

ATTACHMENT B – RATIONALE UNDERPINNING LSL

[Source: ACCI Submission to Victorian Portable LSL inquiry, August 2015⁵⁷]

The original objects underpinning long service leave are anachronistic, bringing into question the relevance of the entitlement in the modern context. In 2004 the Australian Industrial Relations Commission released a discussion paper entitled *Long Service Leave: Towards a National Minimum Standard* (2004 Paper). The 2004 Paper suggested that:

Over time, a number of rationales have underpinned the provision of LSL – these being: to provide employees with an extended leave of absence in order to renew their energies; to reward long and faithful service with an employer; and to reduce labour turnover.⁵⁸

In 2003 Senior Deputy President Lacy of the Australian Industrial Relations noted that since long service leave gained statutory recognition in the states, commencing in New South Wales in 1951:

...there has been little change to the structure of long service leave. It is generally regarded now as an opportunity for an employee to take some respite from a long period of service in the one business.⁵⁹

Portable long service leave schemes do not share this rationale and are generally understood to have been designed in response to the unique nature of industries in which employees are typically engaged on a project basis and move from employer to employer as one project is completed and another starts. However the rationale for portable schemes does not exist in industries where traditional employment arrangements are commonplace and employees are generally employed by employers on an ongoing basis.

A 2013 report entitled “The Case for a National Portable Long Service Leave Scheme in Australia” (McKell Report), cites the following three reasons for providing long service benefits and suggests that the third is “becoming increasingly important as Australians spend larger proportions of their lifetimes in employment and growing numbers of workers are remaining in the workforce at older ages”:

- *to reduce labour turnover;*
- *to provide a reward for long and faithful service; and*

⁵⁷ ACCI (2015) Submission to the Victorian Parliament's Inquiry into Portability of Long Service Leave, pp.7-12.
http://www.parliament.vic.gov.au/images/EDJSCommittee/Sub_42_07082015_Australian_Chamber_of_Commerce_and_Industry.pdf

⁵⁸ Australian Industrial Relations Commission. (2004). *Long service leave in Australia: towards a national minimum standard*. Available at http://www.oirc.gov.au/familyprovisions/aig/TAB_12.pdf, p. 2.

⁵⁹ Re. Office of the Chief Electrical Inspector Enterprise Agreement 2003 (AIRC) PR942414 (5 January 2004) para. 8.

- *to enable employees halfway through their working life to recover their energies and return to work renewed, refreshed and reinvigorated.*⁶⁰

Employee retention and rewarding “faithful service” remain a key priority for employers in the long service leave equation but ACCI queries how they constitute valid reasons for extending existing long service leave arrangements by making them portable. As has been observed by the Productivity Commission:

*While LSL may not be an efficient measure for creating employer loyalty, it must have some effect, which would be diluted with full portability.*⁶¹

Portable schemes seem more likely to increase rather than reduce labour turnover in workplaces.

In considering whether there is a need for portable long service leave to enable employees to “renew their energies”, one needs to consider the evolution of the world of work and they in which this can be achieved through other entitlements, such as the availability of flexible forms of work in the modern economy (e.g. job-sharing, working from home, 48/52 leave and flexible part-time arrangements). These and strategies adopted by employers at the enterprise level will better support this outcome.

It is also far from settled as to whether entitlements accrued under existing schemes are actually taken as long service leave during the life of employment, cashed out or saved for retirement income. The Productivity Commission has recently said the following in relation to the benefits that advocates of portable long service leave have suggested:

*...there are doubts about the magnitudes of some of these benefits. There are several natural experiments on the impacts of LSL portability provided by various existing state-based arrangements...It appears that, notwithstanding the goal of providing a time for recuperation, employees under portable schemes do not necessarily take the leave.*⁶²

The NSW Industrial Relations Advisory Council has advised that Productivity Commission that:

*in many cases, LSL is not regarded as an opportunity for career renewal, but rather as an economic asset.*⁶³

Ferris et al have also observed that:

...it is clear that LSL entitlements are used flexibly, for a wide range of different purposes. LSL can be used for retirement savings; redundancy pay; death and disability pay; to extend parental leave or carers' leave; or as a lump sum resignation payment. In some jurisdictions, LSL payments can be cashed out,

⁶⁰ 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. 10.

⁶¹ Productivity Commission 2015, *Workplace Relations Framework*, Draft Report, Canberra, p. 178.

⁶² Productivity Commission, op. cit., p. 176.

⁶³ Ibid., p.176.

*which means that LSL is simply a savings account that can be drawn upon in an emergency.*⁶⁴

As noted above, Commissioner Gyles made the following comments in his inquiry into Productivity in the Building Industry in New South Wales:

*... the construction industry scheme is not concerned with leave at all, but with payments. In other words, a scheme which was initially promoted on the basis that an employee who faithfully served an employer for an extended period deserved a long break as a reward, has been transformed in the construction industry into a scheme whereby anybody who is employed in the industry for a total of 10 years, no matter many employers are involved or how frequently he or she goes and works temporarily in another industry, will be entitled to a sum of money.*⁶⁵

The ABS has not published data on long service usage since 1990, but Ferris et al observe that the data available suggests that the rates of taking long service leave were low across the board⁶⁶ and also points to the habit of Australian workers accumulating their leave entitlements.⁶⁷

It suggested that the Victorian Government undertake some contemporary research into the utilisation of long service leave amongst eligible Victorian workers in both the public and private sectors before making any significant decisions in relation to long service leave.

The McKell Report suggests the following potential advantages and disadvantages of portable long service leave:⁶⁸

Potential advantages of PLSL schemes	Potential disadvantages of LSL portability
<p>Retention of workers – PLSL schemes address challenges in retaining employees in industries with high levels of labour mobility.</p> <p>Equity – Workers in highly casualised or contract roles otherwise have no practical access.</p>	<p>Administration costs for employers – 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.</p>

⁶⁴ Ferris et al, op. cit., p. 12.

⁶⁵ Gyles, R. QC 1992, Royal Commission into Productivity in the Building Industry in New South Wales, Final Report, Sydney, NSW, p. 92.

⁶⁶ Ferris S et al, op. cit, p. 12.

⁶⁷ Ibid., p. 12.

⁶⁸ Markey et al, op. cit., p. 12.

Potential advantages of PLSL schemes	Potential disadvantages of LSL portability
<p>Mobility and flexibility – Workers have more capacity to move between employers or to take short periods out of employment to meet commitments such as carer responsibilities.</p> <p>Productivity and work environment – 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.</p> <p>Employee attraction – A benefit for “good employers” as employees feel less compelled to stay in poorly managed workplaces in order to meet LSL eligibility requirements.</p> <p>Non-compliance problems reduced – Employers pay for entitlements as they accrue.</p> <p>Free-riding problems reduced – 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.</p> <p>Administrative benefits for employers – Industry funds effectively remove from employers the responsibility for administering LSL arrangements and payment for employees.</p> <p>Cost certainty – 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</p>	<p>Financial costs of providing benefits for employees who leave after a short period of service – 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.</p> <p>Prefunding impact on business cash flows – 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.</p>

Potential advantages of PLSL schemes	Potential disadvantages of LSL portability
<p><i>become insolvent or have trading difficulties.</i></p> <p>Tax benefits – 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.</p>	

It is questionable as to whether all the benefits identified above materialise in practice and in a meaningful way. While retaining employees in 'industries' is perceived to be a potential advantage, there is no recognition of the dividend that employers (who fund the entitlements) currently derive from retaining a stable workforce of experienced, loyal and long serving employees or the fact that it would be lost. The potential 'employee attraction' advantage is based upon suppositions that a cohort of employees working in 'poorly managed workplaces' will now move to 'good employers' because of portability of long service leave entitlements.

Labour mobility in the construction industry is an important feature due to the cyclical nature of work and the portable schemes attach long service entitlements to service within the industry rather than with the one employer. However there is no evidence to suggest that the expansion of portable schemes into other industries will be the catalyst for the retention of people in those industries. There are a wide variety of reasons why people may wish to change careers and industries including but not limited to personal development, financial incentives such as higher pay and better benefits, personal preference and job satisfaction, issues related to health or capacity. Career decisions are very personal and regulating to influence choices through such a discrete employment entitlement is unlikely to be effective.

Portable long service leave schemes are already in existence in some industries including building and construction (in all states), coal mining (at the Commonwealth level), contract cleaning (in New South Wales, the Australian Capital Territory and Queensland), community services and security (in the Australian Capital Territory). Of these schemes, the Productivity Commission recently stated:

In many cases, it would appear that portability schemes are more a direct result of bargaining power by parties in select industries, than of significant evidence of the benefits of such schemes for productivity.⁶⁹

⁶⁹ Productivity Commission, op. cit., p. 178.

The 2003 Report of the Royal Commission into the Building and Construction Industry states that the key factors that led to the introduction of portable schemes in the construction industry were:

- *the strategic nature of the building and construction industry;*
- *high union density and industrial strength;*
- *a well-established industry focus;*
- *patterns of employment in the industry (references omitted).*⁷⁰

These are highly distinctive characteristics. It cannot be assumed that they are relevant across the board and ACCI does not believe that consideration of these factors against the circumstances of other significantly different industries can lead to any cogent rationale for portable scheme expansion.

⁷⁰ Royal Commissioner The Honourable Terrence Rhoderic Hudson Cole RFD QC, 2003, [Final Report of the Royal Commission into the Building and Construction Industry](#), Reform Funds, Vol. 10, p. 219.