



Education and Employment References Committee

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

December 2015



AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcome to ensure the Australian resource industry is an attractive place to invest, do business, and create jobs.

Having actively served resource employers for more than 97 years, AMMA's membership covers employers in every allied sector of this diverse and rapidly evolving industry.

AMMA works with its strong network of likeminded companies and resource industry experts to achieve significant workforce outcomes for the entire resource industry.

Our members include companies working Australians in mining, hydrocarbons, maritime, exploration, energy, transport, construction, smelting and refining, as well as suppliers to those industries.

The resource industry currently employs more than 1.1 million people either directly or indirectly and accounts for 18% of economic activity in Australia¹ (double its share of a decade ago).

Australia's earnings from resources and energy commodities are forecast to increase to around \$178 billion in 2015-16².

First published in 2015 by
AMMA, Australian Mines and Metals Association

Website: www.amma.org.au
ABN: 32 004 078 237

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¹ Reserve Bank of Australia research discussion paper, *Industry dimensions of the resources boom*, February 2013

² Office of the Chief Economist, *Resources and Energy Quarterly—June Quarter 2015*

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EXECUTIVE SUMMARY

- This inquiry is misplaced reform should focus on competitiveness, productivity, jobs, opportunities and living standards, not a marginal issue such as LSL. [Ch.1]
- It is unclear what is really behind this inquiry. Are proponents seeking universal portability, or LSL portability only for specific industries? Which industries? [Ch.1]
- There are opportunities for LSL reform, but not through extending portability [Ch.1].
- The Committee should recommend moving to a national LSL standard (non-portable), through the National Employment Standards [Ch.2].
- There should be increased scope for flexibility in the accrual and usage of LSL where agreed between employers and individual employees [Ch.2].
- A universal portable entitlement would cease to be LSL and create general a right to take a paid sabbatical or career break, which would be unaffordable [Ch.3]
- The costs imposts of portable LSL outweigh any purported benefits [Ch.3].
- LSL should remain part of Australia's minimum employment standards, as a non-portable, standard conditional upon extended service with a single employer [Ch.3]
- Portable schemes increase labour costs, without any commensurate gain in productivity, efficiency or competitiveness [Ch.4]
- Portable LSL is a tax on jobs, and the cost of LSL would at least double.
- LSL is already complex. Portability would do nothing to relieve this complexity and would create its own problems. [Ch.5]
- There appear to be constitutional limitations on what the Commonwealth could ever do in this area. [Ch.5]
- The purported benefits of portable LSL do not stand up to scrutiny [Ch.6]
- There is also no justification for making other (presumably) service contingent employment standards operate on a portable (scheme) basis. [Ch.7]
- So called 'insecure work' (sic) is not increasing and does not justify any extension of the portability of LSL [Ch.8]
- Labour markets and labour mobility are changing and will change further, but this does not justify extending LSL portability. The two are not linked. [Ch.9]
- **This Committee should not recommend any extension of LSL portability in Australia.**
- **LSL should remain contingent on service with a single employer.**

1. INTRODUCTION

1. On 9 November 2015, the Senate referred this inquiry into *the feasibility of, and options for, creating a national long service standard, and the portability of long service and other entitlements* to its Education and Employment References Committee for inquiry and report. The Terms of Reference for this inquiry (the TOR) are as follows, with cross references to where each is addressed in this submission:

The feasibility of, and options for, creating a national long service standard, and the portability of long service and other entitlements, with particular reference to:

- a. *the number of Australians in insecure work; [Chapter 8]*
- b. *the extent and nature of labour market mobility; [Chapter 9]*
- c. *the objectives of portable long service leave schemes, and the key components that might apply; [Chapter 3, 4, 5]*
- d. *which sectors, industries or occupations may, or may not, benefit from such schemes; [Chapter 3]*
- e. *the operation of a portable long service scheme, including: [Chapters 3 and 5]*
 - i. *how and by whom such schemes might be run,*
 - ii. *how such schemes could be organised, be it occupational, industrial or other,*
 - iii. *the appropriate role for the Commonwealth Government in facilitating portable long service leave schemes,*
 - iv. *the impact of varying state and territory long service leave arrangements on a potential national long service scheme administered by the Commonwealth, and No. 123—9 November 2015 3309 [Chapters 4, 5 and passim]*
 - v. *the capacity to operate such schemes within or across jurisdictions, including recognition of service; and [Chapters 3, 5 and passim]*
- f. *any other related matters [Chapter 2].*

How the Committee should proceed

2. AMMA opposes any extension of portable Long Service Leave (LSL) either to additional specific industries through the creation of additional portable LSL schemes, or as an at large portable entitlement for all employees (somehow administered through a massive national portable LSL scheme).

3. AMMA urges the Committee to recommend:
 - a. In favour of LSL remaining contingent on extended service with one employer (i.e. genuine long service before LSL is triggered), as has been the case for decades and as is fundamental to the concept of LSL.
 - b. Against any further extension of portable LSL beyond the specified industries to which it currently applies under federal, state and territory legislation.
 - c. Greater flexibility in how LSL can be accrued, taken and used where agreed between the employee and her or his employer, updating the very tightly controlled, paternalistic, one-size-fits-all approaches under current legislation.
 - d. Moving to a genuinely national LSL standard, through a National Employment Standard on LSL under the *Fair Work Act 2009*. Ideally this would be a cooperative approach which would apply a national LSL standard to all enterprises covered by the Fair Work Act, and harmonised state laws in any residual areas of private sector jurisdiction.

This is not the right focus

4. It is also worth stating upfront that resource industry employers do not support the convening of this inquiry, nor placing priority on LSL.
5. Australia is facing serious threats to living standards and jobs if our industries do not become more productive and competitive. The IMF has articulated one of the key challenges for Australia quite directly:

“a significant pickup in labour productivity will be needed to maintain growth in living standards over the coming decade.”...

“this will be challenging.”

“to deliver sustained growth at around 3% ..., multifactor productivity growth needs to reverse its declining trend...”³
6. This Committee should be focussing on improving Australia as a place to invest, do business and create jobs, and on core employment concerns for employees such as job security, and ensuring skills and experience maintain long term employability, and not on a comparatively marginal concept such as LSL.
7. The Committee should also be engaged with how Australia can become a more productive and competitive place to do business.
8. There are no jobs, or gains for our economy in looking at LSL, and there is no pressing safety net concern requiring remediation.

³ IMF (2013), Article IV Report – Australia (Note this theme is maintained in 2014 and 2015 reports).

Whither LSL?

9. AMMA makes this submission without addressing the more fundamental question of whether LSL should remain part of the Australian employment safety net in Australia at all.
10. Some would argue that LSL is an anachronism, not part of employment standards in comparable countries, and that it should be abolished.
11. AMMA is not putting such a proposal to the Committee. This submission instead engages with how LSL should operate in future if it is to remain part of Australian employment standards minimum entitlements.

Déjà vu

12. AMMA experienced déjà vu in preparing this submission, having just four months ago submitted to the Victorian Parliament's Joint Economic, Education, Jobs and Skills Committee inquiry into 'Portability of Long Service Leave Entitlements'.
13. AMMA also addressed LSL in its March 2015 submission to the Productivity Commission (PC) review of into Australian Workplace Relations Framework. We understand that the PC's final report may well be made public during the course of this inquiry.
14. AMMA's submissions to the PC emphasised that:
 - a. Australia needs to start moving from LSL being a piecemeal patchwork of different state entitlements, towards a genuinely national standard, included in the National Employment Standards of the *Fair Work Act 2009*, which would see State LSL legislation either overridden or harmonised towards (over time) into a single universal standard.
 - b. LSL must remain contingent upon extended service with a single employer, and LSL portability should not be extended to any additional industries or generally.
 - c. Social, cultural and generational change is underway in the way Australians work, and can only increase in the future. Rather than such dynamism adaptation justifying any extension of LSL portability, the LSL system should instead provide employees with greater scope to accrue and use LSL more flexibly to meet the changing demands from (and on) employees.
15. Resource industry employers are disappointed that the Committee has been asked to focus on only a narrow dimension from the range of questions that need to be asked on the future of LSL in Australia. Portability is (and should remain) a marginal concern for the wider operation of LSL into the future.
16. Notwithstanding the selective TOR, this Committee should use the opportunity to address more fundamental and relevant questions for the future of LSL.

17. **The Committee should use the opportunity of this inquiry to recommend a process to move towards a genuinely national LSL standard in our national employment legislation that would apply on a non-portable basis and offer options for greater flexibility in the accrual, taking and use of LSL by agreement between employees and employers.**

What is this inquiry really about?

18. As AMMA participated in the parallel Victorian inquiry, it rapidly became clear that despite asking general questions on possible portability of LSL in Victoria, the inquiry was really directed to particular industries, and specific unions agitating to see portable LSL extended for their members.
19. Is that what this inquiry is really about? Is this inquiry about Parliament House cleaners or security guards, or some specific cohort of employees considered to have been disadvantaged by Australia's long standing LSL legislation?
20. **If the proponents of this inquiry are seeking to progress LSL portability for a specific industry or cohort of employees, it would be useful to have this clarified.**
21. It is important for participating parties to understand what this inquiry is really directed to, because on its face the TOR raise the prospect of general or at large LSL portability across Australia's 11.8 million employees. This would be a very significant matter to tackle.
22. General or at large portable LSL, for all employees, would fundamentally change the nature of LSL, away from a benefit based on extended service (if such a massive change is not on the table, it would be useful to have this clarified).
23. If service were to accrue across multiple employers towards a portable right, **LSL would be transformed to become a universal entitlement to a paid sabbatical every 7, 10 or perhaps 13 years for all employees.** This would have massive labour market implications for both the demand and supply side, and crucially it would do nothing to make Australia a more productive or competitive place to do business.
24. A general right to a sabbatical or career break, irrespective of changes of employer or industry, would amount to Australians awarding themselves a massive increase in employment benefits and a massive increase in labour costs. There is no foundation or basis for such a speculative adventure in awarding ourselves additional holidays, and it is inconceivable that any developed country could do so without massive detriment to its economy and labour market.
25. The McKell Institute, a key proponent of LSL portability, acknowledges what portable LSL actually boils down to:

So how can we revive the idea of Long Service Leave for the modern economy? By making it portable.

Just as your superannuation account follows you from job to job, so should your long service leave.

Of course, it wouldn't really be Long Service Leave anymore - because the long service wouldn't be to a single employer. We could think of it more as Accrued Employment Leave.⁴

26. Portable LSL is a misnomer. Changing LSL as the proponents of portability advocate will fundamentally change it into something else. With more than 11.8 million employees in Australia, the creation of an accrued employment scheme would be a massive undertaking, ranking with the creation of Medicare, or universal accident insurance in New Zealand (the ACC⁵).
27. Considering the economic and jobs challenges facing Australia, and global uncertainty and adversity – this is precisely the wrong time to even begin in countenance such a massive additional impost on employment and the costs of doing business in this country.
28. **It would be the height of irresponsibility for Australia to even think about awarding itself a universal or general right to a sabbatical or career break, particularly in the current economic and labour market environment.**
29. We call upon the proponents of this inquiry to clarify whether they are:
 - a. Seeking to extend portable LSL to additional specified industries (extending the status quo); or
 - b. Instead seeking to create a universal, general entitlement to LSL portability that would apply notwithstanding changes of both industry and employers (i.e. a general right to a sabbatical or career break through some form of transferable portable LSL accounts administered by the federal government).

AMMA Members and LSL

An industry facing significant challenges

30. AMMA's members are Australia's resource industry employers encompassing mining, oil and gas, construction and service providers.
31. It is universally recognised that the resource sector is undergoing a period of significant challenge and change, and for many operations and for many jobs, this is an existential challenge.

⁴ <http://www.dailytelegraph.com.au/news/opinion/long-service-leave-might-be-old-fashioned-but-we-need-it-more-than-ever/story-fnh4jt60-1226663306754>

⁵ <http://www.acc.co.nz/>

32. For those in the resources sector 'coming off the mining price boom' and 'transitioning away from resources' are not economic headlines, but a day to day reality and significant personal and professional burden. Significant cost reductions and job losses are impacting on many in the industry and may impact on many more.
33. AMMA members also compete in intense global markets. Attracting new investment and resource projects into Australia is the lifeblood of the Australian industry. However Australian resource companies are facing increasing challenges in attracting new resource investment.
34. Australia is blessed with massive deposits of resource commodities that the world continues to demand, but not uniquely so. The high costs of doing business in Australia, including high labour costs, are a significant determinant of the world's appetite to invest, do business and create jobs here, and this is being felt in the resource sector more sharply than in most other sectors of our economy.
35. This is not just an issue for resource companies and their employees. To the extent that LNG, coal, iron ore and other commodity investments go to competing economies (inducing new resource economies in Latin America, Africa and Asia), global consumption of these commodities is not injecting taxes and royalties into Australia's state and national coffers. Less resource business coming to Australia means less royalties and taxes for our schools, hospitals and for the growth of the Australian community.

Non-portable LSL in the resource industry

36. Resource sector employment remains highly attractive, rewarding and sought after, and many Australians make long and rewarding careers with AMMA member companies triggering the taking or paying out pro-rata of LSL. Many get the resource bug and forge diverse and rewarding careers with a single employer.
37. Employment in the industry also often encompasses periods working for an employer across different states and territories, and increasingly periods working in the international operations of an Australian employer, often sandwiched between periods of domestic service with the same employer.
38. AMMA members are at the sharp end of the current LSL system:
 - a. Leave, terms and conditions of employment are regulated under the national system through the Fair Work Act, and awards and agreements made under that Act. Virtually all resource operations of any size (other than some exploration activities) fall under the definition of national system employers (including as corporations) under s.14 of the *Fair Work Act 2009* and are regulated by the national rather than state workplace relations systems.

- b. LSL is an exception to this, and is largely determined under a patchwork of inconsistent legislation at the state and territory level, which apply differing levels of LSL entitlement, based on different minimum periods of service.
 - c. Resource employers have to calculate and determine LSL where employees have accrued periods of service in different states or territories, or internationally (for example, both commencing employment and taking LSL in Australia, but with a period of international service sandwiched in between).
39. Resource employers and employees would benefit considerably from Australia moving to a uniform LSL standard, provided this were implemented in a balanced and sensible manner – and this Committee should recommend a process to move towards a national, non-portable, LSL standard.

Portable LSL in the resource industry

- 40. AMMA members are also subject to existing portable LSL schemes, including where the construction of resource operations (major resource projects) is subject to construction industry portable LSL schemes.
- 41. However, non-construction, non-project based, operational resources work is also increasingly caught up in portable LSL.
- 42. Unions such as the ETU demand through pattern enterprise bargaining agreements, that employers make contribution is to portable LSL funds, such as Coinvest in Victoria for maintenance employees working in the resources industry. They do so without regard to such work clearly not being construction.
- 43. This can be a very complex situation to administer and advise upon. The scope and coverage rules for portable LSL schemes, particularly in construction, can be very complicated and not easily delineate which employers and employees should be subject to portable LSL from those subject to non-portable LSL.
- 44. In absolutely no sense is being dragged into a portable scheme LSL advantageous, or positive for resource employers. Portable LSL schemes are costly and complex to deal with, and no cheaper or easier than a company maintaining compliance with LSL standards as they do for all other leave standards.



2. HOW WE SHOULD BE REFORMING LSL

45. Stepping back from the specific issue of LSL portability, which is not supported by employers, this inquiry raises and should address far more fundamental and pressing questions on how LSL in Australia should be reformed.
46. Assuming LSL is to remain part of Australian employment standards, there are three key areas in which it should be reformed:
 - a. The creation of a national LSL standard on a non-portable basis.
 - b. Allowing employees and employers to agree more flexible use of LSL.
 - c. Removing LSL from modern awards.

A National LSL Scheme

47. Examining the possible creation of a national LSL scheme, should come before any consideration of portability and is, we argue, entirely severable from any consideration of portability.
48. Existing entitlements are inconsistent between jurisdictions⁶:

Table 4.1 Long service entitlements^a

| State | Legislation | Qualifying Period | Entitlement |
|------------------------------|-------------------------------|-------------------|-------------|
| New South Wales | Long Service Leave Act 1955 | 10 years | 2 months |
| Victoria | Long Service Leave Act 1992 | 15 years | 13 weeks |
| Queensland | Industrial Relations Act 1999 | 10 years | 8.667 weeks |
| Western Australia | Long Service Leave Act 1958 | 10 years | 8.667 weeks |
| South Australia | Long Service Leave Act 1987 | 10 years | 13 weeks |
| Tasmania | Long Service Leave Act 1976 | 10 weeks | 8.667 weeks |
| Australian Capital Territory | Long Service Leave Act 1976 | 7 years | 6.06 weeks |
| Northern Territory | Long Service Leave Act 1981 | 10 years | 13 weeks |

^a This table does not show the rate at which additional entitlements accrue for service in excess of the qualifying period. There are also some exceptions. For instance, in most states, there is separate legislation for the construction industry, while Commonwealth public servants are covered by the *Long Service Leave (Commonwealth Employees) Act 1976* (Cwth) rather than LSL legislation in the ACT.

Sources: Casey, McLaren and Passant (2012); Workplaceinfo (2015).

49. Note the Victorian entitlement is in fact to LSL after 10 years (8.6 weeks).
50. AMMA recently submitted to the Productivity Commission's soon to report inquiry into Australia's Workplace Relations Framework as follows:

Whilst LSL does not rank amongst the highest priorities of resource employers for workplace reform, on balance Australia should start to move towards a single, uniform national standard for LSL, noting AMMA's

⁶ Productivity Commission 2015, *Workplace Relations Framework*, Draft Report, Canberra, p.174

other recommendations for this to be a flexible and customisable employment benefit.

51. AMMA recognises there are some difficulties with the existing referrals of powers from the states and territories to the Commonwealth, and differences between LSL standards in different states and territories that will need to be addressed to transition to a national scheme (which may take some years).
52. The task of identifying and transitioning to a single national, non-portable LSL standard will not be an easy one. AMMA is not interested in raising employer costs with no link to productivity, nor in increasing liabilities in a crude equalisation to the highest common denominator, and
53. However:
 - a. As a principle or sign post for future employment standards there is no reason why LSL should not be part of our national workplace relations system, as a National Employment Standard.
 - b. The task of identifying and transitioning to a single national, non-portable LSL standard is not becoming any easier by delaying not addressing it. It is time to start tackling this challenge.

Considerations and transitions

54. The Productivity Commission recently queried how to get to a national LSL scheme:

“If a uniform national standard for long service leave was to be adopted, how should the existing disparities between state and territory laws be resolved?”
55. This is a difficult and detailed question, and it is going to involve transitions and the reconciling of differing levels of LSL entitlement and differing lengths of service before entitlements become payable. Employers will strenuously oppose any assumption that a highest common denominator approach must apply, and unions are going to insist no employee should be worse off.
56. However, these difficult questions are not going to get any easier to resolve by waiting or by further delaying tackling this issue. Australia has all but achieved a national workplace relations system with the exception of a couple of areas, one of which is LSL and this should start to be addressed with a view to moving to a completely national employment safety net.
57. The technical challenges of crunching together differing state and territory LSL schemes into a single scheme and transitioning to it do not need to be resolved either in the PC review or by this Senate Committee.

58. Rather, this Committee should determine that:
- a. Extending LSL portability is not the way forward and that LSL should remain contingent on extended service with a single employer (i.e. the status quo).
 - b. There are opportunities for LSL reform, but they lie in the direction of moving to a single national LSL standard to be included in the National Employment Standards (NES0 under the Fair Work Act 2009, and not in extending LSL portability.
 - c. A process needs to be identified to recommend transitional arrangements to a single national LSL standard.

Work in different states and territories

59. There is, and has long been, a complication in the administration and accrual of LSL where an employee accrues service across multiple states and territories. This is a particular complication for resources companies, where employees regularly work across operations and sites in different states.
60. An added complication for multinational companies, and for the burgeoning number of Australian domiciled multinational companies, occurs where employees spend significant periods of their continuous service with an Australian company working in other countries.
61. This is not a problem for Australian resources companies, and they can and do navigate such situations without undue difficulty.
62. This scenario also in no way justifies or progresses any arguments for an extension of portability. Employment across state boundaries, or periods of service overseas, can be accommodated within an employer specific/non-portable approach to LSL.
63. Such scenarios favour working towards a national standard for LSL on a non-portable basis, built on the long-standing status quo of established LSL schemes.

Flexibility in the use of LSL

64. There is also increasing diversity in what employees want to do with their LSL. This is consistent with families and employees moving ever further from decades outdated assumptions about male breadwinners, and stay at home spouses.
65. Contemporary families have increasingly diverse demands and priorities for their leave, both in terms of time and money.
66. Where LSL is accrued, employees will not be able to simply assume there is an automatic capacity to use it with the family. In particular, with both parents working it becomes very improbable that both will have a synchronous entitlement to LSL. Parent A may hit a threshold of 10 years for the taking of LSL, but find his or her spouse has no leave accrued to take extended time off as a family.

67. Employees may also wish to take multiple shorter periods of leave, or to take some proportion of leave as cash (even a half leave at double pay arrangement or vice versa).
68. There is in short a challenge to the LSL system from its key clients – the employees accruing the leave. Their demands are becoming more diverse and they are seeking to agree with their employers on more diverse individual and bespoke ways of using their LSL.
69. The problem is that this collides with long standing, highly paternalistic regulation of how LSL may be taken, which precludes employers agreeing to many of the things that are asked of them by their employees.
70. AMMA has therefore identified various recommendations for reform of LSL that have been commended to both the Productivity Commission and the Victorian Parliamentary inquiry, and that should be considered in place of, and quite separately to, portability.
71. Areas for reform might include:
 - a. Greater scope for employers and employees to agree on an individual or collective basis how LSL will be accrued, paid, cashed out and taken.
 - i. The right of an employee to determine what they would like to do with their accrual of LSL, how they would like to take their accrued LSL, or indeed whether they would like to cash it out in whole or part, should at all times be an individual one, as agreed between the individual employee and his or her employer.
 - ii. Collective agreements should not be able to override or remove scope for an employee to agree with their employer how they would like accrue, take or cash out LSL. Just as families are individual, demands from employees will individual.
 - b. Providing employees with a wider range of options to use LSL flexibly, provided the employee freely enters into such an arrangement and receives pay or leave no less favourable than their accrued or accruing LSL entitlement.
 - c. Opening up scope for employment on a specifically non-LSL contract, provided that:
 - i. The employee and employer specifically agree to employment on such terms.
 - ii. The employee receives appropriate additional consideration (i.e. proportionately higher wages) from the commencement of their employment to compensate for LSL not being payable or leave being available should the employee reach the accrual threshold.

LSL and Modern Awards

72. A small minority of modern awards regulate LSL, specifically displacing the state or territory LSL laws that would otherwise apply.
73. Over time and as part of the creation of a single national, non-portable, LSL system, LSL should become a matter that is not able to be regulated in awards, and the statutory, non-portable standard should apply as universally as possible.
74. Were preservation or transitional arrangements required to avoid prejudice or loss this could be achieved (and is in fact currently being applied through the transitional arrangements of the Fair Work Act) without perpetuating award specific regulation of LSL.

What to make of this

75. The Committee should recommend against any further extension of portable LSL, and should instead recommend alternative priorities for LSL reform:
 - a. The creation of a national LSL standard on a non-portable basis.
 - b. Allowing employees and employers to agree flexible use of LSL.
 - c. Removing LSL from modern awards.



3. PORTABLE LSL

The concept

76. A limited number of industries (building and construction, coal mining, cleaning, see below) have “portable” LSL, in some states and territories. These are contributory schemes administered by government/statutory authorities⁷ and created by legislation⁸.
77. The McKell Institute captures the portable LSL concept as follows:
- Under these models, the employer makes payments to cover an employee's leave entitlements into an administered account or fund, either as they accrue or in the form of a lump sum when the worker changes employment. In most circumstances, the entitlement is funded by the employer via a levy proportional to the worker's wage. The entitlement can be paid out once the worker reaches a defined period of service within the industry.⁹*
78. The table on the following page from the Productivity Commission¹⁰ maps various portable LSL schemes in Australia.
79. A few points are readily observable:
- a. Portable LSL, as opposed to standard or service contingent LSL, is exceptional, and applies in only in specified areas, and to very a limited subset of industries.
 - b. Portable LSL has been very stable over time. Only very rarely have state or territory governments extended portability to additional industries.
80. It is only in an isolated subset of industries, based on unique and industry-specific considerations, that the community standard for LSL does not apply and instead the portable scheme model applies.

⁷ For example, the Queensland <http://www.gleave.qld.gov.au>

⁸ For example, the Queensland [Contract Cleaning Industry \(Portable Long Service Leave\) Act 2005](#).

⁹ Markey, Ray, Parr, Nick, Kyng, Timothy, Muhidin, S, O'Neill, Sharon, Thornthwaite, Louise, Wright, Chris F, Lavermiocca, Catriona, & Ferris, Shauna. (2013), *The Case for a National Portable Long Service Leave Scheme in Australia*, available at http://mckellinstitute.org.au/wp-content/uploads/2013/06/McKell_Portable_LongService.pdf, p.96

¹⁰ Productivity Commission 2015, *Workplace Relations Framework*, Draft Report, Canberra, p.177

Table 4.2 Portable long service leave (LSL) legislation
By jurisdiction

| <i>Jurisdiction</i> | <i>Industry</i> | <i>Start</i> | <i>Legislation</i> | |
|---------------------|-------------------------|-------------------------|---|---|
| Cwth | Coal mining | 1949 | <i>Coal Mining Industry (LSL) Administration Act 1991</i> | |
| NSW | Building & Construction | 1986 | <i>Building and Construction Industry Long Service Payments Act 1986</i> | |
| | | | <i>Building and Construction Industry Long Service Payments Regulation 2011</i> | |
| Vic | Contract cleaning | 2011 | <i>Contract Cleaning Industry (PLSL Scheme) Act 2010</i> | |
| | Building & Construction | 1976 | <i>Construction Industry Long Service Leave Act 1997</i> <i>Rules of the Construction Industry LSL Fund as at 7 April 2009</i> | |
| Qld | Building & Construction | 1992 | <i>Construction Industry Long Service Leave Act 1987</i> <i>Building and Construction Industry (PLSL) Act 1991</i> <i>Building and Construction Industry (PLSL) Regulation 2002</i> | |
| | | Contract cleaning | 2005 | <i>Contract Cleaning Industry (PSLS Scheme) Act 2005</i> |
| | | Contract cleaning | 2005 | <i>Contract Cleaning Industry (PSLS Scheme) Act 2005</i> |
| WA | Building & Construction | 1986 | <i>Construction Industry Paid Portable Long Service Leave Act 1985</i> <i>Construction Industry Paid Portable LSL Regulations 1986</i> | |
| | | | <i>Construction Industry Paid Portable LSL Regulations 1986</i> | |
| SA | Building & Construction | 1987 | <i>Construction Industry Long Service Leave Regulations 2003</i> | |
| Tas | Building & Construction | 1971 | <i>Construction Industry (Long Service Leave) Act 1997</i> | |
| ACT | Building & Construction | 1981 | <i>Long Service Leave (Portable Schemes) Act 2009</i> | |
| | | Contract cleaning | 1999 | <i>Long Service Leave (Portable Schemes) Act 2009</i> |
| | | Community Service | 2010 | <i>Long Service Leave (Portable Schemes) Act 2009</i> |
| NT | Building & Construction | Security | 2012 | <i>Long Service Leave (Portable Schemes) Act 2009</i> |
| | | Building & Construction | 2005 | <i>Construction Industry Long Service Leave and Benefits Act 2005</i> <i>Construction Industry LSL and Benefits Regulations as in force at 3 August 2012</i> |
| | | | | <i>Construction Industry LSL and Benefits Regulations as in force at 3 August 2012</i> |

81. CoINVEST, the portable scheme for the Victorian construction industry, explains its operation and rationale as follows¹¹:

CoINVEST keeps a record of how many days of eligible service a worker accrues in Victoria - this record of service is centralised with us so that we can keep track of your accrued service throughout all of your employers. Once you have built up seven or more years of eligible service, you will be able to claim Long Service Leave from CoINVEST at any point thereafter.

¹¹ <http://www.coinvest.com.au/about-coinvest/how-coinvest-works>

CoINVEST is a compulsory part of the construction industry in Victoria. As such, all employers who perform covered work are required to record with CoINVEST how many days each worker has performed - this is done quarterly and builds up your record of service. The employer then pays a contribution fee into the Long Service Leave Fund so that we can ensure CoINVEST is sufficiently funded to be able to pay out claims to all eligible workers when they make their claim for Long Service Leave.

The Long Service Leave Act

CoINVEST Ltd is a public company which administers the Portable Long Service Leave Scheme for the construction industry in Victoria. The Long Service Leave scheme was created by an Act of Parliament. The Long Service Leave scheme administers the Construction Industry Long Service Leave Act, 1997 (amended 2004).

82. The objective or purpose of portable LSL is unique and apparently fundamentally remedial. Apparently it was determined that there is something unique in the construction and a limited (and inconsistent) set of other industries that warranted a deviation from standard or community (non-portable) LSL standards.
83. We understand portable LSL in construction was imposed in the 1970s because construction workers worked from employer to employer, job to job (i.e the nature of their employment precluded accruing long service with a single employer).
84. AMMA is not saying employers endorse or validate such rationales, merely that they should be correctly understood in any consideration of LSL portability. Portable LSL is fundamentally an industry specific concept because it was advanced as such, and based on the exceptional and atypical nature of some industries.
85. Debates in the ACT Legislative Assembly during recent years makes this clear. In introducing legislation to extend portable LSL to security guards in 2012, the ACT government stated:

The present legislation includes portable long service leave schemes for the building and construction industry, the contract cleaning industry and the community sector. All of these industries have dedicated long-term employees but, largely due to the contract nature of the work, employees often move from employer to employer.¹²

¹² Hansard, ACT Legislative Assembly, Legislative Assembly for the ACT: 2012 Week 4 Hansard (29 March), p.1516.
<http://www.hansard.act.gov.au/hansard/2012/week04/1516.htm>

Extending portability will turn LSL into a universal sabbatical

86. Periodically trade unions and others call for portability or transferability of LSL between employers generally, and moving to some model in which there is a general right to take LSL after any person had been in the Australian workforce for 7 or 10 years.
87. Effectively, these are calls for a general right to a “sabbatical” or ‘career break’ after a given number of years in work, regardless of how long the employee has been with their “final” employer at the point of becoming entitled to the leave.
88. The McKell Institute, a key proponent of portable LSL, bells the cat in acknowledging that portable LSL ceases to be LSL:

So how can we revive the idea of Long Service Leave for the modern economy? By making it portable.

Just as your superannuation account follows you from job to job, so should your long service leave.

Of course, it wouldn't really be Long Service Leave anymore - because the long service wouldn't be to a single employer. We could think of it more as Accrued Employment Leave.

There are many different ways to create a system of Accrued Employment Leave. Employees could have a basic account, invested in low risk areas and linked to their wages, which simply followed them around from job to job. Or you could link a scheme up with existing super funds and achieve economies of scale that way.¹³

89. The Committee will hear such calls again in this review, and this is something of a perennial ambit claim. At no point, however, have the fundamental flaws of such an idea been addressed (nor can they be). These fundamental and fatal flaws with portable LSL include:
 - a. The competitive disadvantage such additional labour costs would impose on Australia compared to competing countries.
 - b. How this could be funded, and why a currently contingent liability (in which the employer can recoup monies set aside for LSL if the employee leaves prior to the qualifying period) should become an absolute liability, and what the impacts of this would be.
 - c. The consequences of, or any justification for, employers paying into any statutory scheme administering mass portable LSL, and the impact of this on employee incomes and spending priorities.

¹³ <http://www.dailytelegraph.com.au/news/opinion/long-service-leave-might-be-old-fashioned-but-we-need-it-more-than-ever/story-fnh4it60-1226663306754>

- d. The signal this sends to employers about hiring people reaching the 7 or 10 year period of career tenure, at which time they would have a right to an extended period of absence. *Why would any employer hire someone who some months into their employment is going to exercise a right to an extended period of absence?* (Noting there is a normative or values-based difference between someone's right to become a parent and take parental leave, and someone simply wanting a career break or a holiday).

There is an element of theft or taking without just terms in all this

90. Presently where an employee leaves his or her employment prior to reaching the qualification threshold (years of service), the employee gets no payment and there is no financial cash flow obligation imposed on a business).
91. For example, where an employee leaves employment in Victoria in the fifth year of employment (prior to the 7 year qualification threshold) no LSL payment is made.
92. This is not the case under a portable model. Where an employee leaves an industry or ceases eligibility for a portable fund, but has not met a minimum number of hours or cumulative service for a pay out from the fund, the fund retains the employer's payments.
93. This needs to be clearly understood. Where an employee ceases employment after, for example, five years:
 - a. Under standard, non-portable LSL, no payments are made as LSL has not been triggered.
 - b. Under portable LSL, the employer would have made five years payments which are retained by the fund, not returned to the employer, and are not open to a claim by an employee.
 - c. The fund retains money that would not have been payable under a non-portable approach.
94. This is made very clear by the advice the portable funds give employees:

If you have less than 7 years of service accrued, you will have a maximum of 4 years to return to the Victorian Construction Industry or your existing service record will be cancelled.¹⁴

Who should run portable schemes [Term of Reference e(i)]

95. TOR (e)(i) queries by whom any portable LSL schemes should be run.
96. AMMA reiterates our firm submission that there should be no extension of LSL portability and no creation of new LSL schemes or models.

¹⁴ <https://www.coinvest.com.au/workers/worker-faq-s>

97. This said, if contrary to the unambiguous views of employers there was any future extension of LSL portability, employers in the resource industry are firmly of the view that it must be administered by the state (i.e. by state or territory governments, or by the Australian government under dedicated legislation).
98. The costs of any such scheme should be recovered from investment of the monies lodged, or met by government. Employers should not be burdened by having a contingent liability made absolute (and the commensurate increase in labour costs) and then have to fund the administration to make this happen.
99. The employer should have no role in any portability scheme beyond making contributions, and no further administrative or paymaster obligations should be imposed.
100. Note: AMMA reiterates the complete opposition of resource industry employers to an extension of LSL portability.

Organisation of portable LSL schemes [Term of Reference e(ii)]

101. TOR (e)(ii) queries "*how such schemes could be organised, be it occupational, industrial or other*".
102. Resource employers do not support any extension of portable LSL to either additional industries, occupations, or to become a universal entitlement. However it should be recalled that to date any portability of LSL has been justified by particular industries being unique, and requiring some deviation from the community wide, non-portable LSL system.

Role of the Commonwealth [Term of Reference e(iii)]

103. TOR (e)(iii) queries "*the appropriate role for the Commonwealth Government in facilitating portable long service leave schemes*".
104. **Retain the status quo:** The appropriate role of the Commonwealth going forward is to maintain its existing role, which is restricted to overseeing the Coal Mining Industry (Long Service Leave Funding) Corporation in accordance with the *Coal Mining Industry (Long Service Leave) Administration Act 1992 (Cth)*.
105. **A massive national question:** Were the Committee to make recommendations for at large or universal portability, this would be a massive national change not only to how Australians work, but also to the task for government. Would it be overseeing dozens (hundreds?) of new portable funds, or would there be one massive scheme for all employment?
106. If it were one grand scheme, who would administer this? General portability would require the creation of LSL accounts for up to 11.8 million employed Australians, and the creation of a massive new bureaucracy, all to administer an entitlement that is likely to be of declining relevance and application.

107. This is a change akin to the creation of Medicare or superannuation, and would need to be nation building to warrant such a massive expenditure of the finances and energies of government.
108. Where would this leave superannuation? A rational employee might want to see their LSL account combined with their superannuation account, to maximise earnings. Why wouldn't policy makers follow that logic through and turn this narrow LSL question into a more significant question about the use of retirement incomes. If LSL is to have its own account and be able to be drawn down upon, why shouldn't there be improved options to use superannuation during the course of employment?
109. Another consideration is housing. An employee struggling to get a deposit together to purchase a home might legitimately ask why an account held in their name (their LSL account) could not be drawn upon to fund a housing deposit. Clearly LSL portability can rapidly raise more significant and for ranging policy questions.
110. **Not an industry fund:** The government would also need to exercise some caution and oversight in ensuring such a bureaucracy was not somehow considered an "industry fund", and would need to run it quite separately to unions and employer bodies.
111. Evidence to the Heydon Royal Commission of the leaking of members' personal details from an industry superfund to the CFMEU, should lead any government considering the creation of any future LSL or other fund based administration to carefully separate it from unions and employers organisations.

Impact of varying state and territory LSL [Term of Reference (e), (iv)]

112. TOR (e), (iv) queries "*the impact of varying state and territory long service leave arrangements on a potential national long service scheme administered by the Commonwealth*".
113. This Term of Reference misses the point. It is the flaws and negative impacts of LSL portability, and the fundamental lack of justification of extending portability that weigh against taking LSL in this direction.
114. AMMA is not arguing that variations between state and territory LSL standards make them irreconcilable in to a single national LSL standard.
115. AMMA and its members are of the conviction that a single national, non-portable, LSL standard is achievable in Australia, and should be pursued.
116. The best minds of the Australian workplace relations policy community are quite capable of analysing/deconstructing existing variable state and territory LSL schemes, and coming up with options to transition to a single national standard which retains its foundation in the accrual of extended service with a single employer.

Service across jurisdictions [Term of Reference (e), (v)]

117. As set out in the Introduction (Chapter 1) service across state, and increasingly international jurisdictions, is a concern for resource employers.
118. As is the case for TOR (e), (iv), there is an answer to this issue, and it lies in moving to a genuinely national LSL scheme on a non-portable basis through the NES and perhaps supported by harmonised model legislation (see Chapter 2).
119. However, Labor mobility across LSL jurisdictions in no way supports portability, and portability does not automatically fix the challenge of applying LSL to cross border service.
120. This clear from looking at the table included in Chapter4 and the example of contract cleaning:

| State | Industry | Start date | Key Legislation | Levy |
|-------|-------------------|------------|--|----------------------------|
| NSW | Contract cleaning | 2011 | <i>Contract Cleaning Industry (PLSL Scheme) Act 2010</i> | 1.7% of total remuneration |
| ACT | Contract cleaning | 1999 | <i>Long Service Leave (Portable Schemes) Act 2009</i> | 2% of ordinary wages paid |
| QLD | Contract cleaning | 2005 | <i>Contract Cleaning Industry (PLSL) Act 2005</i> | 2% of ordinary wages paid |

121. These are portable schemes, yet they differ in both the level of the LSL levy, and the remuneration base to which it is applied. Clearly portability is not of itself a panacea for all LSL challenges.

How to proceed

122. Looking at Term of Reference (d) neither specific sectors, industries or occupations, nor Australia's labour market and economy as a whole would benefit from any extension of portable LSL schemes to additional areas of employment, or to employment as a whole across Australia.
123. The Committee should conclude that:
 - a. The costs and other negative imposts of portable LSL on both individual employers and the state outweigh any purported benefits.
 - b. LSL should remain part of Australia's minimum employment standards, as a non-portable service conditional upon extended service with a single employer.
 - c. There should be no extension of LSL portability.

4. COST CONSIDERATIONS

124. This section is focussed on the cost impact of extending LSL portability for employers, for employment and for our economy and labour market. The additional administrative costs of portable LSL, which are considerable, are addressed in Chapter 5.
125. LSL is unique in that it is (with a very few exceptions) contingent on a service threshold being met, both for being paid out pro-rata on termination and for triggering the actual taking of leave. Where employment terminates prior to the pro-rata payout threshold being met, quite rightly monies remain with the employer.
126. A portable LSL scheme, either for an industry or universally for all employment, fundamentally changes this. It makes what is currently a contingent or conditional liability (extended service being required for LSL) into an absolute liability (LSL is payable on all hours worked¹⁵, from day one of employment).
127. Currently an employer's liability for LSL is determined by the probability of an employee reaching the applicable threshold for the taking or cashing out of LSL (a figure between zero and one). Thus for a given 100 employees the liability for LSL is based on the proportion of them that will reach 7 or 10 years' service and beyond). In a portable scheme, LSL becomes an absolute liability, payable for all employees. This increases the cost of all employment, by
 - a. Rendering LSL payment universal, payable for all employment and all hours worked.
 - b. Removing the requirement for extended service to trigger LSL.

A Tax on Employment

128. LSL remains a contingent liability provision on a company's balance sheet and does not become payable to the employee unless she or he reaches the necessary threshold level of service to trigger either leave or pro rata payment in lieu of the leave.
129. Portable LSL makes this contingent liability for LSL absolute, from day one of employment.
130. An employer would need to make payments into a fund for an employee from the very start of their employment; day one. This broadens, in fact universalises, the proportion of employees for whom LSL payments must be made, increasing labour costs.

¹⁵ Or in some cases all ordinary or non-overtime hours.

131. Portable LSL thereby becomes a universal tax or payment on employment, which would exacerbate already high labour costs and labour on costs in Australia, and would do so with no benefit to (and in fact a detriment to) the costs and comparative attractiveness of investing, doing business and offering employment in Australia.
132. The employer loses the LSL monies from their operating capital and from their funds to invest and realise a gain on, or invest in productive or job creating activities.
133. So not only is there the direct cost of additional LSL contributions (estimated by the proponents of LSL portability to be at least a doubling of existing LSL costs to employers), there is also an opportunity cost as the employer foregoes the opportunity to invest and realise gains on the monies they are forced to pay into a portable LSL fund.
134. The Productivity Commission, during the course of its recently completed inquiry into Australia's Workplace Relations Framework¹⁶ noted that:

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).¹⁷

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).¹⁸

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.

135. ACCI has researched the various levies payable under existing portable LSL schemes, and it can be seen that they are variable, inconsistent and significant:

¹⁶ Productivity Commission 2015, *Workplace Relations Framework*, Draft Report, Canberra, p.178 (paragraph breaks inserted for clarity).

¹⁷ The Australian Workplace Relations Study found that, of a sample of over 5000 people, just over 40 per cent had been with their employer for over 5 years. Depending on the instrument which governs their entitlement, a large proportion of these employees would be eligible for the full entitlement, or a pro-rata entitlement.

¹⁸ Depending on the qualifying period and the duration of the entitlement, and making some other assumptions, the McKell Institute (2012) estimates the levy to be of the magnitude of between 1.67 and 2.5 per cent of remuneration. This is broadly in line with state and territory industry-based schemes.

| State | Industry | Start date | Key Legislation | Levy |
|-------|---------------------------|------------|---|--|
| NSW | Building and construction | 1986 | <i>Building and Construction Industry Long Service Payments Act 1986</i> <i>Building and Construction Industry Long Service Payments Regulation 2011</i> | 3.5 % of the value of building and construction work where the cost of building is \$25,000 or more (inclusive of GST) |
| | Contract cleaning | 2011 | <i>Contract Cleaning Industry (PLSL Scheme) Act 2010</i> | 1.7% of total remuneration |
| ACT | Building and construction | 1981 | <i>Long Service Leave (Portable Schemes) Act 2009</i> | 1.25% of ordinary wages (no levy on apprentices) |
| | Contract cleaning | 1999 | | 2% of ordinary wages paid |
| | Community services | 2010 | | 1.67% of ordinary wages |
| | Security | 2012 | | 1.47% of ordinary wages |
| QLD | Building and construction | 1992 | <i>Construction Industry Long Service Leave Act 1987</i> <i>Building and Construction Industry (PLSL) Act 1991</i> <i>Building and Construction Industry (PLSL) Regulation 2002</i> | 0.3% of total of all costs relating to construction work (if over \$80,000) |
| | Contract cleaning | 2005 | <i>Contract Cleaning Industry (PLSL) Act 2005</i> | 2% of ordinary wages paid |
| VIC | Building and construction | 1976 | <i>Construction Industry Long Service Leave Act 1997</i> <i>Rules of the Construction Industry LSL Fund as at 7 April 2009</i> | 2.7% of every workers' ordinary rate of pay |
| SA | Building and construction | 1987 | <i>Construction Industry Long Service Leave Regulations 2003</i> | 2.25% of total remuneration paid |
| WA | Building and construction | 1986 | <i>Construction Industry Portable Paid Long Service Leave Act 1985</i> <i>Construction Industry Portable paid LSL Regulations 1986</i> | 2% of ordinary rate of pay for all workers (except apprentices) for all days engaged on site |

| State | Industry | Start date | Key Legislation | Levy |
|-------|---------------------------|------------|---|---|
| TAS | Building and construction | 1971 | <i>Construction Industry (Long Service Leave) Act 1997</i> | 2% of ordinary pay |
| NT | Building and construction | 2005 | <i>Construction Industry Long Service Leave and Benefits Act 2005</i> <i>Construction Industry LSL and Benefits Regulations as in force at 3 August 2012</i> | 0.3% of cost of project for work started on or after 1 April 2012 (0.4% for work started prior) |
| CTH | Coal mining | 1949 | <i>Coal Mining Industry (LSL) Administration Act 1991</i> - Amended by <i>Coal Mining Industry (LSL) Legislation Amendment Act 2011</i> . - Two related Coal Mining Industry Payroll Level Acts also apply. | 2.7% of eligible wages paid |

136. This table appears to support the assessment by the McKell Institute¹⁹ that a levy to deliver an extended or universal portable LSL scheme would be in the region of up to an **additional 2.5% in labour costs for Australian employers**, or as follows:

TABLE 5.1
LEVY RATES REQUIRED TO ADDRESS THE WAGES GROWTH/INVESTMENT RETURNS GAP

| ACCURAL RATE | WAGES GROWTH (F) | INVESTMENT RETURNS (I) | GAP (I - F) | LEVY REQUIRED |
|--------------------------------|------------------|------------------------|-------------|---------------|
| 2 months per 10 years' service | 4% | 4% | 0% | 1.71% |
| Accrual rate 1.67% | | 5% | 1% | 1.63% |
| | | 6% | 2% | 1.55% |
| | | 7% | 3% | 1.48% |
| | | 8% | 4% | 1.41% |
| 3 months per 10 years' service | 4% | 4% | 0% | 2.56% |
| Accrual rate 2.50% | | 5% | 1% | 2.44% |
| | | 6% | 2% | 2.32% |
| | | 7% | 3% | 2.22% |
| | | 8% | 4% | 2.11% |

¹⁹ Markey, Ray, Parr, Nick, Kyng, Timothy, Muhidin, S, O'Neill, Sharon, Thornthwaite, Louise, Wright, Chris F, Lavermiocca, Catriona, & Ferris, Shauna. (2013), *The Case for a National Portable Long Service Leave Scheme in Australia*, available at http://mckellinstitute.org.au/wp-content/uploads/2013/06/McKell_Portable_LongService.pdf, p.111

137. Critically, this would impose an increase in labour costs:
- Entirely divorced from any productivity or competitiveness benefits.
 - At a time of economic and labour market risk and uncertainty.
 - That make the creation of new jobs more expensive.
138. This is a major increase in the costs of doing business and creating jobs in Australia, and it is divorced from any increases in productivity or competitiveness. No jobs will be created, no employment will become more secure, and nothing in extending LSL portability will be positive for Australia's economy or jobs.

What to make of this

139. The McKell Report²⁰ summarises concerns of community services employers at the prospect of LSL portability:

Many of the Community Sector organisations were concerned about the cost of providing additional LSL benefits. Since there is generally high staff turnover in this sector, LSL costs were only about 1% of salaries. The provision of PLSL was expected to push LSL costs up to 2% of salaries. Since most of these Community Sector organisations operated on very tight budgets, the additional cost would lead to a reduction of service standards; lay-off of some staff; or an increase in the fees charged to customers for their services. These organisations suggested that the increased LSL costs should be funded by an increase in government funding for the Community Services sector.

Some employers were also concerned about the difficulties of finding staff to "fill in" while others were on leave. They suggested that employers might be reluctant to hire people who already had accrued LSL entitlements from prior jobs, since this would cause staffing difficulties.

140. This is a neat summation of key employer concerns at any extension of portable LSL in Australia, and it comes from those advocating for LSL portability.
141. This Committee should conclude that:
- Portable LSL at least doubles the cost of LSL to Australian employers.
 - This will increase labour costs and the costs of doing business in Australia, and will negatively impact on Australia's attractiveness to invest, do business and create jobs.

²⁰ Markey, Ray, Parr, Nick, Kyng, Timothy, Muhidin, S, O'Neill, Sharon, Thornthwaite, Louise, Wright, Chris F, Lavermiocca, Catriona, & Ferris, Shauna. (2013), *The Case for a National Portable Long Service Leave Scheme in Australia*, available at http://mckellinstitute.org.au/wp-content/uploads/2013/06/McKell_Portable_LongService.pdf, p.54

- c. Organisations that operate on tight margins and tight budgets (which is the case for an increasing proportion of Australian businesses, regardless of size) will be particularly impacted on by such an increase in labour costs.
- d. In the case of export exposed industries, such a productivity decoupled labour cost increase cannot be in any way excused by an assumption that it applies equally to all competitors.
- e. A new tax on employment is the last thing working Australians, their employers, the unemployed and the community need the parliament to be considering at this juncture.

5. PRACTICAL CONSIDERATIONS

Costs of Administration

142. Maintaining and administering portable LSL schemes requires a substantial bureaucracy, such as the Coal Mining Industry (Long Service Leave Funding) Corporation, the NSW Long Service Leave Corporation or Coinvest for Victoria's construction industry. These are statutory bodies that must be administered and overseen by government, which is costly and requires close supervision.
143. Administering portable LSL schemes costs money. Unless government is to meet the start-up and ongoing costs of new portable LSL schemes or a single universal national portable LSL scheme (which would be a massive additional administrative cost to Australian taxpayers) it is foreseeable that employers would be asked to meet these costs in addition to their (no longer service contingent) LSL contributions.
144. Either government or employers (or some combination of both) would be asked to pay to create a massive new bureaucracy to facilitate payment of a benefit which is currently successfully administered by employers in the vast majority of cases, and in which there is no endemic or systemic failure under status quo arrangements.
145. This massive new bureaucracy would also be created without any demand from employees or any mismatch with community expectations, and without any gain to competitiveness, productivity, jobs or living standards. There is simply no problem with existing long service leave that justifies the imposition of significant new costs on employers.
146. This means that the tax on employment may not be limited to 2% or 2.5% contributions on all hours worked (up from only about 1% for existing non-portable LSL), and may extend to additional levies to establish the administration of new portable LSL schemes.
147. It is not acceptable for employers to be asked to fund a new bureaucracy to administer a specific type of leave they already manage quite successfully.
148. This must be to the highest / most expensive standard: There could also be no skimping or corners cut in setting up any portable LSL scheme. Events uncovered by the Royal Commission into Trade Union Governance and Corruption underscore the importance of any new funds, including LSL funds:
 - a. Being administered to the highest standards of governance and accountability.
 - b. Being administered and overseen without union or employer association involvement. The so called industry fund model should not be countenanced.

LSL is already complex

149. In its submission to the Victorian inquiry²¹, ACCI neatly captured the existing complexity of LSL arrangements for national system employers and employees (the vast majority of Australian employers and employees):

Long service leave entitlements for many employees continue to be derived from federal awards that applied prior to the modern awards coming into effect in 2010. This is because of the operation of section 113(1) of the Fair Work Act 2009 (Cth) which provides:

- (1) If there are applicable award-derived long service leave terms (see subsection (3)) in relation to an employee, the employee is entitled to long service leave in accordance with those terms.*

Note: This Act does not exclude State and Territory laws that deal with long service leave, except in relation to employees who are entitled to long service leave under this Division (see paragraph 27(2)(g)), and except as provided in subsection 113A(3).

“Applicable award-derived long service leave terms”, in relation to an employee are defined in subsection 113(3) as:

- (a) terms of award, or a State reference transitional award, that (disregarding the effect of any instrument of a kind referred to in subsection(2)):*

- (i) would have applied to the employee at the test time (see subsection (3A)) if the employee had, at the time, been in his or her current circumstances of employment; and*
(ii) would have entitled the employee to long service leave; and

- (b) any terms of the award, or the State reference transitional award, that are ancillary to or incidental to the terms referred to in paragraph (a).*

The “test time” referred to above is defined in subsection 113(3A) as:

- (c) immediately before the commencements of this Part.... (i.e. before 1 January 2010).*

A number of federal awards that are transitional instruments pursuant to the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth) set out an applicable award-derived long service leave term as they establish long service leave entitlements that would have applied to employees prior to 1 January 2010 (the test time).

²¹ ACCI (2015) Submission to the Victorian Parliament’s Inquiry into Portability of Long Service Leave, pp.18-20.
http://www.parliament.vic.gov.au/images/EDJSCommittee/Sub_42_07082015_Australian_Chamber_of_Commerce_and_Industry.pdf

While these provisions operate to the exclusion of entitlements drawn from state based legislation, some employers already employ a mix of people who derive their entitlements from the relevant federal award and people who do not (i.e. because they are not covered by the transitional instrument). As noted by the Productivity Commission:

This complicates the task of determining the specifics of a worker's entitlement. The employer must first check whether the worker is covered by either an agreement made prior to January 2010 that remains in effect, or by an 'award-based transitional instrument'. Where an agreement has lapsed, and so does not cover the worker, and/or where the relevant instrument does not specify the worker's LSL entitlement, as it is commonly the case, the employer must abide by the relevant state or territory's legislation instead (references omitted).²²

The practical effect of this is that the employer is required to provide for leave in accordance with differing systems drawing from state and federal regulation.

Employers working across state and territory borders also face complexity as a result of the varying long service leave applying in states and territories. To add a further set of arrangements would only add to their compliance obligations.

Furthermore, long service leave arrangements are also reflected in enterprise agreements and the introduction of another scheme has the potential to disturb those negotiated arrangements.

150. Portability is not going to fix this, and firm feedback from resource employers in the AMMA network is that being required to make contributions to funded portable LSL schemes exacerbates rather than relieves cost and complication.
151. Portable LSL schemes are not easier for employers to deal with administratively. It does not become a case of simply sending a cheque/lodging a payment:
 - a. Portable LSL simply replace one administrative task in administering LSL with another of equal magnitude.
 - b. Portable schemes are inflexible and an employer cannot manage and make fund their contributions as they prioritise.
152. Notwithstanding portable LSL in the construction industry, the CFMEU (for example) continuously claims widespread non-payments and errors in Coinvest contributions. If there were something inherently easier, more straightforward and more transparent in portable LSL, this should not occur and compliance should be higher in portable LSL industries.

²² Productivity Commission 2015, *Workplace Relations Framework*, Draft Report, Canberra, p. 173.

153. In fact it appears that portability of LSL in construction serves only to vastly increase disputation and disruption regarding LSL, and to engender disputes and agitation from employees with less than 7 years' service in the industry and with an employer.
154. In considering this, Committee should recall that one of the functions of the Fair Work Commission, and by implication the whole fair work framework, is the promotion of "harmonious and cooperative workplace relations"²³.
155. Looking at the construction industry, portable LSL and payments into portable LSL schemes seem to have simply generated another source of disputation.

What can the Commonwealth actually do?

156. Following a significant High Court decision during the Work Choices era, the *Fair Work Act 2009*²⁴ has been able to in essence set terms and conditions of employment, regulate agreement making etc for employees of corporations, and other entities falling within the definition of a national system employer under the Fair Work Act.
157. National system employers and employees look to the federal legislation for their rights and obligations. State industrial relations systems, legislation and awards cover only a small rump jurisdiction.
158. LSL is an exception to this. Only a small minority of employers and employees have LSL regulated through a federal award or agreement.
159. Most national system employees derive their LSL entitlements from state legislation²⁵, including in the small and settled minority of cases where portability applies. Non-portable, general LSL is derived from the following legislation:
 - a. *NSW Long Service Leave Act 1955*
 - b. *VIC Long Service Leave Act 1992*
 - c. *QLD Industrial Relations Act 1999*
 - d. *SA Long Service Leave Act 1987*
 - e. *WA Long Service Leave Act 1958*
 - f. *TAS Long Service Leave Act 1976*
 - g. *NT Long Service Leave Act 1981*
 - h. *ACT Long Service Leave Act 1976*
160. The Workplace Ombudsman explains this as follows:

²³ Fair Work Act 2009, s.577

²⁴ *New South Wales v Commonwealth* [2006] HCA 52

²⁵ And Territory.

Most employees' entitlement to long service leave comes from long service leave laws in each state or territory. These laws set out:

- *how long an employee has to be working to get long service leave (eg. after 7 years)*
- *how much long service leave the employee gets.*²⁶

161. This begs the question of what the Commonwealth can do as a result of this inquiry, and what changes can be wrought by the Australian Parliament without:

- a. Cooperation with the states and territories; or
- b. A willingness to override the states and territories, and to cover the field with a national portable LSL scheme for all National System Employees (as defined under the FW Act); or
- c. (As AMMA recommends) Commencing a dialogue on moving towards a national (non-portable) LSL scheme, backed up by:
 - i Harmonised state legislation for any remaining rump state jurisdiction, or
 - ii A referral of residual state powers over LSL to the Commonwealth (ie. applying the current Victorian approach on non-LSL matters to other states).

162. It does not appear the Committee can usefully recommend extending portable LSL for cohorts of employees / industries currently covered by state and territory LSL legislation (be they cleaners, security guards, or some other group of employees). Any action in that direction would need to come from the states, as the holding of the current Victorian portable LSL inquiry would indicate.

163. The legislative limitations on what the Commonwealth is capable of implementing are directly relevant to what this Committee can and should recommend. The Committee should take a limited and cautious approach, recommending against extending portability.

What to make of this

164. LSL is already complex, prescriptive and difficult to comply with. An extension of portability would exacerbate such problems.

165. As noted by the Productivity Commission in its interim report on Australia's Workplace Relations Framework in August 2015:

Overall, it is not clear that the benefits of either the typical model of portable LSL or the alternative proposed above, would be sufficient to justify the costs and complications entailed. Submissions to this inquiry are

²⁶ <https://www.fairwork.gov.au/leave/long-service-leave>

yet to provide compelling evidence of major and widespread concern about the present non-portability of most LSL arrangements.²⁷

166. Based on our understanding of the case being presented for an extension of portable LSL and the evidence before both the PC and the Victorian Parliamentary Committee, this Committee should conclude in similar terms to the draft PC conclusions and not recommend any extension in LSL portability.

²⁷ Productivity Commission (2015) *Inquiry into Australia's Workplace Relations Framework, Draft Report*, Canberra, p.179

6. ADVANTAGES V DISADVANTAGES

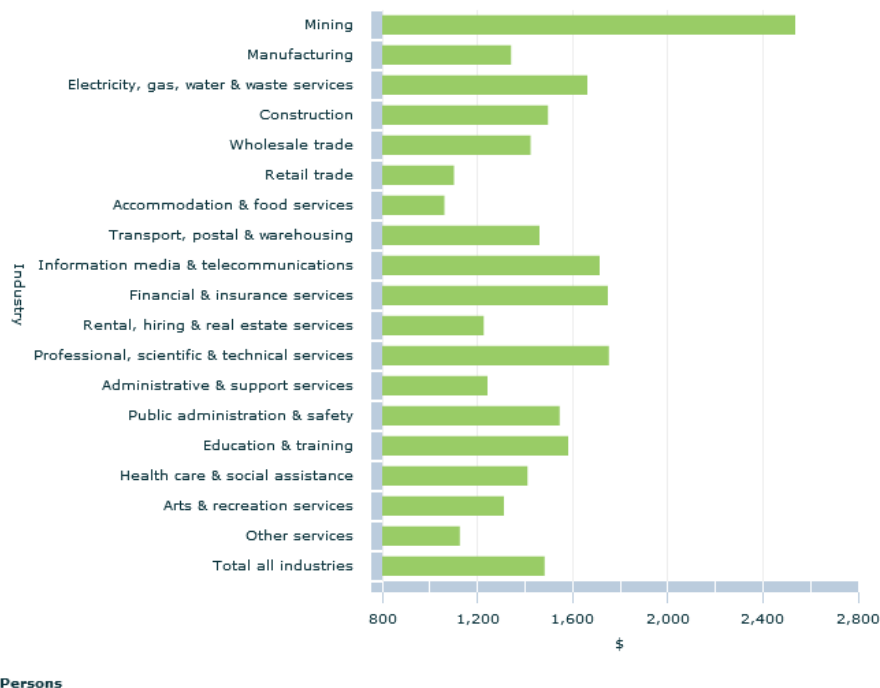
167. The McKell Institute in its research on portable LSL (and advocacy to extend portability) lists a number of 'advantages and disadvantages' of portable LSL (see also [Attachment A](#)).
168. These are deconstructed below to show (expanded in Chapters 5 and 6) that:
- The purported advantages of LSL portability do not stand up to scrutiny.
 - Disadvantages will clearly outweigh any asserted advantages.
 - The Committee should recommend against extending LSL portability.

Claimed Advantages²⁸

Retention of employees

169. According to the McKell Institute, "*portable LSL schemes address challenges in retaining employees in industries with high levels of labour mobility*".
170. The resource industry is not an industry with particularly high labour mobility, nor does it have a problem in retaining skilled employees given that average wages in 'mining' are the highest of all industries:²⁹

Average Weekly Ordinary Time Earnings, Full Time Adults by Industry, Original, May 2015



²⁸Ferris S., Parr N., Markey R., Kyng, T. (2015). Long service leave: past, present and future. *Australian Journal of Actuarial Practice*, Vol. 3, 5-22, p. 7 (The McKell Institute Report)

²⁹ ABS (2015) 6302.0 - Average Weekly Earnings, Australia, May 2015

171. The current challenge for resource employers is not employee retention or any lack of employee appetite to work in the industry, but rather falling labour demand, downsizing and job losses.
172. The idea that employees will determine their choice of employer, or whether to continue or leave employment, based on LSL seems far-fetched.
 - a. Employee decision making is far more short term than the authors of the McKell report suggest.
 - b. Immediate remuneration and terms of employment will be far more salient in employee decision making than a LSL entitlement that may or may not be met and that is years off into the future.
 - c. This is simple psychology on human preferences for immediacy of reward.
173. The Committee also needs to consider whether industry retention is necessarily something to be encouraged. Do we want Australians to stay in lower paying activities such as cleaning or security, or is could scope and incentives to move into other more highly-remunerated industries and occupations more desirable?
174. The pros and cons of encouraging labour market stasis would need to be very carefully scrutinised and this cannot be taken as a given good, or goal.
175. We also question the relevance of this supposed benefit of portable LSL in a tighter labour market, and in a period of geopolitical and community risk. There are other factors at play that may be encouraging increased job retention Australia, without restoring to increasing labour costs (which actually makes jobs less secure).
176. Labour markets also need to be allowed generate the degree of circulation they will naturally generate. With Chapter 9 showing the level of Australians leaving their employment each year is stable at around 16-17%, it is either:
 - a. Futile for governments to attempt to change the level of job turnover across a national labour market, or
 - b. (More likely), any attempt to do so would have unintended negative consequences.
177. If, as we argue, it is either futile or risky to try to manipulate propensity to change employment, the Committee should not recommend measures to attempt this (i.e. not recommend extending LSL portability).
178. There is also no wrong in the existing level of job exists in Australia, and in fact (as we show in Chapter 9) job exits fell between 2012 and 2013 (the most recent data) without portable LSL.
179. This claimed advantage of portable LSL does not stand up to scrutiny and does not justify any extension of LSL portability.

Equity

180. According to the McKell Institute, “Workers in highly casualised or contract roles otherwise have no practical access”.
181. This ignores the clear fact that casual employees get LSL when they accrue long service (see Chapter 8). There is essentially no distinction between modes of engagement (casual, full time or part time) when it comes to accruing an entitlement to LSL.
182. The McKell Institute’s observation also fundamentally misses the point that LSL is and should remain conditional on extended service.
183. In addition, the so called lack of access to LSL for particular employees will not be also not fixed by a portable LSL scheme approach.
184. If employees move into and out of an industry, including periods of casual service, they may not accrue LSL even under a portable scheme. Victoria’s Coinvest scheme requires a cumulative 7 years’ service in that state’s construction industry, and where that minimum threshold is not reached Coinvest makes clear that nothing is payable:

“However, if you never accrue seven years of service, you will never be eligible to claim Long Service Leave”³⁰.

185. This is not like a lifetime account model, as applies in superannuation. An employee who works intermittently or with interruption (i.e. casually), or who comes into and out of an industry, may not trigger sufficient cumulative service for a LSL payment even under a portable, fund model.
186. Note: In this example, an employer will have made LSL contributions for an employee with less than the threshold service (7 years) to the LSL fund that would not have been payable under the existing, non-portable LSL model.
 - a. The employer pays the contributions from the commencement of employment.
 - b. The employee exits the industry, or otherwise ceases having a portable LSL account without receiving any LSL payment.
 - c. The employer does not get the contributions refunded.
 - d. The portable LSL fund retains them. No one seems to win in this scenario other than the portable LSL scheme.

³⁰ Source: <https://www.coinvest.com.au/about-coinvest/how-coinvest-works>

Mobility and flexibility

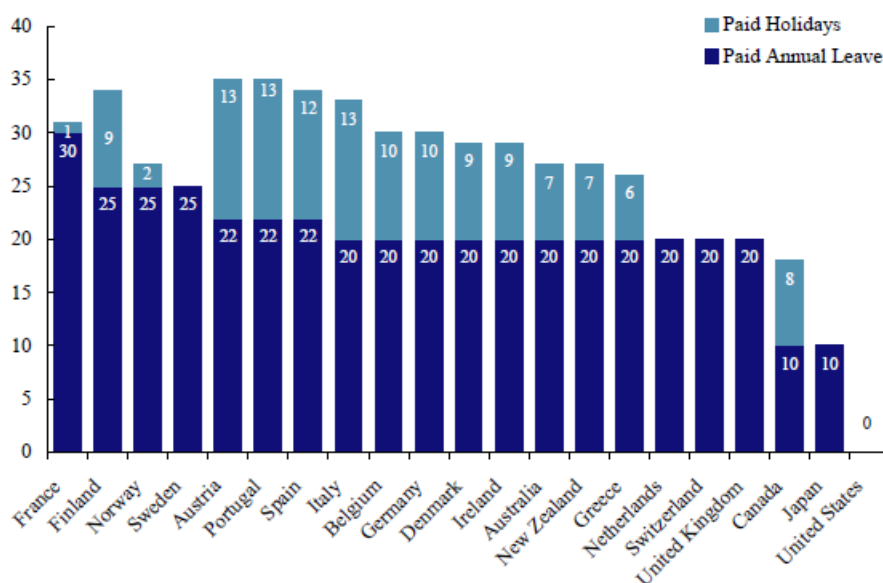
187. According to the McKell Institute, another advantage of portable LSL is that *“Workers have more capacity to move between employers or to take short periods out of employment to meet commitments such as carer responsibilities”*.
188. As set out in Chapter 9, labour mobility in Australia is stable over time, showing that propensity and appetite to move between employers is pretty well established in Australia.
189. The best thing labour market can do to facilitate labour mobility or ‘short periods out of employment’ is grow, and generate strong demand and low unemployment. Such healthy pressure on our labour market will see positive competition between employees who are confident to change jobs, and competition between employers trying to attract and retained skilled people.
190. This comes from sound economic management, education and skills, productivity, government efficiency, the right tax settings etc. It does not come from imposing LSL flexibility and increasing the costs of employment in Australia.
191. The McKell institute is also trying to have it both ways, claiming that portable LSL both (and apparently simultaneously):
 - a. Helps retain employees in specific industries; and
 - b. Helps employees move between employers.
192. It has to be one or the other: either portable LSL is a force for retention or it facilitates employee movement, it cannot be both.

Productivity and work environment

193. The McKell Institute claims that portable LSL offers *“The capacity to take a sustained period of leave to rejuvenate after a lengthy period of continued work has advantages for boosting productivity and morale”*.
194. Leave does create opportunities for rest, and can support productivity, morale and job satisfaction. That is why we have annual leave and public holidays that compare well with other OECD countries³¹:

³¹ Source: http://www.oecd-ilibrary.org/social-issues-migration-health/society-at-a-glance-2009/paid-annual-leave-and-paid-public-holidays-in-the-oecd_soc_glance-2009-graph2_17-en

Paid annual leave and paid public holidays, OECD countries, in working days



195. However, only some employees actually take extended time off beyond annual recreation, and only some can usefully utilise this leave with their family (recalling our general point about two working parents often not being able to usefully coordinate such leave).
196. Stories abound of people using LSL to paint the house because they cannot fund a major holiday or cannot coordinate it with family, and that doesn't seem very restful for most people.
197. Questions to consider include:
 - a. Whether additional rest through LSL offers any significant gain in rejuvenation, productivity and morale, above and beyond Australia's existing substantial annual leave and public holiday safety net.
 - b. Whether any advantages or gains in productivity and morale outweigh the additional costs of LSL.
 - c. Whether portable LSL is the best mechanism to deliver the benefits sought (productivity and morale) or whether other mechanisms exist that may be more effective and not have such significant negative impacts.
 - i. Employers expend considerable time, energy and resources pursuing greater productivity and encouraging employee morale.
 - ii. Employers pursue sophisticated strategies and measures to improve productivity, morale, organisational commitment etc.
 - iii. Crude additions to a delayed return benefit such as LSL are not part of this thinking and cannot be considered particularly relevant.

- d. Whether these supposed benefits could be secured through bargaining or require a change to benefits for all employees. Only where there is a proven bargaining failure should a change to the safety net even begin to be considered.

198. We also note that portable LSL often seems to be about monetary claims not actually taking leave. If this boils down to securing additional dollars, then claims regarding additional rest or productivity are exaggerated.

Employee attraction

199. The McKell institute claims that portable LSL offers “A benefit for “good employers” as employees feel less compelled to stay in poorly managed workplaces in order to meet LSL eligibility requirements”.

200. Industry seriously questions whether employees stay in unattractive or poorly managed workplaces simply to get LSL at some distant stage in the future. Alternatively, the only extent that this could ever be valid would be for employees with extended periods of service nearing thresholds for the taking of LSL (i.e. holding out for a pro rata payment). In other words this is at best a highly marginal and exceptional point.

201. Being an employer of choice is a relevant goal for a number of employers, and to reach this status they endeavour to deliver workplace culture, management practices, remuneration and benefits that are valued by employees. The key to this is innovation and employers being able to work with their employees to meet employee preferences and priorities (and organisational preferences and priorities).

202. Properly understood, this consideration (to the extent it could ever hold water) would favour increasing scope for employees and employers to be able to agree to use LSL more flexibility (see Chapter 2). Employers competing to attract and retain employees should be empowered to better meet changing employee preferences on how their LSL can be used and paid, rather than being forced to make payments into a one size fits all LSL fund from which employer and employee may never see any return.

Non-compliance problems reduced

203. The McKell institute identifies as a benefit of paid LSL that “Employers pay for entitlements as they accrue”. This is not a real problem and portable LSL is not a valid solution.

204. There is no endemic or widespread problem with LSL compliance in Australia, and Australians are generally well aware that after being with an employer for years they get LSL.

205. We would go further and suggest that where compliance problems do exist they are likely to have come to light well prior to someone accruing 7+ years' service.

206. As set out elsewhere in this chapter there is also a government safety net scheme (GEERS/FEG) which ensures that leave entitlements are not lost where an employer becomes insolvent.
207. There are also substantial negative impacts of making LSL non-service contingent, and forcing employers to make contributions for all days worked with no qualifying period. These outweigh any purported benefits.

Free-riding problems reduced

208. The McKell institute also claims that *"Industry based LSL schemes mean that all employers are obliged to fund LSL entitlements, regardless of whether they retain employees who reach the resting period for taking leave"*.
209. This is a bit bizarre. There is no 'free riding' in an employer paying out or funding LSL only where an employee provides extended service to that employer.

Administrative benefits for employers

210. The McKell institute claims as a benefit of portable LSL *"Industry funds effectively remove from employers the responsibility for administering LSL arrangements and payment for employees"*.
211. This is not consistent with the experience of employers making contributions to portable LSL funds. Participation in portable LSL is at least as complicated, costly and time consuming for employers as administering LSL within time and wages records/ administration (i.e. the long standing, non-portable status quo).
212. Resource employers are able to make such observations as we have employees with both general non-portable entitlements and employees subject to portable LSL schemes (such as maintenance electricians, for whom unions have insisted on payments into a portable LSL scheme such as Coinvest in Victoria).
213. Coinvest acknowledges the complication of its supposedly simple system even for its employee users:

Claiming Long Service Leave

Calculating a claim payment isn't just as simple as pressing the "pay" button; it's a complex process of calculations, quality assurance, and multiple checks to make sure you're being paid out correctly in accordance with the rules and act (CoINVEST reserves the right to determine 'ordinary rate of pay' for your Long Service Leave entitlements - refer to Part 8 of the rules).

There are many factors which can affect your rate of pay depending on your current work status and working history. See the below menus for more information:

How to apply for Long Service Leave

How much money is in there?

How will I receive my Long Service Leave payment?

Claim Types: Standard / Unemployed / Left Industry / Retired

Rate of pay – Full & Part Time Workers

Rate of pay – Casual Workers

Rate of pay – Allowances Included

Rate of pay - Working Directors

Rate of pay - Working Subcontractors

Rate of pay – Interstate Service

Rate of pay – Shift Work / Nightshift

Rate of pay – Desalination Plant

Rate of pay – Offshore Workers

Shared Liabilities

214. The level of complication in the operations of portable schemes is further underscored by their coverage rules³², which are every bit as complicated as award coverage or union eligibility rules:
215. To be very clear to the Committee, employers can and do successfully navigate existing LSL arrangements under state and territory laws, and do not need or support someone else (a scheme) assuming these administrative responsibilities.
216. Portable LSL is not materially simpler or less costly to comply with such that this would outweigh the significant disadvantages and negative impacts of such approaches.

Cost certainty

217. The McKell institute further claims as a benefit of portable LSL “*Greater cost stability is provided to employers because the pay-as-you go operation limits the potential for employers to accumulate liabilities and not being able to pay employees their entitlements if they become insolvent or have trading difficulties*”.
218. There are clear accounting practices for making provision for LSL in preparation for employee entitlements falling due (IAS19).

³²

<http://www.coinvest.com.au/media/W1siZiIsIjwMTUvMTIvMDQvMTFfMTdfNDRfNzEzX0NvSU5WRVNUX1J1bGVzLnBkZiJdXQ/CoINVEST%20Rules.pdf>

219. Employers receive advice on LSL contributions from both the Workplace Ombudsman and their employer representatives, and the Ombudsman advises and takes action to ensure entitlements obligations are met.
220. The Australian Government already provides a safety net to ensure employees do not lose their entitlements where an employee becomes insolvent. The GEERS scheme (General Employee Entitlements and Redundancy Scheme) and Fair Entitlements Guarantee (FEG):

provides assistance to people owed certain outstanding employee entitlements following the liquidation or bankruptcy of employers, this help is available through the Fair Entitlements Guarantee (FEG).³³

221. One of the unpaid entitlements which the FEG can cover in the event of employer insolvency is LSL, rendering this claim from the McKell institute a non-issue.

Tax benefits

222. The McKell institute claims as a benefit of portable LSL *"Employers can claim a tax deduction for payment of the levies, and the portable industry funds are not required to pay tax on their investment income"*.
223. It is not at all clear who this is thought to benefit. Employers would prefer to retain monies used to meet LSL obligations, as and when they fall due, as working capital/cash and to use them for general investment and expenditure. The benefit of having this money at hand would outweigh any purported future tax advantage.

Identified Disadvantages

224. The McKell Institute Report was written to make the case for extending LSL portability – this is what one would expect from a campaign document from an activist organisation that labels itself as progressive.
225. In making its case, the authors attempt to put forward both advantages and disadvantages of extending LSL portability. The disadvantages identified in the McKell report are real and are not outweighed by the purported advantages, which as we showed above do not stand up to scrutiny.

Administration costs for employers

226. The first disadvantage of portable LSL acknowledged in the McKell research is *"This factor is pronounced during transitional periods of newly established schemes. However, recent improvements in administrative software and systems were cited by administrators and employer representatives as significantly reducing the administrative burden and cost."*

³³ <https://www.employment.gov.au/general-employee-entitlements-and-redundancy-scheme-geers>

227. Make no mistake, imposing LSL portability will impose additional expenses on employers in terms of:
- a. Divorcing a currently and historically service contingent entitlement from extended service and making it an absolute liability payable to all employees from the first day of service.
 - b. Externalising and bureaucratising LSL administration and compliance, and removing it from employer oversight and control.
 - c. Universalising LSL costs for enterprises without regard to their period in operation and propensity to have staff accrue LSL.
228. Senators should recognise they are being asked to consider making a material increase in Australian labour costs, completely divorced from any increase in productivity or competitiveness, and without any foundation of proven problems with the long standing status quo approach.
229. This includes both additional contribution costs and additional administration costs. Employers also have no confidence that the costs of administering or contributing to any scheme should or could be predicted to fall after some initial 'set up period'.

Financial costs of providing benefits for employees who leave after a short period of service

230. The McKell Institute Report acknowledges that *"In industries where many workers do not achieve the qualifying period under non-portable schemes, PLSL has effectively imposed an additional financial cost for employers"*.
231. For an employer where few or no employees ever reach thresholds of service for LSL, moving to portability moves LSL from a non-concern and a non-liability, into an additional administrative cost for all employees and an additional labour cost imposed on all hours worked.
232. In the resource industry (outside construction) project based or time limited work that never triggers standard or current LSL would do so under a portable model, increasing the costs of such work, and of extracting and exporting resources from Australia. This impacts on taxes and royalties that our fund schools, hospitals and roads.
233. Australia cannot afford to be awarding ourselves labour cost increases divorced from productivity and competitiveness.

Prefunding impact on business cash flows

234. The McKell Institute Report acknowledges that *"Smaller employers may fail to provide for LSL benefits in their accounting systems and simply pay LSL payments from consolidated revenues as required. The PLSL schemes require employers to prefund these benefit payments, which impacts the employers' cash flows"*.

235. Employers have LSL obligations and meet them as required under law. Contributing LSL monies to an external fund allows that fund to:
- Earn interest on such monies, not the employer whose liability to make such payments has not yet fallen due.
 - Retain contributions where the qualifying service threshold in an industry is not met. Under a non-portable approach in such scenarios, the employer would never have had to pay out monies in such situations.

What to make of this

236. The McKell Institute is in the business of advocacy, and describes itself as a “progressive research institute”. Its name honours a Labor luminary, its staff have strong ties to unions and the Labor party, and its board includes a number of union figures. This is not to downplay *ad hominem* its contribution, but rather to accurately locate it as a left wing think tank and to understand where it is coming from as an advocacy organisation.
237. This much is clear from the Institute’s decision to research portable LSL and in how this was presented publicly. The McKell institute is clearly a proponent of LSL portability as the following comments from its Chief Executive, Peter Bently, show:

So how can we revive the idea of Long Service Leave for the modern economy? By making it portable.

Just as your superannuation account follows you from job to job, so should your long service leave.

Of course, it wouldn't really be Long Service Leave anymore - because the long service wouldn't be to a single employer. We could think of it more as Accrued Employment Leave.³⁴

238. Having looked closely at what the McKell report is arguing and subjecting it to the above scrutiny, this Committee should conclude that:
- The purported advantages of LSL portability being asserted by its proponents do not stand up to scrutiny.
 - The disadvantages of portable LSL clearly outweigh the advantages claimed by its proponents, which are speculative and exaggerated.
 - There is no basis in the evidence to recommend the extension of portable LSL to additional industries, or universally as a community wide right to take a sabbatical/career break.

³⁴ <http://www.dailytelegraph.com.au/news/opinion/long-service-leave-might-be-old-fashioned-but-we-need-it-more-than-ever/story-fnh4it60-1226663306754>



- d. To the extent that the issues raised are valid, they could be addressed in agreements made under the *Fair Work Act 2009*, without the imposition of costly and complicated portable LSL schemes.

7. PORTABILITY OF OTHER ENTITLEMENTS

239. The Terms of Reference (TOR) for this inquiry direct the Committee to consider:

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

240. This is virtually impossible to respond to as participants in this inquiry have no idea which “other” entitlements might be under consideration. There are dozens of employment benefits/entitlements in contracts of employment, awards and minimum standards, and it is quite unclear which we need to address.

241. There is an inherent unfairness/asymmetry inherent in this being included in the (TOR) in such an open ended and unclear manner.

242. Employers cannot be asked to tilt at windmills or erect straw men to tackle. We need to some clarity on which other conditions of employment, award standards or National Employment Standards (NES) may be under consideration for portability. Is it personal leave, annual leave, parental leave, unused RDOs, or some other length of service based entitlement?

243. Were a submitting party to this inquiry, perhaps a union or unions, to propose portability of a non-LSL employment condition, employers will not have an opportunity to respond, and the Committee will only hear one side of the argument. We cannot practically give the Committee arguments against all the accruing entitlements unions may want to see made portable, and due process should see employers able to respond to any such claims.

244. We can however make some general points, presuming that the Committee is being asked to consider portability of length of service based leave entitlements:

245. **There is no loss of ‘other entitlements’ due to labour mobility:** To the extent portable LSL is somehow said to be justified by the nature of work in an industry seeing employees change employer without accruing extended service, or by contracts being let without the employee changing job, this is not true for shorter threshold standards such as annual leave or personal leave.

246. Employees accrue these entitlements on a continuous basis from the commencement of employment with no qualifying period, and are paid out at the termination of employment. If an employee has accrued annual leave or unused RDOs, they would be paid out on termination of employment regardless of length of service. There is no ‘loss’ comparable to that purported to apply in the case of LSL (a contention that employers strongly dispute).

247. **We have enforcement mechanisms:** Existing non-compliance, inspection and enforcement offers no support for extending portability. The Workplace Ombudsman provides extensive information on leave entitlements/obligations, conducts proactive and reactive enforcement, and acts to ensure leave and other standards are enforced. This includes information, advice, inspection and enforcement on LSL.

248. **Employees want the money:** Employees want to be paid out their unused entitlements on leaving a job (where payable), and would not want this to be banked for some possible later usage. Consider the example of an employee leaving a job to start another after a couple of weeks' rest. The employee is likely to want to be paid out their unused annual leave on termination of employment to cover that couple of weeks without a wage/salary. They are not going to want to have that leave carried forward somehow leaving them with no income. Where an employee is dismissed or resigns and has to commence a job search (without a new job to go to) this is even more important.
249. **Hiring disincentives:** Employers already struggle to ensure employees use their annual leave, and to manage leave liabilities. This is a huge financial challenge for Australian business, and a range of employers across industries have put in place measures to reduce liabilities for unused annual leave. A system in which employees came to a new employer with a massive leave liability would complicate and exacerbate this considerably, and make a challenge for many employers a challenge for even more employers (ie. managing leave balances).
250. **Payroll complication:** It would also be very complicated for an employee to receive their payroll from their employer, but their annual leave from some external fund (the portable LSL approach). This would lead to considerable risk of error, non-compliance and foregone entitlements.
251. **This will look ridiculous to international investors:** Australia is already a high labour cost country and considered a complex place to do business and employ people. Sending a message to international investors that they would need to pick up liabilities accrued with previous employers, prior to even doing business or employing anyone in Australia, would discourage investment and employment in this country.
252. **The private sector is different:** A measure of portability is possible in the public sector, where the state is (and remains) the employer at all times and transferring money between agencies is essentially an accounting exercise. This is very different in the private sector and can only be accomplished using complex and very expensive schemes, and by making a currently contingent liability absolute.
253. **This would impose a massive administrative burden:** The cost and complication of creating and administering an annual leave account (for example) for more than 11.8 million working Australians would be very significant. A massive national bureaucracy would need to be created - for no demonstrable gain in employment, productivity, enforcement etc.
254. **Hiring incentives will be compromised:** A mid-career employee, or employee with substantial unused portable leave entitlements is going to become less attractive to hire than someone with shorter work tenure. Employers are not going to fill a position with someone who will shortly thereafter exercise a right to take an extended period off.
255. **No link to industry specifics:** AMMA understands existing LSL portability has historically been justified based on industry specific considerations. A universal right to portability of other entitlements would break this nexus.

256. **Nationalising employment?:** If conditions of employment were to cease to be conditional on length of service or accrual, and become administered by state agencies, at some point we would move closer to nationalising employment and removing it from contractual relations between employers and employees.
257. We would start to move towards a position where employees had European style social security accounts, for all conditions of employment other than pay. This would be a pretty extraordinary proposition and a massive shift for Australia, and any decision to move in such a direction would need to be very carefully considered. A national conversation would need to precede any consideration of acting in this direction.
- 258. Absurdity:** Following the logic, a new or greenfields operation could start and hire its first employees only to find it had an obligation to allow them to take considerable periods of leave based on previous service in an industry.

What to make of this

259. The Committee should make no recommendations:
- a. To extend portable LSL to additional industries or as a general entitlement.
 - b. For portability of any non-LSL employment entitlements,



8. NON-STANDARD MODES OF WORK

260. The Terms of Reference for this inquiry ask the Committee also to consider portable LSL and other entitlements, with particular reference to:

“the number of Australians in insecure work;”

261. Firstly a note on nomenclature. Employers hotly dispute the pejorative, presumptuous linguistic manipulation embodied in the use of the term “insecure work”.

262. This is a trade union campaign slogan not a serious or accepted definition delineating particular types of employment from others. This is not an accepted term in workplace relations, or labour economics. There are no ‘insecure work’ clauses in awards, nor is there an ‘insecure work’ National Employment Standard in the *Fair Work Act 2009*.

263. Where trade unions try to manipulate debate using this term, not only is it hotly contested and becomes a source of dispute in itself, but discussion suffers because discussants are inherently not on the same page, or talking about a commonly understood concept. One person’s understanding of insecure work can differ markedly from other people’s understanding.

264. In using such terminology the originators of this inquiry have, with respect, failed to provide sufficient guidance to submitting parties. If the proponents of this inquiry had in mind particular modes or types of employment they would like submitting parties to address, they should have specifically listed them in the terms of reference, not used an amorphous, objectionable slogan.

What really makes employment insecure

265. There is such a thing as insecure work; however insecurity arises other than we suspect the authors of the terms of reference envisage.

266. No private sector business is ever secure, and ultimately no job is secure outside tenured occupations and parts of the public sector. No employee’s job can ever be more secure than the viability and competitiveness of the enterprise in which he or she works.

267. Businesses trade in very challenging circumstances, and these challenges have increased in recent years for many enterprises. (Genuine job security relies on the trading sustainability, competitiveness and productivity of the enterprise).

268. The security of employment in Australia is not enhanced, and can be reduced by simplistically piling on more employment obligations or crudely increasing the compliance costs of employing in this country.

269. Australia simply lacks the competitive advantages, technological advantages, innovation or market share to be able to impose a general right to a paid sabbatical after a given number of years in the workforce without further

harming our already endangered reputation as a place to invest, do business and create jobs. International investors and markets will not reward us for awarding ourselves a unique and globally unknown employment right.

270. Thus to the extent at security of employment is a relevant consideration in this inquiry, it should weigh in favour of the Committee recommending against portability of LSL.

What we can address

271. "Insecure work" is a slogan lifted from the ACTU campaigning.
272. In an attempt to be as useful to the Committee as possible, and to say something in this area, we reviewed the ACTU's so called independent inquiry into insecure work³⁵ to discern what they are talking about.
273. We see from its final report [Lives on Hold: Unlocking the Potential of Australia's Workforce](#), that unions' concerns in this area appear to centre on:
- Casual employment
 - Independent contractors
 - Migrant work

Casual employment

274. It is important in the context of this inquiry to base any consideration of casual employment on facts, not supposition or union mythmaking.
275. Two key facts should comprehensively discharge consideration of casual employment in the context of this inquiry.
276. **Casuals are clearly entitled to LSL:** Under state and territory LSL legislation, LSL accrues and becomes payable based on length of service with the employer, and is (largely) not conditional on the particular mode of employment the employee worked under (full time, part time, casual etc). This means that a casual employee working 7, 10 or more years will get LSL.
277. Online information from Business Victoria illustrates how this works:

An employee's long service leave entitlement is based on his or her normal weekly hours at the time the leave falls due or is to be paid out.

However, in some cases, an employee's hours may vary from week to week. This may occur, in particular, for casual employees.

Where an employee's hours vary from week to week, the employee's hours for calculating long service leave will be averaged over the

³⁵ <http://www.actu.org.au/our-work/independent-inquiry-into-insecure-work-in-australia>

preceding 12 months, or the preceding five years, whichever average hours are the greater.³⁶

278. Casual employees clearly already accrue LSL where they are continuously employed, and will continue to do so. There is no need for portability of LSL to provide casuals with a LSL entitlement.
279. If, as we recommend, this inquiry recommends progress towards a national, non-portable LSL standard, this should proceed on the basis of casual employment counting towards LSL, as it does now at the state and territory level, with a requirement for continuous service with an employer.
280. LSL for casuals, to the extent it is presently applicable, should be part of any future national LSL standard, through the National Employment Standards in the Fair Work Act 2009. It should be possible to pay a marginally higher casual loading, and for employee to forgo any LSL entitlement.
281. **Casual employment is not increasing:** Unions and various commentators will vociferously decry the casualisation of the Australian workforce, and take as a given that more and more jobs that were formerly full or part time are now being done by casual employees.
282. The only problem is... this is not borne out by the evidence. Claims of casualisation are at the very best at least 15 years out of date, and more correctly, are just wrong.
283. The Productivity Commission in its draft report on Australia's Workplace Relations Framework found that:

Security of work appears to have changed relatively little in recent years. While the proportion of casual jobs increased throughout the 1990s, this trend tapered off during the 2000s, particularly for women. Most people working in casual jobs move into permanent jobs in later stages of their lives.³⁷

While there is an impression amongst some that labour markets have experienced major changes in the past few decades, that perception is largely misplaced. Indeed, in that period, labour markets have changed little. Labour mobility and tenure, casualisation, underemployment and unemployment have fluctuated slightly, but not by much (though there appears to be gathering risks in respect of the latter).³⁸

284. The Productivity Commission is effectively saying that for at least 15 years the incidence of casual employment in Australia has not increased.

³⁶ <http://www.business.vic.gov.au/hiring-and-managing-staff/long-service-leave-victoria/lsl-examples-long-service-leave-entitlements> (emphasis added)

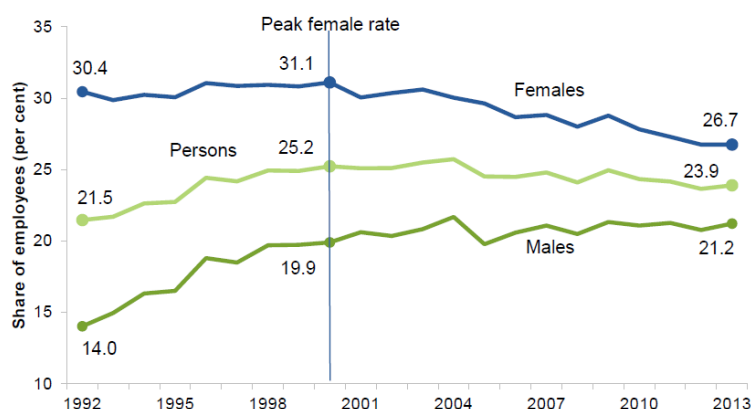
³⁷ Productivity Commission (2015) Draft Report– Workplace Relations Framework - Draft Report, Overview, p.9

³⁸ Productivity Commission (2015) Productivity Commission – Workplace Relations Framework - Draft Report, p.74

285. The PC adds that:

The increase in employment share of non-standard forms of employment has abated, and to some extent even reversed. For example, the share of female employees without leave entitlements — the most commonly used description of a casual worker — scarcely grew between 1992 and 2000, and has since dropped significantly (figure 2.8). While male casual rates grew strongly from 1992 to 2000, they have since stabilised.³⁹

Figure 2.8 **The casual job share has been falling in recent years**
Share of employees, 1992–2013^a



286. The cat has been belled on alleged casualization – it just isn't true.

287. This Committee should conclude that there is nothing in the incidence or regulation of casual employment in Australia, nor in its interaction with LSL, that justifies a shift from employer specific LSL to portable LSL generally across the Australian workforce.

Independent contracting

288. The relationship between independent contracting and LSL seems a pretty simple one. If a purported independent contractor is in fact an employee, he or she will be entitled to LSL based on the length of his or her service as an employee with (what would have been found to be) his or her employer.

289. Again the government provides considerable regulation and information resources on contracting which can assist workers with concerns that they may be employees not contractors. This includes:

- a. <https://www.fairwork.gov.au/find-help-for/independent-contractors>
- b. www.business.gov.au/contractors

290. There are in provisions in the Fair Work Act targeting sham contracting which provide important protections in this area, as do taxation laws.

³⁹ Productivity Commission (2015) Productivity Commission – Workplace Relations Framework - Draft Report, p.101

291. In light of such resources and regulation, we suggest that most instances where an independent contracting arrangement should be found to be an employment arrangement should have come to light well prior to a service threshold being reached for taking LSL, or having it paid out on a pro-rata basis.
292. The Committee should also take into account limitations on any capacity to make reliable conclusions regarding so-called “sham contracting”. The Panel the former Labor government appointed to conduct the Post Implementation Review (PIR) of the *Fair Work Act 2009*⁴⁰ found in 2012 that:

Given the lack of data available the Panel cannot reach a conclusion about sham contracting in Australia across all industries.

Migrant work

293. Unions also link international employees working under various visa types with “insecure work” (sic). A number of inquiries and debates have been undertaken in this area, and some are ongoing.
294. The nexus between international employees and LSL is perfectly clear:
- a. Employers must start to accrue LSL for international employees just as they do for citizens and residents; there is no difference in legal liabilities or rights to LSL based on migration status.
 - b. However, no employee should work under a visa for long enough to become entitled to take or be paid out LSL on a pro rata basis. To get to 7 or 10 years’ service, an international employee should have transitioned to permanent residence, citizenship or some other migration outcome.
 - c. Where an employee commences with an employer on a working visa and remains in that job as they transition to permanent residency, their full job tenure with the employer will determine their LSL entitlement, including the initial period working under a working visa.
 - d. Information on LSL is made available in languages other than English, and advice from the Workplace Ombudsman can be obtained through interpretation in 27 languages.⁴¹.
295. We are not aware of any particular issues being raised in relation to migrant employees and LSL that could make migrant employment relevant to this inquiry.
296. There is nothing germane to this inquiry to be drawn from the employment of non-citizens and non-residents under 457 visas or any other visa series.

⁴⁰ Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation (June 2012), p.224.

⁴¹ <https://www.fairwork.gov.au/contact-us/language-help>

What to make of this

297. Properly considered the various species of work being lumped together under the 'insecure work' banner:
 - a. Are quite irrelevant to the consideration of future policy on LSL.
 - b. In no way justify any recommendations for an extension of LSL portability to additional industries or occupations, or as a general right to take a sabbatical (universal portable LSL).
298. The Committee should make no recommendations pertaining to LSL, based on the purported incidences of, or developments in, 'insecure work' (sic).

9. LABOUR MARKET MOBILITY

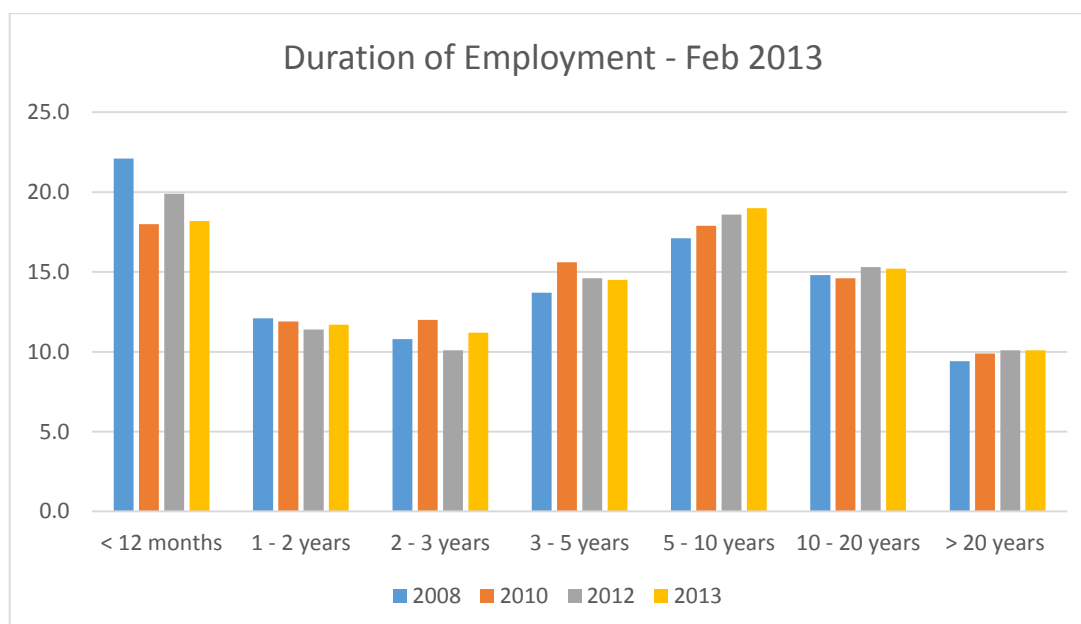
300. The Terms of Reference for this inquiry ask the Committee to consider portable LSL and other entitlements, with particular reference to:

“the extent and nature of labour market mobility;”

301. Presumably, the authors of the terms of reference wished to draw some kind of inference for the future of LSL from changes in labour mobility in Australia.

ABS data – the extent of labour mobility

302. The ABS has for many years published its series on Labour Mobility⁴². The figure below from the most recent survey (February 2013) shows that the duration of employment in Australia remains relatively stable⁴³. This is particularly the case for extended periods of service (over 7 or 10 years) that trigger LSL:



303. ABS labour mobility data also shows us that the proportion of Australians leaving jobs each year also remains relatively stable (below).

304. There appears to be little that can be concluded from the existing Labour Mobility data that would be of assistance to the Committee in considering the future of LSL, or any extension of LSL portability.

⁴² ABS Cat No. 6209.0

⁴³ Source

Persons who ceased a job during the year, Number, and proportion of those who worked at some time during the year-By sex - February 2008 to February 2013⁴⁴

| | 2008 | | 2010 | | 2012 | | 2013 | |
|----------------|----------------|-------------|----------------|-------------|----------------|-------------|----------------|-------------|
| | '000 | % | '000 | % | '000 | % | '000 | % |
| Males | 1 029.3 | 16.8 | 930.3 | 14.7 | 1 091.0 | 16.5 | 1 044.6 | 15.6 |
| Females | 1 020.5 | 19.6 | 922.8 | 17.0 | 1 048.3 | 18.4 | 976.2 | 16.9 |
| Persons | 2 049.8 | 18.1 | 1 853.1 | 15.7 | 2 139.4 | 17.4 | 2 020.9 | 16.2 |

The future

305. Whilst there are few observable changes in labour mobility to date, it is probable that this will change in the future. AMMA foresees the following changes during the medium to longer term:

306. **Job tenure will decrease for many employees:** One of the most discussed futurist trends of recent years is the purported difference in job aspirations, orientations etc. of those entering the workforce compared to established employees. Whilst much of the media fascination with Generation Y, and Millennials is exaggerated and facile, a few clear points do stand out for the future:

- a. Fewer employees are likely to complete extended job tenure with any single employer in the labour markets of the future. An employee entering the workforce now is likely to have more employers across their career, and shorter job tenure with any single employer, than today's mid-career employees and the baby boomers.
- b. Shorter periods of job tenure with any single employer will become the norm, and will not disadvantage or tar any employee in the labour market of the future. Indeed, too long a period with any single employer may unfortunately become a poor reflection on an employee in the eyes of some, and a point of future labour market disadvantage.
- c. Australians will increasingly pursue multiple careers across their working lives.
- d. Skills portability and transferability between employers should facilitate inter-company movement, and even inter-industry movement, for an increasingly diverse range of employees, including in those occupations which previously typified "job for life" employment.
- e. Periods in and out of the workforce - for study, for career change, for self-employment, to raise families, and for sabbaticals and holidays - will become more common and not disadvantage employees' longer term job or career prospects. Periods out of work, or out of work in a particular area, will become more common in the labour markets of the future.

⁴⁴ Source: <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6209.0/>

307. The ABS tracks job tenure in its labour mobility series⁴⁵. Whilst the data is relatively stable at the headline level in terms of the proportion of employees being with one employer for ten years or more, it can be forecast that long tenure employment will be decreasingly prevalent in coming years, particularly outside the public and funded sectors.
308. **Employee priorities will become ever more diverse:** Employees will increasingly drive when they leave jobs, change careers, choose to study, take time with families, etc. This will be diverse and employee-driven and will not be based on the imposed assumptions that underpin existing LSL models.
309. **Male breadwinner assumptions will be less and less relevant:** Long standing rules for the taking of LSL are predicated on the assumption that when the person taking the LSL has LSL, it will suit all members of his family to take LSL. This may have worked well when the male breadwinner model applied, but in contemporary and future Australia:
- a. More and more families will have two working parents.
 - b. The probability that the LSL of the two working parents will fall due at the same time will be negligible.
310. If families of the 21st century are to use LSL for family recreation, there will need to be greater flexibility and choice in how LSL is accrued, taken and used to help parents coordinate asynchronous LSL and other leave entitlements.
311. **Employees will fund their choices:** Contemporary employees are funding their own career shifts, using HECS and other schemes to move into study; choosing part-time work to facilitate study and child caring; and organising periods of holiday or career break based on their own expenditures.
- a. This is not to exaggerate the disposable incomes of today's employees, but to note that where people are pursuing flexibility in their work and careers, it is often self-funded rather than relying on LSL.

What to make of this

312. Labour mobility data, and foreseeable future directions for the Australian workforce favour the approach the resource industry, through AMMA, commends to this Committee, namely:
- a. The Committee should support the retention of LSL as an Australian employment standard/entitlement, on the long standing basis of extended service with a single employer (ie. as a non-portable entitlement).

⁴⁵ ABS Cat. 6209.0 - Labour Mobility, Australia

- b. The Committee should not recommend any extension of LSL portability either to additional industries, or as a universal entitlement to a 'sabbatical' after a given number of years in the workforce regardless of how many employers someone may have worked for.
- c. The Committee should recommend greater flexibility and choice in how employees accrue and take their LSL (by agreement), and the breaking down some of the paternalistic outdated regulation currently governing of how LSL may be accrued, used and taken.
- d. The Committee should recommend for the development of a national LSL model, to be contained in the National Employment Standards under the Fair Work Act. This should see:
 - i All national system employers and employees work under a single national, non-portable, LSL standard, regardless of the state or territory in which they work.
 - ii A national LSL scheme override state and territory legislation.
 - iii The removal of LSL from all awards.
 - iv Options identified / recommended to reconcile the differences between existing state and territory LSL systems, including phasing in over time towards a single national LSL standard.
 - v For the very small residual coverage of the private sector by state workplace relations legislation/awards, there be either:
 - (1) Harmonised or model LSL legislation, identical to any National Employment Standard on LSL under the Fair Work Act, or
 - (2) A referral of state powers over LSL to the Commonwealth, ensuring the national standard applies in all circumstances.