

## **Submissions**

### **NSW BUSINESS CHAMBER**

The New South Wales Business Chamber Ltd (**BNSW**) is New South Wales' peak business organisation with nearly 100,000 members, spanning most industry sectors and sizes. BNSW is a registered state industrial organisation under the Industrial Relations Act 1996 (NSW), as well as a recognised organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth).

Australia Business Industrial (**ABI**) is the industrial relations affiliate of BNSW. ABI is federally registered under the Fair Work (Registered Organisations) Act 2009 (Cth) and engages in policy advocacy on behalf of its membership as well as engaging in industrial advocacy in State tribunals and the Federal tribunal.

## 1. BACKGROUND

- 1.1 The New South Wales government is introducing portable long service leave for community services workers, to encourage these workers to stay in the sector longer.
- 1.2 On 27 March 2024, New South Wales Government published:
  - (a) a public consultation draft of the *Community Services Sector Portable Long Service Leave Bill 2024 (Bill)*; and
  - (b) the 'Portable Long Service Leave for Community Services Statement Regulatory Impact Statement' (**Statement**).
- 1.3 The Statement includes information about the proposed portable long service leave scheme for community services roles in New South Wales (**PLSL Scheme**) and includes 30 questions.
- 1.4 Interested parties have been invited to lodge submissions in response to the Statement by 30 April 2024.
- 1.5 The following submission responds to the questions set out in the Statement and is filed on behalf of BNSW and ABI (**BNSW/ABI**).

### **BNSW/ABI'S POSITION**

## 2. TELL US WHAT YOU THINK ABOUT THE TYPES OF SERVICES WE HAVE PROPOSED COVERING. DO YOU THINK THAT THE SERVICES ARE CLEAR, COMPREHENSIVE AND APPROPRIATE?

- 2.1 BNSW/ABI considers that to best ensure clarity regarding the types of services covered, the services should be linked to award-coverage, much like other existing portable long service leave schemes (eg. building and construction).
- 2.2 The benefit of this approach is that there is a long body of industrial jurisprudence identifying which types of workers are / are not caught by particular awards and a settled approach to interpreting the coverage of these instruments.

## 3. THE BILL COVERS ALL WORKERS WHO DELIVER COMMUNITY SERVICES AND ALL EMPLOYEES IF THE EMPLOYER'S MAIN PURPOSE IS TO DELIVER COMMUNITY SERVICES. DO YOU SUPPORT THIS MODEL?

- 3.1 BNSW/ABI disagrees with the proposal that the following workers should be captured by the PLSL Scheme, namely:
  - (a) all workers who deliver community services (regardless of the industry of their employer); and
  - (b) all employees whose employer's main purpose is to deliver community services, together (**Workers**).
- 3.2 The Statement specifically states that the proposed PLSL Scheme, as it is currently being proposed, will cover workers:
  - (a) in "*administration, maintenance, accounts payable or even property management, if their employer has the predominant purpose of delivering a prescribed community service*"; and
  - (b) "*all workers who provide community services, even if they work within a provider that does not mainly deliver these services*".

- 3.3 The above approach gives rise to various concerns.
- 3.4 Firstly, with respect to employees whose employer is not engaged in the community services industry, there may be a lack of understanding or awareness about the ability to contribute to the PLSL Scheme - given that the employer's primary business focus sits outside the community services sector.
- 3.5 Secondly, in relation to employees who do not themselves perform community services work, but simply work for an employer in that industry:
- (a) coverage of these employees is unnecessary because such employees would not necessarily stay in the industry long term. The purpose of the PLSL Scheme is to recognise that some workers stay in the industry for long periods, albeit with different employers. In the case of 'head office', managerial or support staff, this characteristic is less likely to arise because such employees have skills that are more transferable to other industries generally.
  - (b) The proposed PLSL Scheme will lead to an unequal system whereby workers in areas such as IT, Marketing and HR will be eligible for more favourable long service leave entitlements under the PLSL Scheme, than other workers performing identical roles in fields which are not linked to community services.
- 3.6 As a result, BNSW/ABI proposes that the PLSL Scheme should apply to workers covered by chosen modern awards, rather than covering all workers linked to relevant community services.
- 3.7 BNSW/ABI is of the view that this will reduce uncertainty as to who is covered by the PLSL Scheme and will lessen the pressure on employers to know which employees are eligible for the PLSL Scheme, given that the burden falls on employers to "*self-assess coverage both as an employer and for their workers*".
- 3.8 BNSW/ABI does not oppose the Scheme applying across both the public and private sectors.
- 4. DO YOU THINK THE DEFINITIONS FOR WORKERS, EMPLOYEES AND EMPLOYERS ARE APPROPRIATE?**
- 4.1 BNSW/ABI does not propose any amendments to these definitions.
- 5. CONTRACTORS WILL BE ABLE TO OPT-IN TO THE SCHEME, WITH SPECIAL PROVISIONS THAT APPLY AROUND LEAVE AND PAYMENTS. DO YOU AGREE WITH THIS APPROACH?**
- 5.1 BNSW/ABI does not oppose contractors opting into the scheme, should they wish to. Our practical experience suggests contractors are unlikely to take up this option, but provided the option is voluntary, there is no opposition to this approach.
- 6. SOME DIRECTORS, PARTNERS, AND TRUSTEES WILL BE EXCLUDED FROM THE SCHEME, ALONG WITH PUBLIC SECTOR EMPLOYERS AND WORKERS. DO YOU AGREE WITH THIS APPROACH?**
- 6.1 Yes, BNSW/ABI agrees with this approach.
- 7. THE BILL PROPOSES THAT WORKERS WILL RECEIVE 6.1 WEEKS OF PAID LEAVE AFTER 7 YEARS OF EMPLOYMENT. DO YOU SUPPORT THIS?**
- 7.1 BNSW/ABI does not support this proposal.

- 7.2 BNSW/ABI supports a PLSL Scheme which provides eligible workers with long service leave entitlements of 8.67 weeks after 10 years, an alternative proposal which was modelled and included in the Statement.
- 7.3 Unlike the States of Victoria and ACT, where eligible workers may qualify for long service leave after working with an employer for 7 years, in New South Wales, eligible workers are only entitled to long service leave after a period of 10 years as set out in clause 4(2) of the *Long Service Leave Act 1995 (NSW) (Act)*.
- 7.4 The two existing portable long service leave schemes in New South Wales, which apply to the Building and Construction Industry and Contract Cleaning Industry, provide for portable long service leave after 10 years of service and are consistent with the Act.
- 7.5 As such, it would be inconsistent to introduce a scheme where long service leave is provided after 7 years, whilst all other employees in New South Wales, including the workers which are covered by the other PLSL schemes, are only eligible for long service leave entitlements after 10 years.
- 7.6 Moreover, the provision of a more generous entitlement in the PLSL Scheme will have the effect that employers will be required to pay a greater levy than they otherwise would (given that the probability of employees reaching the trigger for the Scheme payment increases where the service period required is lessened).

## **8. SHOULD A GIFT OF SERVICE BE PROVIDED, AND SHOULD IT BE 12 OR 6 MONTHS?**

- 8.1 BNSW/ABI does not support a 'gift of service'.
- 8.2 The gift will also not have any effect on furthering the purposes of the PLSL Scheme. The purpose is to ensure that employees who stay in the industry long term have equivalent entitlements to other workers who might transfer amongst different employers less than in this industry. A gift does not further this purpose but seeks to confer additional and different entitlements on employees in this sector compared to other comparable sectors.
- 8.3 The introduction of a 'gift' increases the rate which employers must pay, thereby making the proposed rate 1.7%, which is higher than the rate for equivalent schemes in most States.
- 8.4 For completeness, BNSW/ABI is not aware of any instances where 'gifts' were given at the commencement of portable long service leave schemes.

## **9. DO YOU AGREE THAT WORKERS WHO REACH AND PASS THE 7-YEAR THRESHOLD SHOULD ACCRUE A PRO RATA ENTITLEMENT FOR EACH EXTRA YEAR OF SERVICE? IF NOT, WHAT SHOULD APPLY?**

- 9.1 BNSW/ABI does not agree with the proposal that workers who reach and pass the 7-year mark should accrue a pro rata entitlement for each extra year of service.
- 9.2 As set out in section 7 above, BNSW/ABI maintains that eligible workers should only be entitled to portable long service leave entitlements after 10 years, pursuant to the Act.
- 9.3 Further, in accordance with clause 4(2)(B) the Act, workers should accrue additional pro rata entitlements every 5 years after the 10 years completed with the employer, not after each year. This is consistent with the Act.

**10. WHAT DO YOU THINK SHOULD COUNT AS RECOGNISED SERVICE? DO YOU AGREE THAT THE MODEL SHOULD BE BASED ON TIME EMPLOYED, AND NOT HOURS OR DAYS WORKED?**

10.1 As with the general approach to long service leave in NSW, length of service should be based on the period of continuous service in the industry, not the time employed. If an employee is not working for a period, as a matter of general historical industrial practice, would not ordinarily constitute service and should not count as part of the period qualifying for leave payments.

**11. HOW LONG SHOULD WORKERS BE ALLOWED TO WORK OUTSIDE THE SECTOR OR TAKE A BREAK WITHOUT LOSING THEIR REGISTRATION AND SERVICE CREDITS?**

11.1 BNSW/ABI is of the view that the maximum amount of time workers should be able to work outside the sector or take a break without losing their registration and service credits, is 2 months. Allowing workers to work for extended periods outside the sector (for instance years as set out in the Statement) defeats the very purpose of long service leave provisions.

11.2 Long service leave is designed to reward long commitment to employment in a particular employer or in an industry (in the case of industry schemes). Allowing employees to chop and change their industry uproots the entire basis for the awarding of long service leave benefits in the first place.

11.3 This approach is consistent with clause 4(11)(a1)(vii) of the Act.

**12. DO YOU AGREE THAT EMPLOYEES AND CONTRACTORS SHOULD GENERALLY NEED TO TAKE LEAVE IN ORDER TO RECEIVE THEIR ENTITLEMENT? IF NOT, IN WHAT OTHER CIRCUMSTANCES SHOULD THEY BE ABLE TO RECEIVE A PAYMENT WITHOUT TAKING LEAVE?**

12.1 We wish to continue considering our position on this matter.

**13. WHAT PROTECTIONS, IF ANY, DO YOU THINK ARE NEEDED FOR WORKERS OR EMPLOYERS IN RELATION TO SCHEDULING AND TAKING LEAVE?**

13.1 BNSW/ABI is of the view that the protections for workers and employers in relation to scheduling and taking leave should be equivalent to the long service leave entitlements set out in section 4 of the Act.

13.2 If leave is not taken immediately upon its accrual, then mutual consent should be required for the taking of leave at a different period.

**14. PAYMENT FOR LEAVE WILL BE BASED ON AN EMPLOYEE'S HIGHEST WEEKLY AVERAGE WAGE IN THE MOST RECENT 2, 4, 20, OR 40 QUARTERS. DO YOU THINK THE FORMULA IS APPROPRIATE?**

14.1 BNSW/ABI does not agree with the formula proposed.

14.2 BNSW/ABI is of the view that the payment for leave should be based on the average amount of time worked across a period of time, rather than the worker's highest weekly average wage. This approach is in line with New South Wales' existing long service leave legislation, in particular clause 4(3B) of the Act.

14.3 Pursuant to Clause 4(3B) of the Act, a worker for whom no normal weekly hours are fixed, should be entitled to the average weekly number of hours worked by that worker over a period of 12 months or 5 years.

- 14.4 BNSW/ABI disagrees with the proposal that calculating the long service leave payment on the average amount of time worked across the whole period of service would “*not reflect career progression or penalise some workers who worked part time throughout part of their service*”. The clause in the Act mentioned in 14.3 above provides calculations which would help mitigate that concern.
- 14.5 Further, the PLSL Scheme’s proposed calculation for the payment of long service leave could also incentivise workers to work more hours for a week, or a few weeks out of a given period, in order to maximise their long service leave payment. This seems unfair and is not consistent with NSW legislation.
- 15. THE FORMULA FOR PAYMENTS TO CONTRACTORS IS BASED ON LEVY CONTRIBUTIONS AND INTEREST. DO YOU THINK THIS WILL INCENTIVISE CONTRACTORS TO OPT-IN TO THE SCHEME?**
- 15.1 BNSW/ABI does not oppose the proposed formula for payments to contractors.
- 16. DO YOU THINK THAT A LEVY RATE OF 1.7% WILL BE A FAIR COST FOR THE BENEFITS THAT THE SCHEME WILL PROVIDE FOR WORKERS AND THE SECTOR?**
- 16.1 BNSW/ABI does not agree with the proposed levy rate of 1.7%.
- 16.2 As set out in the Statement, the levy rates for existing PLSL schemes for community services in other Australia States are, for the most part, less than 1.7%, namely:
- (a) ACT: 1.6%
  - (b) Victoria: 1.65%
  - (c) Queensland: 1.35%
- 16.3 Whilst South Australia has released draft legislation which includes a rate which is higher than 1.7%, the rate has not been finalised as of yet. In any event, the higher rate is also based on the more generous long service leave entitlements which are available for all eligible workers in South Australia.
- 16.4 As mentioned earlier, BNSW/ABI does not support the proposal to provide eligible workers with a ‘gift’ of service or for entitlements to accrue after 7 years. In the event the proposal to grant workers a ‘gift’ is removed, and the entitlement is triggered after 10 years, this will lower the rate of the levy and will make the rate more comparable to other States.
- 17. DO YOU THINK THE PROPOSED THRESHOLDS FOR SUSPENSION AND CANCELLATION OF REGISTRATION ARE APPROPRIATE? IF NOT, WHAT SHOULD BE DIFFERENT?**
- 17.1 BNSW/ABI is of the view that the thresholds for suspensions and cancellations should be reduced - especially having regard to BNSW/ABI’s position that employees should not be permitted to have a period of up to 4 years outside of the industry.
- 17.2 The period should be reduced to reflect the maximum period an employee is permitted to leave the industry.
- 18. DO EMPLOYERS ALREADY KEEP THIS INFORMATION? IF NOT, WHAT TYPES WOULD BE NEW?**
- 18.1 The Statement states that employers will be required to keep basic information about employees’ long service leave entitlements, including:

- (a) employment or engagement details including start date, end date and where relevant the employment contract;
  - (b) employee identifying details such as name, date of birth and registration number;
  - (c) work details such as the type and number of days;
  - (d) remuneration or wage details for each return period; and
  - (e) any long service leave and payment details.
- 18.2 Under clause 8 of the Act, employers are already required to keep certain records which relate to each employees' long service leave entitlements. As such, it is unlikely that keeping additional basic information would create a significant burden for employers.
- 19. HOW DO YOU THINK THE ADMINISTRATIVE OBLIGATIONS WILL AFFECT EMPLOYERS, AND WILL THE IMPACT VARY? HOW COULD THE DESIGN OF THE SCHEME HELP ADDRESS THESE IMPACTS?**
- 19.1 BNSW/ABI is of the view that administrative obligations imposed as a result of the PLSL Scheme will affect employers. The requirement to report to the LSC every quarter is likely to carry a high administrative cost for employers and is likely to be more difficult for small business employers, as foreshadowed in the Statement.
- 19.2 BNSW/ABI agrees with the alternative proposal set out in the Statement which would allow smaller entities to report and pay levies "annually or upon request if a worker makes a claim".
- 19.3 Further, for medium and larger entities, BNSW/ABI proposes that the frequency of reporting is reduced to once every year, or once every 6 months.
- 20. ARE THERE ANY EXAMPLES OR COMPLEXITIES LINKED TO WORK DELIVERED IN BORDER COMMUNITIES OR ACROSS JURISDICTIONS THAT YOU THINK THE SCHEME SHOULD ACCOUNT FOR?**
- 20.1 BNSW/ABI is aware of some complexities which may arise such as for workers who are employed on towns bordering two states which have different PLSL schemes.
- 20.2 BNSW/ABI would recommend some application provisions be introduced to make it clear that where an employee is covered by a portable scheme in another jurisdiction, then the employee will not be subject to the present PLSL Scheme.
- 21. DO YOU SUPPORT THE FUNCTIONS AND ROLE OF THE COMMITTEE? DO YOU SUPPORT ADDING AN INITIAL LSC REVIEW PROCESS, OR ARE THERE ANY OTHER ADJUSTMENTS YOU THINK ARE NEEDED?**
- 21.1 BNSW/ABI has no comments on this question.
- 22. DO YOU THINK THE PROPOSED CONSTITUTION OF THE COMMITTEE IS BALANCED AND APPROPRIATE TO ADMINISTER ITS FUNCTIONS AND ROLE?**
- 22.1 BNSW/ABI has no comments on this question.
- 23. ARE THERE ANY OTHER COMPLIANCE AND ENFORCEMENT OPTIONS THAT YOU THINK THE BILL SHOULD INCLUDE, OR GAPS THAT HAVE NOT BEEN IDENTIFIED?**
- 23.1 BNSW/ABI has no comments on this question.

**24. DO YOU SUPPORT THE CONFIDENTIALITY AND DISCLOSURE PROVISIONS IN THE BILL?**

24.1 BNSW/ABI has no comments on this question.

**25. SHOULD THIRD PARTIES BE ABLE TO REPORT NON-COMPLIANCE TO THE LSC?**

25.1 BNSW/ABI does not agree that third parties should be able to report non-compliance to the LSC. Third parties are often unlikely to understand the full details pertaining to a person's employment relationship. Inaccurate or uninformed reporting can impose significant burdens on employers in circumstances where no direct complaint has arisen from the relevant employees.

**26. DO YOU THINK THE SUGGESTED ONE-YEAR TRANSITIONAL PERIOD IS SUFFICIENT FOR THE SECTOR TO UNDERSTAND AND PREPARE FOR THE COMMENCEMENT OF THE SCHEME?**

26.1 BNSW/ABI agrees with the suggested one-year transitional period.

**27. ARE THERE ANY ADDITIONAL BENEFITS THAT YOU THINK THE SCHEME WILL PROVIDE?**

27.1 BNSW/ABI is not aware of any additional benefits.

**28. DO YOU, OR EMPLOYERS, CURRENTLY SET ASIDE FUNDS FOR LONG SERVICE LEAVE? IF SO, HOW?**

28.1 Employers do *not* ordinarily set aside funds from the commencement of an employee's engagement. This means that the proposed PLSL Scheme will have a direct increase in employer costs - as it requires funds to be set aside and paid from commencement of an employee's relationship.

28.2 In BNSW/ABI's experience, many businesses commence setting aside funds for the payment of long service leave at around the 4 or 5 year mark of an employee's service. The significant change in approach required to comply with the PLSL Scheme means that the Government should do what it can to reduce these new costs being imposed on employers, including by increasing the qualifying period for long service leave to 10 years and by removing the proposed 'gift' which does not align to the purpose of the Scheme.

**29. WHAT EFFECT WILL THE PROPOSED LEVY HAVE ON YOU, OR EMPLOYERS GENERALLY?**

29.1 The Levy will without doubt increase the cost of running a business in NSW. It introduces an obligation to pay funds for employees at a time than would arise much earlier than employers usually set aside funds for long service leave (see paragraph 28 above).

29.2 It also affects employer cashflow, because instead of merely accounting for long service leave accruals, employers must pay the funds to the PLSL Scheme as they go.

**30. DO YOU HAVE ANY OTHER FEEDBACK ON THE PROPOSED SCHEME? IF SO, WHAT IS THE ISSUE AND HOW DO YOU THINK IT COULD BE ADDRESSED IN THE BILL?**