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Government
of South Australia

SafeWork SA

*Construction Industry Long Service Leave
(Miscellaneous) Amendment Bill 2024*
Discussion Paper

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Introduction

At the 2022 State Election, the Government committed to consult with workers, unions and businesses to expand access to portable long service leave in South Australia – modelled on the existing *Construction Industry Long Service Leave Act 1987* (the Act).

The establishment of a new portable long service for the community service sector provided an opportunity to consult with key construction industry stakeholders and consider necessary updates and modernisations of the Act, to ensure it is operating as effectively as possible before being used as a template for other industry sectors.

Following a period of initial stakeholder consultation, the Government has now released a draft of the *Construction Industry Long Service Leave (Miscellaneous) Amendment Bill 2024* (**the Bill**) for comment.

The Bill has been drafted in close consultation with the Construction Industry Long Service Leave Board to improve and strengthen the legislation which supports the existing construction industry portable long service leave scheme.

This discussion paper is released alongside the Bill to explain how the key amendments will operate in practice.

How can I provide feedback?

SafeWork SA are seeking the views of stakeholders and the public in relation to the Bill. This feedback will be used to shape the final Bill prior to introduction into Parliament in early 2024.

In preparing a submission, it is recommended that you consider the Bill and this discussion paper. The questions posed in the paper are a guide only, you do not need to respond to these questions when providing a submission. If you are responding to a specific question or section of a Bill, please include the reference to enable easy identification of responses. Where possible, your submission should provide reasoning for the position that is advocated and examples or evidence that supports the position.

Submissions can be emailed to SWSAPolicy@sa.gov.au or sent to:

Construction Industry Long Service Leave Discussion
SafeWork SA
GPO Box 465
Adelaide, SA 5001

The closing date for submissions is Friday, 3 May 2024.

Please be aware that any submissions or feedback provided will be subject to the *Freedom of Information Act 1991*. While efforts will be made to keep material confidential where this is requested, in some circumstances submissions be required to be disclosed under that Act. Where disclosure of information may identify you, attempts will be made to consult with you before any documents are disclosed.

Summary of key changes

1. Simplified coverage

The Bill has been drafted to simplify the coverage provisions within the legislation to provide greater clarity for employers, workers and the Board.

In particular, there is currently significant legal uncertainty about the coverage of the civil construction sector under the Act. Unlike other jurisdictions such as Victoria, civil construction is not definitely inside or outside scope; workers may instead fall within scope depending on the specific task being undertaken on a construction project.

This is because the Act currently provides, at section 3(3a), that persons employed in the civil construction industry (as defined in the *Building and Construction General On-Site Award*) are excluded from the scheme unless they are employed in work that wholly or predominantly involves working on structures within the meaning of the Act.

This has resulted in ongoing litigation between the Board and civil construction firms in relation to alleged unpaid levies owed for their employees.

In order to address this issue and bring South Australia in line with other jurisdictions, provisions have been drafted in the Bill to clarify the coverage provisions and bring the civil construction industry within scope of the existing scheme, including appropriate transitional arrangements as detailed further below.

The Bill removes current section 3(3a) and references to outdated industrial Awards from the Act, and inserts a new definition of the construction industry as the work or activities set out at clause 32 of the Bill, as outlined at [Appendix 1](#) of this paper. The Bill also provides that additional work or activities can be brought within scope via inclusion in the regulations.

Workers in scope

Clause 5 of the Bill amends section 5 of the Act to simplify provisions relating to persons within scope of the scheme. References to specific industrial awards, and work as a foreman, have been removed. Provision is also made to prescribe certain forms of construction work under the regulations.

With these amendments, a person is within scope if:

- The person is engaged under a contract of service to perform work in the construction industry; AND
- The person's work qualifies under the regulations by virtue of being engaged in work of a kind prescribed by the regulations; AND
- The person's work involves on site work that makes up at least one-half of the period of employment, in the case of a person employed for:
 - less than 1 month: one half of the whole period of employment; or

- 1 month or more but less than 3 months: one half of the first month of employment; or
- 3 months or more: one half of the any 3 month period of employment.

A new definition has been included for the term **on site work**, which is defined to mean work within the construction industry undertaken at a place at which construction work is carried out and includes work at an adjacent site (and on site and off site have correlative meanings).

2. What will newly covered employers be required to do?

As the Bill expands the scope of the scheme, transitional provisions have been drafted to define a **newly covered employer** as a person who becomes an employer under the Act as a result of the amendments provided in the Bill.

Register as an employer

Transitional provisions contained in the Bill provide a grace period for newly covered employers to register without incurring penalties for delays.

If you're a newly covered employer in South Australia and engage one or more workers to perform construction work (in the context of amendments made by the Bill), you will need to register as an employer within the scheme no later than two years following commencement of the provisions contained in the Bill.

Provisions relating to employer registration are set out at clause 20 of the Bill. Transitional provisions are set out at Schedule 2 of the Bill.

Lodge Employer Returns

Following registration, newly covered employers will be required to complete an Employer Return each quarter, (however may choose to lodge their returns online monthly). Refer to [Moving to quarterly return periods](#) below for further information.

Pay Levies

Newly covered employers will be required to pay an annual levy based on a percentage of their worker's ordinary wages, in relation to their workers who work more than 3 days in a month and more than 5 hours per day performing construction work. No levy is payable in relation to an apprentice.

The current levy rate (applicable from 1 Jan 2019) is 2.00% of worker's remuneration. The levy cannot be deducted from an employee's wage, however levies paid by employers will be tax deductible in the financial year they are paid.

Levies collected are invested by the Board to fund the scheme. An actuarial review of the state and sufficiency of the Board's funds is conducted annually to review the financial position of the scheme and to predict whether income (levy and investment) will be able to

meet the future long service leave liabilities, while maintaining the levy at the lowest possible rate.

Keep Records

Newly covered employers will be required to keep records to substantiate the details declared on Employer Returns. Records must be kept in South Australia for at least seven years after completion of the period they relate to. Employers may be requested to provide these records to the Board, particularly if a query arises from a present or past employee.

The Board will keep a record of each registered worker's service and will pay workers directly when they become entitled to long service leave at no further cost to employers. Penalties apply for keeping records known to be false or misleading.

3. What are newly covered workers within the scheme entitled to?

Newly Covered Worker

A newly covered worker is a construction worker employed by a newly covered employer (whether before or after the commencement of the amendments contained in the Bill coming into effect).

Transitional provisions provide that a newly covered workers coverage in the scheme commences at the time their (newly covered) employer registers as an employer.

Long service leave entitlement

Once a worker has accrued 2,600 service days (equivalent to 10 years full time employment) they will be eligible to take 13 weeks long service leave.

If a worker has accrued more than 1,820 service days (equivalent to 7 years full time employment) and will not be performing construction work for a minimum period of 12 months (as an employee) they be eligible to claim a pro-rata payment. This means a worker will be able to be paid the monetary equivalent of the weeks of long service leave they have accrued at the time they cease employment.

While workers will be encouraged to take a decent break, it will be possible to take long service leave in minimum periods of 1 week.

4. Effective service entitlement for shift workers

Currently, section 14(2a) of the Act operates to provide a cap on the number of service days that a worker can accrue, being no more than five days in any week, and no more than 260 days in a financial year.

This method of calculation disadvantages workers who work more than 5 days in a week but have longer break cycles, such as Fly In Fly Out (**FIFO**) workers, or those with similar rostered work.

Clause 11 of the Bill amends section 14 of the Act, removing the cap on the number of days a worker can accrue in a week to ensure that all workers, no matter what their schedule of work is, will be able to accrue a maximum of 260 effective service days in a year.

5. Greater flexibility in relation to long service leave entitlement

Currently an employer must grant a worker long service leave as soon as practicable after the worker becomes entitled to the leave and the worker applies to take the leave.

Feedback received during initial stakeholder consultation identified that the Act should adopt a minimum term of service with an individual employer before a worker can access their entitlement to long service leave.

Amendments have been drafted to provide that:

- if a worker becomes entitled to long service leave within the first 60 days after commencing work with a new employer, the worker will not be entitled to commence the leave until after that 60-day period has expired; and
- a worker needs to apply for long service leave at least 60 days in advance of when they would like the leave to commence.

In addition to this, the timing of a worker's period of long service leave must take into account the reasonable needs of the employer.

An amendment is also proposed to allow workers to take their long service leave in minimum periods of 1 week (as opposed to the current minimum period of 2 weeks).

Despite the above, and to ensure a level of flexibility, the amendments will allow workers and employees to agree when the worker will take long service leave, including an agreement that the worker take the leave with less than 60 days' notice.

6. Restrictions on employment whilst on long service leave

The Act provides that a construction worker must not engage in any other employment while on long service leave (in place of their employment as a construction worker), and also provides that an employer must not engage a construction worker in employment knowing that the construction worker is on long service leave.

Whilst no changes are proposed to these provisions, as it is not unusual for people to work more than one job, the Government invites feedback on the continued relevance of this provision.

7. Effect on ongoing litigation under the Act

The Bill provides an amnesty for any newly covered employers entering the scheme who are currently in dispute with the Board about whether they or their employees should be covered by the scheme.

If that dispute is resolved by these amendments (e.g. the dispute relates to whether a civil construction employer is properly within scope of the Act) then the employer will not be required to pay any unpaid levies in relation to the period before these amendments commenced.

8. Membership of the Board

Increase in membership of the Board

The Bill includes amendments to increase the Board membership from seven to nine members to ensure newly covered employers and employees in the civil construction industry are represented on the Board.

Board appointment and conditions of membership

Amendments provide that the Minister, rather than the Governor, will be responsible for appointing members to the Board. This change cuts red tape and ensures that Board vacancies can be filled in a timely manner.

The provisions relating to conditions of membership have been updated, including removal of the provision that automatically vacated the office of a member of the Board when the member is absent (without leave of the Minister) from three consecutive meetings of the Board.

Deputy to a member of the Board

In addition, an amendment has been drafted to provide that a Deputy to a Member can remain and act in the office of the vacant member until a new member is appointed.

The intent of this change is to ensure when a Board Member's position becomes vacant the deputy position doesn't become vacant by default, enabling the Board to continue to operate until a new Member is appointed.

9. Proceedings at meetings of the Board

Board member meeting attendance requirements

An amendment provides that meetings of the Board may be held via telephone or other electronic means between the members of the Board, bringing attendance requirements in line with modern meeting practices.

Decisions of the Board

An amendment provides that a proposed resolution of the Board becomes a valid decision even if it is not voted on at a meeting of the Board, as long as:

- notice of the proposed resolution is given to all members of the Board (in accordance with procedures to be determined by the Board); and

- at least 4 members express concurrence in the proposed resolution by letter, fax, email or other written communication setting out the terms of the resolution.

10. Board staff and facilities

Chief Executive Officer of the Board

The existing position of Chief Executive Officer (**CEO**) is codified within the Act, providing that the CEO is appointed by the Board to manage the business of the Board.

It is necessary to recognise the role of the CEO in legislation because the [Portable Long Service Leave Bill 2024](#) proposes to expand this role to be responsible for administration and compliance with the proposed community services sector portable leave scheme.

These changes will deliver economies of scale for both schemes and build on the existing knowledge and expertise of portable long service leave staff.

11. Moving to quarterly return periods

Employer Returns are currently required to be lodged every 2 months (6 times a year), as prescribed by the Regulations.

It is intended that once the Bill has successfully passed through Parliament the Regulations will be amended to provide that returns be lodged quarterly (however employers may choose to lodge their returns online monthly if they choose to do so).

The proposed revised due date for each return period is set out below, penalties still apply for late lodgement and/or payment of levies.

Return Period	Return and levy due by
1 July to 30 September	21 October
1 October to 31 December	21 January
1 January to 31 March	21 April
1 April to 30 June	21 July

The Regulations will still provide employers with the option to lodge their Returns monthly.

Further feedback will be sought from stakeholders on amendments to the Regulations following passage of the Bill through the Parliament.

12. Enforcement Provisions

Concerns have been expressed about whether the Act's current use of criminal penalties is an appropriate means of enforcing obligations under the portable long service leave scheme, particularly when this is inconsistent with enforcement mechanisms in other industrial laws.

In order to address this:

- Most criminal offences in the Act will be replaced with pecuniary penalties, similar to enforcement processes for other employee entitlements under the *Fair Work Act 2009*.
- The Construction Industry Long Service Leave Board will have standing to bring proceedings for a pecuniary penalty to be imposed by the South Australian Employment Tribunal if a person breaches their obligations under the Act.
- If a person breaches the Act this may result in a fine, but in most cases can no longer result in a criminal conviction.

When will these changes come into effect?

Following public consultation, the Government's preliminary intention is that the Bill will be introduced to Parliament in 2024.

Whilst commencement timeframes will be subject to the successful passage of a Bill through Parliament, it is anticipated that the amendments contained in the Bill will come into operation from 1 January 2025, with the two-year grace period for newly covered employers to register commencing at this time.

Appendix 1

1 - What constitutes the construction industry

The **construction industry** is the industry of constructing, deconstructing, reconstructing, renovating, altering, demolishing, relocating, maintaining or repairing any of the following:

- buildings;
- spa pools and swimming pools;
- roads, railways, airfields or other works for the passage of anything;
- breakwaters, docks, jetties, piers or wharves;
- works for solid waste disposal;
- works for the dividing, subdividing or developing of land;
- works for the improvement or alteration of a harbour, river or watercourse for navigation purposes;
- works for the storage or supply of water or for flood mitigation;
- works for the irrigation of land;
- works for the conveyance, treatment or disposal of sewage or of effluent from any premises;
- works for extracting, refining, processing or treating materials or for producing or extracting products and by-products from materials;
- works for conveying products, by-products or materials;
- works for the drainage of land;
- works for the storage of liquids, other than water, or gases;
- works for the generation, supply or transmission of electric power;
- works for telecommunication or for the transmission of radio or television;
- bridges, viaducts, aqueducts or tunnels;
- chimney stacks, cooling towers, drilling rigs, gas holders or silos;
- pipe lines;
- navigational lights, beacons or markers;
- pile driving works;

- sporting or recreational facilities;
- earthworks, other than farming;
- fences, other than fences on farms;
- structures, fixtures or other works not included in paragraphs (a) to (x), but not including earthworks for farming or fences on farms.

The **construction industry** also includes land clearing and site preparation, other than for farming.

The **construction industry** also includes the industry of, whether on or off site—

constructing a thing, other than ordinary stock for sale, in accordance with working drawings;
or

deconstructing, reconstructing, renovating, altering, demolishing, relocating, maintaining or repairing a thing, other than ordinary stock for sale, constructed in accordance with working drawings.

The **construction industry** does not include the industry of performing maintenance or repairs of a minor nature to anything mentioned in subclause (1) or (3) for a person not substantially engaged in work or an activity mentioned in subclause (1), (2) or (3).

2 - Prescribed exclusions

The **construction industry** does not include any work or activity excluded from the operation of this Schedule by the regulations.