



Submission to

Victorian Government
Department of Premier and Cabinet

*Long Service Leave Benefits Portability Scheme -
Regulations Exposure Draft and Regulatory Impact Statement*

Prepared by:

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I. About JobWatch

Job Watch Inc (JobWatch) is an employment rights community legal centre which is committed to improving the lives of workers, particularly the most vulnerable and disadvantaged. It is an independent, not-for-profit organisation which is a member of the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria which also aids Victorian, Queensland and Tasmanian workers about their rights at work. It is funded by the Victorian and Federal Governments, Office of the Fair Work Ombudsman and Victoria Legal Aid to do the following:

- a) provide information and referrals to Victorian, Tasmanian and Queensland workers via a free and confidential Telephone Information Service (TIS);
- b) engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other appropriate organisations;
- c) represent and advise vulnerable and disadvantaged workers; and
- d) conduct law reform work with a view to promoting workplace justice and equity for all workers.

Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our Telephone Information Service. To date we have collected over 200,000 callers' records with each record usually canvassing multiple workplace problems including, for example, contract negotiation, discrimination, bullying and unfair dismissal. Our database allows us to follow trends and report on our callers' experiences, including the workplace problems they face, and what remedies they may have available. JobWatch currently responds to over 12,000 calls per year.

JobWatch welcomes this opportunity to make a submission to the Department of Premier and Cabinet in relation to the *Long Service Benefits Portability Regulations Exposure Draft* and Regulatory Impact Statement.

II. Glossary

LSBP Act	<i>Long Service Benefits Portability Act 2018</i>
Interim Regulations	<i>Long Service Benefits Portability Interim Regulations 2019</i>
Proposed Regulations	<i>Long Service Benefits Portability Regulations Exposure Draft</i>
RIS	<i>Long Service Benefits Portability Regulations 2020 Regulatory Impact Statement</i>
SCHADS	<i>Social, Community, Home Care and Disability Services Industry Award 2010</i>
LSL Act	<i>Long Service Leave Act 2018 (Vic)</i>
LSL	Long service leave
CLC	Community legal centre

III. Summary

- 1) JobWatch is concerned that employees of CLCs currently covered by the “predominant activity” test in the Interim Regulations may no longer be covered under the Proposed Regulations because of uncertainty about SCHADS coverage.
- 2) JobWatch is concerned that levies paid for employees covered under the Interim Regulations will not be recoverable if those employees ceased to be covered under the Proposed Regulations.
- 3) JobWatch is satisfied that the amendment to reg 12(3) clarifies the requirement to pay levies in respect of employees covered by fair work instruments.
- 4) JobWatch is concerned about the impact of double-dipping under the LSL Act.
- 5) JobWatch is concerned about the impact of double-dipping under employment contracts that provide for LSL entitlements.
- 6) JobWatch notes uncertainty about whether reimbursements under reg 12(5) are expressed as pro-rata.
- 7) JobWatch notes the potential for disparities between amounts reimbursed under reg 12(5) and levies paid under the scheme.

IV. Comments on Proposed Regulations

A. Coverage of community legal centres

1) Award requirement

Schedule 1 of the LSBP Act provides that the “community service sector” is the sector in which “community service work” is performed.¹ Community service work is defined to include the provision of community legal services.² In JobWatch’s view, this would include work done by lawyers employed in CLCs.

However, the Proposed Regulations prescribe that employees are not employees for the purpose of the community services sector unless they are “employed under” one of three modern awards, including SCHADS.³

Many CLCs refer to SCHADS in setting their terms and conditions of employment as a matter of common practice. It may be arguable that this is sufficient to satisfy the requirement that employees be “employed under” SCHADS. However, the prevailing view is that some CLC employees, particularly lawyers, are not *covered* by SCHADS,⁴ and may not be employees for the purpose of the Proposed Regulations, despite clearly engaging in community service work.

JobWatch believes this is counter to the purpose of the scheme, and that the “predominant activity” test in reg 10(3) of the Interim Regulations is to be preferred, subject to clarification of the test as proposed in the RIS at 4.3 as Option 1.⁵

2) Levies paid under Interim Regulations

JobWatch is also concerned that CLCs that are currently registered for the scheme, and liable to pay levies in respect of employees not covered by SCHADS, may not be able to recover any levies already paid if these employees cease to be covered by the scheme when the permanent regulations come into force.

¹ LSBP Act sch 1 cl 1.

² Ibid cl 2.

³ Proposed Regulations reg 10(1)(a).

⁴ E.g., <https://www.liv.asn.au/Professional-Practice/Practice-Management/Running-Your-Practice/Awards-and-Salaries-for-Your-Practice>.

⁵ RIS p 37.

B. Double-dipping in the community service sector

1) Payment of levies

In JobWatch's view, the Interim Regulations as currently drafted do not make it clear whether levies are payable where an employee is covered by a "fair work instrument" (FWI) as defined in the LSBP Act⁶ and Interim Regulations.⁷

In JobWatch's view, the amended reg. 12(3) in the Proposed Regulations adequately addresses this ambiguity. It is now clear that levies are payable in respect of all covered employees, and that employers that are required to pay amounts under a FWI in respect of a period of service also covered by the LSBP Act can seek reimbursement of those amounts under the scheme.

2) State legislation

The RIS acknowledges that the definitions of a FWI in the LSBP Act, the Interim Regulations and the Proposed Regulations do not extend to State legislation, and that therefore the double dipping provisions in those instruments do not prevent employees from claiming concurrent entitlements under both the LSBP Act and State LSL legislation, including the LSL Act, nor provide for reimbursement of amounts paid by employers under State LSL laws.⁸

The RIS notes that correcting this problem would require amendment of the LSBP Act and further regulatory amendment, which cannot occur until 2021 at the earliest.⁹ Meanwhile, employers in the community service sector remain exposed to double-dipping.

In JobWatch's view, ensuring that community service sector employers are not required to pay levies without the possibility of reimbursement in respect of employees who become entitled to LSL under the LSL Act requires the urgent attention of Parliament.

⁶ LSBP Act s 3.

⁷ Interim Regulations reg 12(7).

⁸ RIS p 30.

⁹ Ibid.

3) *Contracts*

The issue of double-dipping under common-law contracts of employment that provide for LSL entitlements is not dealt with in the LSBP Act, the Interim Regulations, the Proposed Regulations or the RIS.

However, it is clear that the definitions of a FWI in the LSBP Act,¹⁰ the Interim Regulations and the Proposed Regulations¹¹ do not extend to such contracts, and that therefore the double dipping provisions in those instruments do not prevent employees from claiming concurrent entitlements under both the LSBP Act and such contracts, nor provide for reimbursement of amounts paid under such contracts.

At common law, employers can normally appropriate (or “set off”) contractual entitlements against legislative entitlements if these are for the same purpose.¹² In other words, legislative obligations may be satisfied by contractual payments for the same purpose, without giving rise to two separate obligations.

This principle may support an argument that payment of a contractual entitlement to LSL is in satisfaction of an underlying legislative LSL instrument, and therefore paid “under” that instrument. If the underlying instrument were a FWI, the employer may be able to seek reimbursement under the scheme. If the underlying instrument were the LSL Act, the employer may be able to seek reimbursement only after the necessary legislative and regulatory amendments were complete, but would remain exposed to double-dipping in the meantime.

However, in JobWatch’s view, this argument is not certain to succeed, and the LSBP Act and Proposed Regulations should be amended to expressly provide for reimbursement of amounts paid to employees under contracts for LSL who are also covered by the scheme.

¹⁰ LSBP Act s 3.

¹¹ Interim Regulations reg 12(7); Proposed Regulations reg 12(7).

¹² See, eg, *Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate* [2015] FCAFC 99.

C. Reimbursement

1) *Pro-rata reimbursement*

Both the Interim Regulations and the Proposed Regulations provide that where an employer “is required to pay the worker for long service leave under a fair work instrument in relation to the same, or part of the same, service period”, the employer may be reimbursed for “any amount paid under the fair work instrument”.¹³

Presumably this means that the reimbursement would be pro-rata, according to the service period covered by the scheme as a proportion of the entire service period in respect of which the payment was made. In JobWatch’s view it is unlikely that the intention of the scheme is to reimburse the full amounts paid under FWIs in relation to service periods only partly covered by the scheme, and this should be clarified in the Proposed Regulations.

2) *Disparity between reimbursements and levies paid*

Both the Interim Regulations and the Proposed Regulations provide that reimbursements are to be made for “any amount paid under the fair work instrument”,¹⁴ not levies paid. In JobWatch’s view, this creates a potential anomaly where reimbursements may be significantly greater or less than levies paid, depending on the LSL provisions in a given FWI, and may result in windfalls or shortfalls for employers in the community service sector, or for the scheme itself.

¹³ Interim Regulations reg 12(5); Proposed Regulations reg 12(5).

¹⁴ Ibid.

V. Comments on Regulatory Impact Statement

A. Reimbursement of levies

The RIS makes several references to “reimbursement from the Authority for any levy paid”¹⁵ in relation to proposed legislative and regulatory amendments to address residual double-dipping issues in the community service sector.

However, the Interim Regulations and Draft Regulation currently provide only for reimbursement of “any amount paid under the fair work instrument”,¹⁶ not of levies paid.

In JobWatch’s view, clarification is needed about whether there is an intention to introduce provision for reimbursement of levies paid as part of proposed measures to rectify residual double-dipping issues.

B. Modern awards

The RIS makes several references to LSL entitlements under modern awards.¹⁷ JobWatch notes that s 139 of the *Fair Work Act 2009* sets out an exhaustive list of the matters that may be dealt with by modern awards, which does not include long service leave.

JobWatch thanks the Department of Premier and Cabinet for considering our submission. Please contact Zana Bytheway or John O’Hagan on (03) 9662 9458 if you have any queries.

Yours sincerely



Job Watch Inc
Per: John O’Hagan

¹⁵ RIS pp 12, 39, 68, 72, 76.

¹⁶ Interim Regulations reg 12(5); Proposed Regulations reg 12(5).

¹⁷ RIS pp 4, 29, 30, 39.