



HOUSING INDUSTRY ASSOCIATION



Submission to the
Senate Education and Employment References Committee

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

15 December 2015

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contents



ABOUT THE HOUSING INDUSTRY ASSOCIATION	3
1. EXECUTIVE SUMMARY	4
1.1 INTRODUCTION.....	4
1.2 HIA'S GENERAL RESPONSE TO THE INQUIRY	4
2. THE RESIDENTIAL CONSTRUCTION INDUSTRY	6
3. WORK ARRANGEMENTS IN THE RESIDENTIAL CONSTRUCTION INDUSTRY	6
4. LONG SERVICE LEAVE AS A CONCEPT	7
5. A MINIMUM NATIONAL STANDARD?	8
6. PORTABLE LONG SERVICE LEAVE IN THE CONSTRUCTION INDUSTRY	9
6.1 BACKGROUND.....	9
6.2 COVERAGE	10
6.3 CAN THE PORTABLE LEAVE SCHEMES BE NATIONALISED?	11
7. PRODUCTIVITY COMMISSION'S VIEWS ON PORTABLE LONG SERVICE LEAVE	13
8. OTHER ENTITLEMENTS	14

ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the industry, HIA represents some 40,000 member businesses throughout Australia. The residential building industry includes land development, detached home construction, home renovations, low/medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new housing stock.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over \$150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional member committees before progressing to the Association's National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The Association operates offices in 23 centres around the nation providing a wide range of advocacy and business support, including services and products to members, technical and compliance advice, training services, contracts and stationary and industry awards for excellence.



1. EXECUTIVE SUMMARY

1.1 INTRODUCTION

HIA welcomes the opportunity to make a 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"*.

HIA notes that the Committee's terms of reference are broad and include making inquiry into:

- (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:
 - a. how and by whom such schemes might be run,
 - b. how such schemes could be organised, be it occupational, industrial or other,
 - c. the appropriate role for the Commonwealth Government in facilitating portable long service leave schemes,
 - d. the impact of varying state and territory long service leave arrangements on a potential national long service scheme administered by the Commonwealth, and
 - e. the capacity to operate such schemes within or across jurisdictions, including recognition of service; and
- (f) any other related matters.

1.2 HIA'S GENERAL RESPONSE TO THE INQUIRY

HIA does not support an extension of coverage of the construction industry portable long service leave schemes nor the establishment of a universal entitlement to portable long service.

Arrangements for long service leave in the building and construction industry are unique and different from the entitlements available to most other workers in the economy.

Every state and territory has a PLSL(PLSL) scheme in place for certain workers in the building and construction industry.

These schemes were established to recognise the unique nature of employment in the industry, whereby employees are typically engaged on a project basis and move from employer to employer as one project is completed and another starts.

Portable schemes enable the accrual of long service leave entitlements to survive breaks in service. They recognise long service in the industry, rather than long service with and loyalty to one employer.

In HIA's view, PLSL entitlements should not be extended and only apply to certain project based workers engaged in onsite construction work.

Long service, by its very name, is a benefit accrued after a significant length of service with one employer.

Although the Inquiry's Terms of Reference refer to so-called "insecure work", just because some workers may not maintain sufficient tenure with one employer, does not necessitate they are still, as of right, entitled to "long service" leave.¹

It is incongruous to suggest that it should be extended to all workers, many of whom will voluntarily leave their employment to take up opportunities elsewhere.

Universal PLSL would effectively amount to a tax on employment, driving up costs for small business, making them less viable, sustainable and competitive.

Put simply, the rationale for expansion of PLSL schemes does not exist in areas where traditional employment arrangements are the norm (e.g. where the employees are engaged on an ongoing basis with the one employer).

HIA refers to the following statement from a 1999 Research Paper written for the Labour Ministers Council:

*"It should be recognised that, portability of leave between employers is at odds with the long service leave concept and should only be countenanced in exceptional circumstances."*²

HIA is broadly supportive of measures to simplify and streamline long service leave arrangements.

A national approach to long service should however be focused on removing unnecessary regulation, reduce red tape and the administrative burden on business. HIA does not however support a nationally consistent long service standard which merely leads to the highest common denominator being adopted as the new minimum entitlement.

HIA opposes the introduction of portable personal/sick leave or other portable entitlements in the residential building industry.

HIA's further submissions to the Inquiry deal with the following topics:

- A profile of the residential building industry
- Work arrangements in the residential building industry
- Long service leave as a concept
- A national approach to long service leave
- Construction industry long service leave schemes
- Productivity Commission's views on the portable long service and other entitlements.
- Other entitlements

¹ Thornthwaite, L & Markey, R 'Long service leave, the labour market, and portability of entitlements' Australian bulletin of Labour, Vol. 40, No. 1.

² See pg.19

2. THE RESIDENTIAL CONSTRUCTION INDUSTRY

The building industry represents an important component of the Australian economy. During August 2015, a total of 1,020,400 people were engaged in construction activity.

Independent research by the Centre for International Economics (CIE) shows that for every \$1 increase in construction activity, GDP will rise by \$4.75 as a result. This clearly has positive implications for employment at the economy wide level. The economic benefits of increases in construction activity are even greater in situations such as the current one where the economy is not at full employment.

In terms of employment, an extra \$1 million of construction expenditure generates 9 construction jobs. The initial effect of the additional \$1 million worth of construction is 9 positions in construction-related fields, such as carpenters, brick layers, plasterers, etc. In addition to this initial effect there are also production induced effects generating 7 jobs across those businesses manufacturing the materials needed for the additional construction, such as concrete and steel frames, and those businesses supplying and servicing the concrete and steel frame businesses, such as aggregate quarrying and raw steel production. Further employment benefits extend to the retail and wholesale sectors, including those that supply windows and floor finishings, white goods and appliances, landscaping, furnishings and numerous other domestic and household products purchased for a new home.

In other words, over and above the direct contribution of construction activity to the economy, the construction industry has 'flow-on' impacts on the activities of other industries. This flow-on impact is referred to as the multiplier effect and, it is therefore vital that Government policies support and promote the residential construction industry in order for the industry to continue contributing to the broader economy.

3. WORK ARRANGEMENTS IN THE RESIDENTIAL CONSTRUCTION INDUSTRY

The terms of reference refer to “the number of Australians in insecure work”.

From the outset, HIA wishes to observe that the term ‘insecure work’ is neither a legal term nor ‘a clearly defined concept’³. Gaining prominence through the ACTU’s *Independent Inquiry into Insecure Work*, it is a term of art designed for the specific purpose of driving a certain (negative) view of work arrangements that are not full time and permanent.

Labelling work arrangements such as those performed under casual, fixed term contract, labour hire and independent contracting arrangements as ‘insecure’ is an attempt to delegitimise them in comparison to full time employment.

³ See *Victorian Inquiry into the Labour Hire Industry and Insecure Work*, Background Paper, October 2015 pg.11.

This is inappropriate.

Neither the Australian economy nor the labour market is static. Demand rises and falls over time, in sometimes very unpredictable ways.

A mobile, agile modern economy market with a mix of work arrangements - both permanent and temporary – is required to respond to these circumstances.

The residential construction industry, exemplifies an industry where it is neither reasonably practical, nor desirable to rely solely on full time employees.

Work in the industry is cyclical and project-based and is performed by expert workers and tradespersons with highly specialised skill sets, including concreters, carpenters, bricklayers, joiners, plasters plumbers, electricians, tilers, painters and landscapers.

Today, housing subcontractors would represent more than 90 per cent of workers involved in on-site home construction activity.

Contractors choose to work under these arrangements because they want to run their own businesses and make money and be rewarded for their productivity, efficiencies and entrepreneurial efforts. Builders choose to engage them because of their superior construction and scheduling efficiency and the cost effective benefits that flow on to the consumer. Contractors wish to pick and choose the work they do. They do not want to be treated as employees as it would effectively limit their income.

The benefits from independent contracting include:

- Higher levels of productivity;
- Guaranteed higher quality of work;
- Payment by results which leads to stable costs at greater rewards for productivity;
- Capacity to organise work to suit themselves; and
- it is the most cost effective way of doing much building work.

On this basis HIA submits that any purported ‘link’ between the creation of a national long service leave standard and/or the expansion of portable schemes to ameliorate the effects of so called ‘insecure work’ is inappropriate and misplaced; such moves displace the legitimate rights of independent contractors operating in the residential construction industry.

4. LONG SERVICE LEAVE AS A CONCEPT

Australia is the only country where there is a legislated right to long service leave. The Productivity Commission describe LSL as an “Antipodean idiosyncrasy”. It was invented in the mid-19th century to allow citizens to sail to and back from England every decade.

Despite its quaint origins, a number of rationales have since developed to underpin the retention of long service leave entitlements, including:

- To provide employees with an extended leave of absence in order to renew their energies;
- To reward long and faithful service with an employer; and
- To reduce labour turnover.

Long service leave, nonetheless represents a significant cost burden for employers. Of interest, are comments by the Fair Work Commission's Senior Deputy President Lacy (whilst he was sitting at the Australian Industrial Relations Commission) who has questioned the relevance of long service leave in today's environment:

*'It seems that the rationale for a period of respite from a long period of service is no longer a valid assumption. The world today is a much smaller place than it was in colonial times. People are inclined to be far more mobile now than then. In addition to the fading of the tyranny of distance there has been significant change in the pattern of work that raises some questions about the relevance of long service leave as a benefit in employment.'*⁴

5. A MINIMUM NATIONAL STANDARD?

HIA notes that one of the terms of reference looks at the feasibility of a national long service leave scheme or standard.

A non-exhaustive list of issues that a national long service leave standard would need to deal with the includes:

- the trigger for the initial LSL entitlement;
- the rate of accrual;
- pro rata LSL on termination (it is most commonly provided after seven years' service);
- the entitlement of casual employees;
- whether an employee can cash out;
- whether annual or personal leave counts as service for accrual;
- whether or not LSL can be a "bargained" term for enterprise bargaining purposes;
- whether employees can be directed to take LSL.

Since 27 March 2006, a national industrial relations system has covered employers and employees of all companies. By 2010, all Australian states (except for Western Australia) had also referred their private sector industrial relations powers to the Commonwealth.

The creation of a unified national workplace relations system for sole traders, partnerships and companies has provided greater certainty, clarity and efficiency for businesses and workers than separate state based regulation.

Long service leave, however, remains covered by state and territory arrangements. Section 29(2) of the *Fair Work Act 2009* has the effect that modern awards and enterprise agreements operate 'subject to' state or territory long service leave laws.

⁴ See Re. Office of the Chief Electrical Inspector Enterprise Agreement 2003, SDP Lacy, 5 January 2004, PR942414.

HIA is broadly supportive of measures to simplify and streamline long service leave arrangements. A national approach to long service should however be focused on removing unnecessary regulation, reduce red tape and the administrative burden on business.

HIA does not support a nationally consistent long service standard being achieved at any cost, particularly if merely leads to the highest common denominator being adopted as the new minimum entitlement.

In this regard, the 2008/2009 consolidation of awards into the federal 'modern award' system together with the harmonised model health and safety legislation whilst assisting many larger businesses working across state borders has come at increased costs for small business.

HIA would urge the Committee to avoid taking the politically expedient approach that simply avoids any reduction of employee entitlements.

Accordingly, any attempted harmonisation of long service leave standard should first be subject to a regulatory impact assessment process. As Productivity Commission have stated

"In more complex areas harmonisation can prove both highly contentious and elusive (for example, occupational health and safety).

In cases where state-specific regulations are well entrenched and involve considerable sunk costs, harmonisation for firms that do not operate across state boundaries may produce minimal gains and can impose net costs. The gains may principally be enjoyed by larger firms operating across Australia but simply add to the costs of firms operating only in one jurisdiction. For this reason, and given the large number of small single-state firms in the sector, it is important that governments subject reform and regulatory proposals to cost-benefit analysis. In some cases, there may be more suitable reform options than harmonisation".⁵

6. PORTABLE LONG SERVICE LEAVE IN THE CONSTRUCTION INDUSTRY

6.1 BACKGROUND

Portable long service schemes enable the accrual of long service leave entitlements to survive breaks in service. They recognise long service in the industry, rather than loyalty to one employer. Also, as the Productivity Commission recently observed:

"...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."⁶

⁵ Productivity Commission 2014, *Relative Costs of Doing Business in Australia: Retail Trade*, Research Report, Canberra. pg.14.

⁶ Productivity Commission, Draft Report, Workplace Relations Framework pg. 178.



PLSL schemes were established to recognise the unique nature of employment in the building and construction industry, whereby employees are typically engaged on a project basis and move from employer to employer as one project is completed and another starts.

The 2002 Cole Royal Commission identified the following key factors that led to the introduction of the PLSL schemes in the construction industry:

- The strategic nature of the industry;
- High union density and industrial strength;
- A well-established industry focus; and
- Patterns of employment in the industry⁷.

Beginning with Tasmania in 1971, every state and territory now has a portable long service leave scheme in place for certain workers in the construction industry; the status quo is an acknowledged feature of the industry.

Nonetheless, a number of criticisms can still be made:

- They operate in a manner which is contrary to the historical purpose of long service leave;
- Requires employers to grant leave to employees with short periods of service, simply because the employee has worked in the industry for several years;
- Results in substantial cost increases for employers due to:
 - The much larger proportion of employees who become entitled to long service leave than would otherwise be the case;
 - The need to cover employees absent on long service leave (e.g. overtime costs, training costs, casual labour costs, etc.); and
 - Impact upon an employer's cash flow where the upfront contributions are required.

Even though anecdotally many workers covered by PLSL accumulate their benefits for lump sum purposes, HIA members have raised concerns about the exposure of the end employer "when the music stops" and when the employee in question, who may have been with that particular employer for a relatively short period of time, eventually takes their leave.

The impact is not just productivity losses whilst that business backfills the worker in question, but there are other on-costs as well.

6.2 COVERAGE

Generally speaking, PLSL only covers onsite workers and tradespeople in construction, reconstruction or renovation.

⁷ See Discussion Paper 14 (2002) *Long Service Leave in the Building and Construction Industry*, Royal Commission into the Building and Construction Industry.

In all jurisdictions, administrative workers employed in the building and construction industry are ineligible to participate in the portable long service schemes. They are covered by other awards and the general legislation.

In recent times, there have been attempts in some jurisdictions to broaden the scope of the schemes. This has included attempts to extend the schemes beyond onsite workers and tradespeople up to managerial type employees, such as supervisors.

There have also been moves to broaden the notion of construction to include offsite prefabrication and delivery drivers who, although they have little interaction with onsite work, happen to be employed by the one employer.

COINVEST, the trustee and administrator of the Victorian scheme, has particularly looked to expand coverage of that scheme to electrical manufacturing and engineering employees, even though their work is performed off site in a static environment.

In HIA's submission, the conduct of COINVEST on these matters was unacceptable and inappropriate, with potentially huge financial consequences for employers.

6.3 CAN THE PORTABLE LEAVE SCHEMES BE NATIONALISED?

There are currently 8 separate construction industry PLSL schemes operating across Australia.

Although there are reciprocal arrangements between the different state and territory PLSL schemes which allow workers to transfer their entitlements from one scheme to another, each scheme has different legal and administrative arrangements, and different rules for eligibility and funding.

Some larger employers, who face the burden of navigating different schemes for employees located across state/territory borders, are likely to support a national portable scheme. As noted below there are however a number of practical difficulties in harmonising or nationalising the stand alone construction industry long service schemes.

These differences are noted in further detail below.

Administration

Both Victoria (since 1997) and Tasmania (since 1998) have privately managed schemes. Otherwise, the majority of schemes are administered by statutory corporations which report to a responsible Minister.

There is a view that there is no longer a sound case for the involvement of the Government in the administration of LSL funds and the Government should not be financially exposed to (or benefit from) a scheme in which it no longer has any proper role.

Whether an activity should be privatised or under government control is quintessentially a question for Government but most schemes whether government or privately run have strong industry involvement.

Levies

Secondly, the methods of collection and rates differ from state to state.

PLSL is usually funded by either a contribution from employers based on the 'wages' of eligible employees (similar to the way employers pay premiums of workers compensation) or via a project based levy collected at development application (DA) or building permit stage.

Below is a table comparing the different levy methods and rates between jurisdictions:

State/Territory	Levy	Rate
Queensland	Project based at DA	0.475% of the total cost of work, comprised of: <ul style="list-style-type: none"> • PLSL Levy at 0.25% • Work Health and Safety Levy at 0.125% • Construction Skills Queensland Levy at 0.1%
NSW	Project based at BA	0.35 % of the value of building and construction work where the cost of building is \$25,000
Victoria	Employer Funded	2.7% of the total gross wage
WA	Employer Funded	1.50% of the ordinary rate of pay paid to the employee
ACT	Employer Funded	2.5% levy is paid on gross ordinary wages
SA	Employer Funded	2.25% of a worker's remuneration
Tasmania	Employer Funded	Discounted levy rate of 2%
NT	Project based – before constructions starts	0.1% of the total cost of construction for projects greater than \$1 million in value. The levy does not apply to detached dwellings, including related private garages, carports, sheds or the like.

The project levy based model is usually less paperwork intensive for small business employers as it applies automatically. At the same time, project levies represent a direct additional cost on delivering construction and new housing.

Use of Funds

Other than directly funding long service leave entitlements for registered employees in construction PLSL schemes, funds are used to promote the building and construction industry. This may involve lending funds, with or without interest being charged.

In Tasmania, the Trustee's investment strategy includes an allocation of specific funds to construction projects.

In Queensland, the PLSL scheme directs a proportion of funds collected in long service leave levies into a building and construction training fund.

Whilst in NSW, the State Government has, in the past, repatriated accumulated surplus long service leave funds into the Government's Consolidated Fund. Due to the surplus of funds in the scheme, the levy was suspended in 1993 but was reintroduced on 1 July 1997. It is open to question whether the levy would need to have been reintroduced if funds were not removed.

There is little justification nor legitimacy in imposing upon the industry levies by legislation for long service leave for employees and then using portions of the funds raised for other purposes.

Coverage to self employed

Who is considered a worker for the purposes of the scheme, differs from state to state.

In some states, PLSL applies to subcontractors via deeming legislation, whilst in other jurisdictions long service leave benefits for subcontractors are optional with contractors able to voluntarily contribute on their own behalf.

The NSW scheme is particularly unique as it covers both employed and self-employed workers who perform onsite building and construction work in NSW. Working directors and workers who are sole traders or working in a partnership are entitled to long service leave “credits”.

NSW is able to achieve this because the employer/builder does not directly fund the scheme but rather the scheme is funded by an industry levy collected at building approval stage.

Entitlement

Across the country, both the qualifying periods and the long service leave entitlement under the different state based legislation vary:

State/Territory	Qualifying Period	Entitlement
Queensland	10 years	8.667 weeks
NSW	10 years	2 months
Victoria	15 years	13 weeks
WA	10 years	8.667 weeks
ACT	7 years	6.06 weeks
SA	10 years	13 weeks
Tasmania	10 weeks	8.667 weeks

In HIA's view the different treatment of matters within the different states and territories makes it difficult, impractical and, in many respects, undesirable for the development of national scheme at this stage.

7. PRODUCTIVITY COMMISSION'S VIEWS ON PORTABLE LONG SERVICE LEAVE

The Productivity Commission is currently finalising its review of the workplace relations framework in Australia.

In its draft report, after considering the evidence and arguments, the PC recommended against the implementation of a broad based PLSL entitlement.

The PC noted that any arguable 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.”⁸*

HIA supports the PC's conclusions.

8. OTHER ENTITLEMENTS

Although the terms of reference do not specifically refer to or list these “other entitlements”, HIA understands that the Committee wishes to consider portability of such matters, in addition to long service leave.

HIA notes that certain public sector and council employees are able to transfer their sick leave when they move from agency to agency or council to council, as the case may be.

Incolink also provides for a portable sick leave fund for certain building industry employees in Victoria. The scheme facilitates employer's industrial obligations imposed under the CFMEU (Victorian building industry) pattern bargaining agreement.

HIA opposes the extension of this scheme or similar schemes to the residential building industry.

These obligations are unrealistic for small business and reflect the industrial and bargaining environment under which such agreements were struck.

In its Draft Report, in considering the ACTU's proposal for portable entitlements for casual workers, the PC stated that casual loadings usually reflect the foregone benefits of paid annual and sick leave entitlements and in fact, “imposing any significant additional regulations may reduce employers' willingness to provide such jobs.”

HIA agrees with the PC's iterative conclusions and submits that Committee should strongly consider the views of the PC when framing their final report and recommendations.

⁸ Productivity Commission, Draft Report, Workplace Relations Framework pg. 178