



Submission to the Senate Education and Employment References Committee Inquiry into Feasibility of Portability of Long Service Leave Entitlements

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Summary of Recommendations

1. A system of portable long service leave ('PLSL') schemes should be introduced for all Australian employees. In the alternative, PLSL be introduced to industries which have high employee mobility and/or an undersupply of workers in a particular geographic region and/or a high percentage of women.
2. These schemes replicate the model of 'CoINVEST'. This is the Victorian portable long service leave system for the building and construction industry.
3. These schemes be administered by one authority.
4. Experiences of the *Fair Work Act* employment law overhaul should be considered when PLSL is introduced, particularly at the transition stages.
5. The Modern Award system should be used as a tool for recognition of service.

1. Introduction

Job Watch Inc (**JobWatch**) is pleased to contribute to the Education and Employment References Committee's inquiry into the portability of Long Service Leave Entitlements.

In this submission (which is based on JobWatch's August 2015 submission to the Victorian State government PLSL inquiry), JobWatch makes several recommendations regarding the expansion of portable long service leave schemes. JobWatch is confident that these recommendations, if implemented, will increase equality of long service leave opportunities for workers and will have benefits for the fairness and productivity of Australian workplaces.

2. About JobWatch

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

JobWatch was established in 1980 and is the only service of its type in Victoria. The centre is funded by State and Federal funding bodies to do the following:

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

Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our telephone information service. To date we have collected approximately 170,000 caller records with each record usually canvassing multiple workplace problems including, for example, contract negotiation, discrimination, bullying and unfair dismissal. Our database allows us to follow trends and report on our callers' experiences, including the workplace problems they face and what remedies, if any, they may have available at any given time. JobWatch currently responds to approximately 8,000 calls per year.

The content of this submission is based on the experiences of callers to and clients of JobWatch and the knowledge and experience of JobWatch's legal practice and data from our caller database. The case studies used in this submission are of actual but de-identified TIS callers or clients of JobWatch.

3. Long Service Leave: Rationale and Current Arrangements

Long service leave is an entitlement for an employee to take an extended period of leave after an extended period of service. The purpose of this entitlement is to incentivize long and faithful service, to reduce staff turn over and to allow an employee to renew their energies.¹

The National Employment Standards contain long service leave as a minimum standard,² however the *Fair Work Act* leaves the matter of determining long service

¹ Australian Industrial Relations Commission, *Long Service Leave in Australia- Towards a National Standard*, Report (2004), 2. Available at: http://www.airc.gov.au/familyprovisions/aig/TAB_12.pdf

² *Fair Work Act 2009* (CTH), s 61(g)

leave up to the states where a Modern Award does not discuss long service leave.³ Most Modern Awards do not contain long service leave, therefore the matter is left up to state legislation meaning that across different states, different entitlements apply even within the same or substantially same occupation. Therefore there is somewhat of an absurdity in calling an entitlement a National Employment Standard where it is not employed evenly across the Commonwealth. What this implies is that the long service leave entitlements as they stand are incomplete, and action is needed to standardise the system.

Looking at a one state's system, here we submit Victoria's system as an example; the current state of long service leave arrangements leads to poor outcomes, especially in high turnover industries. The Victorian system is governed by the Long Service Leave Act 1992 (Vic). Under this act, an employee is entitled to take long service leave after 10 years of continuous service to one employer.⁴ After 7 years of continuous employment, an employee is entitled to be paid out at the rate of 1 week per every 6 weeks of employment on the ending of the employment relationship. In some cases, a pre-modern award, registered agreement or private agreement that is no less favourable than the statutory minimum will apply. However, where an employee resigns or is dismissed, their length of service doesn't follow them to their new job even if it is the same or similar job in the same or similar industry. Therefore, despite the employee's commitment to their profession and industry, their long service leave accruals/entitlements are lost. This disincentivises employee commitment to their profession and can represent a loss of valuable skills or expertise.

4. Statistics

Due to JobWatch's extensive database we are able to look at trends in Victoria to discover the number of individuals in precarious or insecure occupation positions which would benefit from reforms in the long service leave system. These include casual employees, older employees, and others. The following table is based on our data of individuals in these positions.

³ *Fair Work Act 2009* (CTH), s 113

⁴ *Long Service Leave Act 1992* (Vic) s 56 A.

Table 1: Employment status of callers to JobWatch in the period of 1 July 2013 to 30 June 2015

| Employment Status | Count | Percentage of total calls |
|------------------------|-------|---------------------------|
| Casual Part Time | 1,052 | 7.54% |
| Casual Full Time | 668 | 4.79% |
| Independent Contractor | 383 | 2.75% |
| Fixed Term Contract | 251 | 1.80% |
| Apprentice/Trainee | 195 | 1.40% |

Nearly 13% of our callers are casually employed, as such they can easily be dismissed, without the requirement of any notice, and clearly forgoing any long service leave they may have otherwise have been entitled to. This is especially the case for long-term casuals, who are nearing the long service threshold, only to be dismissed prior to reaching that threshold.

Table 2: Coverage of callers to JobWatch in the period of 1 July 2013 to 30 June 2015

| Coverage | Count | Percentage of total calls |
|----------------------|-------|---------------------------|
| Caller does not know | 3,587 | 25.7% |
| Modern Award | 3,554 | 25.5% |
| Enterprise Agreement | 1,634 | 11.7% |

Many callers are not aware of their entitlements, 25.7% according to our statistics, a national PLSL plan could also help increase awareness among employees of the source of their entitlements. A lack of awareness of entitlements can lead to exploitation of employees by employers.

Table 3: Union membership of callers to JobWatch in the period of 1 July 2013 to 30 June 2015

| Union Membership | Count | Percentage of total calls |
|------------------|-------|---------------------------|
| Yes | 660 | 4.7% |
| No | 5,904 | 42.3% |
| Unknown | 7,381 | 52.9% |

5. Portable Long Service Leave

A portable long service leave (“PLSL”) system allows an employee to cumulate long service leave across their career within the one industry. Without PLSL, where an employment relationship ends before seven years, the employer is able to keep the money set aside for the employee’s long service leave.

CoINVEST- The Victorian Portable Long Service Leave System

There is already a PLSL system in the construction industries in all Australian States and Territories. In Victoria, the system is called “CoINVEST” and has been operating since 1976. The PLSL systems operating currently are a response to the inherently ‘mobile’ nature of construction work.⁵ That is, most building and construction workers are employed project by project and thus do not enjoy ‘continuous’ employment for the purpose of accruing long service leave.

6. The Objectives of Portable Long Service Leave Schemes

JobWatch submits that the advantages of a PLSL scheme include:

1. It encourages employee retention within industries with high rates of labor mobility.
2. Supports regional development by enabling skilled and experienced labour to leave their employer to move to another geographic area to meet a demand without losing their long service leave entitlements.
3. Mitigates against the possibility of termination because of long service leave accrued. Where an employee is terminated before the 7 year minimum, the employer is entitled to retain the entire sum of the long service leave entitlements.

Case Study

Joe⁶ was a manager who accrued 6.5 years of service. His position was terminated by his employer before he reached the 7 year minimum. Therefore he was not eligible to be paid his long service leave entitlements.

Had Joe been able to register PLSL, he would have been able to transfer his long service leave accrued to his new employer.

4. Strengthens female workforce participation by supporting women to return to the workforce after leaving employment for child rearing purposes.

⁵ As stated on the AusLeave website , “...for people who work on different projects for various employers, it is often difficult to accrue this leave” <http://www.ausleave.com.au>.

⁶ This is a pseudonym for a caller to the JobWatch telephone information service.

Case Study

Amy⁷ worked for 5 years in the health industry. After 5 years of service, Amy's manager terminated her job because she was pregnant.

Under the statutory long service leave system, Amy was not able to carry forward her long service leave entitlements even though due to no fault of her own, she was unlawfully dismissed.

Comparatively, had Amy been registered with a PLSL scheme, she could have carried forward her long service leave entitlements.

5. Enables employees to take a break in their careers midway through their working life to renew their energies, obtain experience in different occupations/industries or increase qualifications through study and then return to their primary profession without losing their accrued long service leave entitlements.

7. Rationale for Introducing Portable Long Service Leave Schemes to Particular Industries

JobWatch submits that PLSL should be introduced to all industries. This would ensure that no worker is disadvantaged by virtue of the industry in which they work. However, if this is found to be administratively unworkable, JobWatch submits that the following industry classes in particular require a PLSL scheme:

1. **Industries with high employee mobility-** Employees in these sectors are typically employed to complete particular tasks and are therefore disadvantaged because they are unlikely to reach the statutory minimum period of service for long service leave. Generally speaking, portable long service schemes are designed to recognise the cyclical and transient nature, in addition to the project/contract based structure, of these industries. **Examples:** cleaning work, healthcare, social work and construction.

It is relevant to note that the industries in which mobility is high are also predominantly those that are more physically and/or emotionally demanding and which have a disproportionately high rate of work related illness and injury.⁸ This

⁷ This is a pseudonym for a caller to the JobWatch telephone information service.

⁸ *Compendium of Workers' Compensation Statistics, Australia 2009-10*, Safe Work Australia, 2012, p 6.

further the need to address the problems surrounding inaccessibility of leave. Indeed, increasing accessibility of leave to employees who perform emotionally or physically demanding roles may prevent 'burnout', thereby possibly reducing workers compensation claims and increasing retention of employees within the particular industry.

2. **Industries where there is an undersupply of skilled workers in particular geographic areas-** There is a significant public and commercial interest in incentivizing employees to move to geographic areas where there is an undersupply of experienced workers in a particular industry. **Example:** An experienced doctor is interested in moving to a hospital in a regional area may be reluctant to move because she will lose her long service leave entitlements. Similar issues can be noted with teachers desiring to teach in the Northern Territory but worried about losing their long service leave.
3. **Industries with a high percentage of women-** The current statutory system discourages women to return to the workforce after having children outside of the parental leave system. This is due to the fact that if a woman ends employment with one employer to have children and subsequently takes up employment with another employer within the same industry, it is considered a gap in employment and her service performed before having children is not recognized for the purposes of long service leave.
Examples: Clerical and administrative staff, community & personal service workers and sales professionals.⁹
4. **Reduce the occurrence of employees being dismissed shortly prior to becoming eligible for long service leave** (see below case studies).

Justine

Justine was employed as a permanent part-time Client Intake Officer in the Health and Community Service industry. Justine, who was in the 35-44 age bracket, had been offered a redundancy package by her employer six months prior to when she would have been entitled to long service leave – that is, after 7 years of working with the employer.

⁹ According to the ABS, women comprise over 60% of these industries in Australia.

Justine had been placed on a 12 month contract, with the contract's expiration date being the 28th February 2015. Pursuant to her redundancy package, Justine was offered 4 weeks pay in lieu of notice, as well as 16 weeks redundancy pay.

Eddy

Eddy was employed as a Workforce Development Manager in the education sector. Eddy, who indentified as falling in the 45-59 age bracket, worked in the capacity of a permanent full-time employee. Eddy was made redundant after 6.5 years with his employer, allegedly as a result of the federal budget cuts.

Sue

Sue, who is between the ages of 45 and 59, worked in a permanent full-time capacity as an Executive Assistant. The industry in which Sue worked in could be described as Personal Services, albeit working in a public hospital. Sue had worked in the relevant hospital for almost 10 years. Sue, on her first day back after having one weeks' break, was confronted by her boss, and was informed that she had left her work computer on during her absence. Sue's boss informed her that such an act was a serious security breach that may warrant a dismissal. Sue was, consequently, suspended without pay.

Sue was informed by her boss that she would be able to hold a meeting, with a personal representative, where she could explain the alleged conduct. However, and also in addition, Sue was notified that if she was to resign and abandon the meeting, her employer would pay out her long service leave.

Sue was of the view that the actions undertaken by her employer were probably as a result of budget concerns at the hospital.

Jen

Jen, an engineer working in the construction industry, who fell in the 35-44 age bracket, was employed on a permanent part-time basis. Jen's employment was retrenched after 6 years and 10 months of service – just short of acquiring long service leave entitlements.

Jen's employer cited that her employment was retrenched because the industry was quiet, in addition to the fact that the company was in a precarious financial position. Furthermore, the employer did not provide Jen with any redeployment opportunities.

Jen was not sure why she had lost her job, particularly given the fact that others, including new employees, despite doing similar work, kept their jobs. The employer did not inform Jen as to why she, in particular, lost her job.

Prune

Prune, a permanent full-time employee working as a Professional Service Worker in the retail trade, was made redundant after over 6 years with her employer. Prune suspected that her redundancy was not a case of genuine redundancy, as her job title had been given to someone else. Prune was on the belief that her redundancy was in connection to the fact that she was approaching her long service leave entitlements. Prune identified herself as being in between the ages of 25 and 34.

Stephen

Stephen, a Senior Engineer, identifying as being in between the ages of 45 and 59, had accrued almost 7 years of service through numerous fixed-term contracts. Stephen was a permanent full-time employee for this period, with a brief stint of casual employment sometime during the middle of his employment engagements.

Stephen's employer wanted to re-engage him under a different contract. The relevant contract provisioned for the recognition of Stephen's previous service but only going back to the start of his then-current contract. The reasoning behind this was that the employer was of the view that Stephen had only been employed since the 1st of July 2009, as opposed to 31st November 2005 – when Stephen first commenced his employment.

Stephen made an enquiry with his employer, but his employer responded by notifying Stephen that it was seeking legal advice, and suggested that Stephen should also.

Ron

Ron, identifying as being above the age of 60, was a full-time Sales/Personal Service Worker in the retail industry. Ron was made redundant 6 weeks shy of providing 7 years of service. Ron was of the view that his up-and-coming entitlement to long service leave was the reason for his redundancy. Ron also expressed his opinion that his age may have also been a factor.

8. Implementation: A PLSL Scheme Should Replicate the CoINVEST Model

JobWatch recommends the CoINVEST PLSL model should be replicated in other industries as designated by legislation for all employees in those definable industries. The CoINVEST scheme provides a portable long service leave scheme for workers in the building and construction industries.

A CoINVEST model has the following features:

1. All workers, employers and working subcontractors are required by law to register with the scheme.¹⁰
2. The employer must complete a Workers' Days and Wages form every three months which details the amount of days an employee has worked.¹¹ These days add up to what the scheme calls 'service credits'.¹²
3. The scheme keeps track of the service credits even if the employee changes employers.¹³ Once an employee has built up 7 years service credits recorded with the scheme, they can make a claim for long service leave.¹⁴
4. In the system, employers contribute a designated percentage to the Long Service Leave Fund every three months- this is an on-cost to employers and not deducted from workers' wages. The contribution rate is currently based on 2.7% of the total gross wage of all their workers – this is to keep the costs uniform and relative between the smaller and larger employees.¹⁵

Nevertheless, although CoINVEST's focus is on 'continuous' service, JobWatch submits that any PLSL scheme should prioritise 'aggregate' service over 'continuous' thereby allowing breaks from an employee's primary industry without detriment to their PLSL accruals.

¹⁰ CoINVEST, Q&A

<http://www.CoINVEST.com.au/media/W1siZiIsIjIwMTUvMDMvMTcvMTVfNTIifNDRfMzQwX0NvSU5WRVNUX1FhbmRBLnBkZiJdXQ/CoINVEST%20QandA.pdf>.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ CoINVEST, *How Co-Invest Works*, <<http://www.CoINVEST.com.au/about-CoINVEST/how-CoINVEST-works>>.

¹⁵ CoINVEST *Who pays for portable long service leave?* <http://www.CoINVEST.com.au/about-CoINVEST/how-CoINVEST-works>.

9. Constitutional Considerations

The *Fair Work Act* is itself a product of the s 51 Constitutional corporations power of the Commonwealth, combined with references of the states to various government employees, as well as other units such as sole traders, not falling under the corporations power.

To implement a PLSL scheme, the Commonwealth government could use a similar procedure, the corporations power for wide coverage of most Australian employees, and cooperative federal opt-ins or power referrals by the states to a national system.

10. Administration: One Authority

JobWatch suggests that the PLSL system could be administered by one authority across industries. The advantages of this system are:

1. Cost efficiencies available through scale and purchasing power;
2. Consistency and fairness between industries by having the same resources and policies available; and

This model is currently in operation in the ACT (where 'ACTleave' administers the long service leave systems of the construction, cleaning, community sector and security industries.)¹⁶

Alternatively, JobWatch is open to whatever works best in a given industry, it could be a system similar to the Superannuation system, which has distributed funds but a central enforcement authority (the ATO) to manage the system. It can also be done via agreement between employer and employee about where the money should be placed.

11. Recognition of Service

JobWatch recommends that recognition of service can be achieved by reference to the current Modern Award system. Where an employee falls under a modern award, then any subsequent employment where the employee falls under the same or substantially similar, modern award the employee's previous service is recognised. The advantages of this approach are several:

¹⁶ Long Service Leave (*Portable Schemes*) Act 2009, s 6.

1. Coverage for most Australian workers due to near-ubiquity of Modern Awards
2. Standardised and familiar system easy for both employees and employers to understand
3. Already settled in the constitutional context of the *Fair Work Act*

Where employees do not fall under a modern award, service could be recognised on a case by cases basis, or through agreement, using a 'same or substantially similar duties' test.

In the alternative, JobWatch recommends that the function of administering a PLSL scheme could be delivered by the employee's superannuation fund as they already have access to relevant employment data and many are industry specific.

12. A National Regime's Impact on Existing Long Service Leave and PLSL Models Across States and Territories

Several states have implemented PLSL schemes already, including Queensland¹⁷ in 2005, the Australian Capital Territory¹⁸ in 2009 and NSW¹⁹ in 2011. The other states, including Victoria, have not yet implemented a state PLSL model; however any national change will affect their domestic long service leave system. That being the case, JobWatch recommends a transitional period in order for the long service leave system to gradually transition from state to federal administration. A similar transitional model was used in the *Fair Work Act* to transition from the pre-Modern Award instruments to Modern Awards and could be successfully used in the PLSL context.

13. Further Research

JobWatch recommends further research be conducted into the efficiencies that a national PLSL system could provide. JobWatch notes that there is a PLSL scheme at the national

¹⁷ Qleave, <<http://www.qleave.qld.gov.au/webdb/wsmanager.nsf/%28web%29/69068076AC79A6A84A2576E10029A8DD>>.

¹⁸ ACTLeave <<http://www.actleave.act.gov.au/>>.

¹⁹ Long Service Corporation <http://www.longservice.nsw.gov.au/>.

level for the coal mining industry.²⁰ The rationale for this scheme is the same as that for the CoINVEST-style systems: the high rates at which workers move between employers in the mining industry makes it difficult for those workers to qualify for long service leave. In many ways this scheme has advantages over the Co-Invest system- for example, it recognises 'aggregate' rather than 'continuous' employment and operates nationally.

14. Conclusion

JobWatch believes that an expansion of PLSL to new sectors rewards employee loyalty to their industry in which they work. As employment trends change towards more transient forms of employment, it is crucial that there is not an erosion of long service leave entitlements.

Thank you for considering our submission. JobWatch is confident that the above recommendations will increase productivity and fairness in Victorian workplaces. We would welcome the opportunity to discuss any aspect of this submission further. Please contact Ian Scott on (03) 8643 1118 if you have any queries.

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²⁰ Coal Mining Industry (Long Service Leave) Funding Corporation is established by the *Coal Mining Industry (Long Service Leave) Administration Act 1992*.