

EXPLANATORY MEMORANDUM

CONSTRUCTION INDUSTRY PORTABLE PAID LONG SERVICE LEAVE AMENDMENT (COVID-19 RESPONSE) BILL 2020

The COVID-19 global pandemic has had far-reaching economic impacts, resulting in financial hardship for many Western Australian families.

The Construction Industry Portable Paid Long Service Leave Amendment (COVID-19 Response) Bill 2020 (the Bill) provides a mechanism for providing financial relief to approximately 18,500 employees in the construction industry.

The Bill achieves this by amending the *Construction Industry Portable Paid Long Service Leave Act 1985* to enable earlier access to pro-rata long service leave entitlements at five (5) years of service, in lieu of the current seven (7) years, for a temporary period of 12 months.

Under the *Construction Industry Portable Paid Long Service Leave Act 1985* (the Act), employees in the Western Australian construction industry are provided with portable long service leave, meaning that employees retain their long service leave should they move between employers in the industry. The scheme is funded through employer contributions, paid to the Statutory Authority established in the Act - the Construction Industry Long Service Leave Payments Board (the Board), trading as MyLeave.

At an average weekly wage of \$1,610 for employees within the Scheme, the gross benefit to these workers will range from \$6,900 (for 4.3 weeks' leave) to \$9,800 (6.1 weeks) for five (5) and seven (7) years' service respectively.

The legislative changes to allow the release of these funds for use by construction workers need to be implemented urgently to have the desired effects of supporting those experiencing financial hardship as a result of COVID-19 as well as stimulating the economy.

The Bill also ensures that employees who would become entitled to such a long service leave benefit, retain their entitlement. It also provides that days of service be accrued based on ordinary hours of work, for cases where an employee is stood down (either in full or part) from 1 April 2020 and remains employed.

CLAUSE 1. SHORT TITLE

Clause 1 of the Bill provides that the Short title of the Act will be the *Construction Industry Portable Paid Long Service Leave Amendment (COVID-19 Response) Act 2020*.

CLAUSE 2. COMMENCEMENT

Clause 2 of the Bill provides for sections 1 and 2 of the Amendment Act to commence on Royal Assent, deems sections 3, 4(1), 4(3), 4(4) and 5 to come into operation on 1 April 2020 and the rest of the Act on the day after assent day.

CLAUSE 3. ACT AMENDED

Clause 3 of the Bill provides for the Amendment Act to amend the *Construction Industry Portable Paid Long Service Leave Act 1985*.

CLAUSE 4. SECTION 3 AMENDED

Clause 4(1) deletes the definition of 'day of service' in section 3(1) and adds a new section 3B outlining an expanded definition of 'day of service' – see clause 5 for information on the new definition.

Per clause 2(b), the definition is deemed to have come into operation on 1 April 2020; this is to ensure the 'day of service' definition includes employees being stood down from 1 April 2020.

Clause 4(2) inserts a definition of 'COVID recovery period' to provide that applicable provisions are enabled for a temporary period of 12 months, with effect from the day after assent. The provision relates to:

- i. taking of long service leave after 5 years of service;
- ii. lump sum payments on termination after 5 years of service; and
- iii. suspending cessation of continuous service for those employees with more than 880 days of service on 1 April 2020.

Clause 4(3) inserts a definition of 'stood down', by reference to new subsection 3B.

This clause is necessary as the existing Act does not allow for employees accruing service days when being stood down. This anomaly was identified upon the introduction of the JobKeeper legislation.

Per clause 2(b), the definition is deemed to have come into operation on 1 April 2020; this is to ensure the 'stood down' definition includes employees being stood down from 1 April 2020.

Clause 4(4) inserts the definition of 'stood down' in new subsection 3B. The definition outlines an employee is 'stood down' if employed on the day, would usually work on that day, and the employee is given either:

- i. a JobKeeper stand down direction or for another reason under the *Fair Work Act 2009 (Commonwealth)*, or
- ii. stood down under an industrial instrument.

This clause also provides for being 'stood down' in prescribed circumstances such as where references to sections of the *Fair Work Act 2009 (Commonwealth)* may change and no longer become relevant, or other legislation is introduced by the Commonwealth Government (e.g. similar to JobKeeper), or in other unknown circumstances, meaning that the section does not work as intended.

CLAUSE 5. SECTION 3B INSERTED

Clause 5 inserts a new section 3B outlining an expanded definition of 'day of service' to include a day in respect of which an employee is 'stood down' for an employee that is not a casual employee (i.e. a permanent employee), or a casual employee that has been working in that employment on a regular and systematic basis during the previous period of 12 months.

The insertion of the section rectifies an anomaly for employees in the construction industry that would be denied a day of service toward a long service leave entitlement if they are stood down.

This clause brings the Act into alignment with the comparable provision in the *Long Service Leave Act 1958*.

Due to the portable nature of long service leave entitlements under the Act, it is necessary to distinguish between a casual employee being 'stood down' for the purpose of accruing a day of service, or a casual employee whose employment is terminated. The requirement that a casual employee must have been working in that employment on a regular and systematic basis during the previous period of 12 months is similar to the definition of long term casual in section 12 of the *Fair Work Act 2009 (Commonwealth)*, and is similarly included within the meaning of eligible employee for the JobKeeper Scheme detailed in section 9(5) of the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (Commonwealth).

Per clause 2(b), the definition is deemed to have come into operation on 1 April 2020; this is to ensure the 'day of service' definition includes employees being stood down from 1 April 2020.

CLAUSE 6. SECTION 6 AMENDED

Clause 6 deletes from section 6(1)(b)(ii) the previous legal name of a nominating body and inserts the new name – changing from 'Chamber of Commerce and Industry of Western Australia (Inc)' to 'Chamber of Commerce and Industry of Western Australia Limited'.

CLAUSE 7. SECTION 22 AMENDED

Clause 7(1)(a) updates the reference in section 22(1) to also include the new section 24B(2) that has been inserted.

Clause 7(1)(b) inserts section 22(1)(aa) to provide that an employee with at least five years of service (in lieu of seven years of service) on 1 April 2020 and whose employment is terminated up until the end of the COVID recovery period, will be eligible for a proportional payment that their period of service bears to 10 years.

Clause 7(2) updates the reference in section 22(2) to also include the new section 24B(2) that has been inserted.

Clause 7(3) inserts section 22(2A). Section 22(2A) provides a proportional benefit to the spouse, partner, dependent or deceased estate, for an employee who dies with at least five years of service on 1 April 2020 and up until the end of the COVID recovery period. This is consistent with the current section 22(2), with five years of service in lieu of seven years of service

CLAUSE 8. SECTION 23 AMENDED

Clause 8 inserts a new section 23(1A) so that the requirement for the Construction Industry Long Service Leave Payments Board to remove employees from the long service leave register and extinguish their entitlement to long service leave, does not apply for employees who have not maintained continuous service during the COVID recovery period, if they have achieved more than 880 days of service on 1 April 2020.

This amendment will ensure employees who have achieved five years of service, or those with at least four years of service who may achieve five years of service by the conclusion of the COVID recovery period, do not have their entitlements extinguished during the COVID recovery period, enabling them to access a long service leave benefit.

The period where extinguishing service does not apply commences on 1 April 2020 to align with the timing of other COVID-19 assistance packages such as the Commonwealth Government JobKeeper.

CLAUSE 9. SECTION 24A AMENDED

Clause 9 removes a redundant reference to a section that was deleted in 2006. It also amends the heading to add an apostrophe for grammatical reasons.

CLAUSE 10. SECTION 24B INSERTED

Clause 10 inserts section 24B, to provide that an employee with at least five years of service (in lieu of seven years of service) on 1 April 2020 up until the end of the COVID recovery period, and with the consent of his employer, can take advance long service leave in proportion that their period of service bears to 10 years.

The same requirements that apply to an employee with at least seven years of service are repeated in the new section 24B(3).

CLAUSE 11. SECTION 29 AMENDED

Clause 11 updates references in section 29 to include the new section 24B with respect to public holidays within a period of long service leave.

CLAUSE 12. SCHEDULE DIVISION 3 INSERTED

Clause 12 inserts Division 3, to incorporate transitional provisions.

The division establishes a pre-commencement period that is necessary to ensure employees are not disadvantaged by the timing of introducing the proposed assistance package into law. This relates to employees with more than 880 days of service on 1 April 2020 who have been removed from the long service leave register and whose entitlement to long service leave extinguished (or will be extinguished prior to assent day) during the pre-commencement period. These employees will be retrospectively registered and have their entitlements re-established.