



Mr Matt O'Connor
Deputy Secretary
Industrial Relations Victoria
1 Macarthur Place
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21 April 2020

Dear Mr O'Connor

REGULATORY IMPACT STATEMENT FOR THE LONG SERVICE BENEFITS PORTABILITY REGULATIONS 2020

I would like to thank your staff at the Department of Premier and Cabinet (the Department) for working with Better Regulation Victoria on the preparation of a Regulatory Impact Statement (RIS) for the Long Service Benefits Portability Regulations 2020 (the proposed Regulations).

The *Subordinate Legislation Act 1994* requires the Commissioner for Better Regulation to provide independent advice on the adequacy of analysis provided in all RISs in Victoria. A RIS is deemed to be adequate when it contains analysis that is logical, draws on relevant evidence, is transparent about any assumptions made, and is proportionate to the proposal's expected effects. The RIS also needs to be written clearly so that it can be a suitable basis for public consultation.

I am pleased to advise that the final version of the RIS received by us on 21 April 2020 meets the adequacy requirements set out in the SLA.

Background

The *Long Service Benefits Portability Act 2018* (the Act) establishes a scheme to allow portability of long service leave benefits to employees in the community services, contract cleaning and security industries. The Long Service Portability Regulations 2019 were developed to support the Act. The scheme allows employees to move from one employer to another within these industries and retain long service leave entitlements. The scheme requires employers to register eligible employees with the Portable Long Service Benefits Authority (the Authority) and pay levies to the Authority for these employees. After an employee is employed for seven years in one of these industries, they can access a long service leave benefit, funded by levy payments.

The scheme commenced on 1 July 2019. In November 2019, the Long Service Portability Regulations 2019 were revoked and re-made to address an administrative error. The re-made Regulations have the same form as the previous Regulations and are called the Long Service Benefits Portability Interim Regulations 2019 (the Interim Regulations). They commenced on 20 November 2019 and will expire on 6 November 2020. The proposed Regulations will replace the Interim Regulations.

The Department explains in the RIS that the proposed Regulations seek to address specific problems with the Interim Regulations identified by stakeholders since the Scheme commenced. The Department focuses on addressing five specific problems in the RIS.

1. clarifying what is community service work;
2. clarifying who is regarded as an employer in the community services sector;
3. clarifying who is regarded as an employee in the community services sector;
4. clarifying who is regarded as an employee in the security sector; and
5. reimbursing employers for 'double dipping' in the community services sector under the *Long Service Leave Act 2018* (the LSL Act).

The first three problems are interrelated and jointly determine which employees in the community services sector are in scope of the scheme.

Analysis

In the RIS, the Department assesses options for addressing each problem using four criteria.

1. *Equity for covered employees* — the extent to which employees intended to be covered by the scheme are covered (weighted at 50 per cent);
2. *Impact on employers – financial costs* — the cost of paying levies to the Authority on behalf of employees (weighted at 20 per cent);
3. *Impact on employers – cost of uncertainty* — the administrative cost of uncertainty about how the scheme applies (weighted at 20 per cent); and
4. *Impact on the Authority* — the administrative burden on the Authority of managing the scheme.

For all criteria, options are assessed relative to the Interim Regulations.

Clarifying what is community service work

The Department's preferred option is to clarify that community services work delivered in a private home is part of the scheme regardless of the age of the client. The Department explains in the RIS that this option will improve equity, as all employees delivering community services work will be covered by the scheme regardless of the setting or the client's age, consistent with the intent of the scheme. This will increase financial costs to employers as more employees will be covered, but decrease uncertainty to employers and employees because of greater clarity. This will also assist the Authority to administer the scheme and provide clear advice.

Clarifying who is an employer in the community services sector

The Department's preferred option involves:

- abolishing the current employer predominance test (where only employers predominantly providing community services are in the scheme) and instead requiring any employer that employs at least one employee who undertakes community service work to register for the scheme;
- explicitly including registered community health centres and women's health centres as eligible employers as part of the scheme; and
- clarifying that for-profit children's services providers are not covered by the Scheme.

The Department explains that abolishing the employer predominance test will increase equity by increasing the number of employers covered by the scheme and hence increasing the number of employees covered. This will increase financial costs to employers. The Department also explains that abolishing the employer predominance test will simplify the scheme, reducing uncertainty costs for employers and impacts on the Authority.

Similarly, the Department explains that explicitly including registered community health centres and women's health centres will increase the coverage of the scheme, improving equity but increasing financial costs for employers. The Department also notes that explicitly including these sub-sectors will reduce uncertainty costs and will assist the Authority in managing the scheme.

The Department explains that clarifying that for-profit children's services providers are not covered by the scheme does not reduce equity because these providers were not intended to be part of the scheme. Greater clarity will reduce uncertainty costs and assist the Authority provide clearer guidance on the scheme.

Clarifying who is an employee in the community services sector

The Department's preferred option is to replace the current employee predominance test with an awards coverage test, defining in scope employees as those covered by the four modern awards for the sector. In the RIS, the Department explains that this option will increase the coverage of the scheme by including both employees who directly deliver community services and employees who support the delivery of community service work through administrative or managerial roles. This will extend coverage and increase financial costs for businesses. The Department states that in the community services sector, unlike in the security and cleaning sectors, administrative and managerial tasks are indivisible from direct delivery of community services and are often carried out by the same person. The Department explains that this approach will provide greater clarity to employers, employees and the Authority as to which employees in the community services sector need to be registered with the Authority and have levies paid to the Authority on their behalf.

Clarifying who is an employee in the security sector

The Department's preferred option is to introduce an employee predominance test for employees in the security industry. The Department explains in the RIS that this would mean people employed by eligible employers who are not predominately performing security work would be excluded from the Scheme, consistent with the intent of the Act. The Department explains that this option does not change the intended scope of the scheme so does not impact on equity or financial costs to employers. The Department also notes that this option would improve clarity, so reduce uncertainty costs for employers and assist the Authority in managing the scheme.

Reimbursing employers for double dipping in the community services sector

It is currently possible for employees to 'double dip' and be paid long service benefits under the scheme and under the LSL Act for the same period of service. The Department explains in the RIS that it is difficult to remove entirely the risk that employees can double dip under employment laws and highlights the fact that there could be unintended consequences from trying to remove entirely the possibility of double dipping, such as reducing the coverage of the scheme. The Department explains that its preferred option is for the Authority to return levies paid by an employer for a particular employee if that employee accesses long service leave entitlements under both the scheme and the LSL Act. This option will not affect equity and will reduce financial and uncertainty costs to employers. This option will reduce the administrative burden on the Authority by making the scheme simpler to administer, but this benefit will be slightly offset by the Authority reimbursing employers.

The Department outlines that its preferred option requires a change to the Act as well as changes to the Regulations. Therefore, the Department intends to amend the Regulations at a later date, subject to passage of necessary amendments to the Act through Parliament.

Implementation and Evaluation

In the RIS, the Department explains that information provision is critical for successful implementation of the proposed Regulations based on feedback from stakeholders about the Interim Regulations and proposed changes being relatively technical. Industrial Relations Victoria (IRV), along with the Authority, will be responsible for monitoring the implementation of the proposed Regulations. These bodies will be assisted by the Working Party that was established by IRV to support the introduction of the Scheme in 2019. This Working Party includes unions, employer groups, government departments, and peak body organisations. It meets regularly with IRV to provide feedback on the Scheme and discuss proposed reforms.

The Act contains provisions requiring a review of the Act three and seven years after the Act commenced. The Department explains in the RIS that the Regulations will be

evaluated as part of these reviews. The three-year review will be an 'implementation review' and will consider the financial and administrative concerns of employers and the coverage of employees in the scheme. The seven-year review will be the first year that employees can access the scheme and will consider whether the broader objectives of the scheme have been achieved.

Should you wish to discuss any issues raised in this letter, please do not hesitate to contact my office on (03) 9092 5800.

Yours sincerely



Anna Cronin

Commissioner for Better Regulation

Red Tape Commissioner