



**Australian Government**

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**Department of Employment**

**Senate Education and Employment References Committee**

**Inquiry into the feasibility of, and options for, creating a  
national long service standard, and the portability of long  
service and other entitlements**

**Submission by the  
Department of Employment**

**16 December 2015**

## Introduction

1. Australia's long service leave system dates back to the 1860s. Victoria and South Australia introduced long service leave to allow colonial bureaucrats with 10 years' service to return to their 'home' country, usually England. This developed into the scheme Australia has today. Long service leave is a concept unique to the Australian industrial relations framework.
2. Under the *Fair Work Act 2009*, state and territory long service leave legislation applies to national system employees except where employees are entitled to long service leave under the transitional National Employment Standard (NES). The transitional NES preserves certain long service leave entitlements in pre-modernised federal awards (and agreements in limited circumstances) as a minimum entitlement. Modern awards cannot provide terms about long service leave. This means that, in general, long service leave provisions are derived from state and territory legislation.
3. The development of a nationally consistent minimum standard for long service leave has been under consideration for some time. Most recently, in its 2007 election policy, the Australian Labor Party committed to working with the states to develop 'nationally consistent long service leave entitlements'<sup>1</sup>. The Review of the Fair Work Act in 2012 recommended developing a nationally consistent long service leave standard<sup>2</sup>. The development of a national standard had broad support during the review, with stakeholders keen to simplify the way long service leave entitlements were determined. The 2013 Coalition Fair Work Laws policy noted this recommendation<sup>3</sup>.
4. In its 2015 review of the workplace relations framework, the Productivity Commission has looked at long service leave, particularly around progressing a national standard or developing alternatives to the current long service leave system, such as an additional leave entitlement.
5. There are existing portable long service leave schemes in certain Australian industries. In the building and construction industry, all states and territories have portable long service leave schemes. Some states and territories have portable long service leave arrangements for other industries, such as cleaning and security work.
6. Commonwealth legislation provides long service leave entitlements to Commonwealth public sector employees and establishes a national scheme for the black coal mining industry.
7. This submission will address the above issues in more detail. It will also provide data on labour mobility and labour market trends. It will note the challenges of establishing a national long service leave standard, as well as setting up and managing portable long service leave schemes.

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<sup>1</sup>Australian Labor Party, 2007, 'Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces', April, Canberra, viewed 30 November 2015, <<http://www.airc.gov.au/kirbyarchives/2009exhibn/documents/070428FWF.pdf>>.

<sup>2</sup>Department of Education, Employment and Workplace Relations 2012, 'Towards more productive and equitable workplaces: an evaluation of the Fair Work legislation', report prepared by McCallum, R., Moore, M. and Edwards, J, August, Canberra, viewed 20 November, <<http://ris.dpmc.gov.au/files/2012/08/03-Final-Fair-Work-PIR-for-publication-20120802.pdf>>.

<sup>3</sup>Australian Liberal Party, 2013, 'The Coalition's Policy to Improve the Fair Work Laws', May, Canberra, viewed 25 November 2015, <<http://lpaweb-static.s3.amazonaws.com/Policies/FairWork.pdf>>.

8. The department considers that there are key policy and practical issues with developing a national standard and implementing any broad based portable long service leave system.

## History of Long Service Leave

9. Australia has had a long service leave system dating back to the 1860s. At the Commonwealth level, the Conciliation and Arbitration Commission arbitrated the first long service leave award (the Engine Drivers and Firemen's (General) (Long Service Leave) Award 1964), which provided for 13 weeks paid leave after 15 years' service, with pro rata payment in lieu of termination after 10 years' service. This was the standard entitlement in state and territory laws until New South Wales (NSW), Queensland (QLD), South Australia (SA), the Australian Capital Territory (ACT) and the Northern Territory (NT) adopted qualifying periods of 10 years or less.
10. All Australian states and territories have passed legislation for portable long service leave in the building and construction industry – with the latest scheme being introduced in the NT in 2005. More recently, some states and territories have established portable long service leave schemes in the contract cleaning, community services and security industries. These schemes allow employees to accrue and access long service leave entitlements via employer levies, even if they change employers.

## Current arrangements for long service leave

11. Long service leave entitlements are generally prescribed by state or territory long service leave laws or an applicable national system workplace instrument (that is, pre modernised federal awards and, in limited circumstances, pre 2010 agreements).
12. Commonwealth public sector employees derive their long service leave entitlements from the *Long Service Leave (Commonwealth Employees) Act 1976*.
13. There are nine main legislative frameworks in place across jurisdictions relating to long service leave:

• <i>Long Service Leave Act 1955</i>	(New South Wales)
• <i>Long Service Leave Act 1958</i>	(Western Australia)
• <i>Long Service Leave Act 1976</i>	(Australian Capital Territory)
• <i>Long Service Leave Act 1976</i>	(Tasmania)
• <i>Long Service Leave (Commonwealth Employees) Act 1976</i>	(Commonwealth)
• <i>Long Service Leave Act 1981</i>	(Northern Territory)
• <i>Long Service Leave Act 1987</i>	(South Australia)
• <i>Long Service Leave Act 1992</i>	(Victoria)
• <i>Industrial Relations Act 1999</i>	(Queensland)
14. In some states and territories, casual employees are eligible for long service leave. References to casual employees in long service leave legislation vary in all states and territories but generally, casual employees may be entitled to the leave pro rata if they are employed on a regular and systematic basis. Whilst the treatment of casual employees varies, no long service leave legislation specifically excludes casual employees.

## **Fair Work Act**

15. The Fair Work Act preserves the operation of state and territory long service leave laws except in relation to employees entitled to long service leave under sections 113 and 113A of the NES in the Fair Work Act. The NES preserves certain long service leave entitlements in pre-modernised federal awards (and, in limited circumstances, pre 2010 agreements). The preservation applies to employers and any existing and future employees covered by the pre-modern instrument. The standard was intended to maintain current arrangements pending development of uniform, national long service leave standard<sup>4</sup>.
16. The Fair Work Act also sets out that:
  - Modern awards cannot include terms dealing with long service leave (s 155 of the Fair Work Act).
  - Enterprise agreements made after 31 December 2009 apply subject to any applicable state and territory long service leave legislation. Such agreements can supplement but cannot override applicable state or territory long service leave laws (s 29(2) of the Fair Work Act).
17. Long service leave is currently excluded from state referrals of power for amendments to the Fair Work Act, with state and territory long service leave laws continuing to apply<sup>5</sup>.

## **Implications for employers and employees**

18. Enterprises operating in multiple states are required to manage different long service leave systems simultaneously. If employees transfer to work interstate, their length of service is recognised, but the quantum of leave accrued is not. There is no scope to pay long service leave entitlements proportionally (that is, employees receive their entitlement based on the state in which they work when the entitlement crystallises).

## **National long service leave standard**

19. A national long service leave standard has been considered by governments for some time.
  - In 2012 the Fair Work Act Review Panel recommended that the Australian Government, together with its state and territory counterparts, expedite the development of a national long service leave standard with a view to introducing it by 1 January 2015. The development of a national standard had broad support during the review, with stakeholders keen to simplify the way long service leave entitlements were determined.
  - The Australian Government noted this recommendation in its election commitment policy document and long service leave has been considered by the Productivity Commission in the 2015 review of the workplace relations system.

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<sup>4</sup>Explanatory Memorandum, Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 (Cth) pg 80.

<sup>5</sup>*Fair Work Act 2009* (Cth), ss 30B(4), 30L(4), 30A(1), 30K(1).

## Challenges

20. The key challenge in establishing a national long service leave standard is that state and territory governments maintain primary responsibility for long service leave entitlements. In order to achieve a national standard, the state and territory governments will need to reach consensus on the provisions, such as the quantum of leave and qualifying periods. This will be difficult, considering the differences in the entitlements between jurisdictions. Achieving a uniform standard based on an average of the current range of entitlements could, for example, result in some employers having higher costs and some employees receiving lower entitlements than under their current arrangements.
21. A comparison of key components of long service leave provisions (initial entitlement, accrual rate per annum, subsequent entitlement, pro rata accessibility after initial entitlement and pro rata qualification) in state and territory legislation is provided in Table 1. A brief analysis of the areas of commonality between the different state and territory schemes is at Table 2.
22. As well as providing for different amounts of leave and qualifying periods, state and territory laws also include a range of entitlements relating to termination of employment and other matters, such as cashing out of leave. Examples of the range of entitlements are:
  - An accrual rate of 1.3 weeks per annum can be applied to employees in SA and NT and mining employees in Tasmania. The other states and territories provide an accrual rate of 0.867 weeks per annum.
  - Employees in SA and the ACT are entitled to access accrued subsequent long service leave on a yearly basis, whereas employees in Tasmania are entitled to access subsequent long service leave on a 10 year interval. The other states and territories provide subsequent long service leave in 5 year intervals.
  - Qualification criteria for access to long service leave on a pro rata basis (whereby employees can access a portion of their leave after a certain period of service) varies between states.
23. There are a number of possible legislative approaches to developing a national standard, including establishment in Commonwealth legislation or harmonisation through the state and territory systems, which has been used for occupational health and safety laws. Given national system requirements, the state and territory governments will need to be consulted and would need to agree to implement a national standard.
24. Any approach would require appropriate transitional arrangements for employees entitled to long service leave under state and territory legislation or the NES. These may raise constitutional issues, such as obligations in relation to acquisition of property and state-based differences.
25. Transitional arrangements are likely to be administratively complex, as they would require employers and employees to comply with multiple legislative instruments during the transition period. The transition period would also be prolonged, as long service leave entitlements crystallise and then can be taken over a period of many years.
26. Depending on the approach, the development of a national standard may continue to require both Commonwealth and state enforcement agencies, as with the current arrangements<sup>6</sup>.

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<sup>6</sup>Each state has different agencies to investigate and resolve disputes. For example, a dispute in Tasmania will be initially directed to WorkSafe Tasmania who will attempt a resolution between parties. If unsuccessful, the matter will be referred to the Tasmanian Industrial Commission. A Commission decision can be enforced through the Magistrates Court.

## Productivity Commission inquiry into the workplace relations system

27. The Productivity Commission has considered long service leave in its 2015 review of the workplace relations framework commissioned by the Government.
28. The Productivity Commission draft report released on 4 August 2015 noted that long service leave 'is an Antipodean idiosyncrasy... invented in the mid-19<sup>th</sup> century to allow citizens to sail to and back from England every decade', without jeopardising their employment<sup>7</sup>.
29. The draft report also raised some equity issues associated with long service leave, noting that people out of the work force for extended periods, such as those bringing up children, often do not benefit from the entitlement<sup>8</sup>.
30. According to the Productivity Commission there are potential benefits with a national scheme, however, the burden of having state and territory systems is not onerous for businesses, including those operating in more than one jurisdiction. State based differences do not create too many problems as:
- Most enterprises operating across a number of states have sophisticated payroll management systems. The stable nature of long service leave entitlements means compliance costs are 'relatively modest'.
  - Most businesses do not operate across state borders and are unaffected by interstate differences.
  - The differences in the wage premium associated with long service leave are not substantial. The Productivity Commission estimates that the more-generous NT and SA schemes add less than 1 per cent to their labour costs.
  - Nationally operating businesses tend to pay above award wages or use enterprise bargaining. This gives business scope to adjust wages to reduce the implicit wage differences between states due to long service leave entitlements.
31. The Productivity Commission noted that one option for progressing a national standard is to grandfather existing entitlements under the NES and for all employees (except Commonwealth public sector employees) to derive their long service leave entitlements from state and territory based legislation only. It considered that this would strip away a layer of complexity for business, as calculating a worker's entitlement would not need consideration of award-based transitional instruments. The workers that are covered by these instruments would find their long service leave entitlements reverting to the level of most other workers in their state or territory.<sup>9</sup>

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WorkSafe Tasmania, 'Long Service Leave', Hobart, viewed 24 November 2015, <  
[http://worksafe.tas.gov.au/laws/long\\_service\\_leave](http://worksafe.tas.gov.au/laws/long_service_leave)>.

<sup>7</sup> Productivity Commission, 2015, 'Workplace relations framework - draft report', 4 August, Canberra, pp 20 and 172

<sup>8</sup> Ibid, p 179

<sup>9</sup> Ibid p 182

32. Another approach canvassed by the Productivity Commission is to replace the entitlement to long service leave with an additional, and potentially portable, annual leave entitlement. It canvassed a portable long service leave scheme where 'if the average employee received the equivalent of two days per year from the current arrangements, then a portable scheme could simply add two days to the current National Employment Standards provision for four week of annual leave'. The Productivity Commission suggested that such a benefit would be available to employees who do not stay in the workforce long enough to achieve long service leave.<sup>10</sup>
33. The draft report also noted that portability or an alternative entitlement would remove a measure for creating employer loyalty and could result in employers being reluctant to hire workers with a benefit accrued under other employers. It also recognised that cost to employers would be impacted in two ways:
- With a portable scheme based on the current level of long service leave entitlements, cost to employers would increase as the number of eligible workers would increase if the entitlement was based on years worked in total, not years worked with one employer (the Productivity Commission notes a McKell Institute 2012 report that said the expanded coverage would result in a 2.5 per cent increase in wage costs)<sup>11</sup>.
  - With the alternative design, an employer who valued longer duration working relationships would need to find and fund other ways to promote tenure while also providing the increased annual leave.<sup>12</sup>
34. The Productivity Commission also invited comment on the portability of long service leave, as well as the costs, benefits and practicality of providing all national system employees with additional days of annual leave in exchange for their long service leave entitlements. Finally, the draft report invited further information on the concept of allowing casual employees to trade some or all of their casual loading for additional entitlements, such as leave.
35. The final report was provided to the Government on 30 November 2015. It will be tabled in the Parliament within 25 sitting days.

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<sup>10</sup> Ibid p 178

<sup>11</sup> Ibid p 178

<sup>12</sup> Ibid p 178

## Committee's Terms of Reference

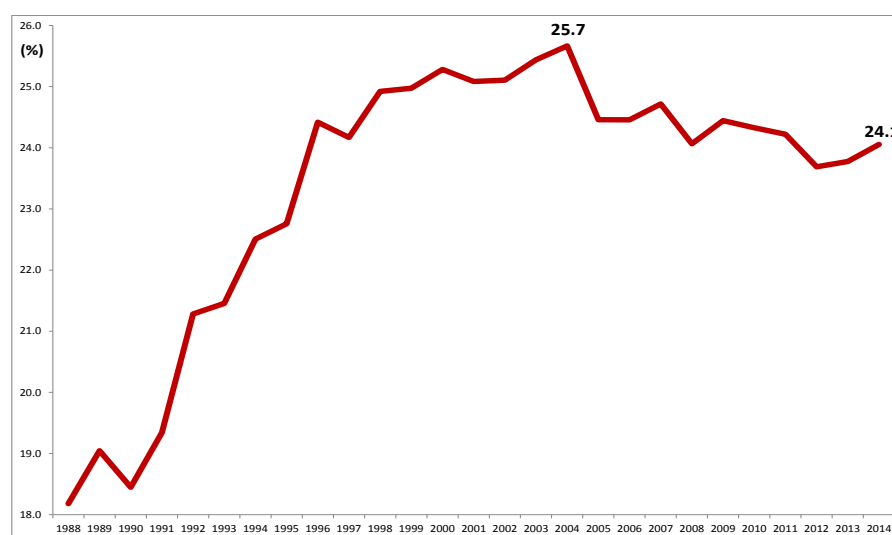
36. In response to the Committee's request, specific information related to portable long service leave schemes is set out below, particularly in relation to labour force data.

### a) Employee data

37. ABS data suggests that casual employment has remained steady for around a decade at approximately 24 per cent<sup>13</sup>. The ABS measures casual employment as employment without leave entitlements.

38. The incidence of casual employees was 24.1 per cent in August 2014, compared with 23.8 per cent in the previous year and 25.7 per cent a decade earlier. Since 1988, casual employment has risen from 18.2 per cent to a peak of 25.7 per cent in 2004, as shown in Chart 1.

**Chart 1: Casual Employee Incidence<sup>14</sup> (excluding Owner Managers of Incorporated Enterprises), 1988 to 2014<sup>15</sup>**



39. Of the 11.5 million people working as at February 2013, slightly more than a quarter (or 2.9 million) had been working with their current employer for 10 years or more—and therefore have (or have had) access to long service leave<sup>16</sup>.

<sup>13</sup> The ACTU uses 40 per cent and has a definition including features such as uncertainty over job length and lack of say over wages and conditions.

<sup>14</sup> Casual incidence is the proportion of total employees represented by casual employees. Owner managers of incorporated enterprises are excluded from the measure of casual incidence reported here.

<sup>15</sup> Australian Bureau of Statistics, 2014, 'Forms of Employment, Australia', cat. no. 6359.0, ABS.; Australian Bureau of Statistics, 2014, 'Characteristics of Employment', cat. no. 6330.0, ABS.

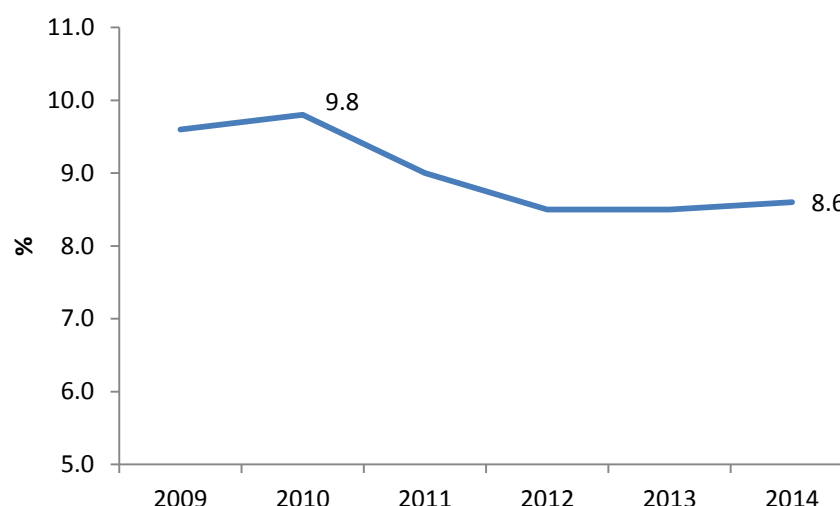
<sup>16</sup> Australian Bureau of Statistics, 2013, 'Labour mobility survey', cat. no. 6209.0, February.



40. The ABS Characteristics of Employment also has data on the number and proportion of employees in their main job who worked on a fixed-term contract. In August 2014, there were 356,100 employees whose main job was a fixed term contract. This is 3.7 per cent of all employees.

41. Independent contractors, including owner managers, make up 8.6 per cent of the workforce (August 2014), down from 9.8 per cent in 2010. Chart 2 shows there is no clear trend in the available data to indicate future proportions of contracting.

**Chart 2: Prevalence of independent contractors<sup>17</sup>**

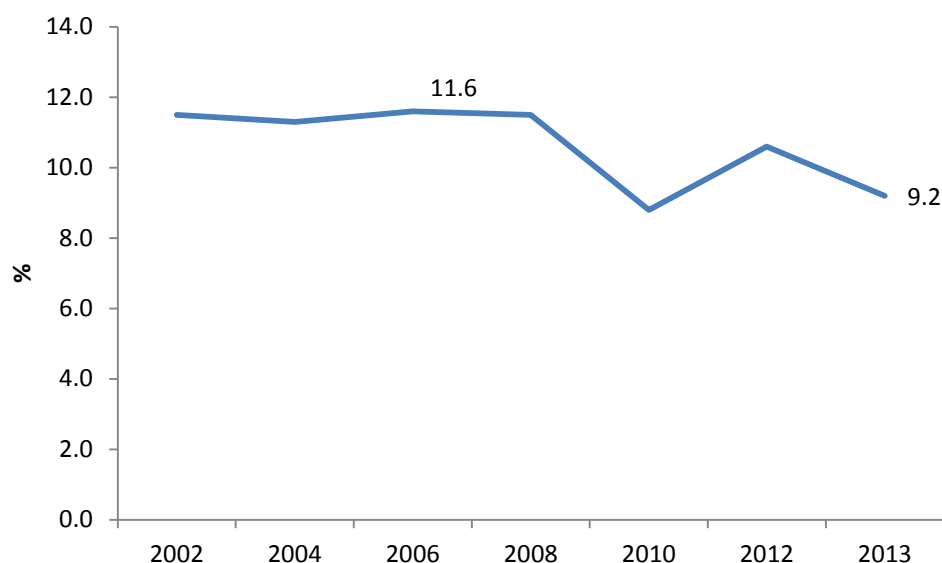


## b) Labour mobility

42. Chart 3 shows trend data since 2002 on employed persons changing employers. In February 2002, around 11.5 per cent of employed persons had changed employers in the previous 12 months. This figure remained steady until 2008, during the Global Financial Crisis. This figure has now declined to 9.2 per cent in the 12 months to February 2013. (Note: data includes owner managers.)

<sup>17</sup>Australian Bureau of Statistics, 2014, 'Forms of Employment, Australia', cat. no.6359.0, ABS; Australian Bureau of Statistics, 2014, 'Characteristics of Employment', cat. no. 6330.0, ABS.

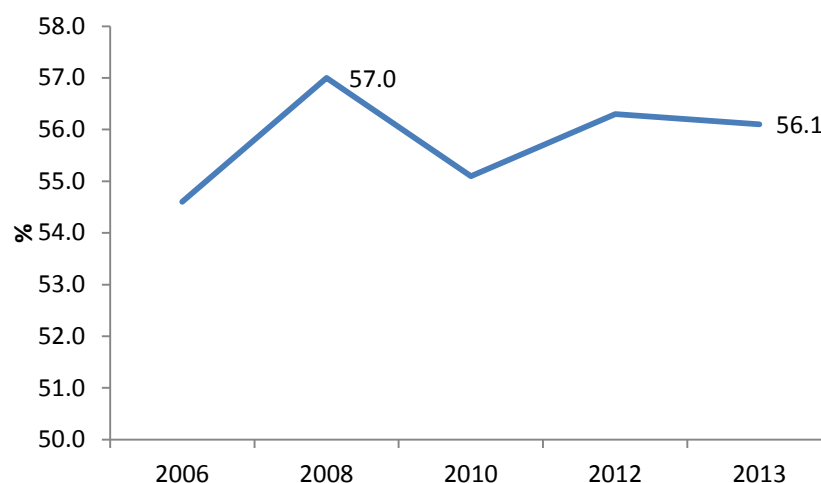
**Chart 3: Incidence of employed persons who changed employers in the last 12 months, 2002-2013<sup>18</sup>**



43. Chart 4 shows that more than half of all people who change jobs also change industries (including owner managers). In February 2006 the figure was around 54.6 per cent of employed persons. The number has been stable since 2012<sup>19</sup>.

44. In its draft report the Productivity Commission notes that the notion that people are increasingly changing jobs or being fired is not supported by evidence.

**Chart 4: Proportion of employed persons who changed employers in the last 12 months who had changed industries, 2006-2013<sup>20</sup>**



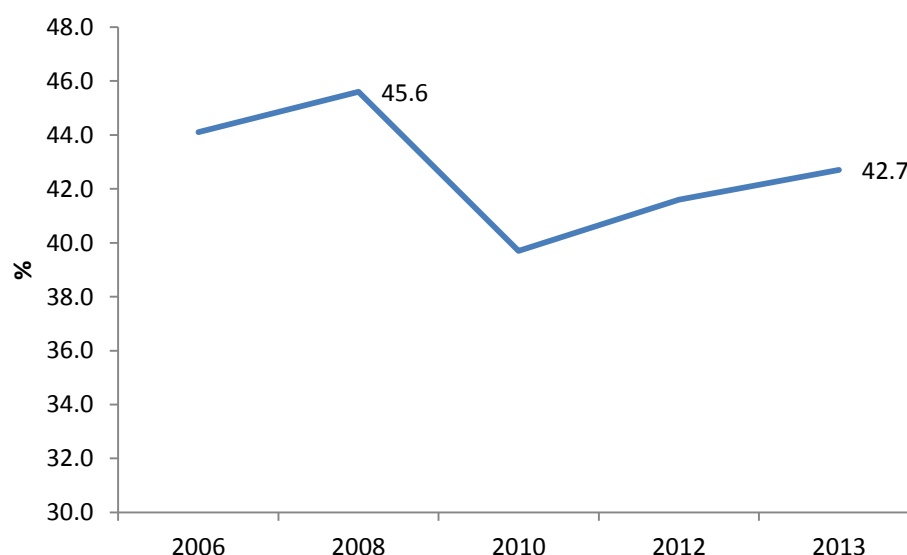
<sup>18</sup>Australian Bureau of Statistics, 2013, 'Labour Mobility, Australia', cat no.6209.0, 2002-2013, ABS.

<sup>19</sup>Note: Due to the introduction of ANZSIC 2006, caution needs to be exercised when comparing 2006 estimates with subsequent years.

<sup>20</sup>Australian Bureau of Statistics, 2013, 'Labour Mobility, Australia', cat no.6209.0, 2006-2013, ABS.

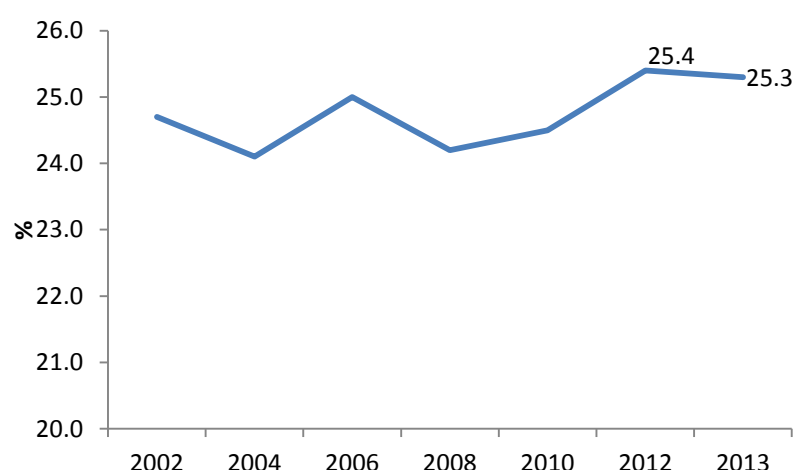
45. The true nature of labour mobility is difficult to pin down. Employees can change both occupation and industry, or just occupation within an industry, or stay in the same occupation but change industry. For example, 'industry' is based on what an employer does (a construction firm or a mining firm), but occupation is based on a person's individual work (being an engineer in either of those industries).

**Chart 5: Proportion of employed persons who changed employers in the last 12 months who had changed occupations, 2006-2013<sup>21</sup>**



46. Since 2002, approximately one-quarter of employees have remained with their employer for more than 10 years. In February 2013 the figure was around 25.3 per cent of employed persons.

**Chart 6: Incidence of employed persons with their current employer/business for more than 10 years, 2002-2013<sup>22</sup>**

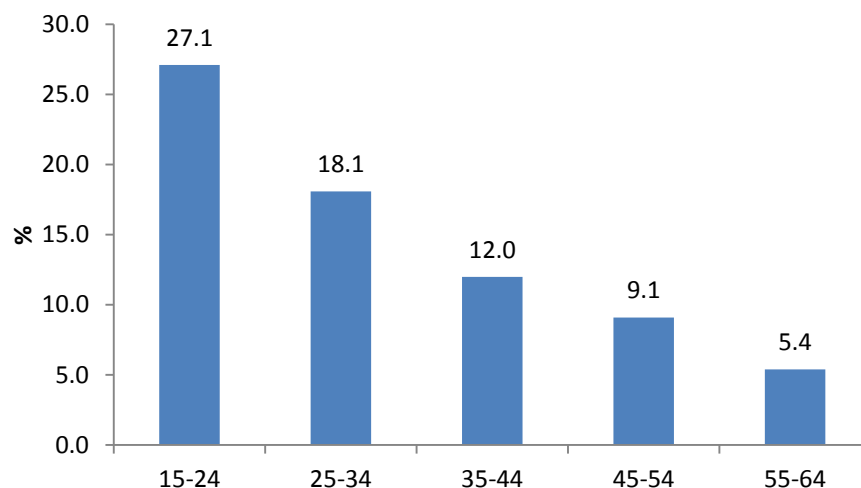


<sup>21</sup> Australian Bureau of Statistics, 2013, 'Labour Mobility, Australia', cat no.6209.0, 2006-2013, ABS.

<sup>22</sup> Australian Bureau of Statistics, 2013, 'Labour Mobility, Australia', cat no.6209.0, 2002-2013, ABS.

47. However, the younger an employee is, the more likely they are to change employers. Data from the 2013 HILDA show 27.1 per cent of employed persons aged 15 to 24 changing employers in the last 12 months. The propensity to change jobs declines with age, to just 5.4 percent of 55-64 year olds changing employers in the preceding 12 months.

**Chart 7: Employed persons who changed employers by age from 2012 to 2013<sup>23</sup>**



Note: This includes owner managers consistent with the ABS data presented above.

### **c) Objectives and Key Components of Portable Long Service Leave Schemes**

48. As noted earlier, the Productivity Commission emphasised that long service leave was put in place to allow public servants to sail to and back from England every decade, without jeopardising their employment<sup>24</sup>, which is no longer relevant in modern Australia. In addition, the Productivity Commission draft report notes submissions by parties that long service leave payouts are now often now used as a financial benefit rather than for rest purposes, which was part of the original intent of the entitlement<sup>25</sup>.

49. Portable long service leave schemes do not reward employee loyalty to one employer, as originally intended. They allow employees to accrue and access long service leave entitlements, even if they change employers. Eligible employees are registered by their employers into their applicable scheme. When the employee moves on to a new employer they are reregistered in the scheme and their fund matches their details to ensure continuity in the industry is recognised.

50. Commonwealth legislation establishes the black coal mining portable scheme. Each state and territory has its own scheme for building and construction, several have schemes for contract cleaning and one has schemes for community services and security.

<sup>23</sup> Household, Income and Labour Dynamics in Australia (HILDA) Survey, Wave 13.

<sup>24</sup> Productivity Commission, 2015, 'Workplace relations framework - draft report', 4 August, Canberra, p 20 and 172

<sup>25</sup> Productivity Commission, 2015, 'Workplace relations framework - draft report', 4 August, Canberra, p 176

51. These industries have portable schemes as some employees stay in the one industry for a long time but the nature of their work means they may have many employers in that time, as contracts for work change.
52. Portable schemes operate like health insurance. They recognise length of service in the industry and mean that the employer, at the time an employee's long service leave crystallises, does not bear all the costs of that leave<sup>26</sup>.
53. However, the cost of a portable approach to long service leave needs to be carefully considered, as there will be significant new costs to employers who currently do not have long service liabilities. Employers are required to make a payment into the fund for all eligible employees. If an employee leaves the industry before they are able to access full or pro-rata long service leave, the monies paid by their employer(s) remain in the fund without the employer or employee receiving a benefit.
54. This presents employers with an additional cost burden as, without the operation of the portable scheme, they would not have had to make long service leave payments in advance to these employees. For example, with WA's MyLeave scheme, MyLeave accounts for these surplus funds not paid out due to employee industry exits, when adjusting employer contribution levies each year<sup>27</sup>.
55. Further practical issues in establishing a portable scheme include determining who will operate the fund and how it will be governed, as well as how contributions will be calculated, collected, invested and reimbursed. There are also likely to be significant administration costs associated with schemes of this nature.
56. Governance arrangements for any portable schemes need to be carefully considered. As seen with the current schemes, these can be multi-million dollar enterprises. Governance arrangements must ensure that the funds are used only for the intended purpose and employer payments are minimised, with any income earned supplementing contributions, and that adequate funds are available to pay out entitlements. Any role of government in overseeing the schemes and securing these funds would also need to be carefully constructed, to ensure the risks are appropriately mitigated.
57. The Royal Commission into Trade Union Governance and Corruption, in investigating income protection and redundancy funds, said that the case studies set out in its interim report illustrate the problems that can arise with the governance of these types of funds<sup>28</sup>.
58. A key component of portable schemes is that, regardless of their detailed operation, they collect levies and invest those levies.
59. The level of investment return has a direct impact on the levies payable into the fund. Poor performance can require higher levy payments to make up income shortfalls and cover employee entitlements. Fund administration costs are varied, and are summarised in Table 3.

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<sup>26</sup>Long Service Corporation, Sydney, viewed 26 November 2015, <<http://www.longservice.nsw.gov.au/cci/the-scheme/about-the-scheme/background>>; ACT Leave, Canberra, viewed 26 November 2015, Canberra, <<http://www.actleave.act.gov.au/>>.

<sup>27</sup> MyLeave, Perth, viewed 4 December 2015, <<http://www.myleave.wa.gov.au/employers/about-the-scheme/>>

60. Finally, the complexity of any transition from the current long service leave arrangements to a portable scheme or schemes, and how any new portable scheme or schemes would interact with the current portable schemes should not be underestimated.

#### **d) Industry or occupation based portable schemes**

61. There are a range of industry based portable schemes in Australia, as detailed in the list below.

	<b>Industry</b>	<b>Legislation</b>
Cth	Coal mining	<i>Coal Mining Industry (Long Service Leave Funding) Act 1992</i>
		<i>Coal Mining Industry (Long Service Leave) Payroll Levy Act 1992</i>
		<i>Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992</i>
NSW	Building & Construction	<i>Building and Construction Industry Long Service Payments Act 1986</i>
	Contract cleaning	<i>Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010</i>
Vic	Building & Construction	<i>Construction Industry Long Service Leave Act 1997</i>
Qld	Building & Construction	<i>Construction Industry Long Service Leave Act 1987</i>
		<i>Building and Construction Industry (Portable Long Service Leave) Act 1991</i>
	Contract cleaning	<i>Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2005</i>
WA	Building & Construction	<i>Construction Industry Portable Paid Long Service Leave Act 1985</i>
SA	Building & Construction	<i>Construction Industry Long Service Leave Act 1987</i>
Tas	Building & Construction	<i>Construction Industry Long Service Leave Act 1997</i>
ACT	Building & Construction	<i>Long Service Leave (Building and Construction Industry) Act 1981</i> <i>Long Service Leave (Portable Schemes) Act 2009</i>
	Contract cleaning	<i>Long Service Leave (Portable Schemes) Act 2009</i>
	Community Service	<i>Long Service Leave (Portable Schemes) Act 2009</i>
	Security	<i>Long Service Leave (Portable Schemes) Act 2009</i>
NT	Building & Construction	<i>Construction Industry Long Service Leave and Benefits Act 2005</i>

62. The two most long standing industries in which portable long service leave schemes operate are black coal mining and building and construction, which are described below.

### Black Coal Mining Industry

63. The Coal Mining Industry Long Service Leave Fund is established by the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Coal LSL Act) as a means of funding long service leave to those employed in the black coal mining industry in NSW, Queensland, WA and Tasmania. The Coal Mining Industry (Long Service Leave Funding) Corporation administers the Fund. The board is made up of employer and employee representatives. Administration costs for the scheme were \$5 million in 2013-14.

64. Long service leave was introduced to the industry in 1949 after the Miners' Federation lobbied colliery proprietors, coal industry groups and federal and state governments for the entitlement. The parties emphasised that the cost could not be carried by individual colliery owners and would need to be shared by the industry. The Commonwealth Government at the time agreed to provide the machinery for running such a scheme and, along with other complementary measures, introduced the *States Grants (Coal Mining Industry Long Service Leave) Act 1949* to form a statutory scheme. With this scheme, the Commonwealth collected an excise per ton of coal produced and made grants to the states, which was used to reimburse employers for their long service leave liability.

According to the second reading speech for the States Grants (Coal Mining Industry Long Service Leave) Bill 1949:

*During their working lives, many employees have changed from one employer to another, and it would be inequitable to place the cost of all such employment solely upon present day employers. Some collieries are not financially capable of meeting the additional cost involved by the leave. Many employees have been employed in the past by colliery companies that are no longer in existence. Moreover, employers would be reluctant to employ men with previous employment in the industry because of the additional liability for long service leave that their employment would involve. This would tend to make labour less mobile than is desirable within the industry, and could result in a loss of skilled labour to the industry. It is also not unreasonable to provide some protection to employees against employers going out of business or becoming insolvent. Under these circumstances, the award can only be financed on an industry-wide basis. To make this possible the establishment of a central fund is necessary in order to spread the liability evenly amongst employers, and particularly to finance the heavy burden [of] introspective liability.<sup>29</sup>*

65. By 1990 there was an accrued unfunded liability for untaken long service leave that the coal excise could not cover. The unfunded liability was estimated at \$250 million, and the Commonwealth Government sought to recover this liability through the establishment of a Commonwealth statutory scheme that collected funds based on a levy on employers. The scheme consists of the following legislation:

- *Coal Mining Industry (Long Service Leave) Administration Act 1992 (Cth)*
- *Coal Mining Industry (Long Service Leave) Payroll Levy Act 1992 (Cth)*
- *Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992 (Cth).*

66. The legislative framework enables:

- the raising of levies by the Commonwealth on employers of persons in the black coal mining industry; and
- the making of appropriations to the Coal Mining Industry Long Service Leave Fund to form assets from which reimbursement payments are made.

<sup>29</sup> J. Dedman Second Reading Speech: States Grants (Coal Mining Industry Long Service Leave) Bill 1949, House of Representatives, Official Hansard No, 42, 1949, p.1794.

67. Since 1993, employers have been required to pay a levy (initially 5 per cent and now 2.7 per cent) of payroll into the Fund managed by the Corporation. The levy is set following an actuarial review.
68. The Corporation can use the levies to pay any long service leave entitlements and invest for the purposes of ensuring sustainability into the future. The cost of the administration is paid from the Corporation's funds.
69. Eligible employees are entitled to take long service leave after eight years of qualifying service. Qualifying service is service as an eligible employee of one or more employers.
70. Note that the entitlement to long service leave under the Coal LSL Act overrides any entitlement in the Fair Work Act or in state or territory laws. It does not override entitlements or rights under an industrial instrument, as the Act establishes a minimum entitlement to long service leave (see sections 39E, 39EA and 39EB of the Act). Employers are reimbursed for long service leave payments made to eligible employees.

### **Building and Construction Industry**

71. Each state and territory operates its own portable long service leave scheme and is party to the National Reciprocal Agreement for the Provision of Long Service Leave in the Building and Construction Industry. This means that building and construction work performed anywhere in Australia is recognised for portable long service leave purposes.
72. One of the main reasons given for introduction of portable long service leave schemes was that the short term nature of projects in the industry meant a worker was unlikely to remain with one employer long enough to accrue the entitlement but they generally stay in the building and construction industry<sup>30</sup>.
73. Building and construction workers in each state and territory are required to join their local portable long service leave scheme and notify the relevant administration body when they commence and finish work with their company. Employers operating across jurisdictions must register for portable long service leave schemes in each state or territory in which they operate.
74. A levy is payable for each state and territory's portable long service leave scheme. Requirements for payment of the levy fall into two categories:
  - In the ACT, SA, Tasmania, Victoria and WA the levy is calculated as a percentage of employee ordinary earnings and is paid by the employer.
  - In NSW, Queensland and the NT, the levy is a percentage of the value of construction projects worth over \$25 000, \$80 000 and \$200 000 respectively. The levy is paid by the person for whom the work is to be done (for example, the developer).
75. Table 3 summarises the administration arrangements for portable long service leave schemes, including employer reporting requirements, method for the payment of the levy, levy contributions and the administrative cost of the schemes.
76. Under the National Reciprocal Agreement for the building and construction industry, workers' portable long service leave entitlements are paid by the scheme in the state or territory where the leave is taken, regardless of the worker's movements before the

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<sup>30</sup>Royal Commission into the Building and Construction Industry, 2003, 'Final Report', (The Hon Cole, Royal Commissioner), February, p.219, viewed 18 November 2015, < <http://pandora.nla.gov.au/tep/24143> >.



entitlement crystallises. The scheme that paid the worker's leave will contact other jurisdictions where the worker has worked to recoup the proportional cost of leave accrued in that state or territory.

77. In the ACT, NSW and Queensland, employers are initially responsible for paying their workers' long service leave entitlements. After payment, employers apply to their portable long service leave fund for reimbursement of this cost. This arrangement presents a period of cost burden for employers while they await the reimbursement of previously paid levies.

#### **e) Operation of portable long service leave schemes**

78. The previous sections of this submission have discussed the operation of portable long service leave schemes, using the black coal mining industry and building and construction industry as examples.

**Table 1: Comparison of long service leave provisions in state and territory legislation**

State	Initial entitlement	Accrual Rate per annum	Subsequent entitlement	Pro rata accessibility	Pro rata qualification	Cash out entitlement in lieu of leave
<b>Western Australia</b>	8.67 weeks after 10 years	0.867 weeks per annum	4.33 weeks after 5 years	Available after 7 years	Termination of employment for any reason other than serious misconduct or the death of the employee	No (not mentioned in legislation)
<b>New South Wales</b>	8.67 weeks after 10 years	0.867 weeks per annum	4.33 weeks after 5 years	Available after 5 years	Termination of employment as a result of illness, incapacity, domestic or other pressing necessity, or any reason except serious and wilful misconduct. Pro rata entitlements are also payable following the death of the employee	No
<b>Victoria</b>	8.67 weeks after 10 years	0.867 weeks per annum	4.33 weeks after 5 years	Available after 7 years	Termination of employment	No
<b>South Australia</b>	13 weeks after 10 years	1.3 weeks per annum	1.3 weeks for each year	Available after 7 years	Termination of employment by any reason other than serious misconduct or unlawful termination of employment by the employee or the death of the employee	Yes
<b>Queensland</b>	8.67 weeks after 10 years	0.867 weeks per annum	4.33 weeks after 5 years	Available after 7 years	Termination of employment as a result of illness/incapacity or domestic or other pressing necessity, unfair dismissal, dismissal for reason other than employee's conduct, capacity or performance or the death of the employee	Yes if applicable industrial instrument allows cashing out, and there is a signed agreement or if employee applies

<b>Northern Territory</b>	13 weeks after 10 years	1.3 weeks per annum	6.5 weeks after 5 years	Available after 7 years	Termination of employment as a result of attaining retirement age, illness, incapacity or domestic or other pressing necessity or a reason other than serious misconduct or the death of the employee	No
<b>Australian Capital Territory</b>	6.07 weeks after 7 years	0.867 weeks per annum	0.867 weeks per annum	Available after 5 years	Termination of employment as a result of attaining retirement age, illness or incapacity or domestic or other pressing necessity, or a reason other than serious and wilful misconduct or the death of the employee	No (not mentioned in legislation)
<b>Tasmania</b>	8.67 weeks after 10 years  13 weeks after 10 years for mining employees	0.867 weeks per annum  1.3 weeks per annum for mining employees	4.33 weeks after 5 years  13 weeks after 10 years for mining employees	Available after 7 years  Available after 5 years for mining employees	Termination of employment as a result of attaining retirement age, illness, domestic or other pressing necessity, or a reason other than serious and wilful misconduct or the death of the employee	Yes

**Table 2: Areas of commonality across state and territory legislation**

LSL condition	Areas of commonality
Initial qualifying period	The qualifying periods for LSL varies between jurisdictions. It is 10 years in all states and territories with the exception of the ACT which is 7 years.
Subsequent qualifying periods	All states allow for further LSL at 5 years with the exceptions of ACT and SA which allow access every year after the initial qualifying period.
Quantum of leave entitlement	In all states and territories it is 0.867 for all states and territories except SA and NT (where it is 1.3 weeks).
Pro-rata entitlement	Pro rata entitlement periods range from 5 years to 7 years. In New South Wales and the Australian Capital Territory employees are entitled to pro rata entitlement after 5 years and in all other states and territories it is after 7 years.
Pro-rata entitlement on termination	The most common clause relating to pro rata entitlement upon termination only applies if the employee dies or the employment is terminated due to illness or incapacity and does not generally include termination for serious misconduct.
Entitlement for casuals, apprentices and trainees	Casuals, apprentices and trainees are entitled to LSL in all jurisdictions provided they meet the service requirements.
Service that counts for LSL	Continuous service is generally accepted in all jurisdictions to be all periods of paid leave and some unpaid leave types. In all jurisdictions, transfer of business did not interrupt continuity of service.
Rate of payment during LSL	In general, employees are paid at their normal weekly rate of pay, excluding overtime and allowances.

**Table 3: Administration arrangements for portable long service leave across all states and territories<sup>31</sup>**

State	Administration body	Structure of administration body	Employers report employee working days and wages	Timing of levy payments	Quantum of levy payments	Value of levies 2014-15 (\$m)	Value of funds invested (\$m)	Administrative costs of the scheme (\$m)
ACT	ACT Leave	A statutory authority	Every three months	Every three months	2.5% of employee ordinary earnings	20.1	133.2	2.2
SA	Construction Benefit Services	A body corporate	Every two months	Every two months	2.25% of employee ordinary earnings	14.7	122.75	1.5
TAS	TasBuild Limited	A private trustee company	Monthly. Every three months on approved application.	Monthly. Every three months on approved application	2% of employee ordinary earnings	9.1	95.7	1.369
VIC	CoINVEST Limited	A public company	Every three months	Monthly in advance OR every three months	2.7% of employee ordinary earnings	134.9	786.4	17.9
WA	My Leave	A statutory authority	Every three months	Every three months	1.5% of employee ordinary earnings	66.7	490	4.1
NSW	Long Service Corporation	A statutory body	Every 12 months	Before a construction certificate is issued. Instalment payments upon application in certain circumstances	0.35% of total value of project	144.5	999	3.1
NT	NT Build	A body corporate	Every six months	Payment in advance of construction. Reconciliation after construction complete	0.1% of total value of project	2.4	62.7	0.47 <sup>32</sup>
QLD	Qleave	A statutory authority	Every 12 months	Prior to a development permit is issued, or before work starts if no permit issued	0.25% of total value of project	68.6	871.4	10
National <sup>33</sup>	Coal Mining Industry LSL Corporation	A body corporate	Monthly	Monthly	2.7%	150	1,309	5

<sup>31</sup>Information from 2014-15 annual reports unless otherwise stated.

<sup>32</sup>Calculated from NT Build annual report by combining 'fees and allowances', 'occupancy costs' and 'other expenses'.

<sup>33</sup>Information from 2013-2014 annual report.

