purposes of this Act. RCSA understands the importance of enforcement against the scheme but seeks reassurance that officers appointed will be permanent employees of a regulator, as opposed to a nominated representative of an employee representative group. The scheme must establish clear and transparent guidelines – including a code of conduct - which officers must be required to commit and adhere to in order to maintain their authorisation. There should also be a transparent and robust avenue for raising concerns, issues, and complaints in relation to behaviour of officers undertaking enforcement activity in relation to the scheme.

The proposed sections of the Bill concerning the Right of Entry and Powers of Inspection granted to Authorised Officers do raise significant concern for RCSA in their breadth, potential overreach and challenge they pose to privacy. While we recognise the importance of ensuring compliance with the legislation, we believe that the powers granted to Authorised Officers under these provisions are excessive and have the potential to infringe upon the rights of employers within designated sectors.

The appointment of Authorised Officers by the Minister, coupled with their authority to enter premises, require document production, seize evidence, and compel individuals to answer questions, raises significant questions around who can become an officer, what level of training and certification is required to become and officer and what obligations they will have under the scheme in terms of behaviour and probity. RCSA is concerned that the breadth and depth of their right to enter, seize and search is far in excess that what is required to enforce the scheme and presents a worrying expansion of government power and influence over workplace operations.

The requirement for individuals to produce documents and answer questions under threat of penalty raises serious concerns about coercion and the potential for abuse of power. Moreover, the absence of specific guidelines or safeguards regarding the exercise of these powers heightens the risk of arbitrary enforcement and unjust treatment of individuals.

RCSA acknowledges the importance of enforcing compliance with the legislation but we believe this aspect of the Bill goes further than it needs to and does not provide any assurance or mechanism to keep the authority it confers in check. RCSA believes there are more collaborative and impactful ways that would be well suited to support the scheme's enforcement and do not require notice-free entry, inspection and seizure rights. If the government is insistent that the rights conferred in the draft legislation are completely necessary, RCSA demands any Bill also contain equally qualification requirements, code of conduct and guidelines around proper use of those powers, including severe penalties for abuse of the powers conferred.

Use of unused leave credits

RCSA is extremely concerned by the evolution of schemes in other jurisdictions as large and growing pools of funding supported by levies collected on behalf of workers but never utilised by those workers they were collected for.

RCSA does not believe portable leave schemes should be able to continue to hold and use funds paid to the scheme for workers who will never access their entitlements. While we recognise the importance of ensuring adequate funding to support the viability of leave payments to workers covered by the scheme, we believe retaining unused funds indefinitely without recourse to employers is unjust and disproportionate.

Under the proposed scheme, employers are required to contribute funds to the scheme for each designated worker employed in a particular sector. However, if an employee never accesses their entitlements due to various reasons such as changing employment or leaving the industry, the funds contributed on their behalf remain with the scheme indefinitely. This arrangement effectively results in employers subsidising the scheme without any corresponding benefit.

We argue that after an extended period of time, if an employee has not accessed their entitlements, the funds contributed on their behalf should be repaid to the employer. This would prevent employers from being unfairly burdened with the costs of unused entitlements.

Retention of unused funds without recourse to employers undermines the principle of fairness and equity. Employers should not be penalised for employees' decisions to not access their entitlements, especially if they have fulfilled their obligations by contributing to the scheme. Repayment of unused funds to employers after an extended period would restore balance and ensure that employers are not unduly disadvantaged by the scheme's operation.

Additionally, the return of unused funds would enhance responsible management of the scheme and promote transparency and accountability.

The ability to hold funds on behalf of employees, whether they access them or not, provides little incentive for the schemes to advocate for employees to take up their entitlements, nor to educate employees as to how the scheme operates and what their entitlements are.

If the purpose of the scheme is to provide additional support to workers in designated sectors and encourage them to stay working within the sector, there should be extensive communication and awareness activity driven by the scheme itself to employees, so they are aware they have entitlements under it. That communication and awareness activity should underpin the ambition of the scheme which is to attract, support and retain workers in an industry. If workers are unaware of the scheme, how is it achieving that aim?

Indefinite holding of funds creates no incentive to encourage workers to stay within the industry, nor promotion and awareness of the scheme itself. Indeed, in many ways, it does the opposite… creates a financial incentive in circumstances where people move out of the industry before being able to claim benefits or are unaware of their entitlements and so do not claim them. It is a scheme funded by employers but drawn upon by workers themselves and there should not be a financial windfall for funds, government, and bureaucracy in circumstances where employees do not claim the entitlements employers have paid for them.

RCSA is strongly opposed to the industry board being able to issue loans from the funds under management or to enable the Treasurer to authorise common funds investment where there are multiple designated sectors operating schemes.

Position on the board

As indicated earlier in this submission, RCSA is concerned that few of those developing and managing portable leave schemes approach them with a lens to their impact, relevance and workability in non-traditional employment arrangements, such as labour-hire.

Given labour hire is the 6th largest employing sector in Australia, with almost 700,000 employees nationwide, RCSA believes there should be a least one position on the board that represents the on-hire sector and ensures a voice at the table for non-traditional employment arrangements. There are an enormous number of employees in community services that are employed in an on-hire capacity. Issues around operation and practical administration within the context of their experience will be support better operation of the scheme.

Summary

RCSA appreciates the opportunity to contribute development of a Portable Long Service Leave Scheme in South Australia. We would further welcome any opportunity to engage further with the Department and the Minister's office to delve into more detail around considerations of the scheme in the context of a non-traditional working arrangements.

The scheme presents significant compliance complexity for the labour and on-hire industry, who supply a large number of workers into the community services sector. Often those workers are engaged across more than one industry or sector on a daily or weekly basis.

RCSA has significant concerns around some of the scheme's foundational principles, in particular the lack of clarity around scope of coverage and the accrual of entitlements on a daily rather than hourly basis. We also believe the move exclude public sector, council and other prescribed workers from the scheme's coverage undermines its very ambition and should be rectified immediately.

Beyond that, we also fundamentally oppose the scheme retaining unused and unclaimed entitlements, and the use of those funds as outlined in the draft legislation.

RCSA believes the scheme should be required to repay unused funds to support fairness and accountability and ensure there is no financial incentive that undermines what the scheme's ambition should be; namely to promote and encourage workers to stay in the industry and take up their entitlements.

RCSA welcomes the opportunity to work with the Government beyond this submission to further explore and consider the issues outlined in this document.

About RCSA

RCSA is the peak body for the recruitment and staffing industry in Australia and New Zealand.

RCSA promotes and facilitates professional practice within the recruitment and staffing industry. It sets the benchmark for industry standards through representation, education, research and business advisory support to our member organisations and accredited professionals who are bound by the Australian Competition and Consumer Commission (ACCC) authorised RCSA Code for Professional Conduct.

In addition to the Code, RCSA has established the StaffSure Certification Scheme. StaffSure permits business, government, and workers to find and partner with reputable Workforce Service Providers such as on-hire companies, professional contracting firms and private employment agencies. Going beyond most Labour Hire Licensing Schemes, providers are independently audited against the StaffSure Standard, which includes a fit and proper person check, work status and renumeration, financial assurance, safe work, immigration, and accommodation.

RCSA is also a proud member of the World Employment Confederation (WEC), the voice of the recruitment and staffing industry across 50 countries, and the Australian Chamber of Commerce and Industry (ACCI).