

**ACTU Submission to  
Parliament of Australia  
Senate Standing Committee on Education and  
Employment**

**THE FEASIBILITY OF, AND OPTIONS FOR, CREATING A  
NATIONAL LONG SERVICE STANDARD, AND THE  
PORTABILITY OF LONG SERVICE AND OTHER  
ENTITLEMENTS**

11 December 2015

## Introduction

1. The Australian Council of Trade Unions ('ACTU') is pleased to make a submission to this Inquiry. The ACTU is the peak body representing almost 2 million working Australians. The ACTU and its affiliated unions have a long and proud history of representing workers' industrial and legal rights and advocating for improvements to legislation to protect these rights.

2. We note the terms of reference require this Inquiry to investigate:

*"The feasibility of, and options for, creating a national long service standard, and the portability of long service and other entitlements, with particular reference to:*

- a. *the number of Australians in insecure work;*
- b. *the extent and nature of labour market mobility;*
- c. *the objectives of portable long service leave schemes, and the key components that might apply;*
- d. *which sectors, industries or occupations may, or may not, benefit from such schemes;*
- e. *the operation of a portable long service scheme, including:*
  - i. *how and by whom such schemes might be run,*
  - ii. *how such schemes could be organised, be it occupational, industrial or other,*
  - iii. *the appropriate role for the Commonwealth Government in facilitating portable long service leave schemes,*
  - iv. *the impact of varying state and territory long service leave arrangements on a potential national long service scheme administered by the Commonwealth;*
  - v. *the capacity to operate such schemes within or across jurisdictions, including recognition of service; and*

f. *any other related matters.*<sup>1</sup>

3. Our submission addresses the Committee's terms of reference below, drawing on our submissions to previous relevant State and Federal inquiries<sup>2</sup>. The ACTU supports the establishment of a national long service leave ('LSL') standard and a national long service leave portability scheme. As we discuss below, a national portable scheme is necessary to ensure equal access to long service leave, particularly in the face of the dramatic increase in the number of Australians in insecure work.
4. Below we discuss the nature and extent of insecure work and labour mobility in Australia before addressing our preferred national long service leave standard and some options for the form and operation of a national long service leave scheme. A summary of our recommendations is included at the end of this submission.

### The number of Australians in insecure work

5. The number of Australians in insecure work has risen dramatically in recent decades. In 2011, the ACTU commissioned an independent inquiry into insecure work by a panel of esteemed experts chaired by Brian Howe AO (the 'Howe Inquiry'). The inquiry conducted a wide-ranging survey of the relevant academic literature, conducted 25 days of public hearings in 22 towns and cities and considered over 550 public submissions. The Howe Inquiry's report, *Lives on Hold: Unlocking the Potential of Australia's Workforce* (2012) is the most extensive assessment of insecure work in Australia to date. The Inquiry defined insecure work as:

*"...poor quality work that provides workers with little economic security and little control over their working lives. The characteristics of these jobs can include unpredictable and fluctuating pay; inferior rights and entitlements; limited or no access to paid leave; irregular and unpredictable working hours; a lack of*

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<sup>1</sup> See Australian Parliament, Senate Standing Committees on Education and Employment, The feasibility of, and options for, creating a national long service standard, and the portability of long service and other entitlements, Terms of Reference, available at < [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Education\\_and\\_Employment/LSL\\_Portability/Terms\\_of\\_Reference](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/LSL_Portability/Terms_of_Reference)>.

<sup>2</sup> See ACTU Submission to the Productivity Commission's Inquiry into the Workplace Relations Framework, March 2015; ACTU Submission to the Parliament of Victoria, Economic, Education, Jobs and Skills Committee Inquiry into Portability of Long Service Leave Entitlements, August 2015, ACTU Submission to the Parliament of Victoria Inquiry into Labour Hire Industry and Insecure Work, December 2015, ACTU Preliminary Submission to the Productivity Commission Inquiry into Geographical Mobility, August 2013.

*security and/or uncertainty over the length of the job; and a lack of any say at work over wages, conditions and work organisation. These challenges are most often associated with non-permanent forms of employment like casual work, fixed-term contracts, independent contracting and labour hire – all of which are growing."*<sup>3</sup>

6. The Inquiry found that the growth of these jobs had to an extent taken place "under the radar" with "40% of the workforce in non-permanent forms of employment, and... a quarter of employees with no entitlement to sick leave or paid leave."<sup>4</sup> The Inquiry noted that the extent of casual employment has grown significantly in recent decades, from 15.8% in 1984 to around a quarter of all employees since then.<sup>5</sup>
7. The number of casual employees in Australia, for example, almost tripled between 1982 and 1999, rising from just below 700,000 to almost 2 million.<sup>6</sup> Casual density, the proportion of casual jobs out of all jobs, grew from 15.8 percent in 1984 to a peak of 27 percent in 2000-2003, before becoming relatively stable at about 24 per cent between 2005 to 2014.<sup>7</sup> This relative stabilisation was thought to be explained partly by the growth of other forms of insecure work, such as fixed-term contracts, labour hire and independent contracting, which have given employers other options for minimising costs and shifting risks on to their employees.<sup>8</sup> The latest ABS statistics, released in November 2015, show that casual density has continued to increase again, rising from 23.8% of all workers in August 2013 to 24.1% at August 2014.<sup>9</sup>
8. As Figure 1 shows, whilst casualisation exists across all industries, casual density is particularly concentrated in some areas such as accommodation and food services (65.4%), agriculture forestry and fishing (39.9%) and retail trade (39.3%).

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<sup>3</sup> See *Lives on Hold: Unlocking the Potential of Australia's Workforce* (2012), p14.

<sup>4</sup> *Ibid* p17.

<sup>5</sup> *Ibid*. NB: the ABS uses employment without leave entitlements as its primary measure of casual employment: See Part-Time and Casual Employment (Feature Article), *Australian Labour Market Statistics*, cat 6105.0, July 2013.

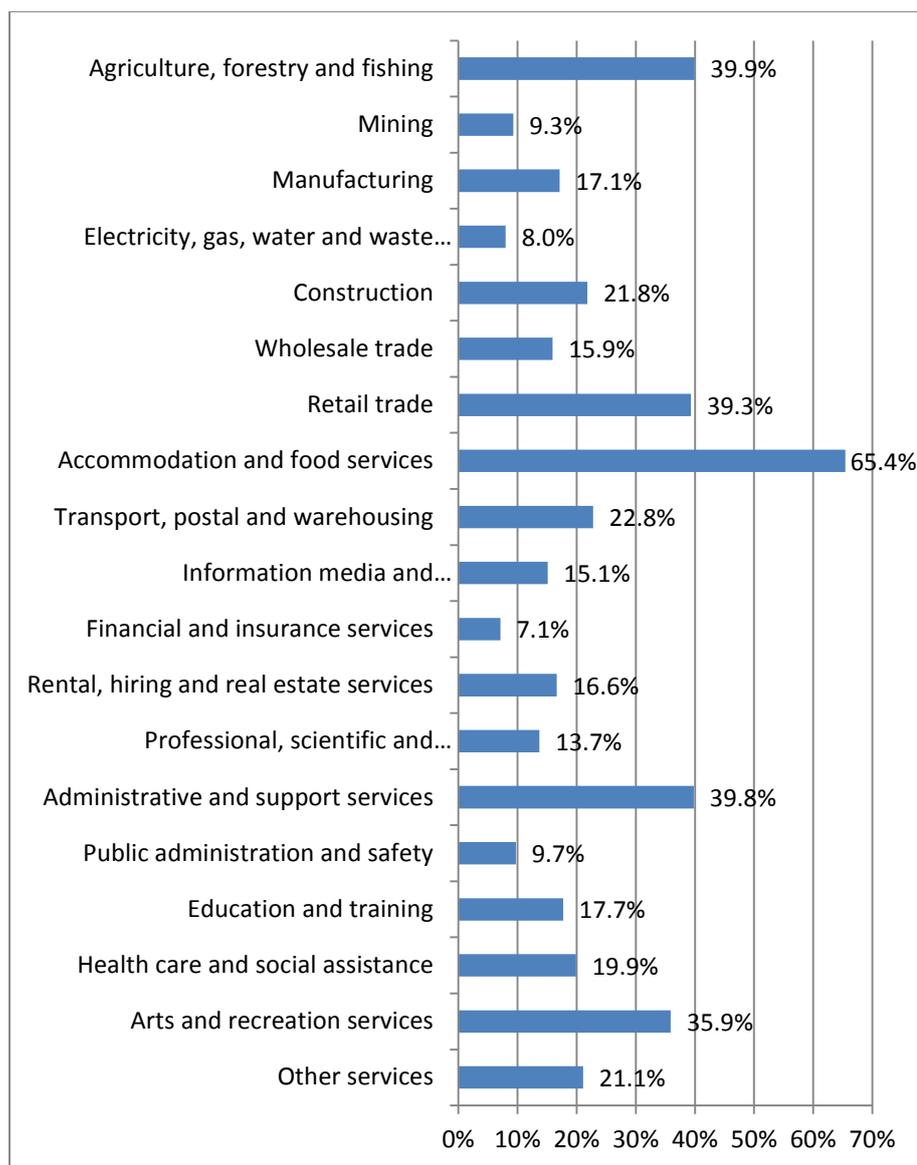
<sup>6</sup> Campbell, I. 'The Spreading Net: Age and Gender in the Process of Casualisation in Australia' in *Journal of Australian Political Economy*, issue 45, June 2000, pp68-99 at p68.

<sup>7</sup> Research and analysis by the Centre for Workforce Futures, Macquarie University, commissioned by ACTU in 2015 based on: Simpson, Dawkins and Madden (1997) 'Casual employment in Australia: incidence and determinants' *Australian Economic Papers* 36 (69) pp194-204 for data 1984-1987, and based on ABS, *Employment Benefits, Australia*, cat. no. 6334.0; ABS, *Weekly Earnings of Employees (Distribution)*, cat. no. 6310.0, 1988-1997; ABS, *Employee Earnings, Benefits and Trade Union Membership*, cat. no. 6310.0, 1998-2013; ABS *Trade Union Members, Australia*, cat. no. 6325.0, 1996.

<sup>8</sup> *Lives on Hold*, p10 and p14.

<sup>9</sup> See ABS Cat 6333, November 2015.

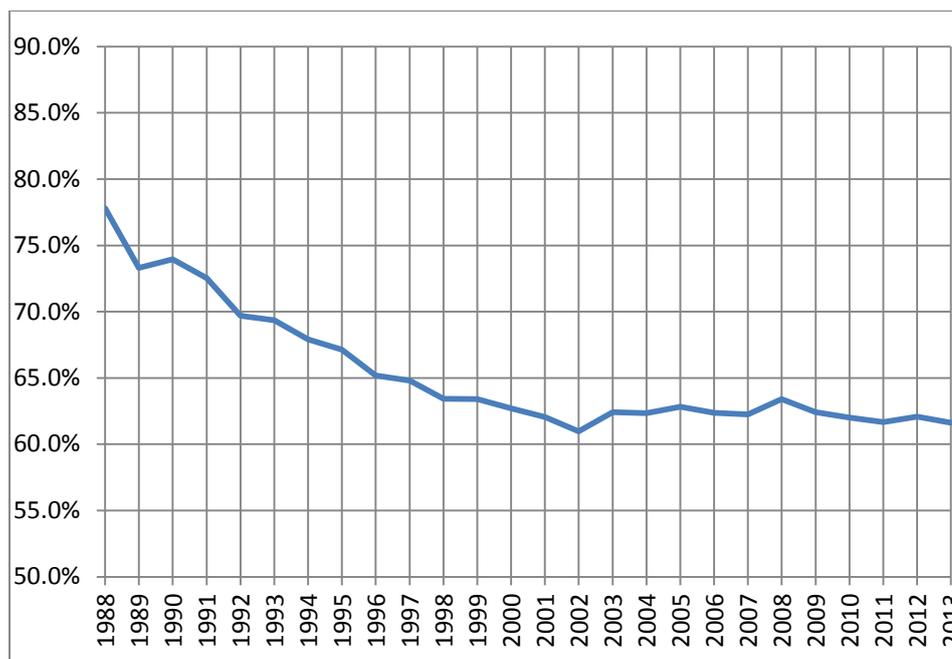
Figure 1: Casual employment density of industries, 2013



Source: ABS Employee Earnings, Benefits and Trade Union Membership, cat. no. 6310, 2013.

9. The rise in casual employment coincides with an ongoing decline in the level of full-time permanent employment as shown in Figure 2.

Figure 2: Full-time permanent employment, 1988-2013



Sources: ABS, *Weekly Earnings of Employees (Distribution)*, cat. no. 6310.0, 1988-1997; ABS, *Employee Earnings, Benefits and Trade Union Membership*, cat. no. 6310.0, 1998-2013; ABS *Trade Union Members, Australia*, cat. no. 6325.0, 1996.

10. According to the ABS, 9% of employed persons were independent contractors in their main job in August 2014.<sup>10</sup> The Howe Inquiry estimated that approximately 40% of all independent contractors are in fact 'dependent contractors' with no authority over their own work and a significant number engaged under sham contracting arrangements, which misrepresented or disguised employment as independent contracting.<sup>11</sup> Four percent of all employees were working on a fixed-term contract in August 2014, with many more doing so in the public sector (9.8%) than the private sector (2.6%) and as many as 14.6% doing so in the education and training industry, where fixed term employment is most concentrated.<sup>12</sup>

11. Labour hire workers are estimated to constitute between 2% and 4% of employees.<sup>13</sup> Insecure workers also include out-workers, particularly in the textile, clothing and footwear industry who are often amongst the most insecure, vulnerable and marginalised workers in Australia. The complex and rapidly changing arrangements for contracting for

<sup>10</sup> Ibid.

<sup>11</sup> See *Lives on Hold*, p16.

<sup>12</sup> See ABS, *Characteristics of Employment, Australia, August 2014* cat 6333.0, data cube 33.

<sup>13</sup> See *Lives on Hold*, p16.

the performance of work in the industry makes the true number of outworkers difficult to estimate reliably.

12. Insecure workers also include those experiencing working time insecurity due to irregular, excessive or insufficient hours and/or fluctuating pay and income. Such workers include permanent employees. Excessive or insufficient hours constitute a form of work insecurity by preventing workers from exercising control over their working hours, with flow on effects on work/life balance, family and social life as do irregular hours and fluctuating pay and income. ABS statistics from 2011 show 15.9% of all employed persons report usually working 50 hours or more a week and 21% of all workers would prefer to work fewer hours.<sup>14</sup> According to one study, 60% of those working excessive hours would prefer fewer hours<sup>15</sup>. In 2011, 25% of employees experience earnings or income that fluctuates between pay periods, including 19% of employees working full-time hours and 41% of those working part-time hours.<sup>16</sup>

13. We consider there would be some value in the ABS investigating how it might develop an insecure work indicator. Such an indicator could show the percentage of all workers who are in insecure work using objective measures consisting of:

- a. Casual employees,
- b. Independent contractors who are in fact dependent contractors or in sham contracting arrangements;
- c. Fixed term or fixed task employees;
- d. Labour hire workers who are not already accounted for in the casual employment figures (and for the ABS to publish the extent to which labour hire workers are casual);
- e. Permanent workers with irregular, insufficient or excessive hours and/ or fluctuating pay or income. That is, permanent workers who can't control their hours, including those who can't work enough or work excessive or irregular hours; and

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<sup>14</sup> *Lives on Hold*, p17.

<sup>15</sup> Research by the Workplace Research Centre, Sydney University, as quoted in *Lives on Hold*, p17.

<sup>16</sup> *Lives on Hold*, p17.

- f. Outworkers not otherwise accounted for above, including outworkers who subcontract to other workers.

14. The above should include better estimates of labour hire workers as it is likely that, using current methods, the ABS is underestimating the number of these workers.<sup>17</sup> An additional survey question may be required to capture sham contractors.

15. Care must also be taken not to underestimate the extent of outworkers. Consultation with relevant stakeholders and in particular the TCFUA would be essential to reaching a view on how this could be best be accomplished.

16. Ideally, such an index would also capture earnings disparities and allow the number and proportion of insecure workers to be broken down by industry, location, gender and age.

### The extent and nature of labour market mobility

17. The term 'Labour market mobility' or 'labour mobility' generally refers to the movement of workers within the labour market, whether it be between jobs or occupations or between geographical regions. Whilst labour mobility has the potential to match suitable jobs that fit workers' preferences and allow for the accommodation of economic shocks and structural change in the economy, this can come at significant cost to workers as it is widely recognised that job stability provides significant economic security and benefit to workers.<sup>18</sup> Often, location is an insurmountable barrier to labour mobility. Labour mobility can also disaffect firms through the loss of experienced workers.

18. According to the Australian Workplace Relations Study ('AWRS') of 2013-2014, the mean employee tenure for all employees is 5.76 years and 5.62 years for part-time employees.<sup>19</sup> A feature of the increased casualisation of the workforce is that many workers are working as casual employees on a long-term basis. Hence, casual employment tenure increased to 4.09 years as at the same date. Mean employment tenure by employment status and industry is set out in table 1 below.

#### Table 1: Mean Employment Tenure – Years

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<sup>17</sup> See *Lives on Hold*, p16.

<sup>18</sup> See D'Arcy, Gustafsson et al, Economic Analysis Department, Labour Market Turnover and Mobility' in *Reserve Bank of Australia Bulletin* December 2012 Quarter, p1.

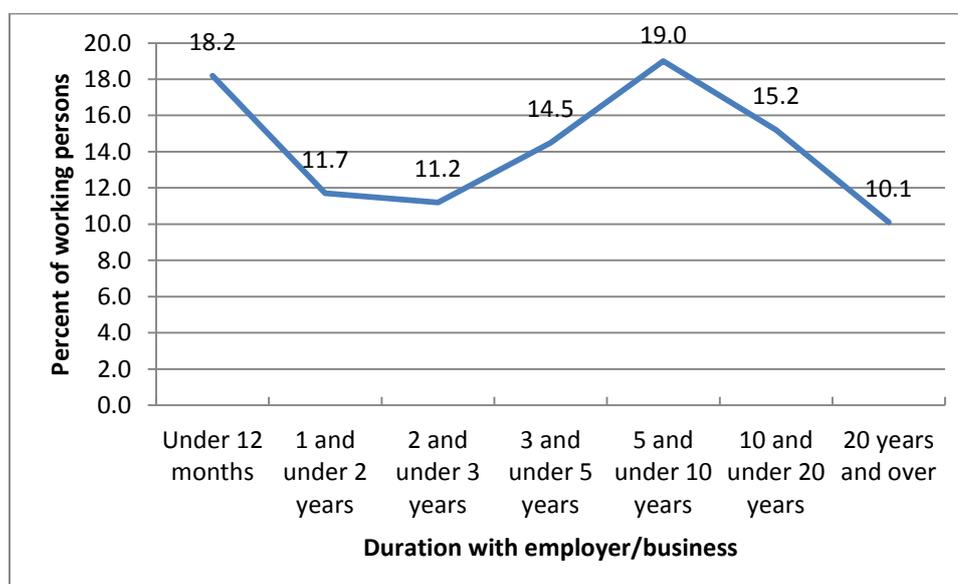
<sup>19</sup> Australian Workplace Relations Study ('AWRS') 2013-2014 as analysed by the Centre for Workforce Futures, Macquarie University for ACTU.

Category	Total	Part-time only	Casual
Male	6.1	5.5	4.2
Female	5.5	5.6	4.0
Permanent	6.1	6.5	
Casual	4.1	4.0	
Full-time	5.9		4.9
Part-time	5.6		4.0
Mining	3.7	3.6	2.1
Manufacturing	7.6	7.7	5.6
Electricity, Gas, Water and Waste Services	5.0	6.0	4.1
Construction	4.8	4.2	4.1
Wholesale Trade	6.6	6.8	7.7
Retail Trade	6.0	5.0	4.1
Accommodation and Food Services	5.8	5.3	2.8
Transport, Postal and Warehousing	5.8	4.3	2.4
Information Media and Telecommunications	5.2	6.4	2.0
Financial and Insurance Services	7.7	7.1	5.6
Rental, Hiring and Real Estate Services	5.1	5.4	1.9
Professional, Scientific and Technical Services	4.2	5.1	4.3
Administrative and Support Services	4.4	5.3	3.9
Public Administration and Safety	7.4	5.8	4.3
Education and Training	6.1	6.1	5.4
Health Care and Social Assistance	5.3	5.6	4.3
Arts and Recreation Services	6.5	5.3	4.3
Other Services	5.2	5.2	7.5
<b>Total</b>	<b>5.8</b>	<b>5.6</b>	<b>4.1</b>

Source: Australian Workplace Relations Study ('AWRS') 2013-2014 as analysed by the Centre for Workforce Futures, Macquarie University for ACTU.

19. The latest ABS statistics in Figure 4 below indicate that, as at February 2013, 18.2% of persons who were working had worked for their current employer/business for under 12 months. 9.2% had changed employer/business in the last 12 months, whilst 19.0% had been with their current employer for 5 or under years and 15.2% for 10 and under years.<sup>20</sup>

Figure 4: Duration with employer/business - proportion of all working persons, Feb 2013



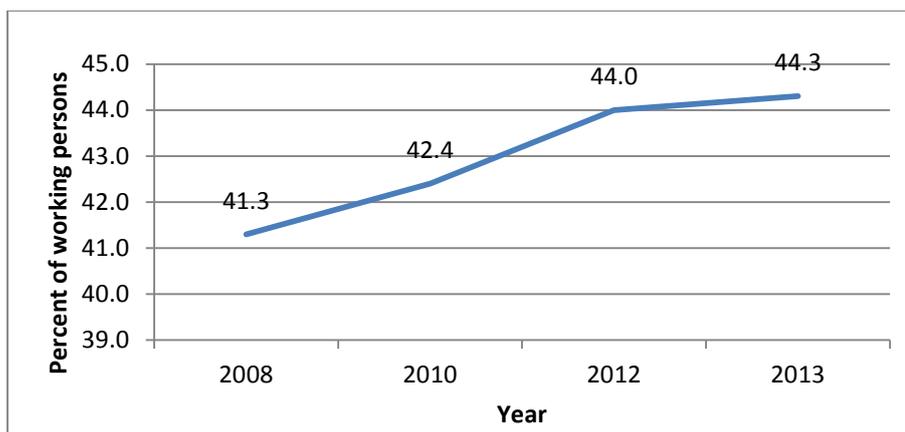
Source: ABS, Labour Mobility, Australia, February 2013, cat 6209.0.

20. Figure 5 below shows that the duration of employment increased between 2008 and 2013, with the proportion of persons working with their current employer/business for 5 years or more increasing from 41.3% in 2008 to 44.3% in 2013.<sup>21</sup>

Figure 5: Proportion of working persons working with current employer/business for 5 years or more, percent 2008-2013

<sup>20</sup> See ABS, Labour Mobility, Australia, February 2013, cat 6209.0.

<sup>21</sup> Ibid.



Source: ABS, *Labour Mobility, Australia, February 2013, cat 6209.0.*

21. 49.1% of those who ceased their last job of under 12 months' duration did so involuntarily and 38.3% of those who ceased their last job of less than 5 years' duration did so involuntarily.<sup>22</sup> Job turnover is very unevenly distributed amongst workers. As researchers at the Reserve Bank of Australia noted in 2012:

*"While on average one in five workers experiences a change in their employment situation each year, individuals' experiences vary a lot: some workers change their job situation quite often while a relatively large group of workers change jobs very rarely. In part this reflects differences in turnover by age, gender and across industries, but it also reflects differences in individuals' strength of attachment to employment."*<sup>23</sup>

22. The researchers further note that that the share of workers with long tenure has increased over recent decades, suggesting that job stability on average may have actually risen despite increases in casual employment.<sup>24</sup> This suggests an increased segmentation of the labour market with many workers structurally prevented from accessing long service leave. As Welters *et al* and others have noted, many casual employees become trapped in casual employment that does not lead to permanent employment.<sup>25</sup> Those with the highest job tenure tend to be in particular occupation

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<sup>22</sup> Ibid.

<sup>23</sup> See D'Arcy, Gustafsson *et al*, Economic Analysis Department, 'Labour Market Turnover and Mobility' in *Reserve Bank of Australia Bulletin*, December 2012 Quarter, p2.

Ibid, p2-3.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

groups and higher earnings levels such as managers and professionals.<sup>26</sup> The Chair of the Howe Inquiry described this segmentation more broadly in terms of an emerging divide between 'core' and 'peripheral' workers, with the former accessing standard entitlements (like LSL) and the latter structurally denied such entitlements:

*"Over the past few decades, a new divide has opened in the Australian workforce. No longer between the blue-collar and white-collar worker, it is between those in the "core" of the workforce and those on the "periphery".*

*Those in the core are likely to be in full-time employment, either permanently within organisations, in management positions, or possessing skills for which there is steady demand and for which they can charge a premium. They are likely to enjoy sick leave, paid holidays and in many cases parental leave above the government's universal scheme.*

*For them, flexibility means the chance to work in a variety of industries, to work overseas, to earn good money freelancing or in a secure part-time arrangement. Periods of unemployment are likely to be short or voluntary.*

*Below and around this group are those on the periphery. They are employed on various insecure arrangements, casual, contract or through labour hire companies, on low wages and with far fewer if any benefits.*

*Many do not know what hours they will work from week to week, and often juggle multiple jobs to attempt to earn what they need.*

*If their skills are low, or outdated, they are not offered training through work. They shift between periods of unemployment and underemployment that destroy their ability to save money.*

*Their work is not a "career"; it is a series of unrelated temporary positions that they need to pay rent, bills and food.*

*For them, flexibility is not knowing when and where they will work, facing the risk of being laid off with no warning, and being required to fit family responsibilities around unpredictable periods of work."<sup>27</sup>*

23. Australians' life expectancy and overall workforce participation is increasing. Hence Australians spend a longer proportion of their lives in employment, making the necessity

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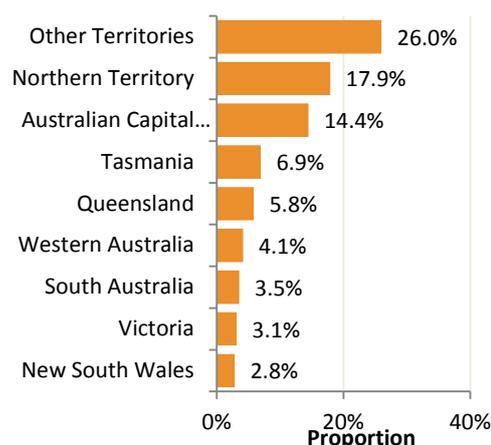
<sup>26</sup> the occupational groups with the highest proportion of people who had worked with their current employer/business for 10 years or more as at February 2013 were Managers (38%), Professionals (29%); and Clerical and administrative workers (28%): see ABS, *Labour Mobility, Australia*, February 2013, cat 6209.0.

<sup>27</sup> See *Lives on Hold*, p5.

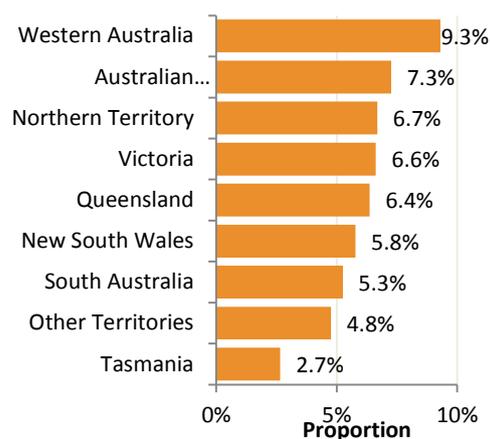
for periodic extended leave only more important. The expected lifetime number of years in employment increased from 28.7 in 2001 to 31.9 in 2011 for females and 35.1 in 2001 to 36.8 in 2011 for males.<sup>28</sup> Retirement ages are also expected to be protracted further.

24. In terms of geographical mobility, the latest census data (from 2011) shows that 89.5% of people resided in the same state in 2011 as they had in 2006.<sup>29</sup> The census does not record individuals' reasons for moving and not just employed persons so the statistics do not pertain exclusively to labour mobility. International migration, temporary migrant workers, fly-in-fly-out and other long-distance and labour on demand commuters also affect labour mobility.<sup>30</sup> The levels of international and interstate migration vary significantly between the states and territories. For example, 2.7% of Tasmanian responders were overseas five years ago, compared to 9.3% of those in Western Australia.

*Figure 6: Proportion of population that was interstate five years ago*



*Figure 7: Proportion of population that was overseas five years ago*



Source: ACTU calculations based on ABS Census 2011

25. Labour mobility and work insecurity have the potential to undermine workers' potential to accrue long service leave.<sup>31</sup> Extended casual employment, labour hire and other temporary labour have the potential to be used by employers to prevent costs associated including redundancy pay and long service leave. As the Howe Inquiry found, a key driver

<sup>28</sup> See McKell et al (2013) at p27.

<sup>29</sup> ACTU Preliminary Submission to the Productivity Commission Inquiry into Geographical Mobility, 23 August 2013, p1, based on ABS Census 2011. The Census statistics referred to exclude those whose place of residence 5 years ago is listed as 'not stated' or 'not applicable'.

<sup>30</sup> See Productivity Commission, *Geographic Labour Mobility: Research Report*, April 2014, available at <<http://www.pc.gov.au/inquiries/completed/labour-mobility/report/labour-mobility.pdf>>.

<sup>31</sup> Ibid.

of the growth in insecure work has been the emergence of a business model that shifts the risks associated with work from the employer to the employee and minimises labour costs.<sup>32</sup> A more broadly based system of long service leave accrual is necessary in order to ensure equal access. Some options are discussed below.

### The objectives of portable long service leave schemes, the key components that might apply, and the operation of a portable long service leave scheme

#### *A national standard for long service leave*

26. There is little doubt that long service leave performs an important function as part of the framework of worker entitlements that help maintain a healthy balance between work and private life. Long Service Leave is associated with three main purposes:

- a. As a means to enable employees an extended period of rest after an extended period of work to recover their energies and return to work renewed and reinvigorated;
- b. As a reward for long and faithful service; and
- c. As an incentive to reduce labour turnover.

27. The colony of Victoria was the first jurisdiction to implement legislation providing for long service leave to enable officers to 'return home' to Europe at a time when the only travel option was sailing ship. Under *An Act to Regulate the Civil Service 1862 (Vic)*, the Governor in Council could grant up to twelve months' leave on half salary to any Civil Service officer, provided that the officer had completed ten years' continuous service.

28. Barely ten years later, Victoria's Royal Commission on the Civil Service recommended provision of six months leave on full pay after 15 years' service (with a further six months unpaid on request) for the sole purpose of recreation. The following year, Victorian legislation provided this quantum of leave for civil servants after 10 years' service. Other jurisdictions soon followed suit, so that by Federation some form of long service leave entitlement for civil servants was common across most of the colonies.

29. During the Second World War, entitlements to LSL began to spread to groups of workers outside the public service by decision of industrial tribunals at state and federal level. In

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<sup>32</sup> *Lives on Hold*, p10.

the 1950s, LSL entitlements continued to spread and by 1960 a LSL entitlement under law existed in all states and territories, albeit with some variation in the quantum of leave and qualifying period.

30. Whereas the initial provision of long leave was to enable civil servants to return home to Europe after extended service in the colonies, a century later the entitlement was recognised and accepted simply as an entitlement to rest and an opportunity to refresh after an extended period of work.
31. Notably of course, in the Australian labour market of the mid-twentieth century, it was predominantly men who worked for wages; women who worked were entitled to a fraction of the male minimum rate and typically received a correspondingly fractional wage, and most left the workforce upon marriage or when children arrived. The single-income family was the norm and the norm in most industries was for long, and often life-long, service with a single employer.
32. The contemporary Australian labour market is vastly different from that of fifty years ago. The proportion of women in the labour force has risen sharply; two-income families outnumber single-income families; the share of part-time in total employment has risen dramatically; casual and fixed-term employment is widespread; the digital age and globalisation has seen whole skill sets become obsolete, old jobs disappear, and life-long learning has replaced the old paradigm of school – work – retirement.
33. The essential rationale for long service leave – the entitlement to an extended period of rest and refreshment after many years at work – is not confined to workers serving a single employer. The existence of the entitlement has not apparently reduced labour turnover (one of the ostensible justifications for it in distant times) – indeed it may have hastened it to the extent that some employers terminate staff prior to completion of qualifying periods, with a view to cutting costs.
34. Over the past half century, initially in the coal mining and later in building and construction and a limited number of other sectors, the inherently discontinuous nature of employment and the high probability of workers in the industry moving from employer to employer saw the inception of portable long service leave provisions in certain industries. In recent years, portable LSL provisions have been extended to contract cleaners (in the ACT, Queensland and NSW) and the community and security sectors (ACT), with eligibility extended to some casual workers and apprentices and removal of continuity of service requirement in the black coal mining industry.

35. It is time for portability of LSL to be extended generally, reflecting the inherent and emerging nature of the employment relationship in today's labour market.

36. The *Fair Work Act 2009 (Cth)* ('FW Act') recognises that LSL is part of the National Employment Standards ('NES') and further anticipates that in due course an appropriate NES standard will be formulated and implemented. The Explanatory Memorandum accompanying the *Fair Work Bill 2008* explains the intent as follows:

*"This Division sets out the entitlement to long service leave for national system employees.*

*This entitlement is a transitional entitlement, pending development of a uniform, national long service leave standard with the States and Territories.*

*This Division preserves long service leave entitlements in pre-modernised awards (referred to as applicable award-derived long service leave terms).*

*If an employee does not have applicable award-derived long service leave terms, any entitlement to long service leave will be derived from State or Territory long service leave legislation (subject to its modification or exclusion by certain industrial instruments)."*<sup>33</sup>

37. The transitional position adopted in respect of the NES reflects the complexities associated with the regulation of LSL throughout Australia. There are differences in the minimum level of entitlement to LSL under the different schemes in existence, reflecting the fact that, historically, LSL entitlements have been contained in State and Territory legislation, State and Commonwealth industrial awards and Commonwealth legislation. Table 2 below summarises the entitlements contained in the statute-based schemes.

38. A further layer of complexity is added by the operation of the portable LSL schemes applying to the building and construction, coal mining, security<sup>34</sup> and contract cleaner<sup>35</sup> industries. These schemes operate on an entirely different basis to the traditional statutory LSL schemes, in that they recognise service with (potentially) multiple employers allowing employees to accrue an entitlement based on service in an industry or sector. Clearly, the portable schemes have been established to meet a certain need or

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<sup>33</sup> *Fair Work Bill 2008 (Cth)* Explanatory Memorandum at paragraphs 436 - 439.

<sup>34</sup> Applies only to the ACT.

<sup>35</sup> Applies in NSW, QLD and ACT.

set of circumstances that any NES based standard should be careful not compromise or undermine. Indeed, as we discuss below, there is a serious question as to whether a national portable LSL scheme is the logical next step in the evolution of LSL, given the growth of casual, part-time and intermittent employment arrangements in the Australian economy<sup>36</sup> and the high level of employee mobility in particular industries.<sup>37</sup> Table 3 summarises the provisions of current portable LSL schemes.

*Table 2: Features of Statutory Long Service Leave Schemes*

JURISDICTION	KEY LEGISLATION	ENTITLEMENT
NSW	<i>Long Service Leave Act 1955</i>	2 months after 10 years' service. Then 1 month leave for each subsequent 5 years' service.
NSW	<i>Long Service Leave (Metalliferous Mining Industry) Act 1963 No 48</i>	3 months after each 10 years' service.
VIC	<i>Long Service Leave Act 1992</i>	8.67 weeks after 10 years' service. Then 4.33 weeks after each additional 5 years' service.
QLD	<i>Industrial Relations Act 1999</i>	8.67 weeks after 10 years' service. Then further leave after each additional 5 years' service.
SA	<i>Long Service Leave Act 1987</i>	13 weeks leave after 10 years' service. Then 1.3 weeks leave for each subsequent year.
WA	<i>Long Service Leave Act 1958</i>	8.67 weeks leave after 10 years' service. Then 4.33 weeks leave after additional 5 years' service.

<sup>36</sup> See Markey, Parr, O'Neill et al, *The Case for a National Portable Long Service Leave Scheme in Australia*, McKell Institute, 2013 at p23.

<sup>37</sup> Markey, et al (2013) at p10.

TAS	<i>Long Service Leave Act 1976</i>	8.67 weeks leave after 10 years' service. Then 4.33 weeks leave for each additional 5 years employment.
NT	<i>Long Service Leave Act 1981</i>	13 weeks leave after 10 years' service. Then 6.5 weeks after each additional 5 years' service.
ACT	<i>Long Service Leave Act 1976</i>	0.2 months leave for each year of service, with leave available to be taken after 7 years' service.
Commonwealth	<i>Long Service Leave (Commonwealth Employees) Act 1976</i>	3 months after 10 years' service, pro-rata for part-time employees.

*Table 3: Portable, industry-based Long Service Leave Schemes*

STATE	PLSL SCHEME	ENTITLEMENT
NSW	Building and Construction	8.67 weeks for each 10 years' service; 4.33 weeks for each subsequent 5 years' service.
	Contract Cleaning	Cleaning - 8.67 weeks after 10 years' service (3650 days); 4.33 weeks for each 5 years' service thereafter (1825 days)
ACT	Building and Construction	13 weeks after 10 years' service
	Contract Cleaning	6.067 weeks after 7 years' service
	Community Services	4.333 weeks after 5 years' service
	Security	8.667 weeks leave after 7 years' service

QLD	Building and Construction	8.67 weeks after 10 years' service (2,200 days); pro rata entitlement after 7 years' service
	Contract Cleaning	8.67 weeks after 10 years' service; pro rata after 7 years' service
VIC	Building and Construction	42.4 days after each 7 years' service
SA	Building and Construction	13 weeks after 2600 days (260 days p.a.)
WA	Building and Construction	8.67 weeks after 10 years' service (2200 working days); 4.33 weeks after 5 years' service thereafter (1100 days)
TAS	Building and Construction	13 weeks after 10 years' service (2200 working days); 4.33 weeks after each 5 years' service thereafter (1100 days)
NT	Building and Construction	65 days after 10 years' service (2600 days) (i.e. 13 weeks), 32.5 days for each 5 years' service thereafter
Commonwealth	Coal Mining	13 weeks for each 8 years' service

39. It is our strong submission that all sectors, industries and occupations in the contemporary labour market will benefit from the creation of a generalised entitlement to portable long service leave. We believe it is a clear role of government to facilitate the introduction of a generalised system of portable LSL entitlements. A national portable LSL standard should build on and supplement a generalised national LSL scheme.

40. LSL cannot properly be described as a careful industrial compromise between employee and employer interests. Whilst employer interests are protected to the extent that the entitlement accrues over a long period of time and employers have a significant say in when the leave is taken, LSL is unambiguously about the interests and well-being of employees. It is based on the notion that long periods of service with an employer or within an industry or sector is itself deserving reward and recognition by way of additional

leave entitlements and that refreshment and renewal of workers through accessing a LSL entitlement contributes to national productivity and social well-being.

41. Accordingly, any generalised LSL standard should, at a minimum, maintain existing LSL entitlements that apply to employees in various States and industries throughout Australia and must ensure the continued successful operation of existing industry portable LSL schemes ('IPLSL') and preserve more generous State or Territory provisions where they exist.
42. It is imperative that any generalised national LSL scheme should not be introduced to the detriment of workers who already have the benefit of a superior LSL scheme; it must not disentitle classes of employees already entitled to something better. Such an outcome would be perverse and contrary to the goal of generalising an inherently beneficial scheme.
43. This can be achieved by adopting a 'highest common denominator' approach in respect of the Statutory LSL schemes. This means the adoption of a scheme based on the legislated standards applying in South Australia and the Northern Territory in relation to the core entitlement, with elements of other statutory schemes being picked up in areas such as access to pro-rata entitlements, the rate of payment of LSL and the extent of entitlements for casual employees.

*ACTU preferred national LSL standard*

44. Under this approach, workers would receive 13 weeks long service leave after 10 years' service with an employer. LSL would accrue at the rate of 1.3 weeks' for each year of service and pro rata for part years. This is the preferred option of the ACTU.
45. In normal circumstances, LSL would be available after 10 years' service and the timing of the leave would be by agreement between the employee and employer, subject to a reasonableness test in respect of the operational requirements of the business. In the case of pressing domestic necessity, illness or injury, access to LSL entitlements would be available on a pro-rata basis after five years. Similarly, accrued LSL would become available after five years on termination of employment by the employer, except by reason of serious and wilful misconduct of the employee. Pro-rata access to LSL on termination would be available after 7 years, regardless of the reason for termination, or initiator of the termination.

46. Other than in the circumstances described above, LSL would not be able to be “cashed-out”.
47. The LSL scheme would apply to all national system employers and employees, with relevant exclusions pertaining to the coverage of existing IPLSL schemes. The scheme would also provide for coverage of casual and seasonal employees, for example, based on a revision of the criteria utilised by in the Victorian *Long Service Leave Act 1992* (such revision to ensure that casual workers were appropriately covered) .
48. The rate of pay applicable to long service leave as taken, would be the employee’s normal or actual weekly rate of pay, including shift loadings, regular bonuses, allowances and rostered or compulsory overtime. This position is broadly consistent with the approach in relevant Tasmanian and Queensland legislation.
49. Under the proposed scheme, ‘continuous employment’ with an employer would encompass a transfer of business to a new employer, as well as the transfer of an employee’s employment from one corporate entity to an associated entity within a corporate group. Also, the termination and subsequent re-hiring of an employee by the same employer or an associated entity within a period of three months would result in the reinstatement of continuous service for the purposes of accruing LSL.
50. Similarly, ‘service’ for the purposes of accrual, would include normal working hours and the all types of leave, plus unpaid parental leave. Unpaid leave, including periods of industrial action, would neither count as service nor break the continuity of service. Employer stand down due to slackness of trade would not break service and would count as time worked or a period of service. Interruptions in employment caused by the employer with the intention of avoiding LSL obligations, would count as service.
51. Finally, as is the case with most existing jurisdictions, a public holiday falling within a period of long service leave will lead to the LSL being extended by that the duration of the public holiday and LSL can be taken in advance, by agreement between an employer and employee.

*ACTU Alternative position: a minimum safety net provision based on the most common statutory LSL entitlement, but preserving the operation of existing IPLSL schemes and more beneficial State LSL statutory entitlements.*

52. The alternative position in respect of a national NES-based LSL standard, is for the provision to be a minimum safety net provision only, based on the most common LSL

standard of 8.67 weeks leave after 10 years' service and 13 weeks after 15 years' service.

53. The difficulty with such an approach however, is that a significant proportion of the workforce already have a statutorily derived minimum standard in excess of such an NES standard. In particular, employees generally in South Australia, the Northern Territory, the Australian Capital Territory are in this category. In addition, specific categories of employees such as Commonwealth Public Servants, employees in the coal mining industry nationally and in the metalliferous mining industry in New South Wales, building and construction workers in South Australia, Victoria, Northern Territory, Tasmania and the ACT are also the beneficiaries of a superior standard of LSL.

54. Therefore, for the NES-derived LSL standard to operate beneficially, it must exempt entirely (or at least, substantially) the existing statutory schemes applying to the relevant classes of employees with superior LSL entitlements.<sup>38</sup> If this were not to occur, then the operation of the FW Act will be such as to over-ride the operation of the State-based statutory schemes – at least to the extent that these schemes cover national system employers and their employees.<sup>39</sup> As previously submitted, the operation of an NES-based LSL scheme should not operate so as to disentitle classes of employees who already have the benefit of a superior LSL scheme. Such an outcome would be perverse and contrary to the stated purpose of the NES as minimum safety net entitlements that are able to supplemented, *inter alia*, by awards and enterprise agreements.

55. On the basis that this critical issue of maintaining existing entitlements under State<sup>40</sup> laws is properly dealt with, there seems no particular difficulty in crafting a minimum NES entitlement for LSL. The key elements of such a scheme would be as described below.

56. Under the minimum entitlement model, workers would receive 8.67 weeks long service leave after 10 years' service with an employer, accruing to 13 weeks LSL after 15 years.

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<sup>38</sup> Whilst it would be possible for the Commonwealth to directly legislate in respect of these employees to replicate under the FW Act, the various entitlements contained in State legislation, this would appear to be an unnecessarily complex approach to dealing with the preservation of these entitlements.

<sup>39</sup> *New South Wales v Commonwealth* ("the Work Choices Case") [2006] HCA 52; 81 ALJR 34; 231 ALR 1 (14 November 2006).

<sup>40</sup> We also operate on the assumption that it would not be appropriate (and that there is not intention) to legislatively change the status-quo as to the current interaction of the coal mining industry scheme and the NES. Section 39E of the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth) excludes the operation of the NES in respect to the matters dealt with in the Act.

57. In normal circumstances, LSL would be available after 10 years' service and the timing of the leave would be by agreement between the employee and employer, subject to a reasonableness test in respect of the operational requirements of the business. In the case of pressing domestic necessity, illness or injury, access to LSL entitlements would be available on a pro-rata basis after five years. Pro-rata access to LSL on termination would be available after seven years, regardless of the reason for termination, or initiator of the termination.
58. Other than in the circumstances described above, LSL would not be able to be “cashed-out”.
59. The LSL scheme would apply to all national system employers and employees, with relevant exclusions pertaining to the coverage of State legislation providing for a superior LSL entitlement as well as the existing IPLSL schemes.
60. Coverage of casual and seasonal employees should be based on the formula used in Victorian legislation.
61. The rate of pay applicable to long service leave would be based on the current provision in the NES relating to the payment of annual leave taken and on termination.<sup>41</sup>
62. Under the minimum scheme, ‘continuous employment’ with an employer would encompass a transfer of business to a new employer, as well as the transfer of an employee’s employment from one corporate entity to an associated entity within a corporate group. Also, the termination and subsequent re-hiring of an employee by the same employer or an associated entity within a period of three months, would result in the reinstatement of continuous service for the purposes of accruing LSL.
63. Similarly, the terms ‘service’ and ‘continuous service’ would be as defined in s22 of the FW Act. However, interruptions in employment caused by the employer with the intention of avoiding LSL obligations, would also count as service.
64. Consistent with the position in most existing jurisdictions, a public holiday falling within a period of long service leave will lead to the LSL being extended by that the duration of the public holiday and LSL can be taken in advance, by agreement between an employer and employee.

*Options for a national portable long service leave scheme*

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<sup>41</sup> FW Act ss90(1) and 90(2).

65. A single-employer based LSL model is not sufficient to meet needs and realities of the modern workplace.
66. The existence of well-functioning and long established portable *industry* long service leave schemes evidences the clear need to provide for workers whose form of employment (casual, contract, owner-operator) or sector (mining, construction, security, care) stands in the way of their ever achieving long-term engagement with a single employer. Contemporary labour market trends are raising the share of such workers in total employment.
67. The ACTU is considering a range of models for providing portable accesses to a range of leave entitlements, including long service leave. Of particular note in this regard is the 2013 report produced by the McKell Institute and the Macquarie University Centre for Workplace Futures entitled *The Case for a Portable Long Service Leave Scheme in Australia* ('McKell Report').<sup>42</sup> The McKell Report is a comprehensive and wide-ranging study on the operation of existing industry portable LSL (PLSL) schemes in Australia. It also identifies three possible models for a future portable *national* long service leave scheme, as follows:

a. **OPTION A – The Approved Deposit Fund (ADF) model**

*“The ADF model is based on the system of Approved Deposit Funds (ADFs) established in the superannuation industry during the 1980s (also known as Rollover Funds). Employers make their own internal provisions for LSL until an employee leaves or is eligible for LSL. Employees who leave service can roll over a lump sum PLSL benefit into any ADF they nominate. The accrued benefit payable at exit from an employer would be calculated using a defined benefit formula, based on the employee’s wages at the date of exit, in line with existing legislation, awards and/ or workplace agreements. The lump sum benefit would not normally be payable in cash (unless the employee met a LSL condition of release). The ADF invests the money on behalf of the employee, in an accumulation-style account, until the employee is eligible to receive LSL.”<sup>43</sup>*

b. **OPTION B – The Industry-based Defined Benefit Fund Model**

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<sup>42</sup> See Markey, Parr, O'Neill et al, *The Case for a National Portable Long Service Leave Scheme in Australia*, McKell Institute, 2013.

<sup>43</sup> Markey et al (2013), at p14.

*“An alternative model involves the creation of a range of industry-based defined benefit funds. There are already more than a dozen established industry based PLSL arrangements, however, each of these provides only limited portability. Workers only accrue LSL benefits while working within the industry, and may forfeit their entitlements if they cease working in the industry prior to completing the vesting period of service. Workers who complete the vesting period, and then leave the industry are usually entitled to claim a cash payout.*

*Employers in the industries covered by existing schemes are required to be registered with the relevant fund. The employers periodically provide information about each employee and periodically pay levies to the fund administrators. Each fund is invested in line with a strategy determined by the Board and/or approved by the Minister or Trustee. When an employee becomes eligible for an LSL payment, a benefit may be payable directly from the LSL fund; or may be payable by the employer, who then claims reimbursement from the fund. The benefits payable are calculated in accordance with the relevant legislation and/or award. This currently means that LSL benefits are defined benefits.*

*Each fund is periodically reviewed by an actuary, who assesses the adequacy of the fund’s assets, relative to the fund’s liabilities, using reasonable assumptions about the future experience of the fund. The actuary might recommend an increase or a decrease in the levy rate, in order to maintain an acceptable level of solvency. The fund administrators play a role in ensuring that employers comply with their obligations, for example, educating new employers, inspecting records of registered employers and imposing financial penalties for late payments.”<sup>44</sup>*

c. **OPTION C – The Accumulation Model**

*“Employers would be required to make regular contributions for all eligible employees into designated LSL accounts administered by superannuation funds and/or authorised financial institutions. (The minimum contribution would be determined by the National Employment Standards.)*

*Account funds would be invested on behalf of the account holder and investment earnings would be credited. Administration fees would be deducted. The account-*

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<sup>44</sup> Markey et al (2013) at pp 15-16.

*provider would be required to maintain records sufficient to determine the worker's eligibility for LSL cash payments in the future. The LSL benefit would not become payable in cash until the worker met an "LSL condition of release", similar to the preservation requirements applicable to superannuation benefits. The LSL account provider would be required to meet registration, reporting, and corporate governance requirements, similar to those imposed on the financial institutions that hold superannuation savings. APRA would set standards for authorisation and monitor account providers. Banks, life insurers, and superannuation funds would be eligible to offer LSL accounts, as long as they met the authorisation standards."*<sup>45</sup>

68. All of the above models have the potential to be expanded over time to cover and protect other forms of leave and entitlements such as redundancy pay.
69. The possible introduction of any portable national LSL scheme involves important and complex reform of existing industrial arrangements. It is therefore essential that the widest possible input and consultation be sought before the specific direction of fundamental reform is determined. To that end, this Inquiry is welcomed.

### **Which sectors, industries or occupations may, or may not, benefit from such schemes**

70. All sectors, industries and occupations will benefit from a long service leave scheme. Some of the benefits of long service leave and of a more generally accessible portable entitlement are outlined below.<sup>46</sup> The benefits for employees include:

- a. Improved mental and general health, greater wellbeing and work/life balance (extended work and inadequate leave is connected to stress-related illnesses such as heart disease and stroke).
- b. Greater employment security;
- c. Greater ability for employees to plan their lives;
- d. Greater equity as highly casualised or contract roles and transient workers would not otherwise be entitled to LSL.

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<sup>45</sup>Ibid at p17.

<sup>46</sup> See Markey et al (2013).

- e. Greater mobility and flexibility for workers (workers can move between employers and take short periods out of work without losing long service leave).
- f. Improved work environment – sustained rest means improved employee morale;
- g. Employee attraction – flexibility for workers provided by good employers means employees feel less compelled to work for bad or disorganised ones
- h. Non-compliance are problems reduced.
- i. Portable long service leave is most suited to areas with high degrees of insecurity and fluctuating demands but this is not to say that shouldn't be available elsewhere as an alternative means of funding entitlements.

71. The benefits for employers and the economy include:

- a. Reduced costs relating to mental health and illness (mental stress claims are often the most expensive workers compensation claims);
- b. Attract and retain skilled and experienced workforce and therefore increased industry service standards and industry performance;
- c. Improved presenteeism and productivity;
- d. A level playing field is maintained for employers competitively tendering and any free-riding is reduced. There is a practical and effective deterrent for non-compliant operators. For example, in NSW and QLD cleaning industry, employers and employees both supported the scheme but not universally. 2 years into the ACT scheme's operation, there was broad support from employers with very high rates of compliance.
- e. Administrative benefits for employers in planning for and allocating funds for future liabilities. A portable contribution based model should mean that contingent liabilities for LSL would cease to exist;
- f. Benefits to tourism industry through more people taking long holidays;
- g. Cost certainty as there is greater stability through a pay-as-you-go system;
- h. Tax benefits as employers can claim a tax deduction for the levies;

72. It ought also be remembered that portable schemes have the benefit of minimising the socialised as well as individual costs of business insolvencies. Currently, the *Fair Entitlements Guarantee* scheme provides payments to workers who have lost their entitlements, including long service leave entitlements, as a result of the insolvency of their employer. In 2012-2013 the scheme paid \$31.9 million in long service leave payments, which made up 12.4% of the scheme's payout amounts<sup>47</sup>.
73. Whilst the aim should be to provide portable long service leave in all sectors, any progressive roll-out of such schemes should focus first on those with the most transient workforce, including accommodation and food services, retail trade, higher education, arts and recreation and community services.

### Summary of recommendations

74. In summary, the ACTU recommends:

- a. Establishing a National Long Service Leave Standard of 13 weeks' leave after 10 years. Our preferred model would make LSL available:
  - i. pro rata after 7 years on termination;
  - ii. pro rata after 5 years on the basis of pressing domestic necessity, illness or injury;
  - iii. to casual and seasonal employees;
  - iv. but with exclusions preserving existing industry portable LSL schemes;  
and
- b. Establishing a national portable long service leave scheme, either under:
  - i. an approved deposit fund model;
  - ii. an industry-based defined benefit fund model; or
  - iii. an accumulation model;

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<sup>47</sup> Department of Employment Statistics: <http://www.aph.gov.au/DocumentStore.ashx?id=3aaba945-289d-427a-9026-4e86bd95ea44&subId=300050>

- c. The national portable long service leave scheme should be extended to all non-excluded industries and sectors with any phased roll-out focusing first on those sectors with the most transient workforce such as accommodation and food services, retail trade, higher education, arts and recreation and community services; and
- d. Further examining the potential for the above models to be extended to cover and protect other forms of leave and entitlements such as redundancy pay; and
- e. That the ABS investigate developing an insecure work indicator.

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