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# Senate Inquiry into the portability of long service leave and other entitlements

11 December 2015



Australian  
Chamber of Commerce  
and Industry



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# 1 Introduction

The Australian Chamber welcomes the opportunity to make a contribution to the Senate Education and Employment Reference Committee's (Committee) inquiry into the feasibility of, and options for, creating a national long service standard, and the portability of long service and other entitlements (Inquiry). The terms of reference for the Inquiry are framed in such a way that it extends beyond portability of long service leave entitlements. In particular, the Committee has been asked to look into 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:

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

The Australian Chamber's primary position is that it does not support the expansion of existing portable long service leave schemes and nor does it support the creation of new ones in relation to long service or other leave entitlements due to concerns that this will have the effect of:

- imposing new or higher taxes on employment;
- imposing additional labour costs associated with doing business in Australia, negatively impacting Australia's competitiveness;
- creating additional administrative and financial burdens for employers, impacting cash flow, service levels and operations in sectors impacted;
- creating apprehension about employing people with longer career tenures due to the service related nature of entitlements.

The Australian Chamber would also be unable to support the establishment of a national long service leave standard that would impose additional costs on businesses which would be in no better position as a result. Given that the overwhelming majority of employers only operate in one jurisdiction, it is reasonable to ask whether the transitional costs that would be incurred if a national long service leave standard was introduced, are justifiable.

It is also noted that the Inquiry is seeking information about the number of Australians in "insecure work". It is important to recognise from the outset that this is not a term defined within law and a

person's perception regarding the level of security in their work is subjective. Notwithstanding this the term "insecure work" is a term commonly used by the trade union movement in industrial and policy campaigns. By way of example, a report stemming from an inquiry commissioned by the ACTU in 2012 (ACTU Inquiry) entitled "Lives on Hold: Unlocking the potential of Australia's Workforce" (ACTU Report) defined insecure work as 'poor quality work that provides workers with little economic security and little control over their working lives' and identified the following 'indicators of insecure work':

- *unpredictable and fluctuating pay*
- *inferior rights and entitlements*
- *limited or no access to paid leave*
- *irregular and unpredictable working hours*
- *uncertainty regarding length of a job, and*
- *lack of any say at work over wages, conditions and work organisation.*<sup>1</sup>

The ACTU Report, quoting the terms of reference for the ACTU Inquiry, states that:

*Certain forms of employment are prone to insecure work, including casual work, fixed-term contracts, seasonal work, contracting and labour hire. These forms of employment will be of particular attention for the inquiry. Also of consideration will be the problems faced by workers employed part-time and workers in non-traditional workplaces, such as home-base outworkers.*<sup>2</sup>

In the Australian Chamber's view, the ACTU Inquiry adopted a pessimistic view of work performed outside of a full-time permanent employment relationship without giving adequate weight or consideration to the benefits of flexible forms of working. Work modes that vary from the model of full-time permanent employment such as part-time, casual and fixed-term employment, independent contracting and labour hire play a key role in supporting an agile and adaptable workforce and great caution needs to be exercised to preserve the legitimacy of these forms of work.

For the purposes of this submission, work falling outside the model of full-time permanent employment is referred to as "non-traditional work" on the basis that it diverts from the historical "Harvester model" of the male working full time in a traditional trade or occupation to provide for his wife and children. However this term is applied somewhat reluctantly because as noted by the Productivity Commission, in the modern labour market:

*It is not possible to characterise a 'normal' pattern of work. Many people do not work in regular full-time long-tenure jobs in daylight hours on weekdays. Indeed, there are many part-timers, shift and overtime workers, people in non-traditional forms of employment, and people with short-term tenure in their jobs. More than one in twenty people are multiple jobholders and close to one in three secondary students work.*<sup>3</sup>

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<sup>1</sup> ACTU, *Lives on Hold: Unlocking the Potential of Australia's Workforce* 201, p. 1.

<sup>2</sup> Ibid.

<sup>3</sup> Productivity Commission, *Workplace Relations Framework Draft Report*, p. 89.

“Non-traditional” work forms are now a normal part of the labour market and play a critical role from the perspective of both employees and employers. Accordingly, while this Inquiry is concerned with the number of people in “insecure work”, a more constructive approach would, in the Australian Chamber’s view, involve a consideration of the types of labour market models that would support the agility and adaptability required for the sustainability of our economy and high living standards.

Australia is an economy in transition and the decline in income generated from the resources sector has not yet been offset by growth in other sectors. It is difficult to predict with precision or certainty where all of the growth and jobs of the future will come from however the needs of the modern market economy will not be met by employing only permanent employees working between 9am and 5pm Monday to Friday.

It is acknowledged that some will be fearful of jobs becoming precarious or “insecure” as a result of change and the ways in which people, business models, workplaces and work are adapting. However as a society we must overcome this fear and recognise that an agile and adaptable workforce is critical to business sustainability, growth and employment and businesses and policy makers must respond to this reality. The Australian Chamber considers that this can be achieved by shifting the policy discussion away from the notion of “job for life” job security in a permanent full-time and toward employability and work flexibility.

This Inquiry comes at a time where we have a workplace relations framework that was designed for a different era. It is entirely appropriate for the policy discussion to acknowledge this and consider changes to the framework that would enhance labour market mobility and employment outcomes. As noted in the Competition Review Draft Report:

*The rise of Asia and other emerging economies puts new pressure and expectations on Australia’s domestic systems that were built for a particular economic landscape and at a particular time.*

*Australia will need policies, laws and institutions that help us make the most of the opportunities we face. In particular, we need to build adaptability, flexibility and responsiveness into our systems. A heightened capacity for agility and innovation will be needed to match changing tastes and preferences with our own capacity to deliver commodities, goods and services into Asia and elsewhere in the developing world.<sup>4</sup>*

It is appropriate to consider whether aspects of the workplace relations framework existing as historical legacies from over 100 years ago are appropriate in the contemporary setting. We must pursue reforms that support and do not impede progressive business strategies that seek to respond to our fast changing operational environment. The nature of work is changing rapidly as technology is increasingly encroaching upon traditional, manual ways of working in many industries. Productive work is becoming less concerned with fixed hours and fixed work locations. Work is not confined to single jurisdictions and time zones and technology is continuing to change how consumers engage with business and their expectations about service. The social dynamic is trending toward a desire for smart technology, greater flexibility, convenience and freedom of choice.

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<sup>4</sup> The Australian Government Competition Policy Review, Competition Policy Review Draft Report, September 2014, p. 14.

Against this backdrop an increasing number of businesses have adopted ‘prospector’ style corporate strategies which encourage innovation, seek out new opportunities and seek more flexible and efficient ways of working and accessing the market. In the interests of diversifying the Australian economy and supporting jobs growth it is critical that entrepreneurial risk and innovation be encouraged and supported. Those who have taken the risk in establishing a business require a workplace that is agile, engaged and adaptable to change. Responsiveness and innovation should not be inhibited by rigid and mechanistic labour market structures that deny flexibility and adaptability.

The creation of more employer funded portable employment entitlements that would increase the cost of employing and doing business in Australia is not the answer to the labour market challenges arising from the modern economy nor is the further regulation of “non-traditional” work forms to the point where they become uneconomical. In the context of workplace relations policy, Government and policy makers should be concerned with reforming areas of the system which impede the capacity of businesses to structure their work systems to meet the needs of the market. Our policy settings should aim to support an environment in which arrangements can be negotiated and implemented in a constructive, cooperative way having regard to the circumstances and mutual interests of the business and workers in the context of the business’ operations and needs of the market.

## 2 History of long service Leave in Australia

Paid long service leave is unique to Australia and New Zealand and an informed policy discussion regarding changes to the nature and structure of long service leave should involve consideration of the historical origins of long service leave as an employment entitlement.

Long service leave in Australia has its genesis from the colonial era, providing public service employees in South Australia and Victoria with a ‘furlough’ to enable them to visit the United Kingdom. Legislation passed by South Australia and Victoria in 1862 initially provided between 6 and 12 months paid leave to civil servants after 10 years of service to the colonies at a time where it could take multiple months to travel by sea. The scheme has been described by Burgess et al as providing “*respite for those who were separated by distance between “home” and workplace*” and providing a benefit reserved for those “*relatively high in the colonial administration hierarchy*”.<sup>5</sup>

In 1911 the first amendments were made to Commonwealth long service leave benefits that enabled access to the benefit for a broadened range of purposes including:

- as an additional form of retirement savings by enabling those who had completed 20 years’ service to take a lump sum payment on retirement in lieu of taking the leave; and
- as a death benefit to dependents of public sector employees.<sup>6</sup>

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<sup>5</sup> Burgess J, Sullivan A and Strachan G. (2002). *Long Service Leave in Australia: Application and Reform*, University of Newcastle, p. 1.

<sup>6</sup> Ferris S., Parr N., Markey R., Kyng, T, (2015). Long service leave: past, present and future. *Australian Journal of Actuarial Practice*, Vol. 3, 5-22, p. 7.



It should be noted that this occurred before Australia's retirement incomes policy was well evolved and well before the introduction of the compulsory superannuation guarantee laws in 1992. Social welfare was in its infancy, with age pension schemes non-existent until the early 1900s.

Long service leave was confined to the public sector until the 1940s and then began its gradual extension into the private sector via inclusion in private sector awards with entitlements created through the processes of conciliation and arbitration. Entitlements under these provisions were based on continuous service with one employer.

State based legislative entitlements to long service leave emerged from the 1950s at a time where the Australian economy was experiencing a post-war boom.<sup>7</sup> Ferris et al have suggested:

*There was strong demand for labour and there was concern about high labour turnover rates. Perhaps this made employers more willing to provide benefits that might help to attract and retain staff (many corporate superannuation schemes were established in the same era).<sup>8</sup>*

The New South Wales Government was the first state to introduce legislation to mandate long service leave entitlements and Ferris et al note that when introducing this legislation, the Minister for Labour and Industry identified that the reduction of labour turnover was among the purposes of long service leave.<sup>9</sup> The Minister also identified that it would be long and faithful service with a single employer that the long service leave entitlement would reward.

In the context of its introduction in the early 1950s, the legislation may have been seeking to give effect to an entitlement that encouraged employees to stay with the one employer and which may have provided some benefit to employers that were struggling to retain their employees due to high demand for labour. However in the modern economy, employer strategies targeted at attracting and retaining employees have evolved significantly and legislation mandating portable long service leave entitlements beyond current arrangements is not an appropriate means of achieving this objective.

### 3 Are people “missing out” on entitlements?

Our ageing population and increasing healthy life expectancy mean that people will be working longer and will have more roles during the course of their working lives, issues which are explored further in this submission. However this does not translate to a structural change in service patterns that would warrant an expansion of existing long service leave schemes. Ferris et al recently examined ABS and HILDA data in relation to the length of time people have been working with their current employer and found:

- in 2012 about 27 per cent of male workers had been employed in the same job for at least ten years, a figure that has remained stable over the period between 1988 and 2012;<sup>10</sup>
- in 2012 about 23 per cent of female workers had been employed for at least 10 years, increasing from about 15-16 per cent over the same period. Ferris et al expressed the view

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<sup>7</sup> Ferris et al., op. cit., p. 8.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid., p.p. 10-11.



that “[t]his might reflect improvements in maternity leave or increasing female workforce participation rates at older ages, or both”.<sup>11</sup>

The 2012 figures aligned with HILDA data.<sup>12</sup> Ferris et al also noted that older workers have lower resignation rates than younger workers and that the percentage of long-serving employees increases rapidly with age, finding:

*For those aged 55 to 64, more than half have been employed by their current employer for at least 10 years; for those aged 65 or more, about two thirds have been employed by their current employer for at least 10 years. This suggests that for those who remain in the workforce over the longer term (until age 65), at least two-thirds are likely to become eligible to take LSL.*<sup>13</sup>

As our population ages and people remain in the one workplace for longer, access to long service leave can be expected to increase. This counters suggestions that employees are ‘missing out’ on entitlements.

It should also be recognised that the employment choices made by employees will often reflect their life stage and people will not, at various junctures of their life, intend to accumulate long periods of continuous service with the same employer or same industry. Young people in society are delaying major life events relative to earlier generations and nearly double the proportion of young people were attending an educational institution in 2011 than in 1976 (26% compared with 14%).<sup>14</sup> Many more young people are working part-time hours with 34% of young adults employed to work less than 35 hours per week compared with 11% in 1976. Increased flexibility in the workplace and the existence of forms of work that enable them to balance their work, study and personal priorities has contributed to this outcome. The average young person is now more likely to be living without a partner and children and there is a higher probability of them studying and working casual or part-time hours in a service related industry.

Jobs people take on early in life, while providing a foothold into the labour market, will not necessarily be in the industry in which they wish to pursue a career. Access to flexible work patterns for the purposes of balancing work, study, social and other personal commitments may be, depending upon personal circumstances, of much greater appeal and benefit than entitlements associated with accumulating long service with the one employer or within the one industry.

## 4 Rationale underpinning long service leave

The original objects underpinning long service leave are anachronistic, bringing into question the relevance of the entitlement in the modern context. In 2004 the Australian Industrial Relations Commission released a discussion paper entitled *Long Service Leave: Towards a National Minimum Standard* (2004 Paper). The 2004 Paper suggested that:

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<sup>11</sup> Ferris et al, op. cit., p. 11.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

*Over time, a number of rationales have underpinned the provision of LSL – these being: to provide employees with an extended leave of absence in order to renew their energies; to reward long and faithful service with an employer; and to reduce labour turnover.<sup>15</sup>*

In 2003 Senior Deputy President Lacy of the Australian Industrial Relations noted that since long service leave gained statutory recognition in the states, commencing in New South Wales in 1951:

*...there has been little change to the structure of long service leave. It is generally regarded now as an opportunity for an employee to take some respite from a long period of service in the one business.<sup>16</sup>*

Portable long service leave schemes do not share this rationale and are generally understood to have been designed in response to the unique nature of industries in which employees are typically engaged on a project basis and move from employer to employer as one project is completed and another starts. However the rationale for portable schemes does not exist in industries that lack this predominant character.

A 2013 report entitled “The Case for a National Portable Long Service Leave Scheme in Australia” (McKell Report), cites the following three reasons for providing long service benefits and suggests that the third is “becoming increasingly important as Australians spend larger proportions of their lifetimes in employment and growing numbers of workers are remaining in the workforce at older ages”:

- *to reduce labour turnover;*
- *to provide a reward for long and faithful service; and*
- *to enable employees halfway through their working life to recover their energies and return to work renewed, refreshed and reinvigorated.<sup>17</sup>*

Employee retention and rewarding “faithful service” remain a key priority for employers in the long service leave equation however the Australian Chamber does not consider that these constitute valid reasons for extending existing long service leave arrangements by making them portable. As has been observed by the Productivity Commission:

*While LSL may not be an efficient measure for creating employer loyalty, it must have some effect, which would be diluted with full portability.<sup>18</sup>*

Portable schemes seem more likely to increase rather than reduce labour turnover in workplaces.

In considering whether there is a need for portable long service leave to enable employees to “renew their energies”, it is also important to consider the evolution of the world of work and the way in which this can be achieved through other factors, such as the availability of flexible forms of

<sup>15</sup> Australian Industrial Relations Commission. (2004). *Long service leave in Australia: towards a national minimum standard*. Available at [http://www.airc.gov.au/familyprovisions/aig/TAB\\_12.pdf](http://www.airc.gov.au/familyprovisions/aig/TAB_12.pdf), p. 2.

<sup>16</sup> Re. *Office of the Chief Electrical Inspector Enterprise Agreement 2003* (AIRC) PR942414 (5 January 2004) para. 8.

<sup>17</sup> Markey, Ray, Parr, Nick, Kyng, Timothy, Muhidin, S, O'Neill, Sharon, Thornthwaite, Louise, Wright, Chris F, Lavermiocca, Catriona, & Ferris, Shauna. (2013), *The Case for a National Portable Long Service Leave Scheme in Australia*, available at [http://mckellinstitute.org.au/wp-content/uploads/2013/06/McKell\\_Portable\\_LongService.pdf](http://mckellinstitute.org.au/wp-content/uploads/2013/06/McKell_Portable_LongService.pdf), p. 10.

<sup>18</sup> Productivity Commission 2015, *Workplace Relations Framework*, Draft Report, Canberra, p. 178.

work in the modern economy (e.g. job-sharing, working from home, 48/52 leave and flexible part-time arrangements). These and strategies adopted by employers at the enterprise level will better support this outcome.

It is also far from settled as to whether entitlements accrued under existing schemes are actually taken as long service leave during the life of employment, cashed out or saved for retirement income. The Productivity Commission has recently said the following in relation to the benefits that advocates of portable long service leave have suggested:

*...there are doubts about the magnitudes of some of these benefits. There are several natural experiments on the impacts of LSL portability provided by various existing state-based arrangements...It appears that, notwithstanding the goal of providing a time for recuperation, employees under portable schemes do not necessarily take the leave.<sup>19</sup>*

The NSW Industrial Relations Advisory Council has advised that Productivity Commission that

*in many cases, LSL is not regarded as an opportunity for career renewal, but rather as an economic asset.<sup>20</sup>*

Ferris et al have also observed that:

*...it is clear that LSL entitlements are used flexibly, for a wide range of different purposes. LSL can be used for retirement savings; redundancy pay; death and disability pay; to extend parental leave or carers' leave; or as a lump sum resignation payment. In some jurisdictions, LSL payments can be cashed out, which means that LSL is simply a savings account that can be drawn upon in an emergency.<sup>21</sup>*

Commissioner Gyles made the following comments in his inquiry into Productivity in the Building Industry in New South Wales:

*... the construction industry scheme is not concerned with leave at all, but with payments. In other words, a scheme which was initially promoted on the basis that an employee who faithfully served an employer for an extended period deserved a long break as a reward, has been transformed in the construction industry into a scheme whereby anybody who is employed in the industry for a total of 10 years, no matter many employers are involved or how frequently he or she goes and works temporarily in another industry, will be entitled to a sum of money.<sup>22</sup>*

The ABS has not published data on long service usage since 1990, but Ferris et al observe that the data available suggests that the rates of taking long service leave were low across the board<sup>23</sup> and also points to the habit of Australian workers accumulating their leave entitlements.<sup>24</sup>

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<sup>19</sup> Productivity Commission 2015, *Workplace Relations Framework*, Draft Report, Canberra, p. 176.

<sup>20</sup> Ibid., p.176.

<sup>21</sup> Ferris et al, op. cit., p. 12.

<sup>22</sup> Gyles, R. QC 1992, Royal Commission into Productivity in the Building Industry in New South Wales, Final Report, Sydney, NSW, p. 92.

<sup>23</sup> Ferris S et al, op. cit, p. 12.

<sup>24</sup> Ibid., p. 12.

The McKell Report suggests the following potential advantages and disadvantages of portable long service leave:<sup>25</sup>

Potential advantages of PLSL schemes	Potential disadvantages of LSL portability
<p><b>Retention of workers</b> – PLSL schemes address challenges in retaining employees in industries with high levels of labour mobility.</p> <p><b>Equity</b> – Workers in highly casualised or contract roles otherwise have no practical access.</p> <p><b>Mobility and flexibility</b> – Workers have more capacity to move between employers or to take short periods out of employment to meet commitments such as carer responsibilities.</p> <p><b>Productivity and work environment</b> – The capacity to take a sustained period of leave to rejuvenate after a lengthy period of continued work has advantages for boosting productivity and morale.</p> <p><b>Employee attraction</b> – A benefit for “good employers” as employees feel less compelled to stay in poorly managed workplaces in order to meet LSL eligibility requirements.</p> <p><b>Non-compliance problems reduced</b> – Employers pay for entitlements as they accrue.</p> <p><b>Free-riding problems reduced</b> – Industry based LSL schemes mean that all employers are obliged to fund LSL entitlements, regardless of whether they retain employees who reach the resting period for taking leave.</p> <p><b>Administrative benefits for employers</b> – Industry funds effectively remove from employers the responsibility for administering LSL arrangements and payment for employees.</p> <p><b>Cost certainty</b> – Greater cost stability is provided to employers because the pay-as-you go operation limits the potential for employers to accumulate liabilities and not being able to pay employees their entitlements if they become insolvent or have trading difficulties.</p> <p><b>Tax benefits</b> – Employers can claim a tax deduction for payment of the levies, and the portable industry funds are not required to pay tax on their investment income.</p>	<p><b>Administration costs for employers</b> – This factor is pronounced during transitional periods of newly established schemes. However, recent improvements in administrative software and systems were cited by administrators and employer representatives as significantly reducing the administrative burden and cost.</p> <p><b>Financial costs of providing benefits for employees who leave after a short period of service</b> – In industries where many workers do not achieve the qualifying period under non-portable schemes, PLSL has effectively imposed an additional financial cost for employers.</p> <p><b>Prefunding impact on business cash flows</b> – Smaller employers may fail to provide for LSL benefits in their accounting systems and simply pay LSL payments from consolidated revenues as required. The PLSL schemes require employers to prefund these benefit payments, which impacts the employers’ cash flows.</p>

<sup>25</sup> Markey et al, op. cit., p. 12.

It is questionable as to whether all the benefits identified above materialise in practice and in a meaningful way. While retaining employees in 'industries' is perceived to be a potential advantage, there is no recognition of the dividend that employers (who fund the entitlements) currently derive from retaining experienced, loyal and long serving employees or the fact that it would be lost.

Labour mobility in the construction industry is an important feature due to the cyclical nature of work and the portable schemes attach long service entitlements to service within the industry rather than with the one employer. However there is no evidence to suggest that the expansion of portable schemes into other industries will be the catalyst for the retention of people in those industries. There are a wide variety of reasons why people may wish to change careers and industries including but not limited to personal development, financial incentives such as higher pay and better benefits, personal preference and job satisfaction, issues related to health or capacity. Career decisions are very personal and regulating to influence choices through such a discrete employment entitlement is unlikely to be effective.

Portable long service leave schemes are already in existence in some industries including building and construction (in all states), coal mining (at the Commonwealth level), contract cleaning (in New South Wales, the Australian Capital Territory and Queensland), community services and security (in the Australian Capital Territory). Of these schemes, the Productivity Commission recently stated:

*In many cases, it would appear that portability schemes are more a direct result of bargaining power by parties in select industries, than of significant evidence of the benefits of such schemes for productivity.*<sup>26</sup>

The 2003 Report of the Royal Commission into the Building and Construction Industry states that the key factors that led to the introduction of portable schemes in the construction industry were:

- *the strategic nature of the building and construction industry;*
- *high union density and industrial strength;*
- *a well-established industry focus;*
- *patterns of employment in the industry (references omitted).*<sup>27</sup>

These are highly distinctive characteristics. It cannot be assumed that they are relevant across the board and the Australian Chamber does not believe that consideration of these factors against the circumstances of other significantly different industries can lead to any cogent rationale for portable scheme expansion.

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<sup>26</sup> Productivity Commission, op. cit., p. 178.

<sup>27</sup> Royal Commissioner The Honourable Terrence Rhoderic Hudson Cole RFD QC, 2003, *Final Report of the Royal Commission into the Building and Construction Industry*, Reform Funds, Vol. 10, p. 219.



## 5 Potential impacts arising from the extension of portable long service leave

### 5.1 Competitiveness

As noted above, legislated long service leave is generally considered a uniquely Australian and New Zealand entitlement arising from a colonial heritage, notwithstanding that some countries do provide some linkage between other forms of paid leave and length of service. The 2003 Report of the Royal Commission into the Building and Construction Industry noted that despite some countries such as Britain and Greece providing additional annual leave entitlements as a reward for continuity of service “Australia’s approach to long service leave is distinctive in that long service leave is a legislated right of the entire workforce”.<sup>28</sup> Given its uniqueness, any expansion of this entitlement will have the effect of increasingly already high labour costs by global standards, impacting Australia’s international competitiveness and attractiveness as a location for investment.

### 5.2 Financial and employment impacts

The Australian Chamber has concerns that the extension of the operation of long service leave beyond the scope of existing schemes will result in significant cost increases to employers with negative employment impacts. Portable long service leave schemes are, in most cases, effectively a levy or tax on employment and as noted by the Productivity Commission:

*A move to mandate portability at the current level of LSL entitlements would entail a significant increase in LSL costs to business. Under current arrangements, the total costs of LSL for an employer depend on the tenure distribution of its workforce. As many employees leave before the qualifying period, the total claims under the current arrangements are much smaller than would apply under a portable scheme (where employers’ tenure would be based on their working lives, not their specific tenure with an employer). The greater coverage of employees would be reflected in the levy imposed on employers with one estimate suggesting that portable LSL costs could be up to 2.5 per cent of work costs (McKell Institute 2012). In the absence of any counteracting wage reductions, this would have some dampening effect on employment and encourage businesses to use more capital instead of labour.<sup>29</sup>*

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<sup>28</sup> Cole, op. cit., p. 217.

<sup>29</sup> Productivity Commission, op. cit., p. 178.

The levies payable in relation to existing schemes are set out in the following table:

State	Industry	Start date	Key Legislation	Levy
<b>NSW</b>	Building and construction	1986	<i>Building and Construction Industry Long Service Payments Act 1986</i> <i>Building and Construction Industry Long Service Payments Regulation 2011</i>	3.5 % of the value of building and construction work where the cost of building is \$25,000 or more (inclusive of GST)
	Contract cleaning	2011	<i>Contract Cleaning Industry (PLSL Scheme) Act 2010</i>	1.7% of total remuneration
<b>ACT</b>	Building and construction	1981	<i>Long Service Leave (Portable Schemes) Act 2009</i>	1.25% of ordinary wages (no levy on apprentices)
	Contract cleaning	1999		2% of ordinary wages paid
	Community services	2010		1.67% of ordinary wages
	Security	2012		1.47% of ordinary wages
<b>QLD</b>	Building and construction	1992	<i>Construction Industry Long Service Leave Act 1987</i> <i>Building and Construction Industry (PLSL) Act 1991</i> <i>Building and Construction Industry (PLSL) Regulation 2002</i>	0.3% of total of all costs relating to construction work (if over \$80,000)
	Contract cleaning	2005	<i>Contract Cleaning Industry (PLSL) Act 2005</i>	2% of ordinary wages paid
<b>VIC</b>	Building and construction	1976	<i>Construction Industry Long Service Leave Act 1997</i> <i>Rules of the Construction Industry LSL Fund as at 7 April 2009</i>	2.7% of every workers' ordinary rate of pay
<b>SA</b>	Building and construction	1987	<i>Construction Industry Long Service Leave Regulations 2003</i>	2.25% of total remuneration paid
<b>WA</b>	Building and construction	1986	<i>Construction Industry Portable Paid Long Service Leave Act 1985</i> <i>Construction Industry Portable paid LSL Regulations 1986</i>	2% of ordinary rate of pay for all workers (except apprentices) for all days engaged on site
<b>TAS</b>	Building and construction	1971	<i>Construction Industry (Long Service Leave) Act 1997</i>	2% of ordinary pay
<b>NT</b>	Building and construction	2005	<i>Construction Industry Long Service Leave and Benefits Act 2005</i>	0.3% of cost of project for work started on or after 1 April 2012
			<i>Construction Industry LSL and Benefits Regulations as in force at 3 August 2012</i>	(0.4% for work started prior)
<b>CTH</b>	Coal mining	1949	<i>Coal Mining Industry (LSL) Administration Act 1991</i> - Amended by <i>Coal Mining Industry (LSL) Legislation Amendment Act 2011</i> . - Two related Coal Mining Industry Payroll Level Acts also apply.	2.7% of eligible wages paid



Where long service leave is taken, employers are required to implement contingent arrangements which may include allocation of overtime, sourcing contingent labour and training. Such arrangements not only result in direct costs but also impact the productivity of the workplace.

The impacts upon small business are particularly acute as small businesses are less able to source and train temporary staff, reallocate work, or otherwise cover absences over an extended period, resulting in less than optimal business performance. While the impacts of an employee taking long service leave under state based legislation or federal awards are already felt by these businesses, to help offset the burden, employers have the benefits of a loyal and long serving employee. However the impact of an absent employee is not mitigated by these factors under portable schemes.

### 5.3 Operational impacts

The extension of portable long service leave to industries where employees are more commonly employed on an ongoing basis (rather than on a project basis) would see such schemes operate in a manner contrary to the intended purpose of portable long service leave. This has the potential to create a number of undesirable consequences.

Staff retention is a key concern for most employers and is a particular concern for small business employers given that the cost of turnover is more acutely felt or in regions where it may be difficult to source alternative labour. While long service leave currently requires management, particularly where employees in essential roles take leave, in the case of non-portable entitlements the vesting of the entitlement will have meant that the employer has had the opportunity to plan ahead and will have already had benefit of the employer's loyal service over a considerable period. However in the case of portable schemes, this is not the case. The entitlement provides no incentive for an employee to remain with one employer and employees may take leave as a result of service accrued with other employers. An employer may be required to meet the operational costs associated with the absence notwithstanding an employer's short service with them. This could have a number of unintended consequences, including creating employer apprehension of employing people with experience acquired from other employers. As recognised by the Productivity Commission:

*Some employers may be reluctant to hire workers with accumulated entitlements as these would be more likely to request protracted leave close to their commencement date.<sup>30</sup>*

Portable schemes are not appropriate for industries where ongoing employment is common or industries that are not structured around project based employment.

### 5.4 Broadening access to portable leave arrangements comes at a cost

The impacts of expanding access to portable long service leave funds should not be underestimated and history relating to expansion of state based funds can demonstrate these impacts. By way of example, in 2001 the Governor in Council approved exercise of trustee powers

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<sup>30</sup> Productivity Commission 2015, *Workplace Relations Framework*, Draft Report, Canberra, p. 178.

to enlarge the class of persons who could access Victoria's ColInvest fund applying to workers in the building and construction industry, with this power providing for:

- access to pro-rata long service leave after seven years (instead of ten);
- access to an entitlement of 13 weeks' long service leave after 10 years (instead of 15); and
- payment of all accrued benefits of 55 days and over to estates of deceased workers.<sup>31</sup>

After this power was exercised in 2001, which the 2003 Report of the Royal Commission suggests was the result of 'industrial pressure, ColInvest's 2001 annual report indicated that the changes had resulted in an increase of \$36.2 million in fund liabilities.<sup>32</sup> The impact is described in the 2003 Report of the Royal Commission as follows:

*As a direct result, employers in Victoria, who have not needed to contribute to the fund since 1993 because of the sufficiency of returns on investment of the fund to meet their long service leave obligations to their employees, will commence paying a levy to the fund of 1.5 percent of each worker's ordinary pay from 1 July 2003. Clearly that cost will be passed on as a part of the cost of building and construction work in Victoria.<sup>33</sup>*

While the impact of increasing taxes on employment in the building and construction industry is a key concern for matters such as housing affordability and the cost of providing key infrastructure, it is also a key concern for employment outcomes. Where employers are unable to pass on these costs to consumers they are forced to adopt other coping strategies which can include a reduction in the number of people employed and/or the hours they work.

As noted in the 2003 Report of the Royal Commission:

*The continuing provision of various benefits has steadily and incrementally widened the class of workers who can access a payment from the fund, to the point that long service leave schemes in each of the participating jurisdictions now concern an additional payment to workers, and have little to do with 'long service'.<sup>34</sup>*

In addition to opposing any further expansion of portable long service leave funds, the Australian Chamber considers it crucial that any funds collected for the purposes of portable long service leave under existing funds should continue to be managed to the highest standards, with quarantining of entitlements and minimising industry costs and the rate of contribution.

## 6 Practical impediments

The introduction of more portable schemes, in addition to existing long service leave schemes that already vary considerably, would create even further complexity and confusion, particularly where employees move between roles, employers and industries and where employers operate across multiple jurisdictions.

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<sup>31</sup> Cole, op. cit., p. 243.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid..

Long service leave entitlements for many employees continue to be derived from federal awards that applied prior to the modern awards coming into effect in 2010. This is because of the operation of section 113(1) of the *Fair Work Act 2009* (Cth) which provides:

- (1) *If there are applicable award-derived long service leave terms (see subsection (3)) in relation to an employee, the employee is entitled to long service leave in accordance with those terms.*

*Note: This Act does not exclude State and Territory laws that deal with long service leave, except in relation to employees who are entitled to long service leave under this Division (see paragraph 27(2)(g)), and except as provided in subsection 113A(3).*

“Applicable award-derived long service leave terms”, in relation to an employee are defined in subsection 113(3) as:

- (a) *terms of award, or a State reference transitional award, that (disregarding the effect of any instrument of a kind referred to in subsection(2)):*
- (i) *would have applied to the employee at the test time (see subsection (3A)) if the employee had, at the time, been in his or her current circumstances of employment; and*
  - (ii) *would have entitled the employee to long service leave; and*
- (b) *any terms of the award, or the State reference transitional award, that are ancillary to or incidental to the terms referred to in paragraph (a).*

The “test time” referred to above is defined in subsection 113(3A) as:

- (a) *immediately before the commencements of this Part.... (i.e. before 1 January 2010).*

A number of federal awards that are transitional instruments pursuant to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) set out an applicable award-derived long service leave term as they establish long service leave entitlements that would have applied to employees prior to 1 January 2010 (the test time). While these provisions operate to the exclusion of entitlements drawn from state based legislation, some employers already employ a mix of people who derive their entitlements from the relevant federal award and people who do not (i.e. because they are not covered by the transitional instrument). As noted by the Productivity Commission:

*This complicates the task of determining the specifics of a worker’s entitlement. The employer must first check whether the worker is covered by either an agreement made prior to January 2010 that remains in effect, or by an ‘award-based transitional instrument’. Where an agreement has lapsed, and so does not cover the worker, and/or where the relevant instrument does not specify the worker’s LSL entitlement, as it is commonly the case, the employer must abide by the relevant state or territory’s legislation instead (references omitted).<sup>35</sup>*

<sup>35</sup> Productivity Commission 2015, *Workplace Relations Framework*, Draft Report, Canberra, p. 173.

The practical effect of this is that the employer is required to provide for leave in accordance with differing systems drawing from state and federal regulation.

Furthermore, long service leave arrangements are also reflected in enterprise agreements and the introduction of another scheme has the potential to disturb those negotiated arrangements.

In its submission to the Productivity Commission Inquiry into the workplace relations framework, the Australian Chamber highlighted that the experience of the Australian Chamber and its members during the process of Award Modernisation, when various federal and state entitlements were consolidated, was largely unsatisfactory. The results of that process tended to be common standards with increased costs for employers. Given that the overwhelming majority of employers only operate in one jurisdiction, it is reasonable to ask whether the transitional costs that would be incurred if a national long service leave standard was introduced, are justifiable. The Australian Chamber would not be able to support the establishment of a national long service leave standard that would impose additional costs on businesses which would be in no better position as a result.

Despite this, the Australian Chamber acknowledges, as observed by Casey et al, that the “existing long service leave provisions in Australia are complex and prescriptive, differing considerably in operation and level of entitlement across jurisdictions”.<sup>36</sup> Employers that do work across state and territory borders face complexity as a result of the varying long service leave schemes applying in states and territories. The Australian Chamber would not support the creation of new schemes or arrangements that would only add to their compliance obligations and create further complexity.

## 7 There has been relative stability in employment patterns but should there be?

It is acknowledged that this Inquiry is also seeking information about the number of Australians in “insecure work”. As noted earlier in this submission, this is not a term defined within law and a person’s perception regarding the level of security in their work is subjective. Notwithstanding this, the Productivity Commission has observed:

*Security of work appears to have changed relatively little in recent years. While the proportion of casual jobs increased throughout the 1990s, this trend tapered off during the 2000s, particularly for women. Most people working in casual jobs move into permanent jobs in later stages of their lives.*<sup>37</sup>

It has also stated:

*The increase in employment share of non-standard forms of employment has abated, and to some extent even reversed. For example, the share of female employees without leave entitlements – the most commonly used description of a casual worker – scarcely grew between 1992 and 2000, and had since dropped significantly (figure 2.8). While male casual*

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<sup>36</sup> Casey R., McLaren J. and Passant J. (2012). Long service leave in Australia: an examination of the options for a national long service leave minimum standard. *Journal of Applied Law and Policy*, 17-37, p. 19.

<sup>37</sup> Productivity Commission, Op. Cit, p. 9.

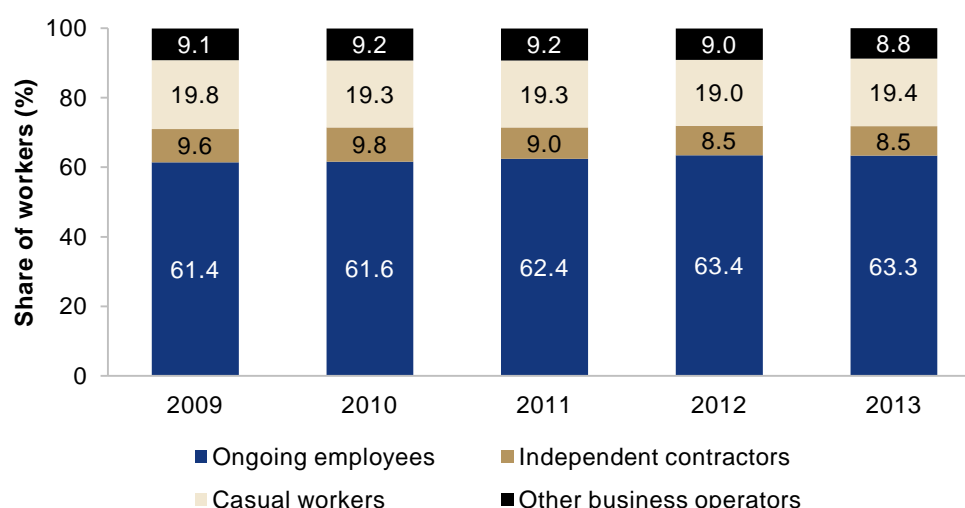
*rates grew strongly from 1992 to 2000, they have since stabilised. The share of casuals working part-time has also stabilised (figure 2.9).<sup>38</sup>*

It could be considered surprising that there has been no recent significant structural change in work types given the structural changes we are seeing within our economy.

Collectively, the Productivity Commission has found that “[i]ndependent contracting, labour hire and casual workers comprise just under 40 per cent of the workforce” and that “[t]his figure has decreased slightly over the last five years”.<sup>39</sup> More specifically, it identified that between 2009 and 2013, the proportion of the workforce engaged under “alternative employment forms” fell from 38.4 to 37.7 per cent.<sup>40</sup> The ABS classifies employment forms as ongoing employees, independent contractors or casual workers and as can be seen from the Productivity Commission’s analysis below, there has been relatively stability in the forms of employment in recent times:

### **Stability in the forms of employment**

*2009–2013, per cent of total workers*



Source: Productivity Commission Draft Report, p. 714 ABS 2014, *Forms of Employment, Australia*, November 2013, Cat. No. 6359, released 7 May 2014.

Despite this stability in work types the Productivity Commission has noted that:

*While the majority of workers are engaged on an ongoing basis, there are some common alternatives. These alternatives have characteristics that appeal to some workers and/or employers, offering them an improvement over the standard employment relationship.”*

*The more substantial of these employment forms include:*

- *independent contractors, who supply their services on a job-by-job basis*
- *workers contracted to labour hire firms, who are then hired out to a ‘host’*
- *casual workers*

<sup>38</sup> Productivity Commission, *Op. Cit.*, p. 101.

<sup>39</sup> *Ibid*, p. 711.

<sup>40</sup> *Ibid*, p. 714.

- *owner-managers of incorporated and unincorporated businesses, who are not independent contractors.*

*There are a number of other forms of work that comprise small but significant proportions of the workforce. These include fixed term employees, piece or outworkers, interns, apprentices and trainees.<sup>41</sup>*

The majority of ‘non-traditional’ work is casual employment and the Productivity Commission has noted that “labour hire and subcontracting is rare in most industries”. The ABS categories make it difficult to quantify the prevalence of labour hire and people engaged via labour hire arrangements could satisfy any of the classification definitions depending on their circumstances however the Productivity Commission has made reference to a recent estimate suggesting that labour hire employees make up around one per cent of the workforce<sup>42</sup> and recent ABS data suggests that the number of labour hire workers paid by a labour hire firm or employment agency is approximately 124,400, around one per cent of the total number of persons employed.<sup>43</sup>

#### **Fixed term contracts and labour hire**

<i>Employment category</i>	<i>Number</i>	<i>Share of employed</i>
<b>Fixed term contract prevalence</b>	('000s)	(per cent)
Employees on fixed term contracts	367.2	3.2
Employees not on fixed term contractors	9 267.8	80.1
Non-employees	1 931.6	16.7
<b>Labour hire prevalence</b>		
Employed people who are in labour hire	144.4	1.2
Employed people who are not in labour hire	11 429.3	98.8

<sup>a</sup> From ABS 2013, *Forms of Employment, Australia*, Cat. No. 6359.0. <sup>b</sup> The share of total employment was obtained from ABS 2011, *Forms of Employment*, Cat. No. 6359.0 and applied to total employment for November 2013. Sourced from Productivity Commission, Draft Report, March 2015, p. 100.

Notwithstanding that such forms of engagement are not the “norm”, these forms of engagement will play an increasingly important role in ensuring an agile and productive workplace.

While significant changes in labour market patterns are not necessarily evident, it is likely that decreasing numbers of people will stay in the same industry or occupation throughout their working life, and that those who do remain in the same “occupation” will not be working in the same way towards the end of their working life as when they started. In many cases the jobs of today will not exist in the longer term or will have been reinvented. There will be different tasks requiring new skills and capabilities. This is the direct consequence of technological advancement, bright entrepreneurial people seeing an opportunity and the reshaping of consumer tastes and expectations. We will continue to see shorter lifecycles for products and services and changing social preferences well into the future.

However as our population ages and people remain in the workplace for longer we can expect that people will take on more jobs across the course of their working life. The participation rate of older

<sup>41</sup> Productivity Commission, Op. Cit., p. 712.

<sup>42</sup> Ibid., p. 714, citing Shomos, Turner and Will 2013.

<sup>43</sup> ABS, *Characteristics of Employment*, cat. no. 6333.0.



workers is rising as our population ages and access to flexible forms of work has supported this outcome. People are becoming increasingly concerned with career longevity.

At the other end of the employment lifecycle, many more young people are working part-time hours. On this issue the ABS has observed:

*Many students may need to work part-time in order to support themselves while studying, and the increased flexibility in the workplace has made it easier for them to do so...*

*These differences may be a reflection of the changes in the labour market. For example, since the 1970s there has been a general fall in full-time job opportunities for young people. In addition there has been substantial growth in industries that offer part-time employment such as retail and hospitality services, while there has been a decline in industries that offer traditional full-time employment such as manufacturing...<sup>44</sup>*

The Productivity Commission has also found that:

*Casual work rates are highest among the very young – people aged 15-19 years – and become progressively lower (for a given gender) until age 60-64 years. Since school retention rates have risen (figure 2.12), the rising casual rates among young people suggests that more are combining employment with education...<sup>45</sup>*

The Productivity Commission considers that the “implication of lower casual rates for older employees is that casual employment is often temporary”.<sup>46</sup> Such data provides some insight into the changing work patterns in response to life stages.

Structural changes in the economy are also resulting in a change in industry mix increasing demand for labour outside the 9am-5pm Monday to Friday paradigm.<sup>47</sup> As noted by Professor Phil Lewis:

*In 1975 the ‘soft’ services (such as health, finance, retail, education, restaurants, and so on) accounted for just over 50 per cent of all jobs, but by 2013 the sector accounted for more than 70 per cent of all jobs (ABS 2012a). By contrast, manufacturing’s share of total employment almost halved over the same period to about 10 per cent in 2013. There were also reductions in the relative shares of jobs in the ‘industrial’ services (such as construction, communications, electricity, gas and water)... It may be thought that for a modern service-based economy, such as Australia, imposing higher wages (penalty rates) when the demand for services is often greatest is something of an anomaly.<sup>48</sup>*

The RBA has observed:

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<sup>44</sup> Australian Bureau of Statistics, 2013, ‘Young adults: Then and now’, cat. no. 4102.0.

<sup>45</sup> Productivity Commission, Op. Cit., p. 102.

<sup>46</sup> Ibid, p. 102.

<sup>47</sup> Lewis P, ‘Paying the penalty? The high price of penalty rates in Australian restaurants’, Agenda: A Journal of Policy Analysis and Reform, Vol. 21, No. 1, 2014: 5-26.

<sup>48</sup> Ibid.



*Across industries, recent employment outcomes have reflected the changing composition of economic activity away from the resources sector. Over the course of 2014, a large portion of employment growth was household focussed industries, such as education, accommodation & food service, and retail trade.<sup>49</sup>*

There has been substantial growth in industries that offer part-time and casual employment.<sup>50</sup>

As noted earlier in this submission, the Productivity Commission has also observed that:

*It is not possible to characterise a 'normal' pattern of work. Many people do not work in regular full-time long-tenure jobs in daylight hours on weekdays. Indeed, there are many part-timers, shift and overtime workers, people in non-traditional forms of employment, and people with short-term tenure in their jobs. More than one in twenty people are multiple jobholders and close to one in three secondary students work.<sup>51</sup>*

However the relative stability in work forms and employment may suggest that our labour market is not as agile or adaptable as it should be. The Australian Chamber has made detailed submissions to the Productivity Commission as a part of its review of the workplace relations framework seeking reform of workplace settings so that it is better able to respond to the changed needs of the modern economy. While outside the scope of this Inquiry it will also be important to consider complimentary policy settings in the area of taxation, superannuation and retirement savings, competition law and social policy in creating an environment that best supports an agile and adaptable workforce.

## 8 Supporting entrepreneurship

While our changing world of work creates challenges, it also provides opportunities for people to pursue pathways to economic independence through new business opportunities and self-employment. Competition in the marketplace is increasing and while some may feel threatened by the emergence of new business models and ways of working, a closer analysis is required to understand what is driving the change and how we can embrace this change as an opportunity to enhance productivity and participation outcomes.

When businesses are in their dynamic yet high risk establishment and growth phases, work is not always ongoing or guaranteed and a broad range of work arrangements will be needed. Through a choice of work options, businesses are able to scale up and down to meet volatile demand and can fill skill and labour gaps as required. While the workplace relations system presents certain barriers to maximum agility, a focus on outputs rather than inputs can be achieved through non-traditional work forms. These work forms deliver many benefits for both parties to the arrangement which are often overlooked.

Our economy is becoming increasingly dependent upon small business and policy should be focussed on helping our entrepreneurs build solid foundations within Australia and grow businesses that employ and this means there is a pressing need for our policy makers to challenge

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<sup>49</sup> Reserve Bank of Australia, Statement of Monetary Policy, February 2015, p. 44.

<sup>50</sup> Australian Bureau of Statistics, 2013, 'Young adults: Then and now', cat. no. 4102.0.

<sup>51</sup> Productivity Commission, Op. Cit., p. 89.

convention in the way we regulate employment relationships and the workplace. Encouraging entrepreneurship, small business growth, adaptability and innovation is key to Australia's future growth and this necessitates increased pursuit of innovative business models and an agile workforce. It necessitates ore simplified and streamlined regulation to enable these small businesses to do what they do best.

Acknowledged by such diverse sources as the FWO, the Productivity Commission and the Fair Work Commission itself, Australia's workplace regulation is very complicated and small businesses in particular find compliance to be a challenge. The workplace relations system is poorly designed for those required to implement and comply with it and the Australian Chamber has made comprehensive submissions to the Productivity Commission's inquiry into the workplace relations framework which seek to address this.

The Australian Chamber called out the complexities of the system extensively in its initial system to the Productivity Commission's inquiry into the workplace relations framework and also noted the FWO's acknowledgement of the system's complexity providing the following extracts from an address made in 2014:

*We are very much aware that workplace laws can be complex for the uninitiated.*

*We know they also exist amongst a whole pile of rules you have to follow about all sorts of things...*

*...*

*For those who aren't industrial experts, the margin for error is high.*

*...*

*...there are many people who are a long way from understanding the intricacies of things such as the interaction between the National Employment Standards and awards, or the difference between above award payments, enterprise agreements and an Individual Flexibility Arrangement.*

*This is why we are publicly acknowledging that the system could be simpler.*

*That we should take every opportunity to make the framework clearer.*

*...*

*If we can decrease complexity then this reduces the red tape you have to grapple with.*

*There is a clear productivity benefit.<sup>52</sup>*

The way in which the regulation is delivered and enforced should be appropriate to the circumstances of small business. A Productivity Commission report entitled 'Regulator Engagement with Small Business' arose from a research study to benchmark the extent to which the different approaches to regulator engagement with small business have the potential to affect the costs (including time and effort) incurred by these businesses.

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<sup>52</sup> Fair Work Ombudsman (Natalie James), Speech for the National Small Business Summit: FWO's Deal with Small Business, 8 August 2014, Melbourne.

This report acknowledged that there is a broad spectrum of regulations at multiple levels of government and that “[f]or some small businesses, compliance necessitates the diversion of a substantial proportion of productive business time and modifications to their production or service delivery processes in ways that are uncertain to deliver improvements in regulatory outcomes”.<sup>53</sup> In an economy in which we are highly dependent on small business growth to diversify our sources of economic activity and income streams, this is an unsatisfactory outcome.

The Productivity Commission found that small business especially value:

- *compliance requirements that are straightforward to find, understand and implement — this necessitates brevity, clarity and accessibility in the communication of compliance obligations and reporting requirements that are consistent with existing business approaches*
- *in the regulator’s approach to compliance management and enforcement, a demonstrated capacity and willingness by regulators to:*
  - *be flexible and proportionate in their enforcement, with a consistent focus on outcomes*
  - *minimise unnecessary compliance and reporting costs imposed on small business, including the cumulative burden derived from engagement with multiple regulators*
  - *understand the needs and constraints of small business generally and those specific to their business or industry.*<sup>54</sup>

While the Productivity Commission also identified that such small businesses value ‘compliance requirements that are straightforward to find, understand and implement’, it is apparent that much of the workplace relations framework has not been designed with these principles in mind which presents significant barriers for the 93% of Australian businesses employing between 1-19 employees.

The Productivity Commission also considered the profile of person behind a small business with statistical information indicating that the typical owner is ‘likely to have completed secondary school or a trade qualification but often have not undertaken formal management training and tend not to use a business plan’.<sup>55</sup> Migrant small business owners were also identified as a significant group at 27 per cent.<sup>56</sup> More recent data indicates this figure is climbing and now sits at around 29 per cent.<sup>57</sup>

The Australian Chamber maintains the view that a simplified and streamlined system will deliver productivity benefits and will better support compliance outcomes and an understanding of rights and obligations from the perspective of both employers and employees. It will reduce the apprehension businesses have around directly employing workers. Accordingly, this Inquiry should not be concerned with looking to increase the regulatory burden through further regulation, whether in relation to labour hire businesses, businesses engaging independent contractors, businesses utilising non-traditional work forms or otherwise.

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<sup>53</sup> Productivity Commission 2013, *Regulator Engagement with Small Business*, Research Report, Canberra, p. 3.

<sup>54</sup> *Ibid*, p. 38.

<sup>55</sup> *Ibid*, p. 31.

<sup>56</sup> *Ibid*, p. 32.

<sup>57</sup> *Ibid*, pp. 44-45.

## 9 Policy must shift its focus away from ‘job for life’ security and toward ‘employability’ and flexibility

Traditional skills and knowledge banks are being challenged and ‘adaptive learning’ is coming into focus. Information is freely available anytime and anywhere and in our dynamic, changing context, a person’s ability to learn new things, to apply those learnings and stay adaptable is critical.

Against this backdrop, the focus of policy now needs to shift away from the traditional notion of ‘job-for-life’ job security and toward ‘employability’ and flexibility. Just as organisations need to be able to adapt to our changing environment, so must the people within them. People will need to acquire skills which are readily transferable between roles, employers and industries. Greater value is placed on what a person produces, as opposed to how long they are physically based in a workplace and this is becoming less conducive to a workplace relations structure that promotes permanent employment with the one employer. People may find greater economic security by diversifying sources of income by self-employment, contracting and by working in a combination of ways for more than one person or business, sometimes at the same time. Indeed in our rapidly changing work of work ‘portfolio employment’ may provide greater security for many than working for the one employer in a traditional, permanent form of employment. With our environment changing at a rapid pace a person’s ability to adapt and learn new things quickly is critical.

In the traditional employment context, people must be encouraged to be innovative and take risks if they see a way to improve a product or service offering for the customer or end user. Employers should foster a culture that ensures those the people working for the business at any given time see themselves as contributing to its performance and evolution, and have an appreciation of the challenges that our rapidly changing world presents.

## 10 Greater capacity to negotiate arrangements of mutual benefit is needed

Maximising both participation and productivity will be critical to Australia’s future growth, competitiveness and the maintenance of high living standards. Our regulatory environment must enable access to the broadest range of work arrangements possible. Barriers to employment within the industries that can facilitate flexible forms of labour engagement must be removed. With flexible work driven by both supply and demand factors, there is scope to identify more effective ways of better aligning business-worker preferences and expectations and enabling the negotiation and implementation of working arrangements that reflect the mutual needs and interests of the parties.

During its inquiry into the workplace relations framework the Productivity Commission identified that an overarching concern is “the extent to which bargaining arrangements allow employees and employers to genuinely craft arrangements suited to them”.<sup>58</sup>

The Australian Chamber maintains the view that the workplace relations framework’s focus on complex, collective agreement making together with prohibitions on the making of statutory

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<sup>58</sup> Productivity Commission, Inquiry into the Workplace Relations Framework, Issues Paper 3: Bargaining, p. 1.

individual agreements, is not conducive to SMEs and their employees negotiating arrangements of mutual benefit. Such an outcome leaves businesses in a situation where parties are required to navigate the complex and inflexible award system.

The inflexibilities within the award structure such as prescriptive minimum engagement periods, prescriptive part-time hours and excessive penalty rates impose significant limitations on the pattern of hours an employer can offer and are significant barriers to participation for those requiring ultra-flexibility. If employers and employees are unable to implement mutually beneficial changes to award working arrangements in the absence of a significant cost impost, flexibility will not be extended and the parties will be forced to work within the strictures of the award. This may prevent employees accessing working patterns that suit them and may prevent employers from structuring their working arrangements in an efficient way.

In the Australian Chamber's view, the reform task ahead should complete the evolution from the adversarial, conflict based approach from which the system derives its historical origins toward an environment where wages and conditions are overwhelmingly set by workplace bargaining, either collectively or individually, underpinned by a simple, flexible safety net. The notion of freedom to contract should be reflected in the framework and primacy given to the intention of the parties.

## 11 Non-traditional labour forms do not equate to a social ill

The existence of non-traditional forms of labour engagement does not amount to a 'social ill' that needs to be targeted and treated. Independent contracting, labour hire, casual and fixed term employment are critical pillars of the labour market and deliver benefits for businesses, workers and consumers.

The Productivity Commission recently observed in its Draft Report:

*There is little question that some members of the workforce see work that is not performed within a permanent employment relationship as a one-sided bargain, with job insecurity affecting their own schedules, the capacity to bargain with employers and the ability to borrow and make plans for the future.*

*However, this perspective on non-standard work is an overly negative one. What holds for some does not hold for all. There is little evidence that the prevalence of non-traditional forms of labour is an adequate predictor of low quality jobs (PC 2006; Wooden and Warren 2004). People in non-standard jobs are highly heterogeneous. Such jobs can suit people's circumstances well and can act as stepping stones for more secure employment.<sup>59</sup>*

Even this assessment of 'non-traditional' or non-traditional work as a stepping stone presents an overly pessimistic view. The evolution to an agile, innovative and creative world of work will open up a broad range of work arrangements which provides greater choice and participation options. For example, the Productivity Commission has noted that fixed term work "is generally preferred by employees who enjoy changing jobs periodically, enjoy having a finite horizon for their work

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<sup>59</sup> Productivity Commission Op. Cit., p. 100.



relationship, but do not want to be self-employed”.<sup>60</sup> Many workers are taking control of their working lives through self-employment. A study released by Upwork estimated that 4.1 million people, or around 32 percent of the workforce have carried out freelance work in the past year. The majority of those surveyed said they made the shift by choice, now earn more and would not go back to a traditional job, no matter how much it paid.

Consumers have ultimately benefited from non-traditional labour forms which deliver efficiency, productivity and competition which keeps prices for goods and services lower than they would otherwise be. As noted by the Productivity Commission “[w]here using alternative labour forms does lower costs then, in any workably competitive market, the wider community will typically capture most of the benefits through lower prices.”<sup>61</sup>

Over the years, governments have introduced a number of laws that have eroded the benefits of using non-traditional forms of labour. Via “deeming” provisions, governments have variously sought to treat independent contractors the same as employees for taxation purposes (payroll tax) and extend various employee welfare benefits (workers compensation, superannuation) to independent contractors. The FW Act expanded the scope of protection afforded to employees by giving independent contractors protection from “adverse action”.

In the context of our rapidly changing environment, we need to be recalibrating our policy settings and adopting an approach that promotes, rather than discourages non-traditional work forms such as self-employment. For example, the main provisions of the *Independent Contractors Act 2006* (Cth) became operative on 1 March 2007, with its main objective stated to be:

- to protect independent contractors’ freedom to enter into service contracts;
- to recognise independent contracting as a legitimate form of work arrangement that is primarily commercial; and
- to prevent interference with “genuine independent contracting arrangements”.

It was the first time we had seen legislation attempting to “preserve” independent contractor status rather than overriding common law independent contractor status and it was a positive step in the right direction. However the legislation was limited in its application, particularly due to its inability to override state legislation determining status outside the context of industrial laws, e.g. workers compensation and pay roll tax laws, and was ultimately modified to reflect different purposes.

The Australian Chamber has long advocated the following principles in support of independent contracting:

- Recognition that the underlying principle of freedom of contract is the basic pillar on which our system of commerce and industry operates;
- That persons genuinely and freely entering into contracts for the provision of their personal services as contractors should, provided those contracts are lawful, not have them varied, redefined, reshaped, annulled, downgraded or otherwise interfered with by persons or bodies (including governments, regulators, tribunals or courts) who are not parties to those contracts;

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<sup>60</sup> Productivity Commission, Op. Cite, p. 715.

<sup>61</sup> Ibid, p. 717.

- That the common law generally provides a proper and sufficient basis on which the law should give legal recognition to a contract for services and a proper basis for setting out the necessary elements of a contract for services, although additional certainty can be provided by statute so long as common law rights are not prejudiced;
- That contracts of employment where employees are labelled as contractors, but where in fact and law they are really employees, are sham contractor arrangements and do not have legal recognition as contracts for services at common law;
- That arrangements which are non-consensual or which are tainted by coercion or undue influence are not enforceable and do not have legal recognition as contracts for services at common law;
- That genuine and consensual contracts for services under which work is performed as principal and contractor are in and of themselves a legitimate, welcome and beneficial form of commercial arrangement that adds value to the Australian economy, and in particular is no less welcome than contracts of employment;
- That genuine and consensual contracts for services are not inherently exploitative, unfair or otherwise requiring the attention of consideration of governments, parliaments or regulators;
- That contracts for services provide a flexibility, efficiency and productivity that is of real value to the parties and the economy and society as a whole;
- That the values of entrepreneurship, risk taking, investment and choice which underpin contracts for services are values that should be welcomed, encouraged and highly regarded by policy makers.
- Governments should not be in the business of deciding what working arrangements suit a business or individuals. Regulating true independent contractors as employees is a regulation of entrepreneurship, and not something that even the International Labour Organisation has recommended.

The Productivity Commission has also acknowledged the importance of non-traditional forms of labour engagement, stating for example:

*Independent contracting differs from ongoing work in that it offers greater autonomy. Because they contract out their services on a job-by-job basis (most are single person owner-operated businesses), independent contractors can usually choose what jobs to take, the hours they work, and the way in which they complete the job. They can also work for a number of clients simultaneously. Independent contracting arrangements developed unaided as an alternative to the standard employment for and, by 2006, they had become such an intrinsic aspect of the WR system that the Independent Contractors Act 2006 (Cth) was introduced.<sup>62</sup>*

The Productivity Commission has also suggested:

*Typically, casual work appeals to workers who value flexible hours, with the option of declining work (Shomos, Turner and Will 2013) as well as workers who are either just*

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<sup>62</sup> Productivity Commission, Op. Cit., p. 715.



*entering or close to leaving the workforce. Adding to this appeal is the higher hourly rate, or casual loading...*<sup>63</sup>

The Productivity Commission has observed that in many cases casual workers will “have the benefit of regular work as well as the higher wage rates associated with the loading” paid to casual employees.<sup>64</sup> The Productivity Commission has suggested that nearly 59 percent of casuals work the same hours each week while 40 per cent of casual workers had been with the same employer for more than two years.<sup>65</sup> This is not evidence of a social ill that requires remediation.

As noted by Professor Forsyth “[l]abour hire is a legitimate way of engaging workers that is now an established feature of the Australian labour market”.<sup>66</sup> Professor Forsyth has also correctly observed that “there are many potential benefits of labour hire arrangements for workers, businesses, the community and the economy”.<sup>67</sup>

In its submission to the Productivity Commission’s inquiry into the workplace relations framework the Australian Council of Trade Unions argued that:

*... [l]abour hire exists purely as an avoidance strategy and its continued operation in the present regulatory settings is untenable unless one accepts that the workers who are engaged by the labour hire agencies are second class citizens.*<sup>68</sup>

The Australian Chamber strongly rejects this assertion. There is no evidence to suggest a greater incidence of non-compliance by employers who are labour hire businesses. It may even be the case that engagement of employees through a third party will aid in compliance as the labour hire business may have more sophisticated payroll and human resources functions than the host.

Non-traditional forms of work can facilitate:

- higher levels of productivity;
- guaranteed higher quality of work;
- payment by results which leads to predictability of costs;
- capacity to flexibly organise work to meet project schedules;
- innovation and wealth creation;
- freedom of choice and flexibility for the individual.

These forms of labour engagement provide the flexibility required to respond to our rapidly changing economy and product and service cycles where work is not always ongoing or guaranteed. Where specialist or additional skills are required for discrete and finite periods, skill and labour gaps are able to be filled through legitimate contractual arrangements. Businesses may be able to minimise productivity loss and minimise the risk of non-compliance by engaging labour through third parties who attend to the complex compliance obligations associated with direct employment.

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<sup>63</sup> Productivity Commission, Op. Cit, p. 715.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Victorian Inquiry into Labour Hire, Background Paper, October 2015, p. 4.

<sup>67</sup> Ibid., p. 9.

<sup>68</sup> ACTU, p. 3

Many workers do not want to be employees but enjoy the freedom and financial incentives associated with self-employment. Many value the opportunity to work at their own pace and to work their own hours without detailed supervision. Whilst working for profit rather than a wage brings risk, the contracting model rewards productivity and delivers the fruits of one's own effort. The focus of policy should be on educating the self-employed about ways to guard against risk rather than trying to fundamentally alter their status as a self-employed person or creating obstacles to self-employment as a pathway to economic independence.

If flexibility, efficiency and productivity is not enhanced it will constrict the capacity of the economy to grow at a sustainable rate, and will reduce the nation's living standards. Accordingly, non-traditional labour forms must be promoted as a perfectly legitimate way of performing work in the modern economy and an entirely valid alternative to direct, permanent employment and must be supported because of the many benefits they provide.

## 12 Restricting the use of contractors and labour hire arrangements is anti-competitive

The Productivity Commission, in its draft report arising from its inquiry into the workplace relations framework (Draft Report), considered that "[t]here are grounds for changes to the Fair Work Act to limit the capacity of agreements to regulate the use of contractors and labour hire (which are in any case, in spirit, contrary to the *Competition and Consumer Act 2010* (Cth)".<sup>69</sup> Consistent with this view the Productivity Commission made the following draft recommendation (Draft Recommendation 20.1):

*Terms that restrict the engagement of independent contractors, labour hire and casual worker, or regulate the terms of their engagement, should constitute unlawful terms under the Fair Work Act 2009 (Cth).*<sup>70</sup>

This recommendation is strongly supported by the Australian Chamber. The principle of freedom of contract is the fundamental pillar on which our system of commerce and industry operates. Persons genuinely and freely entering into contracts for the provision of their services should not have those arrangements interfered with by persons or bodies (including governments, regulators, tribunals or courts) who are not parties to those contracts.

Contractual arrangements in which workers provide services on commercial terms to companies on a short term, contract or project basis as required through an intermediary are legitimate, welcome and beneficial forms of commercial arrangement that add value to the Australian economy. Such forms of labour engagement are no less appropriate than other forms of genuine and consensual labour engagement and provide flexibility, efficiency and productivity dividends.

The Productivity Commission has identified that reasons firms and workers choose labour hire arrangements can include the ease at which these arrangements enable firms to fill temporary

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<sup>69</sup> Productivity Commission, Op. Cit., p. 34.

<sup>70</sup> Ibid., p. 60.

positions and meet fluctuations in demand and the access that such arrangements can provide to flexible hours and potentially to ongoing employment.<sup>71</sup>

The 2015 Intergenerational Report has highlighted the participation challenges confronting an ageing Australian population stating:

*The community and economy will benefit from opportunities to support older Australians who want to work, as well as boosting opportunities for women, young people, parents and people with disability to participate in the workforce. This can be achieved through policies that support people who choose to stay in the workforce for longer, or re-enter it sooner after a temporary absence.*

It is important that the WR Framework facilitates the broadest possible range of options for workforce participation to meet our diverse workforce needs and non-traditional work forms such as casual employment, labour hire and independent contracting will play a critical role in achieving this.<sup>72</sup>

## 13 Non-traditional forms of employment will enhance participation outcomes as our population ages

The Australian Chamber has played an active role in promoting the business case for employing people from a broad and diverse pool of Australians including people with a disability, mature aged workers, indigenous Australians, women returning to work, workers with different industry backgrounds, the unemployed and people who might have historically been considered 'outside the box'. This commitment can be seen from the Australian Chamber's 'Employ Outside the Box' resources which promote a number of important messages for employers. In particular, the Australian Chamber continues to heighten awareness of demographic changes and structural changes in our economy which will see skill and labour shortages and intensify the need for employers to draw from a broad and reliable supply of labour.

Demographic shifts as our population ages will see a heightened focus on career longevity. As our population ages and people remain in the workplace for longer we can expect that people will take on more jobs and will consider a range of different forms of work across their working life. The participation rate of older workers is rising as our population ages and access to flexible forms of work is important in supporting this outcome.

The Intergenerational Report highlighted our shifting demographics and ageing population stating that:

*Australians will live longer and continue to have one of the longest life expectancies in the world. In 2054-55, life expectancy at birth is projected to be 95.1 years for men and 96.6 years for women, compared with 91.5 and 93.6 years today.*

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<sup>71</sup> Productivity Commission 2006, *The Role of Non-Traditional Work in the Australian Labour Market*, Commission Research Paper, Melbourne, May 2006, p. 3.

<sup>72</sup> 2015 Intergenerational Report Australia in 2055, Commonwealth of Australia, March 2015, p. iii.

*In 2054-55, there are projected to be around 40,000 people aged over 100. This is a dramatic increase, well over three hundred times the 122 Australian centenarians in 1974-75.<sup>73</sup>*

The Intergenerational Report also observed that:

*Life expectancies at birth in Australia for both males and females remain among the highest in the world. According to UN data for the period 2010-15, Australia ranks equal first with Iceland in male life expectancy. For females, Australia ranks only behind Japan, Spain, France and Italy.<sup>74</sup>*

We can expect life expectancy to increase as time progresses with the Intergenerational Report suggesting:

*Medical research underway today in areas such as stem cell therapy, new medicines and other biotechnology has the potential to provide further dramatic improvements in life expectancy. It is for this reason that some experts have suggested that life expectancy may reach in excess of 140 years. The projections assume that the improvements from medical research continue at the same rate as the past.<sup>75</sup>*

It is necessary to consider the impact of our ageing population in the context of the workforce with Australian statistics having predicted that by 2056 there will be about two to three people of working age for person aged 65 years and over. In this regard, the Intergenerational Report notes:

*There will be fewer people of traditional working age compared with the very young and the elderly. This trend is already visible, with the number of people aged between 15 and 64 for every person aged 65 and over having fallen from 7.3 people in 1974-75 to an estimated 4.5 people today. By 2054-55, this is projected to nearly halve again to 2.7 people.<sup>76</sup>*

While the number of people of 'traditional working age' may be falling, the cohort of people who may have once been considered to have been outside of 'traditional working age' is growing in scale. The Intergenerational Report stated:

*By 2054-55, the number of people aged 65 to 84 will have increased substantially. By 2054-55 there are projected to be 7.0 million Australians aged 65 to 84, compared with around 3.1 million in 2015. This would represent just under 18 per cent of the total population, compared with 13 per cent in 2014-15. In 1974-75, around 1.2 million persons were aged over 65, or around 9 per cent of the population.<sup>77</sup>*

However as we age, it is likely that Australians will be able to work in a productive capacity for longer. In this regard the Intergenerational Report noted that "[r]ecent improvements in life expectancy have been met or exceeded by improvements in these health expectancies. That is,

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<sup>73</sup> Intergenerational Report, pp. vii-viii.

<sup>74</sup> Ibid, p. 6.

<sup>75</sup> Ibid, p. 7.

<sup>76</sup> Ibid, p. viii.

<sup>77</sup> Ibid, p. 13.

not only are Australians' lives getting longer, they are enjoying good health for an increasing number of those extra years".<sup>78</sup> The Intergenerational Report stated:

*Not only will Australians live longer, but improvements in health mean they are more likely to remain active for longer. 'Active ageing' presents great opportunities for older Australians to keep participating in the workforce and community for longer, and to look forward to more active and engaged retirement years.*<sup>79</sup>

The Intergenerational Report also made reference to the Australian Institute of Health and Welfare's (AIHW) estimated 'health expectancies' for Australians which suggested that:

*A male born in 2012 could expect to live 79.9 years (period method) and an average of 62.4 of those years without disability. A female could expect to live 84.3 years, and an average of 64.5 of those years without disability. Of the years spent living with disability, an estimated 11.8 were without severe or profound core activity limitation for men, and 12.0 for women; that is not needing help with activities of self-care, mobility or communication.*<sup>80</sup>

The Intergenerational Report also referenced the World Health Organisation's estimates of healthy life expectancy which measure the average number of years that a person can expect to live in 'full health' by taking into account years lived in less than full health due to disease and/or injury. The measure suggested that in 2012 Australians had the equal fourth highest healthy life expectancy at birth in the world being 73 years for both sexes combined.<sup>81</sup>

*The number of Australians aged 65 and over is projected to more than double by 2054-55, with 1 in 1,000 people projected to be aged over 100. In 1975 this was 1 in 10,000.*<sup>82</sup>

The Intergenerational Report notes:

*Participation is made up of three elements: how many people choose to seek work (the workforce participation rate), how many of them can get jobs when they do seek work (the unemployment rate) and the average number of hours worked by individuals who have jobs. Improvements in participation happen as more people choose to look for work, and more of them are able to find work.*<sup>83</sup>

There is little doubt that Australian governments are facing increasing fiscal pressures as the population grows and ages with programs most affected by demographic factors being health and expenditure, age and service pensions and aged care funding.<sup>84</sup> However with the right policy settings in place, these pressures may be partially offset by increases in participation by employing outside the box and challenging social norms and perceptions regarding 'retirement age', work ability and by promoting the notion of career longevity. Indeed the Intergenerational Report states:

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<sup>78</sup> Intergenerational Report, p. 8.

<sup>79</sup> Ibid., p. viii.

<sup>80</sup> Ibid, p. 8, sourced from Australian Institute of Health and Welfare Bulletin 126, Healthy Life Expectancy in Australia: Patterns and Trends 1998 to 2012.

<sup>81</sup> Ibid, p. 8, sourced from World Health Organisation, Healthy Life Expectancy at Birth.

<sup>82</sup> Ibid, p. 1.

<sup>83</sup> Ibid, p. 2.

<sup>84</sup> Ibid, p. xvi.



*Increasing participation rates contributed 0.2 percentage points to average growth over the past 40 years. Over the next 40 years declining participation is projected to detract 0.1 percentage points from average growth.*

*...over the next 40 years, ongoing improvements in Australian living standards will remain primarily contingent upon continually improving our productivity, and require us to take every opportunity to increase participation rates.<sup>85</sup>*

The Australian Chamber considers that sections 134 and 3 of the *Fair Work Act 2009* (Cth) (FW Act) were intended to be concerned with enhancing job growth opportunities and reducing unemployment. The FW Act's qualification of the promotion of social inclusion "through increased workforce participation" reinforces this view. The commonly understood notion of workforce participation refers to the share of the working age population, i.e. persons aged 15 and above, who are either in a job or actively looking for one - those who are "willing to work". Workforce participation, population and productivity are commonly referred to as the "three Ps" that impact on economic growth and higher levels of workforce participation also have the effect of reducing pressure on the social welfare system as well as promoting social inclusion and equity objectives.

Much has been said about the challenges our ageing population presents for our social welfare system and economy. Participation rates are influenced by a wide variety of factors including individual work preferences, cultural and social attitudes, government policies such as retirement incomes policy and the tax transfer system as well as labour market regulation. It is critical that government and policy makers ensure that policies and regulations do not have the effect of discouraging workforce participation and in this regard, aspects of our workplace relations framework are in need of reform.

The inflexibilities within the award structure such as prescriptive minimum engagement periods, prescriptive part-time hours and excessive penalty rates impose significant limitations on the pattern of hours an employer can offer and are significant barriers to participation for those requiring ultra-flexibility. Union applications are currently before the Fair Work Commission and seek to inject even more inflexibility into the system, including (among other things) clauses that would see the inclusion of longer minimum engagement periods. One size fits all minimum engagement periods of four hours are too inflexible given the very diverse circumstances faced by employers and their employees. Flexibility is required so that employers are not prevented from offering work.

The changes sought will, if awarded, result in additional regulatory and cost imposts for employers in what is already an unduly complex system. The 'common' nature of the claims is akin to an attempt to expand the legislated NES yet such content is not subjected to a regulatory assessment process as would be expected of changes to the NES.

There is no place in the modern economy for award provisions which restrict the kinds of employment that employers and employees may wish to enter into. Regulations that force changes to the nature of an employee's contract of employment (e.g. from a casual contract of employment to a full-time contract of employment) or which place impractical restrictions on engagement

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<sup>85</sup> Intergenerational Report, p. xii.

patterns inherently discourage hiring. Job opportunities should not be demonised because they are not permanent or offer fewer hours than full-time employment. The 2015 Intergenerational Report has highlighted:

*To drive higher levels of prosperity through economic growth, we must increase productivity and participation. If we are to achieve these goals we need to encourage those currently not in the workforce, especially older Australians and women, to enter, re-enter and stay in work, where they choose to do so.<sup>86</sup>*

The report highlights the importance of opportunities to support increased participation rates and a system centred around the 9-5, Monday to Friday paradigm does not facilitate the creation of employment opportunities to cater for a broad range of personal circumstances, including persons looking to balance work and caring responsibilities or transition to retirement.

If employers and employees are unable to implement mutually beneficial changes to award working arrangements in the absence of a significant cost impost, flexibility will not be extended and the parties will be forced to work within the strictures of the award. This may prevent employees accessing working patterns that suit them and may prevent employers from structuring their working arrangements in an efficient way. The importance of maintaining the legitimacy of non-traditional forms of work will become increasingly important in maximising participation outcomes as our population ages.

## 14 Conclusion

As noted earlier in this submission, the Australian Chamber does not support the expansion of portable long service leave or other entitlements beyond the current arrangements and considers that any move to do so would negatively impact on the cost of doing business and employment in Australia. As far as long service leave is concerned, if the entitlement to the leave is no longer dependent on long service with an employer, its character will fundamentally change because no longer will employers be guaranteed the benefit of long, faithful and productive service of experienced employees in return for the long service leave payments they make.

This inquiry takes place in a context where there are existing state and territory based portable long service leave schemes operating in selected industries. Portable long service leave schemes were established to recognise the distinctive nature of employment in industries where employees are typically engaged on a project basis. However the rationale for portable long service leave schemes is not supported in other industries, particularly where traditional employment arrangements are commonplace. Furthermore, the cost and administrative burden associated with the establishment and operation of such schemes would significantly outweigh any benefits that some suggest portable long service leave schemes deliver. The claimed benefits are not supported by robust and probative evidence yet the negative impacts that the expansion of portable schemes will have on employment and business competitiveness are clear. The imposition of such schemes typically involve the imposition of a levy on employment and as a recent *VECCI-Bank of Melbourne Survey of Business Trends and Prospects* indicated, employers are not in a position to be able to

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<sup>86</sup> Intergenerational Report, p iii.



absorb the costs of such a tax on employment. Almost sixty per cent of survey respondents indicated that if they were required to contribute 2.7 per cent of their total gross wage bill to a central scheme, they would seek to reduce employee wages, benefits or hours. These results illustrate the negative impact that a scheme expansion would have on employers, jobs and workers.

As the Productivity Commission has recently stated in relation to its consideration of long service leave:

*Overall, it is not clear that the benefits of either the typical model of portable LSL or the alternative proposed above, would be sufficient to justify the costs and complications entailed. Submissions to this inquiry are yet to provide compelling evidence of major and widespread concern about present non-portability of most LSL arrangements.<sup>87</sup>*

The Australian Chamber also maintains the view that there is no ‘one size fits all’ employment model that will suit the circumstances of all employees or all employers and no single ‘right method’ of labour engagement. The Productivity Commission has suggested “[w]hether or not an employer seeks to use a certain form of work depends on their assessment of how productive *and* how costly the workers might be”.<sup>88</sup> The Productivity Commission acknowledged “[i]t is reasonable and entirely rational for employers to work to reduce costs and lift productivity, even if this does involve moving to the use of alternative forms of employment like casual workers, labour hire or genuine independent contractors.” Such analysis is commercially responsible and the types of work that a business requires and can provide will change from business to business.

Similarly, employee work preferences are very personal and change from person to person. The Productivity Commission has suggested “[f]or workers, the attractiveness of various forms of work depends largely on the associated financial and non-pecuniary benefits”.<sup>89</sup> The value that individuals place on the benefits that each form of non-traditional work provides will vary from person to person based on their preferences and circumstances.

The Productivity Commission has observed:

*Given that not everybody wants to work under the same conditions, these alternative employment forms partly satisfy the wide variety of preferences across the workforce. Whether it be the autonomy of independent contracting, the flexibility and the higher wage rate of the casual worker or the reduction in job search costs for the labour hire worker, each of these employment forms has some appeal to a large number of workers.<sup>90</sup>*

Freedom to contract and negotiate arrangements of mutual benefit should be promoted as a key policy objective in any discussion about “non-traditional” work forms.

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<sup>87</sup> Productivity Commission 2015, *Workplace Relations Framework*, Draft Report, Canberra, p. 179

<sup>88</sup> Productivity Commission, Draft Report, p. 715.

<sup>89</sup> Draft Report, p. 715.

<sup>90</sup> Draft Report, p. 716.

## 15 About the Australian Chamber

### 15.1 Who we are

The Australian Chamber of Commerce and Industry speaks on behalf of Australian business at home and abroad.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, making us Australia's most representative business organisation.

We speak on behalf of the business sector to government and the community, fostering a culture of enterprise and supporting policies that keep Australia competitive.

We also represent Australian business in international forums.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses also get involved through our Business Leaders Council

### 15.2 What We Do

The Australian Chamber strives to make Australia a great place to do business in order to improve everyone's standard of living. We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

## ACCI Members

**AUSTRALIAN CHAMBER MEMBERS:** BUSINESS SA CANBERRA BUSINESS CHAMBER CHAMBER OF COMMERCE NORTHERN TERRITORY **CHAMBER OF COMMERCE & INDUSTRY QUEENSLAND** CHAMBER OF COMMERCE & INDUSTRY WESTERN AUSTRALIA **NEW SOUTH WALES BUSINESS CHAMBER** TASMANIAN CHAMBER OF COMMERCE & INDUSTRY **VICTORIAN EMPLOYERS' CHAMBER OF COMMERCE & INDUSTRY MEMBER NATIONAL INDUSTRY ASSOCIATIONS:** ACCORD – HYGIENE, COSMETIC & SPECIALTY PRODUCTS INDUSTRY **AIR CONDITIONING & MECHANICAL CONTRACTORS' ASSOCIATION** AGED CARE AND COMMUNITY SERVICES AUSTRALIA **ASSOCIATION OF INDEPENDENT SCHOOLS OF NSW** AUSTRALIAN BEVERAGES COUNCIL LIMITED **AUSTRALIAN DENTAL INDUSTRY ASSOCIATION** AUSTRALIAN FEDERATION OF EMPLOYERS & INDUSTRIES **AUSTRALIAN FOOD & GROCERY COUNCIL** AUSTRALIAN HOTELS ASSOCIATION **AUSTRALIAN INTERNATIONAL AIRLINES OPERATIONS GROUP** AUSTRALIAN MADE CAMPAIGN LIMITED **AUSTRALIAN MINES & METALS ASSOCIATION** AUSTRALIAN PAINT MANUFACTURERS' FEDERATION **AUSTRALIAN RETAILERS' ASSOCIATION** AUSTRALIAN SELF MEDICATION INDUSTRY **AUSTRALIAN STEEL INSTITUTE** AUSTRALIAN SUBSCRIPTION TELEVISION AND RADIO ASSOCIATION **BUS INDUSTRY CONFEDERATION** CONSULT AUSTRALIA **COMMERCIAL RADIO** FITNESS AUSTRALIA **HOUSING INDUSTRY ASSOCIATION** LIVE PERFORMANCE AUSTRALIA **MASTER BUILDERS AUSTRALIA** MASTER PLUMBERS' & MECHANICAL SERVICES ASSOCIATION OF AUSTRALIA **MEDICAL TECHNOLOGY ASSOCIATION OF AUSTRALIA** NATIONAL ELECTRICAL & COMMUNICATIONS ASSOCIATION **NATIONAL FIRE INDUSTRY ASSOCIATION** NATIONAL RETAIL ASSOCIATION **NATIONAL ROAD AND MOTORISTS' ASSOCIATION** NSW TAXI COUNCIL **OIL INDUSTRY INDUSTRIAL ASSOCIATION** PHARMACY GUILD OF AUSTRALIA **PLASTICS & CHEMICALS INDUSTRIES ASSOCIATION** PRINTING INDUSTRIES ASSOCIATION OF AUSTRALIA **RESTAURANT & CATERING AUSTRALIA** SCREEN PRODUCERS AUSTRALIA **VICTORIAN AUTOMOBILE CHAMBER OF COMMERCE**