Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au

Office of the President

9 January 2020

Our ref: KB-ILC

Committee Secretary
Education, Employment and Small Business Committee
Parliament House
George Street
Brisbane Qld 4000

By email: [redacted]

Dear Committee Secretary

Community Services Industry (Portable Long Service Leave) Bill 2019

Thank you for the opportunity to provide comments on the Community Services Industry (Portable Long Service Leave) Bill 2019 (t**he Bill**). The Queensland Law Society (**QLS**) appreciates being consulted on this important piece of legislation.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the QLS Industrial Law Committee, whose members have substantial expertise in this area.

QLS is generally supportive of the provision of portable long service leave.

The authority

The Explanatory Notes (at page 3) provide that the scheme is to be administered by the existing PLSL Authority, QLeave, with oversight by a governing board consisting of a Chair; a Deputy Chair with financial/investment expertise; and an equal number of employer and employee representatives. However, clause 10 of the Bill establishes the Community Services Industry (Portable Long Service Leave) Authority. Qleave is not mentioned in the Bill.

We recommend that the Committee seek clarification from the Department on this point and on clause 38, which provides that staff from the Building and Construction Industry Authority will provide staff to the authority established in the Bill.

Definitions

We make some general comments with respect to the definitions of key terms contained in this Bill.

Queensland Law Society is a constituent member of the Law Council of Australia

Law Council OF AUSTRALIA

Worker

Clause 8(2) provides that a regulation may prescribe a class of individuals who will not be considered to be workers. The Explanatory Notes and Briefing Paper which accompany this Bill do not provide appropriate guidance as to the possible classes of workers who might be excluded. QLS would welcome consultation with the Department when the Regulation is being drafted to ensure that there are no unintended consequences arising from the way any groups are carved out of this scheme.

Employer

- Clause 7(1) defines “community services” as services of a type stated in schedule 1 or prescribed by regulation. A significant and broad list of services are then listed in the schedule which includes groups such as, “advocacy services”, “employment services”, “mental health services” and “women's services”, all of which could include various types of organisations.
- Clause 9 defines an employer is, “an entity established for, or with purposes including, the provision of community services that engages an individual.” The clause does not state that the provision of community services needs to the entity’s sole or even dominant purpose.
- The Briefing Paper from the Department outlines the scope of the scheme and provides that an employer can have two separate and distinct businesses, where workers in one business are covered but the workers in the other business.

It is not clear, from the above, which employers will need to register for this scheme. The intent of the legislation is to provide portable long service leave to those who work in the community services industry. The scheme is intended to be broad, however, it is not clear, whether an organisation that is only peripherally involved in the industry is covered.

If it is the intention that even employers with just a small percentage of workers involved in this industry are required to register, then the legislation needs to make this clear in the definition provisions and in the regulation, where appropriate.

The Explanatory Notes state, in reference to clause 6, that, “(*f)or the purposes of this Act, it (the scheme) is intended to be distinct from the aged care industry and the child care or early childhood education industry*”. However, the schedule lists services which could form part of the aged care, child care or early childhood education industries. If it is the intention that these sectors are to be excluded from the scheme, then this should be expressed in the Bill.

Workers and employers should have certainty with respect to what long service leave scheme they fall within. An adverse consequence of a scheme that is poorly explained is that a worker or employer will have incorrect information about their entitlements and obligations.

A further aspect of clause 9 that we consider requires amendment is the reference in subsection (3) to section 7 of the *Labour Hire Licensing Act 2017* (**LHL Act**). The *Labour Hire Licensing Regulation 2018*, in section 4, sets out those individuals who are not “workers” under that scheme and includes, as an example, a “person employed by a community service organisation…”. This is because community care workers are generally classed as in-house

employees under this scheme and not persons 'provided' for labour hire purposes. This is a clear inconsistency that needs to be addressed.

Accordingly, we submit that amendment needs to be made to clauses 6, 7, 8 and 9 to ensure that it is clear who is a “worker” and “employer”.

Clarity regarding the definition of “employer” is particularly important to ensure that an employer does not breach its obligation to register under clause 54 (which has a maximum penalty of 40 penalty units) and become subject to a court order under clause 55.

We note when the Labour Hire Licensing scheme commenced, businesses were able to ask the Labour Hire Licensing Compliance Unit to determine if they were a labour hire provider pursuant to the LHL Act. We recommend that a similar process should be made available to employers wishing to confirm whether they are to be covered by the scheme. The authority is an appropriate body to make this determination.

It will also be important for the Department and authority to disseminate information to affected sectors and employers to ensure they are aware of the new scheme, prior to its commencement.

Finally, we note that there are several provisions that provide that a regulation may add another type of person or group to a definition. It would be beneficial for the draft regulation to be released for public consultation before it is made to ensure there are no unintended consequences.

Payment of long service leave

Part 6, Division 3 of the Bill provides for the calculation and payment of long service leave.

We note that clause 74 provides the basis upon which long service leave under this scheme is to be calculated. The explanatory notes and the briefing paper assist to understand these provisions but it is unlikely that workers, employers and advisers will go to these documents once the legislation comes into effect.

We recommend that a note be inserted into the legislation with clear, real world examples of how the payments are to be calculated. The authority should also be resourced to give advice on this point, where appropriate.

Reviews and appeals

We recommend amendments to clause 91(a)(i) of the Bill to clarify that a review or appeal is able to be sought in respect of a decision made by the authority under this legislation. The current drafting suggests a decision must have arisen from an application. This raises a concern that not all decisions will be capable of review and appeal.

With respect to clause 92(3), there may be circumstances when a person should be granted the ability to seek a review outside of the timeframe for making this application but will not be able to seek an extension until after the expiration of this timeframe. The authority should have the discretion to be able to accept an application in appropriate circumstances outside of the timeframe.

Clause 93(2) should be amended to require the authority to provide a decision to the applicant, even if the 45 day timeframe has passed. This will provide certainty to the applicant

and will prevent them from incurring the costs of an unnecessary appeal pursuant to clause 94(2)9b). We make the same comments with respect to subsection (3).

Powers of authorised officers

The Bill, in clause 111 adopts provisions of the *Contract Cleaning Industry (Portable Long Service Leave) Act 2005* (**Contract Cleaning legislation**) with respect to powers of entry and investigation.

The provisions in the Contract Cleaning legislation raise concerns for QLS. These powers have appeared in numerous pieces of legislation. QLS has advocated to parliamentary committees and government departments that these powers are too broad and breach fundamental cornerstone principles of our legal system. Whilst we accept that the Committee is not tasked with reviewing the Contract Cleaning legislation, the Bill should not adopt the Contract Cleaning legislation provisions, but rather provide reasonable powers to the authorised officers under this scheme.

Our concerns with the provisions in the Contract Cleaning legislation are as follows:

- The power of entry pursuant to section 107(d) allows entry when the place of business is "open for carrying on a business" or "otherwise open for entry". This is far too broad and gives greater power to an authorised officer than is permitted, in many cases, under the *Police Powers and Responsibilities Act 2001*. There is insufficient evidence, in our view, to justify the overriding privacy concerns and the businesses' right to privately enjoy premises. This section is also concerning as many businesses will be in possession of private and confidential information, including medical records.

- We are concerned that section 114(3) gives the power to an officer to take a thing, but there do not appear to be any provisions covering return of property taken.

- Similarly, section 115 does not express what behaviour will be considered "reasonable help" and thus this decision will be left in the hands of the officers. We note the maximum penalty for a breach of this section is 100 penalty units.

Offences

We note that clause 112(2)(b) provides for a limitation period based on when the alleged offence was committed and when this comes within the complaint's knowledge. In our view, this could create uncertainty and we consider a firm limitation period should be set.

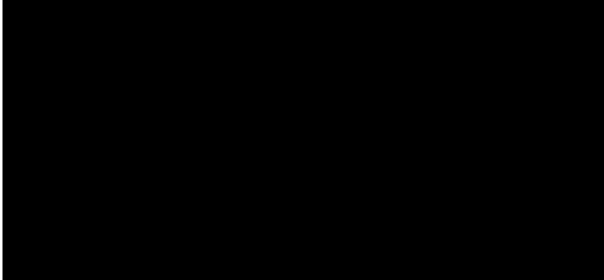
Industrial Relations Act 2016

We note the proposed amendments to section 95(4) of the *Industrial Relations Act 2016* (Qld) seek to address the issues raised in *Schipp & Anor v The Star Entertainment Qld Limited* [2019] ICQ 009. It does so firstly by including "incapacity" within the definition of "illness".

Although not stated in the Explanatory Notes, the proposed amendment appears to seek to differentiate between a situation where an employer terminates the employment of an employee because of an illness related incapacity (in which case the employee would be entitled to pro rata long service leave) and a more general lack of capacity to perform their duties (in which case they would not). The Society supports the clarification.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully



Luke Murphy
President