Ai GROUP SUBMISSION

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

Senate Education and Employment References Committee

10 December 2015

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

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1. Introduction

Ai Group makes this submission to the Senate Education and Employment References Committee's *Inquiry into the feasibility of, and options for, creating a national long service standard, and the portability of long service and other entitlements* (**Inquiry**).

While the title of the Inquiry refers to *long service leave and other entitlements*, the terms of reference to the inquiry deal only with long service leave and portable long service leave.

This submission deals with those matters that are raised in the terms of reference and in particular considers:

- The fundamental purpose of long service leave;
- A national long service leave standard, including:
    - What a national long service leave standard should look like; and
    - Why a national long service leave standard is necessary;
- The history of portable long service leave in the building and construction industry and the coal mining industry;
- The Productivity Commission's findings on the portability of long service leave; and
- The lack of any valid case for the extension of portable long service leave entitlements beyond the coal mining industry and building and construction industry, including:
    - The cost burden of portable long service leave and its impacts on employers and employees;
    - The extent of labour market mobility; and
    - The stability of casual employment in Australia.

Ai Group strongly opposes any extension of the portability of long service leave entitlements in industries beyond the building and construction industry and the coal mining industry where these entitlements currently exist. We urge the Committee to emphatically reject any extension of portable long service leave entitlements.

The analysis in this submission highlights that portable long service leave schemes are **more than four times as costly** as traditional long service leave schemes. The implementation of a portable long service leave scheme would cost Australian employers over **$16 billion per annum**. Such a massive cost impost upon employers would damage the Australian economy. Australian employers would become less competitive against overseas firms. The impact would be felt by Australian workers through lower employment, downsizing and plant closures.

2. The fundamental purpose of long service leave

The fundamental purpose of long service leave is to reward an employee with a period of rest after a long period of loyal service with one employer. Consistent with this fundamental purpose, long service leave was conceived in Victoria in the 1860s to give the workforce of that time the opportunity to periodically make the long journey back to their home countries.[1] In 1953 the Victorian Parliament passed the *Factories and Shops (Long-Service Leave) Bill*. Mr Frazer, during the Second Reading Speech of the bill, referred to the history of long service leave in Victoria:

> *"Almost 100 years ago in the year 1862 long-service leave was introduced in Victoria for the first time. It is true that we were then only a colony, and it may have been granted by the illustrious Legislative Council of the day in order to permit those who came here in the course of the expansion of the Empire to visit their people in the Old Country. However, the Civil Service Act was passed, and it granted six months' leave to persons who had rendered ten years of civil service in the colony. The Government does not propose to go so far as that in this Bill. In the year 1883, the Government of the day introduced long-service leave generally in the Public Service and made provision for six months' leave on full pay and six months on half pay to public servants, but there was this limitation it was to be granted by the Governor in Council on the recommendation of the Public Service Commissioner."*[2]

The fundamental purpose of long service leave was described by Justice Haylen of the NSW Industrial Relations Commission in *TWU of New South Wales v AJ Mills & Sons t-as Mills Transport CDM Logistics* [2008] NSWIRComm 245 (emphasis added):

> *"64 Before dealing with the particular matter before the Court, it is convenient to make some general remarks about the nature of long service leave. The Long Service Leave Act 1955 is described as an Act to make provisions entitling workers to long service leave; to amend the Industrial Arbitration Act 1940 and for purposes connected therewith. On the introduction of the Long Service Leave Bill in Victoria in 1953, the responsible Minister described the purpose of long service leave as being "a period of rest for the employee, so that he might recuperate after a long period of continuous service". It has otherwise been described as having the purpose of providing a rest to employees to re-energise and recuperate after many years of loyal service to an employer. These general descriptions were encapsulated in the statement of Hungerford J in Kaal Australia Pty Ltd v Federated Clerks' Union of Australia [2001] NSWIRComm 6; (2001) 103 IR 344 where his Honour said at [26] when rejecting a proposal for payment in lieu of leave on the basis that it was contrary to the fundamental and inherent purpose of the Long Service Leave Act, namely being a period of paid leave for long service."*

[1] Productivity Commission, *Workplace Relations Framework – Productivity Commission Draft Report*, August 2015, p.172.
[2] Mr Frazer, Second Reading speech: Factories and Shops (Long-Service Leave) Bill 1953, 22 September 1953.

Long service leave (in the 'traditional way') was a claim sought by unions and considered by the Conciliation and Arbitration Commission and State industrial tribunals, with respect to private enterprise in some industries around the time of the miners' strike in the 1940s. It generally was not awarded if opposed by the employer.[3]

The second reading speech to the *Industrial Arbitration (Amendment) Bill 1951* (NSW) noted the development of long service leave in awards at the time:

> "*Of the 600 State awards, fifty-two contain provisions for long-service leave. Many claims for this right have been made in all industrial jurisdictions, some of which have been granted and others refused.*"[4]

The *Industrial Arbitration (Amendment) Act 1951* (NSW) was the first piece of legislation in the Australia (and the world) to provide an entitlement to long service leave to employees more generally. The Act provided the NSW industrial tribunal with the power to insert a model long service leave term into awards on application by the industrial parties. The primary purpose of the amendment was to reward *good and faithful service* to an employer and to *provide an opportunity for employees to recuperate after rendering good and faithful service for that long period*. This was noted in the Second Reading Speech to the bill:

> *"The Labour Party considers that long service leave is a reward for good and faithful service. Another aim of the provision is to avert labour turnover, and thirdly, to provide an opportunity for employees to recuperate after rendering good and faithful service for that long period.*"[5]

Nonetheless, it was acknowledged in the Second Reading Speech that the provision of long service leave through legislation was an election commitment honoured by the NSW Labour Party after winning Government at the time:

> *"As to long-service leave, the Premier in his policy speech before the last State elections, announced that if his party were returned to office long-service leave and sick leave would be awarded to workers as a right. That provision is contained already in several Acts and in principle, dates back to 1884. Many claims for this right have been made by industrial organisations to tribunals in both the Federal and State jurisdictions. The Labour Party, being convinced of the justice of such claims, decided that at the first opportunity, it would give the workers this privilege."*[6]

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[3] See *The Australian Tramway and Motor Omnibus Employees Associations v The Commissioner for Road Transport and Tramways, New South Wales and Another* 1948 CAR 323 at 335. Here, Blackburn C says "*I am not prepared to order long service leave otherwise than now provided in awards, as it is not the practice of the arbitration authority to order same when opposed by employers*".

[4] Mr Colborne, Second Reading speech: Industrial Arbitration (Amendment Bill) 1951 (NSW), 6 June 1951.

[5] Ibid.

[6] Ibid.

Later, in 1955, the NSW Parliament passed the *Long Service Leave Act 1955* (NSW), which is still, save for a number of amendments, in operation today. The Second Reading Speech to the corresponding bill emphasised, like the *Industrial Arbitration Amendment Act 1951* (NSW), the principle of long service leave is to provide a *recognition of the necessity for greater leisure* and for *employers to realise their obligation to reward employees for many years' standing*:

> *"The principle dealt with in this bill, that of long service leave, is one on which I do not think there is any dispute. Throughout the world there is an ever-increasing recognition of the necessity for greater leisure. Employers also realise their obligation to reward employees of many years' standing."*[7]

Both these purposes are lost with the provision of portable long service leave entitlements. The reality is that portable long service leave schemes conflict with the fundamental purpose of long service leave, in so far that:

- Portable long service leave provides no reward for service with the one employer; and
- The focus of portable long service leave schemes is on an employee's entitlement to a lump-sum payment, not on an entitlement to a period of rest. For example, in the *Jemina v Coinvest Case,*[8] the Federal Court, the Full Federal Court and the High Court of Australia accepted the arguments of CoINVEST that the *Construction Industry Long Service Leave Act 1997* (Vic) (**CILSL Act**) is not a law about long service leave and does not provide any entitlement to leave; but rather it is a law which requires the payment of a levy – much like a taxation law.

Given that portable long service leave schemes conflict with the fundamental purpose of long service leave, and impose much higher costs upon employers and the community, Ai Group strongly opposes such schemes being extended, beyond those industries where portable long service leave currently exists nationally throughout the industry and has been in place for many years; namely the building and construction industry and the coal mining industry.

[7] Mr Downing, Second Reading speech: Long Service Leave Bill 1955 (NSW), 28 October 1955.
[8] *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* [2009] FCA 327 at para [10]; *Jemena Asset Management Pty Ltd v Coinvest Limited* [2009] FCAFC 176 at para [26]; and *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* [2011] HCA 33 at par [33].

3. A National Long Service Leave Standard

What a national long service leave standard should look like

Ai Group, in its recent submissions to the Productivity Commission's inquiry into the Workplace Relations Framework, argued in support of a national long service leave standard implemented through the National Employment Standards (**NES**).

The national standard should reflect the previous federal award long service leave standard, i.e. 13 weeks long service after 15 years of service, with pro-rata entitlements after 10 years. The standard should include the ability to cash out long service leave by agreement in writing between the employer and an individual employee, and the ability to take long service leave in any number of periods which are agreed. Only service in Australia should be counted for the purpose of the national standard. This is important given Australia's increasingly mobile workforce.

The national standard should oust the operation of State and Territory long service leave laws for employees covered by the *Fair Work Act 2009* (Cth) (**FW Act**).

The national standard should not contain a general exclusion for employers and employees covered by portable long service leave schemes. The coverage of some of these schemes is extremely vague and problematic (e.g. the Victorian Construction Industry Portable Long Service Leave Scheme administered by CoINVEST). The coverage typically creeps wider over time through changes to coverage Rules and through unreasonably expansive interpretations of existing coverage rules adopted by bodies like CoINVEST over which unions have a great deal of influence given the composition of their Boards.

In implementing the proposed national standard, employees should retain any long service leave accrued up to the date of implementation. For example, if an employee in South Australia had accrued 13 weeks of long service leave as a result of 10 years of service, this entitlement should not be lost but future long service leave would accrue on the basis of 13 weeks for 15 years of service.

If a national standard is not achievable in the short term then the following arrangements should apply in the meantime:

1. It is very important that the existing long service leave provisions in the NES are not removed. The removal of these provisions would significantly increase costs for employers in the metal, graphic arts, vehicle, food and other industries where the major pre-modern awards contained long service leave entitlements, and these provisions now operate as terms of the NES. If the NES provisions are removed, thousands of employers will lose the nationally consistent long service leave provisions which they are currently applying and be forced to apply inconsistent State and Territory laws. This would significantly increase their costs, particularly in respect of their employees in States and Territories where more generous long service leave laws apply (e.g. South Australia and Northern Territory).

2. State and Territory long service leave laws should be harmonised in key areas, including:

    - Allowing leave to be cashed out by agreement with the employer;
    - Allowing leave to be taken, by agreement with the employer, in any number of periods including single days;
    - Implementing a consistent definition of "ordinary pay" for the payment of long service leave entitlements; and
    - Clarifying that overseas service is not counted.

3. Enterprise agreements need to be able to override State and Territory long service leave laws, subject to a no disadvantage test, as this is an effective mechanism for an enterprise to achieve nationally consistent provisions.

Why a national long service leave standard is necessary

Australia's long service leave laws are mess. The interaction between the long service leave provisions in the NES, State and Territory laws and enterprise agreements is so complex that employers and employees find it difficult to navigate and determine entitlements.

Also, sensible and longstanding long service leave flexibilities which benefited employers and employees were removed through the FW Act.

The long service leave provisions in the FW Act have the following effects:

- As a stop-gap measure until a national long standard leave standard was developed, section 113 of the FW Act was implemented to preserve the long service leave terms in pre-modern awards as provisions of the NES; and
- Except for the limited NES provisions in ss.113 and 113A of the FW Act, long service leave provisions in enterprise agreements cannot override State long service leave laws (ss.26, 27 and 29 of the FW Act).

The stop-gap measure was implemented by the former Labor Government based on an expressed intention at the time to work with the State and Territory Governments to develop a national long service leave standard. This has not occurred and there is no sign that the Governments will ever have the political will to agree on such a standard, given significant differences in entitlements in some States and Territories.

From 1993 to 31 December 2009, employers and employees were free to include provisions in enterprise agreements to implement nationally consistent long service leave provisions. This flexibility was lost from 1 January 2010 under the FW Act. The loss of this flexibility is not in the interests of employers or employees.

While subsections 113(4), (5) and (6) of the FW Act provide a very limited and cumbersome mechanism to preserve nationally consistent long service leave provisions in pre-FW Act enterprise agreements, these provisions have failed, as is evident from the fact that they have not been used.

The expansion of portable long service leave schemes is certainly not the answer to resolving the complexity with Australia's long service leave laws:

- These schemes are typically four times as costly for employers as traditional long service leave schemes because employers are required to pay a levy of about 2-3 per cent on the wages of every employee, from the day that the employee commences employment. Under the regular long service leave laws, the employer's liability only arises once the employee has several years of service with the employer.

- Portable long service leave levies are, in effect, a tax on employment. They impose a significant cost burden on employers which impacts their ability to take on more employees.

- Long service leave is intended to reward employees for long and faithful service with one employer and this intention needs to be retained. This is not reflected in portable long service leave schemes.

4. The history of portable long service leave in the building and construction industry and the coal mining industry

Portable long service leave was first introduced in Australia in the coal mining industry, following a major coal miners' strike in 1949.[9] A summary of the relevant history is extracted below:

> *"The purpose of this bill is to arrange for the financing of long service leave benefits which have been granted by an award of the Coal Industry Tribunal issued on the 14th October, to certain employees in the coal-mining industry. Other measures which will be brought forward shortly are complementary to this bill and, taken with this measure, form a single scheme. Honorable members will doubtless be aware that after having lodged a claim with the Coal Industry Tribunal for long service leave, which up to that time had not been determined, on the 19th May of this year the miners federation also included long service leave in a log of claims served on the colliery proprietors, the Joint Coal Board and the Australian and State governments. This log of claims was considered at a series of conferences of the parties concerned. At these conferences it was emphasized that if an award of long service leave were made, the cost could not be borne by the individual owners but would have to be financed on an industry basis. The representative of the*

[9] Mr Dedman, Second Reading speech: States Grants (Coal Mining Industry Long Service Leave) Bill 1949, 20 October 1949.

> *Australian Government, Senator Ashley, said that, if long service leave were granted either by agreement between the unions and the proprietors or by an award of the tribunal, the Australian Government would arrange for finance for such a scheme. At the same conference, the then New South Wales Minister for Mines, Mr. Baddeley, representing the New South Wales Government, stated that his Government would "play its part". Honorable members will know that those conferences broke down. The tribunal then proceeded to conclude the hearing of the long service leave case, and announced that it would issue a draft award for discussion between the parties on the 14th June. Because of the general strike in the industry and the events which preceded it, the draft award was not issued. After the strike ended, the matter was reconsidered by the tribunal, which has now made an award in respect of members of the miners' federation employed in the coalmining industry. This award is identical with that made in draft form prior to the strike. The Government is now proceeding to provide the machinery for the running of the scheme."*[10]

A coal mining industry portable long service leave scheme remains in operation today under federal legislation.[11]

Portable long service leave in the coal mining industry preceded State and Territory long service leave that provide for long service leave in the 'traditional way'. New South Wales was the first jurisdiction to introduce long service leave in 1951 with the passing of the *Industrial Arbitration Amendment Act 1951* (NSW) (see above).

The portability of long service leave did not feature within the legislature, or industries beyond coal mining, until 1974 when the *Building and Construction Industry Long Service Payments Act 1974* (NSW) was passed by the New South Wales Parliament. The purpose of the NSW legislation is expressed in the second reading speech for the NSW Bill:

> "*The introduction of a scheme to provide for long service benefits for workers in the building and construction industry has been sought for many years since the introduction of the Long Service Leave Act in 1955. Due to the nature of the industry, which requires mobility of its work force for employment by different employers at different places as building activities wax and wane, many workers in the industry have not been able to achieve continuity of employment with one employer which is necessary qualification under the Long Service Leave Act*."[12]

[10] Ibid.
[11] *Coal Mining Industry (Long Service Leave) Administration Act 1992*, *Coal Mining Industry (Long Service Leave) Payroll Levy Act 1992* and *Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992*
[12] Mr Willis, Second Reading speech: Building and Construction Industry Long Service Payments Bill, 19 November 1974.

During the Parliamentary debate over the NSW legislation, the building and construction industry was characterised as:

> "*In the building industry we are on what is known as hourly hire. The employer can give the worker the sack at an hour's notice and similarly the employee at an hour's notice can tell the employer that he wants to terminate his employment. By the very nature of the industry men are engaged to build a cottage and when the cottage is finished they are given the sack. They have to "follow the job" until they find other employment. In serving fifteen years in the building industry an employee could literally work for 300 or 400 employers. Under the old long-service leave provisions, workers in the building industry would never have been eligible for long-service leave*."[13]

Similar to the background to the introduction of the coal mining long service leave scheme, the NSW building and construction industry scheme arose from an industrial dispute between building industry unions and building industry employers. The disputation was focussed on during the Parliamentary debate over the *Building and Construction Industry Long Service Payments Bill 1986* (NSW) (the successor to the *Building and Construction Industry Long Service Payments Act 1974* (NSW)) the Hon. Joe Slater Thompson, a Labor party member of the Legislative Council said:

> "*I was a member of Parliament at the time of the 1974 Act, which was progressive legislation. I would be the first to agree with the late Fred Bowen that that legislation was a breakthrough, but, again, the Hon. M. F. Wiilis failed to say that for four or five years prior to the introduction of that legislation there had been massive disruption in the building industry in an endeavour to obtain portable long service leave. There is no doubt that although the 1974 legislation was to be applauded, it was not introduced as an act of generosity, but because there had been so much unrest in the building industry as a result of the anomaly whereby building workers did not remain with the one employer for a sufficient time to become eligible for long service leave entitlements.* [14]

Portable long service leave was then introduced in the Victorian building and construction industry by the passing of *Building Industry Long Service Leave Act 1975 (Vic)* (**BILSL Act 1975**) – predecessor legislation to the CILSL Act, by the Victorian parliament.

Like the portable long service leave schemes that preceded it, the passing of the BILSL Act 1975 reflected the settlement of an industrial dispute in the building industry, rather than community recognition of the merits of portable long service leave. The building unions had at the time pursued a national campaign for portable long service leave in the building industry which, because of the intermittent nature of building work, would accumulate for service to the industry, as opposed to the employer.[15] The "*Government decided that if the parties involved in the dispute*

[13] New South Wales Parliamentary Debates, Legislative Assembly, 19 November 1974, page 2896.
[14] New South Wales Parliamentary Debates, Legislative Council, 28 April 1986, page 2829 to 2831.
[15] Elder J, (2007), *The History of the Master Builders Association of NSW: The First Hundred Years*, University of Sydney, p.169 < http://prijipati.library.usyd.edu.au/handle/2123/1936> .

could reach agreement, the Government would introduce the necessary legislation which would help resolve the dispute".[16]

The second reading speech to the BILSL Act 1975 explained that the purpose of the legislation was to provide long service leave entitlements to workers in the construction industry who, because of the nature of the industry, would find it difficult to accumulate the years of service with a single employer to become entitled to LSL under the *Labour and Industry Act 1958*.[17]

This history demonstrates that industrial disputation was a driver for the introduction of portable long service leave in both the coal mining industry and the building and construction industry.

This history also demonstrates that, with respect to the building and construction industry, the following factors also were influential to the introduction of portable long service leave:

- At the time of the schemes' introduction, work in the building and construction industry was of an intermittent nature. Employees were typically employed for a project then their employment was terminated;

- Because of the intermittent nature of the work it was difficult for employees in the building and construction industry to meet the continuity of service requirements with an employer which would give rise to an entitlement to long service leave. This was described as an anomaly;[18] and

- Because of the widespread disruption in the industry, the unions, employers and Government came to a negotiated outcome to resolve the dispute.[19]

The above factors were present in the building and construction industry in the 1970s. These days, even in the building and construction industry, these factors no longer exist. Nowadays most workers on construction projects are employed by subcontracting firms, not by head contractors, and workers are typically relocated from project to project by their employer without their employment being terminated. This is obvious from recent ABS statistics which reveal that almost 27 per cent of persons employed in the construction industry have remained employed with the same employer for 10 years or more.[20] This compares with less than 10 per cent of persons who have been employed in the industry with the same employer for more than one but less than two years.[21]

[16] Victorian Parliamentary Debates, Legislative Assembly, 17 April 1975, page 5118.
[17] Mr Wilcox, Second Reading speech: Building Industry Long Service Leave Bill, 17 April 1975.
[18] See New South Wales Parliamentary Debates, Legislative Council, 28 April 1986, page 2830.
[19] See New South Wales Parliamentary Debates, Legislative Council, 28 April 1986, page 2830. Also see Victorian Parliamentary Debates, Legislative Assembly, 17 April 1975, page 5118.
[20] ABS 2013, *Labour Mobility, Australia*, February 2013, cat. no. 6209.0, ABS, Canberra.
[21] ABS 2013, *Labour Mobility, Australia*, February 2013, cat. no. 6209.0, ABS, Canberra.

Despite the reality that the factors which justified the introduction of portable long service leave in the building and construction industry no longer exist, Ai Group is not arguing for the abolition of longstanding existing portable long service schemes at this time. Rather we argue that portable long service leave entitlements must not be extended to other industries.

5. The Productivity Commission's views on the portability of long service leave

The Productivity Commission is currently undertaking a review of the workplace relations framework in Australia, including long service leave laws. On 5 August 2015 it published a draft report which makes a number of important observations with respect to the portability of long service leave entitlements.

In its draft report, the Productivity Commission acknowledges the propensity of portable long service leave to dilute the purpose of long service leave and the negative impact that portable long service leave would have on employees and employers.

Below is a relevant extract from the Productivity Commission's draft report (emphasis added):[22]

> *"… It appears that, notwithstanding the goal of providing a time for recuperation, employees under portable schemes do not necessarily take the leave. For example, in a submission to a review of a New South Wales scheme for contract cleaners, for instance, the Australian Industry Group argued that:*
>
> > *… the experience in other States shows that it is rare for employees to actually take leave under these schemes; rather the emphasis has been on the employees accumulating money. … [The schemes] do not, in practice, have the effect of giving workers a period of rest and recuperation. (Ai Group 2013)*
>
> *Similarly, according to the NSW Industrial Relations Advisory Council, 'in many cases, LSL is not regarded as an opportunity for career renewal, but rather as an economic asset' (2013).*
>
> *…*
>
> *Further, while the argument that LSL portability may improve dynamic efficiency is sound in principle, it is not clear that the effects are significant.*
>
> *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.*

[22] Productivity Commission, *Workplace Relations Framework – Productivity Commission Draft Report*, August 2015, p.176-178.

There are still likely to be some benefits from making LSL portable, although in considering the merits of introducing a portable scheme, those benefits must be compared with the costs entailed:

(i) While LSL may not be an efficient measure for creating employer loyalty, it must have some effect, which would be diluted with full portability.

(ii) 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.

(iii) 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 employees' 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 wage 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."

After considering the evidence and arguments, the Productivity Commission has not recommended the implementation of portable long service leave entitlements in its draft report.

At the time of writing this submission, the Productivity Commission's final report had been delivered to the Government but had not been publicly released.

6. There is no valid case for extending portable long service leave entitlements

There is no valid case for extending portable long service leave to other industries and a powerful case against it.

6.1 The cost burden and its impacts on employers and employees

It is vital that portable long service leave not be extended beyond those portable long service leave schemes already in operation.

Table 1 summarises the portable long service leave schemes in the building and construction industry and the Coal Industry Long Service Leave Scheme. These are the only two industries where portable long service leave schemes operate across the entire industry in each State and Territory.

Table 1: Summary of portable long service leave schemes in the building and construction industry and coal mining industry

Jurisdiction	Legislation and Regulations	Entitlement	Current levy
Commonwealth	Coal Mining Industry (Long Service Leave) Administration Act 1992	13 weeks after 8 years of service	2.7 per cent of eligible wages paid
Victoria	Construction Industry Portable Long Service Leave Act 1997	9.1 weeks after 7 years of service	2.7 per cent of the ordinary rate of pay
New South Wales	Building and Construction Industry Long Service Leave Payments Act 1986	8.67 weeks for each 10 years of service	0.35 per cent of cost of building, for all projects that cost $25,000 or more
Australian Capital Territory	Long Service Leave (Portable Schemes) Act 2009	13 weeks after 10 years of service	2.5 per cent of gross ordinary wages (excluding apprentices)
Queensland	Building and Construction Industry (Portable Long Service Leave) Act 1991	8.67 weeks after 2,200 days worked	0.25 per cent of the total cost of construction work over the value of $150,0000
South Australia	Construction Industry Long Service Leave Act 1987	13 weeks after 2,600 service days or a pro-rata entitlement after 1,820 service days	2.25 per cent of total remuneration
Western Australia	Construction Industry Portable Paid Long Service Leave Act 1985	8.67 weeks after 5 years of service and 4.33 weeks for each 5 years of service thereafter. Pro-rata entitlement of 6 weeks after 7 years of service	1.5 per cent of ordinary rate of pay (apprentices excluded)
Tasmania	Construction Industry (Long Service Leave) Act 1997	13 weeks after 10 years of service and pro rata for each 5 years of service thereafter	2 per cent of ordinary rate of pay
Northern Territory	Construction Industry Long Service Leave and Benefits Act 2005	13 weeks after 10 years of service	0.1 per cent of the cost of construction work for projects that start on or after 7 April 2014.
Commonwealth	Coal Mining Industry (Long Service Leave) Administration Act 1992	13 weeks after 8 years of service	2.7 per cent of eligible wages paid

There are two different funding models for the portable long service leave schemes in Table 1:

- The Commonwealth coal industry scheme, as well as the construction industry schemes in Victoria, South Australia, Western Australia, Tasmania and the ACT, impose a levy on individual employers.

- The construction industry schemes in New South Wales, Queensland and the North Territory are funded by a levy paid at the development stage of a project.

The Coal Industry Long Service Leave Scheme and Victorian Construction Industry Portable Long Service Leave Scheme impose a levy of 2.7% of 'ordinary pay' on all employers in the respective industries.

Table 2 below reveals that a 2.7 per cent levy calculated on full time ordinary earnings over 12 months[23] would amount to a cost for Australian employers of more than **$16 billion per annum**. Table 2 has been prepared by Ai Group using ABS data from May 2015.

Table 3 below compares the cost of traditional long service leave, calculated on the basis of the entitlements in the *Long Service Leave Act 1992* (**LSL Act 1992**) (which are broadly similar to the entitlements in most other States and Territories) with the cost of a portable long service leave scheme with a 2.7% levy (taken from Table 2).

Table 3 reveals that traditional long service leave costs less than a quarter (approximately $3.8 billion over 12 months) than the $16 billion annual cost of a portable long service leave scheme.[24]

[23] Ai Group's analysis only captures the ordinary earnings of full-time employees. It excludes the ordinary earnings of part-time and casual employees.

[24] Ai Group's analysis only captures the ordinary earnings of full-time employees. It excludes the ordinary earnings of part-time and casual employees. Ai Group's analysis captures those employees with 10 years or more tenure with the same employer and 60 per cent of those employees with more than 5 but less than 10 years tenure with the same employer. The percentage of 60 per cent is used to take into account those employees with seven, eight and nine years' tenure with the same employer but exclude those with five and six years' tenure, as the LSL Act 1992 entitles employees to LSL if their employment is terminated after seven years or more tenure with the same employer.

Table 2: Estimated annual cost of a 2.7 per cent long service leave levy on full-time ordinary time earnings in Australia by industry

Industry	Employment numbers* ('000) Full-time employees***	Average Weekly Earnings ($)** Full-time weekly ordinary time earnings****	Total estimated weekly payroll ($m) Full-time ordinary time earnings	Total estimated annual LSL costs @ 2.7% ($m) based on full-time ordinary time earnings
Agriculture, Forestry and Fishing	220.9	n/a	n/a	n/a
Mining	239.2	2,536.3	606.7	851.8
Manufacturing	728.7	1,341.4	977.5	1,372.4
Electricity, Gas, Water and Waste Services	140.7	1,661.4	233.8	328.2
Construction	864.8	1,497.5	1,295.0	1,818.2
Wholesale Trade	309.4	1,423.9	440.6	618.5
Retail Trade	626.9	1,101.4	690.5	969.4
Accommodation and Food Services	327.6	1,060.8	347.5	487.9
Transport, Postal and Warehousing	487.7	1,461.2	712.6	1,000.5
Information Media and Telecommunications	172.0	1,714.2	294.8	414.0
Financial and Insurance Services	341.2	1,748.2	596.5	837.5
Rental, Hiring and Real Estate Services	155.9	1,226.3	191.2	268.4
Professional, Scientific and Technical Services	746.7	1,753.0	1,309.0	1,837.8
Administrative and Support Services	245.8	1,242.5	305.4	428.8
Public Administration and Safety	588.5	1,545.4	909.5	1,276.9
Education and Training	572.1	1,581.7	904.9	1,270.5
Health Care and Social Assistance	835.2	1,410.8	1,178.3	1,654.3
Arts and Recreation Services	119.5	1,311.2	156.7	220.0
Other Services	333.6	1,126.8	375.9	527.8
Total (ANZSIC06 DIVISION LEVEL)	**8,056.4**	**1,483.1**	**11,948.4**	**16,775.6**

* 4-quarter average up to May 2015. Australian Bureau of Statistics 2015, Labour Force, Australia, Detailed, Quarterly, May 2015, cat no. 6291.0.55.003, Table 05, ABS, Canberra. Data has been adjusted over four quarters.

** Australian Bureau of Statistics 2014, Average Weekly Earnings, November 2014, cat no. 6302.0, Table 10G, ABS, Canberra.

***Full-time employees are permanent, temporary and casual employees who normally work the agreed or award hours for a full-time employee in their occupation and received pay for any part of the reference period. If agreed or award hours do not apply, employees are regarded as full-time if they ordinarily work 35 hours or more per week[25]

****Weekly ordinary time earnings refers to one week's earnings of employees for the reference period, attributable to award, standard or agreed hours of work. It is calculated before taxation and any other deductions (e.g. superannuation, board and lodging) have been made. Included in ordinary time earnings are award, workplace and enterprise bargaining payments, and other agreed base rates of pay, over-award and over-agreed payments, penalty payments, shift and other allowances, commissions and retainers, bonuses and similar payments related to the reference period, payments under incentive or piecework, payments under profit sharing schemes normally paid each pay period, payment for leave taken during the reference period, all workers' compensation payments made through the payroll, and salary payments made to directors. Excluded are amounts salary sacrificed, non-cash components of salary packages, overtime payments, reimbursements to employees for travel, entertainment, meals and other expenditure incurred in conducting the business of their employer, and other payments not related to the reference period.[26]

[25] ABS 2014, Average Weekly Earnings, Australia, November 2014, cat. no. 6302.0, ABS, Canberra.
[26] ABS 2014, Average Weekly Earnings, Australia, November 2014, cat. no. 6302.0, ABS, Canberra.

Table 3: Estimated annual cost of traditional long service leave in Australia by industry

Industry	All employees with 5 to 10 years tenure with the same employer*	Estimate of current annual LSL expense ($m) @ 0.866 weeks for 60% of employees with 5 to 10 years tenure with the same employer. 60% represents employees with 7, 8 and 9 years tenure**	All employees with 10 years or more tenure with the same employer*	Estimate of current annual LSL expense ($m) @ 0.866 weeks per year for employees with 10 years' or more tenure with the same employer***	Total estimated current annual LSL for employees with 7 years or more tenure with the same employer****	Total estimated annual LSL costs @ 2.7% ($m) Based on full-time ordinary time earnings
Agriculture, Forestry and Fishing	12.4%	n/a	52.7%	n/a	n/a	n/a
Mining	19.2%	60.64	12.9%	67.9	128.5	851.8
Manufacturing	19.6%	99.46	29.3%	247.6	347.1	1,372.4
Electricity, Gas, Water and Waste Services	18.4%	22.30	26.8%	54.2	76.5	328.2
Construction	18.6%	125.10	26.7%	299.7	424.8	1,818.2
Wholesale Trade	20.7%	47.50	27.3%	104.2	151.7	618.5
Retail Trade	18.9%	67.76	16.6%	99.3	167.1	969.4
Accommodation and Food Services	13.1%	23.70	8.0%	23.9	47.6	487.9
Transport, Postal and Warehousing	18.4%	68.23	27.2%	167.7	236.0	1,000.5
Information Media and Telecommunications	19.6%	30.00	26.8%	68.4	98.4	414.0
Financial and Insurance Services	22.8%	70.58	24.0%	123.8	194.4	837.5
Rental, Hiring and Real Estate Services	17.4%	17.32	21.4%	35.4	52.7	268.4
Professional, Scientific and Technical Services	21.1%	143.78	23.6%	267.8	411.6	1,837.8
Administrative and Support Services	15.9%	25.24	16.2%	42.7	68.0	428.8
Public Administration and Safety	22.2%	104.79	37.5%	295.1	399.9	1,276.9
Education and Training	19.7%	92.74	36.5%	286.3	379.1	1,270.5
Health Care and Social Assistance	20.5%	125.63	25.1%	256.6	382.2	1,654.3
Arts and Recreation Services	17.4%	14.18	23.2%	31.5	45.7	220.0
Other Services	18.7%	36.48	25.0%	81.3	117.8	527.8
Total (ANZSIC06 DIVISION LEVEL)	**19.0%**	1,181.83	**25.3%**	**2,622.4**	**3,804.2**	**16,775.6**

*Data taken from the Australian Bureau of Statistics 2015, Labour Mobility, Australia, February 2013, cat no. 6209.0, Table 05, ABS, Canberra.
** The estimate in this column is based on the annual cost of payroll for those employees with 5 to 10 years tenure by 0.866, being the rate of accrual of LSL under the VIC LSL Act divided by 60 per cent. Ai Group has used a percentage amount of 60 per cent to take into account those employees with seven, eight and nine years' tenure with the same employer but exclude those employees with five and six years' tenure. The estimation was done using the data of the ordinary time earnings weekly payroll for full-time employees found in ABS catalogue 6302.0 as at November 2014 and ABS data in ABS catalogue 6209.0 (Table 05) from February 2013 detailing the number of employees with 5 to 10 years tenure with the same employer.

*** Ai Group's estimate in this column is based on the annual cost of payroll for those employees with 10 or years tenure by 0.866, being the rate of accrual of LSL under the LSL Act 1992. This estimation was done using the data of the ordinary time earnings weekly payroll for full-time employees found in ABS catalogue 6302.0 as at November 2014 and ABS data in ABS catalogue 6209.0 (Table 05) from February 2013 detailing the number of employees with 10 years or more tenure with the same employer.

**** This column represents the sum of column two and column four.

Ai Group has estimated that the cost burden on employers if portable long service leave entitlements were to be provided to all Australian workers would be more than **four times** the cost burden imposed by the general long service leave laws in Australia.

State and Territory general long service leave laws already impose a significant cost burden on Australian employers and reduce international competitiveness, without the imposition of the major cost burden which would arise from extending portable long service leave entitlements into other industries.

Long service leave is unique to Australia and New Zealand.[27] When long service leave was widely introduced in Australia in the 1950s, Australia's economy operated behind high tariff barriers. Today, Australia has one of the most open economies in the world and international competitive pressures are intense.

Companies in trade exposed industries like manufacturing would undoubtedly be damaged through the much higher costs of portable long service leave entitlements.

Portable long service leave, as a new national standard, would impose a massive new tax on employment. The adverse impacts on Australian firms would be felt by Australian workers through lower employment, downsizing and plant closures.

6.2 The extent and nature of labour market mobility

As discussed in section 2 above, the fundamental purpose of long service leave is to reward an employee with a period of rest after a long period of loyal service with one employer.

Long service leave which accrues in the traditional way and is not portable provides a significant benefit to employees and may provide some benefit to employers. There is an incentive for employees to remain with their existing employer and hence the employer may benefit from lower turnover.

In contrast, portable long service leave does not provide a benefit to employers; it simply imposes a substantial cost burden. Portable long service leave schemes provide no incentive to employees to remain with their current employers. An employer may spend several years providing professional support and development to a worker only to lose them to another employer.

[27] Productivity Commission, *Workplace Relations Framework – Productivity Commission Draft Report*, August 2015, p.172.

ABS data reveals that 25 per cent of persons have remained with the one employer for at least 10 years and 19 per cent have remained with one employer between five to 10 years (see **Table 3**). This data suggests that 44 per cent of workers would remain employed with the one employer for at least 5 years.

Recent ABS statistics reveal that almost 30 per cent of persons employed in the manufacturing industry have 10 or more years of tenure with a particular employer (see **Table 3**). This is the highest percentage of any period of employment across manufacturing, for example, persons with more than one but less than two years of service with the one employer represent only 10 per cent of the all persons employed in the manufacturing industry.[28] Nearly 20 per cent have remained with one employer between 5 to 10 years.

Around 27 per cent of persons employed in the construction industry have remained employed with the same employer for 10 years or more[29] (see **Table 3**). This compares with less than 10 per cent of persons who have been employed in the industry with the same employer for more than one but less than two years.[30]

Furthermore, workers are less likely to move between jobs as they age and the median age of workers is increasing in Australia.[31] In the manufacturing industry, almost 30 per cent of persons employed in the industry are aged between 45 and 54.[32] The largest proportion of workers in the manufacturing industry are of 'mature age'.[33] These employees have strong employee tenure with a single employer.

The above statistics demonstrate that there is no justification to extend portable long service leave entitlements.

6.3 The number of Australians in casual employment is stable

Arguments by unions that portability of long service leave is warranted because of the alleged casualization of the workforce are false and misleading.

The proportion of persons who are working on a casual basis has been reasonably stable since 1998 at 19 per cent to 20 per cent of all workers.[34] Indeed, it may have fallen a touch, with an average of 19.3 per cent of workers in casual employment from 2008-2013, versus an average of

[28] ABS 2013, *Labour Mobility, Australia*, February 2013, cat. no. 6209.0, ABS, Canberra.
[29] ABS 2013, *Labour Mobility, Australia*, February 2013, cat. no. 6209.0, ABS, Canberra.
[30] ABS 2013, *Labour Mobility, Australia*, February 2013, cat. no. 6209.0, ABS, Canberra.
[31] Ferris, Parr, Markey and Kyng, (2015), *Long service leave: past, present and future*, Australian Journal of Actuarial Practice, Volume 3, page 11.
[32] ABS 2015, *Labour Force, Australia*, Detailed, Quarterly, Feb 2015, cat. no. 6291.0.55.003, ABS, Canberra, (Data Cubes E05 - Employed persons by Industry (ANZSIC sub-division), Sex, Age and Status in employment, August 1991 onwards).
[33] The ABS considers persons aged older than 45 to be a '*mature age worker*'. See for example ABS 2004, *Australian Social Tends*, 2004, cat. no. 4102.0, ABS, Canberra.
[34] ABS 2013, *Forms of Employment, Australia*, November 2013, cat. no. 6359.0, ABS, Canberra.

20.3 per cent for the period from 1998 to 2007. The proportion of employees with no leave entitlements peaked at 20.9 per cent in 2007, roughly coinciding with the commencement of GFC-related disruptions in the Australian economy. Casual work then fell to 19.0 per cent in 2012.[35]

Nonetheless, 'long-term casuals' are entitled to long service leave in the ordinary way. For example, the *Long Service Leave (Amendment) Act 2005* introduced section 62A into the LSL Act 1992 to make it clear that casual employees and seasonal employees employed in Victoria are entitled to LSL. Specifically subsection 62A(1) provides that the period of service of a casual employee is to be regarded as continuous if the employee has not had an absence from employment with the employer of more than 3 months. Section 62A was inserted into the LSL Act 1992 to address concerns that casual employees who were regularly employed by the same employer missed out on long service leave entitlements. Similar long service leave entitlements exist for casual employees employed in each of the other States and Territories.

Workers employed on a casual basis are entitled to a wage premium of generally 25 per cent to compensate for the inability of some casuals to not accrue leave entitlements like long service. See for example the *Metal Industry Casual Employment Decision* whereby a Full Bench of the Australian Industrial Relations Commission took into account long service leave when determining the level of the loading payable to casual employees.[36]

The idea of extending portable long service leave entitlements beyond the building and construction industry and the coal mining industry has no merit and we urge the Committee to emphatically reject it.

7. Conclusion

For the reasons outlined in this submission, Ai Group urges the Committee to recommend that:

- A national long service leave standard be included in the NES, providing for long service leave in the traditional way. It should reflect the previous federal award long service leave standard, i.e. 13 weeks long service after 15 years of service, with pro-rata entitlements after 10 years of service. We refer the Committee to section 3 of this submission.

- Portable long service leave entitlements not be extended beyond the industries where longstanding portable long service leave schemes exist in each State and Territory (i.e. the building and construction industry and the coal mining industry.

[35] ABS 2013, *Forms of Employment, Australia*, November 2013, cat. no. 6359.0, ABS, Canberra.
[36] Application by the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union to vary the *Metal, Engineering and Associated Industries Award 1998* (29 December 2000, Print T4991).

Ai Group Submission – Inquiry into the feasibility of, and options for, creating a national long service standard, and the portability of long service and other entitlements

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