

Master Builders Australia

Submission to the Senate Education and
Employment Standing Committee

on

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

11 December 2015



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1 Introduction

- 1.1 This submission is made on behalf of Master Builders Australia Ltd.
- 1.2 Master Builders Australia (Master Builders) is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder State and Territory Associations. Over 125 years the movement has grown to over 33,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.

2 Purpose of Submission

- 2.1 The Senate referred an inquiry into the feasibility of, and options for, creating a national long service standard, including the potential portability of long service and other entitlements, to the Senate Education and Employment Standing Committee (Committee) for inquiry and report. The closing date for submissions to the Committee's inquiry is 11 December 2015.
- 2.2 In September 2015, Master Builders made submissions to the Productivity Commission (PC), with regard to long service leave (LSL), in response to its Draft Report into the Workplace Relations Framework (Draft Report).¹ In the submission, Master Builders argued that in the event that a uniform model for LSL is drafted or an amendment to the National Employment Standards (NES) is proposed to include LSL benefits, the building and construction industry should be carved out of these amendments given its unique characteristics.
- 2.3 The building and construction industry's complex and distinctive contracting arrangements has led to the establishment of its own State and Territory based portable LSL scheme that has already been in place for decades.
- 2.4 Master Builders in the following sections will provide an extract of our submissions in response to the PC's Draft Report and address parts of the Committee's terms of reference, bearing in mind that a portable LSL scheme

¹ Australian Government, Productivity Commission, Workplace Relations Framework, Draft Report, August 2015

already exists for the building and construction industry. The Committee's inquiry terms of reference include:

- (a) the number of Australians in insecure work;
- (b) the extent and nature of labour market mobility;
- (c) the objectives of portable long service leave schemes, and the key components that might apply;
- (d) which sectors, industries or occupations may, or may not, benefit from such schemes;
- (e) the operation of a portable long service scheme, including:
 - (i) how and by whom such schemes might be run,
 - (ii) how such schemes could be organised, be it occupational, industrial or other,
 - (iii) the appropriate role for the Commonwealth Government in facilitating portable long service leave schemes,
 - (iv) the impact of varying State and Territory long service leave arrangements on a potential national long service scheme administered by the Commonwealth, and No. 123—9 November 2015 3309
 - (v) the capacity to operate such schemes within or across jurisdictions, including recognition of service; and
- (f) any other related matters.

3 Paid Long-Service Leave in the Building and Construction Industry

- 3.1 Rather than being in response to a perception of insecurity of work, an acknowledgment of the transient and largely project-based nature of construction work led to the building and construction industry, together with State and Territory governments, developing its own portable LSL scheme. The regime is administered under individual State and Territory legislation and

provides employees with the opportunity to take advantage of the benefits of LSL, even when they are unable to maintain the continuity of one employer.²

- 3.2 Although historically the nature of employment in the industry was stable, with many builders in the past retaining a large direct day-labour work force, in the 1970s arrangements started to change as builders became increasingly project managers engaging sub-contractors to undertake work on site.
- 3.3 The basis of the construction sector scheme was in recognition of the mobile nature of construction work and that workers would generally rarely qualify for LSL benefits. The motivation behind the development of portable LSL schemes was to put construction workers on an equal footing with non-construction workers who could not qualify for LSL. Master Builders, however, does not support the implementation of any portable LSL scheme that benefits non construction-site or off-site employees. Such reform would be contrary to the original purpose of establishing the existing scheme and unnecessary.
- 3.4 Master Builders acknowledges that the lack of uniformity, as a result of inconsistent State and Territory legislation, can pose a challenge to some employers who operate across the jurisdictions. The distinctiveness and operational complexity of LSL in the building and construction industry, however, would be difficult to encompass within any uniform arrangement under the NES. On the whole, the State/Territory based regimes function well and, in most of the jurisdictions, have done so for decades.
- 3.5 In addition to individual State and Territory legislation that prescribe requirements and benefits in relation to LSL, each jurisdiction has specific legislation that provides unique arrangements for the building and construction industry as illustrated in Table 1. In the building and construction industry employees are effectively rewarded for industry service rather than for loyal service to one employer.

² See - *Long Service Leave Act 1955* (NSW), *Long Service Leave Act 1992* (VIC), *Industrial Relations Act 1999* (QLD), *Long Service Leave Act 1958* (WA), *Long Service Leave Act 1987* (SA), *Long Service Leave Act 1976* (TAS), *Long Service Leave Act 1976* (ACT), *Long Service Leave Act 1981* (NT).

Table 1 – Building and Construction Industry Portable LSL legislation

State/Territory	Key Legislation
NSW	<i>Building and Construction Industry Long Service Payments Act 1986 (NSW)</i> <i>Building and Construction Industry Long Service Payments Regulation 2011 (NSW)</i>
ACT	<i>Long Service Leave (Portable Schemes) Act 2009</i>
QLD	<i>Building and Construction Industry (Portable Long Service Leave) Act 1991 (QLD)</i> <i>Building and Construction Industry (Portable Long Service Leave) Regulation 2013 (QLD)</i>
VIC	<i>Construction Industry Long Service Leave Act 1997 (VIC)</i>
SA	<i>Construction Industry Long Service Leave Act 1987 (SA)</i> <i>Construction Industry Long Service Leave Regulations 2003 (SA)</i>
WA	<i>Construction Industry Portable Paid Long Service Leave Act 1985 (WA)</i> <i>Construction Industry Portable Paid Long Service Leave Regulations 1986 (WA)</i>
TAS	<i>Construction Industry (Long Service) Act 1997 (TAS)</i>
NT	<i>Construction Industry Long Service Leave and Benefits Act 2005 (NT)</i> <i>Construction Industry Long Service Leave and Benefits Regulations 2014 (NT)</i>

3.6 Each State and Territory portable LSL statute refers to the establishment of a Long Service Leave Authority (Authority).³ The Authority undertakes a number of functions including the administration of LSL benefit schemes and payment of benefits to eligible workers, as well as keeping employers and workers' registers for those covered under the relevant portable LSL legislation.

3.7 There are, however, a number of inconsistencies across State and Territory portable LSL legislation. It could be argued that the inconsistencies in the legislation have arisen following pressure for their establishment from individual unions. The Cole Royal Commission found that the confused legislative drafting resulted in employers, sometimes unwittingly, making underpayments to LSL Authorities as a result of a lack of understanding of workers' legal rights.⁴

³ For example see – QLeave (QLD) - <https://www.qleave.qld.gov.au/>, Long Service Corporation (NSW) - <http://www.longservice.nsw.gov.au/bci/the-scheme>,

⁴ Above note 4, Volume 12, page 94

3.8 Each State and Territory statute differs in its definition of 'eligible worker', with some jurisdictions including contractors, sub-contractors and workers employed through labour hire arrangements as eligible under a portable LSL scheme.⁵ In Queensland, for example, under section 3A(1) of the Building and Construction Industry (Portable Long Service Leave) Act 1991 (QLD), an eligible worker is defined as an individual who –

(a) under a contract of service is engaged to perform work in the building and construction industry for the majority of the person's ordinary hours of work; or

(b) under a contract, whether or not the contract is a contract of service, or at piecework rates, is engaged to perform work in the building and construction industry, for labour only or substantially for labour only, for the majority of the person's ordinary hours of work; or

(c) under a contract, whether or not the contract is a contract of service, performs work in the building and construction industry for the majority of the person's ordinary hours of work, unless—

(i) the individual—

(A) is paid to achieve a Stated result or outcome; and

(B) has to supply all, or substantially all, of the plant and equipment or tools of trade needed to perform the work; and

(C) is, or would be, liable for the cost of fixing a fault with the work performed; or

(ii) a personal services business determination is in effect for the individual performing the work under the Income Tax Assessment Act 1997 (Cth), section 87-60.

3.9 In comparison, section 3(1) of the Construction Industry Portable Paid Long Service Leave Act 1985 (WA) States that an employee means –

(a) a person who is employed under a contract of service in a classification of work referred to in a prescribed industrial

⁵ See - section 3 *Building and Construction Industry Long Service Payments Act 1986* (NSW), section 9 *Long Service Leave (Portable Schemes) Act 2009*, section 3A *Building and Construction Industry (Portable Long Service Leave) Act 1991* (QLD), section 14A *Construction Industry Long Service Leave Act 1997* (VIC), section 5 *Construction Industry Long Service Leave Act 1987* (SA), section 3(1) *Construction Industry Portable Paid Long Service Leave Act 1985* (WA), section 3 *Construction Industry (Long Service) Act 1997* (TAS), section 6 *Construction Industry Long Service Leave and Benefits Act 2005* (NT).

instrument relating to the construction industry that is a prescribed classification; or

(b) an apprentice

- 3.10 The differences under the relevant portable LSL legislation are such that in Western Australia, only those employed under a contract *of* service are defined as eligible workers, and in the remaining jurisdictions generally those employed under a contract *for* service can also benefit from portable LSL schemes. This is an important distinction as there are different obligations for employers depending on whether a worker is deemed an employee or classified as an independent contractor.⁶
- 3.11 In addition to the differences across the jurisdictions with regard to which workers are eligible to benefit from portable LSL schemes, there are also key differences under standard LSL legislation as to when an eligible worker can redeem an entitlement. For example, under the *Long Service Leave Act 1976* (ACT) eligible workers receive 1/5 of a month's leave for each year of employment, which can be taken after 7 years of service.⁷ Alternatively, in the other States and Territories, workers are only eligible to benefit from LSL entitlements after 10 years of service and the amount of paid LSL can vary from 13 weeks then 1.3 weeks for each subsequent year in South Australia to 2 months, with then 1 month for each subsequent 5 years of service, in NSW.⁸
- 3.12 Although the differences in eligibility and entitlement criteria between various statutes can be quite subtle, the disparity can cause some confusion for employers or head contractors, who are responsible for remitting benefits for eligible workers who sometimes work on multiple projects and across various jurisdictions. The current regime, however, is in some part assisted by cross-jurisdictional reciprocal arrangements drawn into the State or Territory legislation.

⁶ Differentiating who is an employee and who is not is sometimes difficult. The Courts have held that a 'multi factor' which involves examining different aspects of the employment relationship such as the degree and nature of control the employer has over the worker, is needed in order to make such a determination. See *Stevens v Bodribb Sawmilling Co. Pty* (1986) 160 CLR 16, *Hollis v Vabu* (2001) 207 CLR 21.

⁷ Sections 3, 4 of the *Long Service Leave Act 1976* (ACT).

⁸ See section 5 of the *Long Service Leave Act 1987* (SA), Section 4 of the *Long Service Leave Act 1955* (NSW).

4 Tailoring a Scheme that Meets the Needs of the Building and Construction Industry

- 4.1 It has been widely argued that LSL provides an incentive for some workers to maintain their position with one employer and to discourage mobility. These criteria, however, do not generally apply in the building and construction industry through the building unions' concerted original push to make "loyalty" to the industry the only criterion.
- 4.2 Depending on the jurisdiction, payments are made to the relevant LSL fund via either a levy payable on an employee's wages, as a percentage of the cost of building work, or from an amount built into the cost of construction application fees. Table 2 below illustrates the number of valid claims for the 2014/2015 financial year, together with their value, made under the existing portable LSL schemes.

Table 2 – Building and Construction Industry LSL Statistics FY 2014/2015

State/Territory	No of Valid Applications	Total Benefits Paid
NSW	11,124	\$69.0 million
ACT	854	\$8.5 million
QLD	12,026	\$83 million
VIC	12,106	\$102.9 million
SA	1,967	\$12.63 million
WA	3,910	\$30.9 million
TAS	793	\$6.2 million
NT	348	\$2 million

- 4.3 In the Draft Report, the PC proposed an 'alternative design' which suggested scaling back the average portable entitlement so that the costs to business are similar to those under the current system which would be a sound approach. The PC has suggested, for example, that if the average employee received the equivalent of 2 days per year from current arrangements, then a portable scheme could simply add two days to current entitlements under the NES.⁹ This approach could address the complexities of employment arrangements that are unique to the building and construction industry.

⁹ Australian Government, Productivity Commission, Workplace Relations Framework, Draft Report, August 2015, page 178

- 4.4 Grandfathering of the current LSL schemes for the building and construction industry also makes sense. Any replacement scheme that would be established in its place would need to either recognise the traditional onus of LSL and/or establish uniformity in the building and construction industry.
- 4.5 In the event that a uniform model for LSL is drafted or an amendment to the NES to include a reference to LSL is proposed, Master Builders submits that the building and construction industry should be carved out in acknowledgement of the unique differences in the operation of LSL compared to other industries. However, as a general policy position, we largely support uniformity and measures which decrease employer's costs. Accordingly, uniformity via the least cost State and Territory model should only be proposed by the Committee with current entitlements "grandfathered".

5 Administration of Long Service Leave Schemes

- 5.1 It is crucial that any LSL scheme is administered soundly and in a cost effective manner. Whether under the stewardship of a statutory or industry appointed board, world's best practice methods and with accountability and transparency at the forefront of the administration of any portable LSL scheme entity.
- 5.2 In addition, LSL schemes should be administered in a way that reduces administrative costs and compliance burden to the employer, therefore maximising the benefit to the employee benefiting from the scheme. The current regime in NSW, for example, which has been operating successfully since 1973, is a fully portable scheme which is totally funded through a percentage of Building Applications and Development Application costs. As a result, employers within the building and construction industry in NSW are not required to fund any LSL liability.
- 5.3 Feedback from our members has suggested the current administrative models, across the jurisdictions, work well and are not considered overly burdensome in their current form.
- 5.4 The key challenge remains, however, to take exiting State based construction industry LSL schemes, some of which function very well, to a national level, without forfeiting the benefits which have already accumulated under existing autonomous State based schemes.

6 Conclusion

- 6.1 It is crucial that any extension of a portable LSL scheme to workers and industries which do not have genuine seasonal or irregular employment patterns is not an attempt to increase any entitlements to LSL by stealth by the unions, given the rationale behind original non-portable LSL schemes was to reward employees for staying with one employer.
- 6.2 Unlike the unique characteristics of construction work that led to the initial establishment of the portable LSL scheme, Master Builders is not convinced that there is a strong enough case in support of providing employees in non-construction based roles, such as office workers, a portable LSL scheme.
- 6.3 Master Builders reiterates that any amendment to the NES, or drafting of a uniform cross-industry model that proposes to include model LSL benefits, should exclude the building and construction industry on the basis that its distinctiveness has already been a catalyst for an existing scheme that provides for portable LSL to eligible workers.
- 6.4 Finally, although there are perceived benefits in a uniform LSL scheme for the building and construction industry, any proposal to transition to a single national system will demand extensive due diligence with and across various State and Territory schemes. This would require the comparison of the various fund's financial performance, projected earnings and liabilities and an equitable plan for transition to a national scheme that includes the grandfathering of existing entitlements under a cost-effective, accountable and transparent model of administration.
