

CHAPTER 2

Nationalising long service leave

History of long service leave

2.1 The history of long service leave (LSL) is important in understanding the ideological viewpoints driving debate about its future. The history of LSL has featured heavily in arguments both for and against the extension of portability of LSL entitlements to people who do not remain with one employer for enough time to be eligible for traditional LSL entitlements.

2.2 In considering the history of LSL in Australia and whether changes are necessary, the Australian Chamber of Commerce and Industry (ACCI) noted:

Paid long service leave is unique to Australia and New Zealand and an informed policy discussion regarding changes to the nature and structure of long service leave should involve consideration of the historical origins of long service leave as an employment entitlement.¹

2.3 In Australia, LSL has existed since the 1860s when it was designed to allow people to return to their home country once a decade. In this respect, LSL has long been considered a reward to people who demonstrated loyalty by remaining with their employer for considerable periods of time. It also served the practical purpose of refreshing the workforce as well as retaining skills and expertise with a particular employer.

2.4 Thus, as noted by the Australian Industry Group (AiGroup) in its submission, the conception of LSL was intrinsically linked to its original purpose:

The fundamental purpose of long service leave is to reward an employee with a period of rest after a long period of loyal service with one employer. Consistent with this fundamental purpose, long service leave was conceived in Victoria in the 1860s to give the workforce of that time the opportunity to periodically make the long journey back to their home countries.²

2.5 The extension of LSL beyond the public sector to the private sector occurred in the 1940s 'via inclusion in private sector awards with entitlements created through the processes of conciliation and arbitration'.³ These entitlements were 'based on continuous service with one employer'.⁴

1 Australian Chamber of Commerce and Industry, *Submission 20*, p. 7.

2 Australian Industry Group, *Submission 7*, p. 5.

3 Australian Chamber of Commerce and Industry, *Submission 20*, p. 8.

4 Australian Chamber of Commerce and Industry, *Submission 20*, p. 8.

2.6 The key characteristic of LSL as originally designed was therefore that it was available to certain employees who remained with a single employer for a significant amount of time.

2.7 Beyond this traditional construct, some portability schemes developed in industries where there existed unique employment arrangements.⁵ In these cases, portability was designed to allow eligible workers continuity in accruing LSL, despite the fact that they may not have spent the mandated length of time with a single employer.

2.8 Portability is seen as especially important for workers in industries such as the building and construction industry, whose nature means that workers do not usually work for a single employer for long periods of time, but who may be employed over many years on a project basis, or in some other way routine to that industry.

2.9 In its submission ACCI explains the rationale for portability of LSL:

Portable long service leave schemes ... 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 that lack this predominant character.⁶

2.10 The McKell Institute, an independent public policy institute, produced a report in June 2013 entitled 'The Case for a National Portable Long Service Scheme in Australia' (the McKell report).⁷

2.11 The McKell report argues for a national portable long service scheme which would cover all workers. It cites three benefits of providing long service leave to workers:

- to reduce labour turnover;
- to provide a reward for long and faithful service; and
- to enable employees halfway through their working life to recover their energies and return to work rewarded, refreshed and reinvigorated.⁸

5 See list of industry or occupation based portable schemes in Department of Employment, *Submission 33*, p. 14.

6 Australian Chamber of Commerce and Industry, *Submission 20*, p. 10.

7 McKell Institute, *The Case for a National Portable Long Service Scheme in Australia*, June 2013, http://mckellinstitute.org.au/wp-content/uploads/2013/06/McKell_Portable_LongService.pdf (accessed 16 December 2015).

8 McKell Institute, *The Case for a National Portable Long Service Scheme in Australia*, June 2013, http://mckellinstitute.org.au/wp-content/uploads/2013/06/McKell_Portable_LongService.pdf (accessed 16 December 2015), p. 10.

2.12 The McKell report notes the third reason 'is becoming increasingly important to Australian workers' as they spend a larger proportion of their lives in employment, and are working to an older age.⁹

2.13 The McKell report also suggests that high mobility in the workforce has resulted in a low proportion of workers being able to access LSL benefits – 'some due to employment choices and others for structural reasons'.¹⁰

2.14 The Australian Nursing and Midwifery Federation (ANMF) submitted:

The ANMF believes that long service is a valuable and valued entitlement. However, since the inception of LSL in the nineteenth century the circumstances of work and society have changed immeasurably. Work has changed dramatically (both in its complexity and intensity), work is less secure, changes of employment (and employer) are more frequent and workers are more often required to reskill in order to obtain and retain employment.

...

All of these factors make entitlement and access to long service leave even more important today...¹¹

2.15 The Motor Trade Association of South Australia (MTA) states:

While the MTA does not argue in this submission that there should be a change to the proposed quantum of LSL entitlement, it is worth the Committee making note of the need to revisit this issue at a further date given that the original rationale for LSL may no longer be applicable to the modern workplace relations system.¹²

2.16 Thus, changes in labour market mobility in Australia since the inception of LSL in the 1860s may mean that LSL no longer has the same relevance it once did and that it should be viewed in a fresh context, consistent with current workforce realities. This includes recognising the importance of the individual worker and the way in which individuals participate in the workforce.

9 McKell Institute, *The Case for a National Portable Long Service Scheme in Australia*, June 2013, http://mckellinstitute.org.au/wp-content/uploads/2013/06/McKell_Portable_LongService.pdf (accessed 16 December 2015), p. 10.

10 McKell Institute, *The Case for a National Portable Long Service Scheme in Australia*, June 2013, http://mckellinstitute.org.au/wp-content/uploads/2013/06/McKell_Portable_LongService.pdf (accessed 16 December 2015), p. 10.

11 Australian Nursing and Midwifery Federation, *Submission 14*, pp 3-4.

12 Motor Trade Association of South Australia, *Submission 24*, p. 8.

The long service leave system

2.17 The current LSL system is by all accounts, complex. There are multiple working parts and the system is non-uniform across jurisdictions and industries.

2.18 A starting point for understanding LSL arrangements is the National Employment Standards (NES) which includes a long service leave standard to provide an employee leave after a long period of working for the same employer.¹³ This was designed to be a transitional standard, pending the development of a uniform national long service leave standard.

2.19 While the NES sets out minimum employment standards, a worker's terms and conditions of employment generally come from an award or agreement.¹⁴

2.20 Most entitlements to long service leave come 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; and
- how much long service leave the employee gets.¹⁵

2.21 The Productivity Commission has outlined the relationship between the NES and various legislation, noting the complexity and unevenness of these arrangements:

Whereas the NES provisions on other leave entitlements are quite specific and self-contained — for instance stipulating that all full time national system workers are entitled to four weeks paid annual leave per year or up to 12 months unpaid parental leave — the NES provisions on LSL are neither. They provide only for a 'transitional' Entitlement to LSL for the workers who would have otherwise been covered by a pre-reform award or enterprise agreement. Most employees in the national system derive their LSL entitlement from state and territory legislation...

This complicates the task of determining the specifics of a worker's entitlement. The employer must first check whether the worker is covered by an agreement made either prior to January 2010 that remains in effect, or by an 'award based transitional instrument'. Where an agreement has lapsed,

13 The NES consist of ten minimum standards of employment. The NES apply to all employees covered by the national workplace relations system, regardless of the applicable industrial instrument or contract of employment. Terms in awards, agreements and employment contracts cannot exclude or provide for an entitlement less than the NES, and those that do have no effect. Fair Work Commission, <https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/minimum-workplace-entitlements/introduction-to-the-national-employment-standards> (accessed 16 December 2015).

14 Fair Work Commission, <https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/minimum-workplace-entitlements/introduction-to-the-national-employment-standards> (accessed 16 December 2015).

15 Fair Work Commission, <https://www.fairwork.gov.au/leave/long-service-leave> (accessed 15 February 2016).

and so does not cover the worker, and/or where the relevant instrument does not specify the worker's LSL entitlement, as is commonly the case, the employer must abide by the relevant state or territory's legislation instead. The reliance on state and territory legislation has resulted in considerable variation in LSL arrangements and entitlements across Australia.¹⁶

2.22 The table below sets out the long service leave entitlements for each state and territory. The committee notes significant differences in qualifying period and entitlement across jurisdictions.¹⁷

Table 16.1 Long service leave entitlements^a

<i>State</i>	<i>Legislation</i>	<i>Qualifying Period</i>	<i>Entitlement</i>
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 years	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* (Cth) rather than LSL legislation in the ACT.

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

2.23 By way of comparison, in New Zealand LSL 'is not a legal requirement but may be negotiated between an employer and employee as an additional entitlement under their employment agreement. How long an employee has to work to qualify for long service leave will depend on what is agreed between the employee and employer'.¹⁸

2.24 Submitters to this inquiry have suggested that Australia's complex and non-uniform arrangements regularly causes confusion for both workers and employers, and can also lead to unintended errors in dealing with LSL entitlements for

16 Productivity Commission, *Workplace Relations Framework: Report No. 76*, 30 November 2015, <http://www.pc.gov.au/inquiries/completed/workplace-relations/report/workplace-relations-volume1.pdf> (accessed 17 February 2016), pp 520-521.

17 Productivity Commission, *Workplace Relations Framework: Report No. 76*, 30 November 2015, <http://www.pc.gov.au/inquiries/completed/workplace-relations/report/workplace-relations-volume1.pdf> (accessed 17 February 2016), p. 521.

18 New Zealand at Work, <http://www.dol.govt.nz/workplace/knowledgebase/item/1314> (accessed 22 January 2016).

individuals. This is particularly so for employers which operate their business across multiple jurisdictions.

2.25 Master Builders Australia 'acknowledges that the lack of uniformity, as a result of inconsistent State and Territory legislation, can pose a challenge to some employers who operate across the jurisdictions'.¹⁹

2.26 The MTA also notes challenges in its submission:

Currently, the NES maintains the status quo of various industrial instruments that applied as of 1 January 2010, without any consistency. It is a transitional arrangement pending the development of a uniform NES-LSL.

...

Determining the appropriate LSL instrument under the NES can be complex, especially where pre-reform Federal LSL awards are involved. The applicability of a particular award or other LSL instrument to an employee is often unclear, confusing and adds to business compliance costs. A more simplified and easy to apply approach should be a feature of any transitional arrangement to a new LSL standard under the NES.²⁰

2.27 The committee notes that criticism and concern about the current arrangements is widespread across both employee and employer groups. For example, the AiGroup states:

Australia's long service leave laws are a mess. The interaction between the long service leave provisions in the NES, State and Territory laws and enterprise agreements is so complex that employers and employees find it difficult to navigate and determine entitlements.²¹

2.28 In its submission, the Australian Council of Trade Unions (ACTU) discusses both traditional and portable LSL schemes in terms of overall complexity of the system:

The transitional position adopted in respect of the NES reflects the complexities associated with the regulation of LSL throughout Australia. There are differences in the minimum level of entitlement to LSL under the different schemes in existence, reflecting the fact that, historically, LSL entitlements have been contained in State and Territory legislation, State and Commonwealth industrial awards and Commonwealth legislation.

...

A further layer of complexity is added by the operation of the portable LSL schemes applying to the building and construction, coal mining, security and contract cleaner industries. These schemes operate on an entirely

19 Master Builders Australia, *Submission 10*, p. 4.

20 Motor Trade Association of South Australia, *Submission 24*, p. 9.

21 Australian Industry Group, *Submission 7*, p. 9.

different basis to the traditional statutory LSL schemes, in that they recognise service with (potentially) multiple employers allowing employees to accrue an entitlement based on service in an industry or sector.²²

2.29 Jobwatch Employment Rights Legal Centre echoes this sentiment in its submission:

The National Employment Standards contain long service leave as a minimum standard, however, the Fair Work Act leaves the matter of determining long service leave up to the states where a Modern Award does not discuss long service leave. Most Modern Awards do not contain long service leave, therefore the matter is left up to state legislation meaning that across different states, different entitlements apply even within the same or substantially same occupation. Therefore, there is somewhat of an absurdity in calling an entitlement a National Employment Standard where it is not employed evenly across the Commonwealth. What this implies is that the long service leave entitlements as they stand are incomplete, and action is needed to standardise the system.²³

2.30 The South Australian Wine Industry Association (SAWIA) supports a move to nationally harmonised long service leave (under certain circumstances), in light of practical difficulties employers can experience in determining correct entitlements:

One of SAWIA's larger members recently experienced a number of challenges determining the correct long service entitlements for interstate employees despite having advanced and modern payroll software and significant in-house payroll and IT expertise. Further, medium sized businesses with interstate employees are more likely to utilise a standard payroll system which in SAWIA's experience cannot easily manage the required calculations for either accrual or the payment for taking annual leave, particularly where there has been a change in employment status.

In SAWIA's experience, even with the highly sophisticated payroll software, determining long service leave entitlements for each relevant jurisdiction and payments far too often involves a degree of manual processing where employees in multiple locations are involved. This is an example of unnecessary red tape, loss of productivity and costs for businesses of all sizes.²⁴

2.31 The information provided to the committee from a range of representative groups highlights the significant challenges that can exist for employers trying to navigate the LSL system as it currently stands, particularly those employers who operate across more than one jurisdiction. This leads to the question of whether the LSL standard should be nationalised.

22 Australian Council of Trade Unions, *Submission 19*, p. 16.

23 Jobwatch Employment Rights Legal Centre, *Submission 15*, pp 4-5.

24 South Australian Wine Industry Association, *Submission 22*, p. 2.

Should the LSL standard be nationalised?

2.32 In light of the inherent complexities with navigating the current LSL arrangements in Australia, numerous submitters suggested that implementing a national LSL standard would help ensure consistency between jurisdictions and simplify the system. In turn, this would reduce the risk of errors in calculating workers' entitlements.

2.33 In its 2015 Workplace Relations Framework inquiry report²⁵, the Productivity Commission noted that several major employer groups and unions supported moving to a uniform national standard:

Many submitters recognised the benefits of moving to a uniform national standard. The Australian Council of Trade Unions (ACTU) argued that 'the missing element in the comprehensive suite of minimum standards set out in the [National Employment Standards] is long service leave'. Without agreeing on the specifics of any entitlement, the Australian Workers' Union, the Australian Industry Group, the Australian Mines and Metals Association and the Victorian Government joined the ACTU in endorsing, in principle, a national approach.²⁶

2.34 This is consistent with the information provided by submitters to this inquiry who have argued that consistent arrangements should be adopted to simplify the LSL scheme. Further, some submitters have suggested that nationalising the system is the natural starting point for LSL reform in Australia:

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.²⁷

2.35 AMMA strengthened its argument for nationalising the LSL system in Australia, by pointing out that Australia 'has all but achieved a national workplace system with the exception of a couple of areas, one of which is LSL'²⁸ and suggests simplifying the system as a priority:

AMMA and its members are of the conviction that a single national, non-portable, LSL standard is achievable in Australia, and should be pursued.

The best minds of the Australian workplace relations policy community are quite capable of analysing/deconstructing existing variable state and

25 Productivity Commission, *Workplace Relations Framework: Report No. 76*, 30 November 2015, <http://www.pc.gov.au/inquiries/completed/workplace-relations/report/workplace-relations-volume1.pdf> (accessed 17 February 2016).

26 Productivity Commission, *Workplace Relations Framework: Report No. 76*, 30 November 2015, <http://www.pc.gov.au/inquiries/completed/workplace-relations/report/workplace-relations-volume1.pdf> (accessed 17 February 2016), p. 522.

27 Australian Mining and Minerals Association, *Submission 11*, p. 9.

28 Australian Mining and Minerals Association, *Submission 11*, p. 10.

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.²⁹

2.36 The ANMF suggests that a 'nationally consistent LSL scheme could potentially streamline current arrangements for both employers and employees, particularly those operating in various state and federal jurisdictions'.³⁰ Similarly, the National Farmers' Federation (NFF) argues that '[a]doption of a national long service leave standard should be a priority, to reduce complexity and compliance costs'.³¹

2.37 A number of submitters note that this issue is not new, referring to previous discussion about reforming LSL. For example, the Recruitment and Consulting Services Association of Australia and New Zealand (RCSA):

RCSA support the harmonisation of regular long service leave entitlements within Australia, as proposed during the establishment of the National Employment Standard under the Fair Work Act 2009.

The maintenance of a state based system of long service leave results in unnecessary confusion and administrative cost for employers that employ employees across state borders.³²

2.38 Similarly, the NSW Farmers Federation discussed the complexity of current arrangements and noted that a review of the Fair Work legislation in 2012 recommended a national standard for LSL be established.

NSW Farmers fully supports the creation of a national standard for LSL to ensure consistency across the states and to help reduce complexities for employers operating in more than one state or territory. There are national minimum standards relating to other types of leave (e.g. annual leave and personal/carer's leave), so a national standard should also apply to LSL, especially given that there are similar themes that can be found across the jurisdictions.³³

2.39 The Health Workers Union – Victoria (HWU), added:

Australia has multiple legislative frameworks relating to long service leave operating across its states and territories. This makes the existing long service leave provisions in Australia highly complex and inflexible.

...

Notwithstanding, National standards would provide greater flexibility for employment across different states and territories and reduce the

29 Australian Mining and Minerals Association, *Submission 11*, p. 21.

30 Australian Nursing and Midwifery Federation, *Submission 14*, p. 5.

31 National Farmers' Federation, *Submission 31*, p. 9.

32 Recruitment and Consulting Services Association, *Submission 13*, p. 2.

33 NSW Farmers Federation, *Submission 25*, p. 6.

administrative burden for employers who operate across more than one jurisdiction.³⁴

2.40 The evidence strongly suggests that there is broad support for a nationalised LSL standard, in light of the non-uniform and complex arrangements currently in place. The key rationale for a nationalised system would be to simplify the current arrangements and ensure that both employers and workers are better able to understand and apply LSL entitlements, regardless of jurisdiction. Nationalisation would be especially helpful to those employers who engage workers across multiple jurisdictions.

2.41 It would appear a logical starting point of any reform of LSL in Australia to consider standardising arrangements across all jurisdictions. Successful simplification of standard LSL arrangements would be likely to make the administration of portable LSL easier to deal with.

Challenges of achieving a national LSL standard

2.42 Evidence received by the committee suggests almost universal acceptance that current LSL arrangements are unduly complex and that strong support exists for a national approach to be adopted.

2.43 The Department of Employment (the department) submitted that a 'national long service leave standard has been considered by governments for some time' and during a 2012 Fair Work Act Review, development of a national standard had broad support with stakeholders expressing a preference to simplify the LSL system.³⁵

2.44 However, a number of submitters, including the department, point out that achieving a nationalised standard will not be easy at a practical level because of a range of significant challenges, including the multi-jurisdictional nature of the current LSL arrangements, cost to employers and potential loss of entitlements by some workers:

The key challenge in establishing a national long service leave standard is that state and territory governments maintain primary responsibility for long service leave entitlements. In order to achieve a national standard, the state and territory governments will need to reach consensus on the provisions, such as the quantum of leave and qualifying periods. This will be difficult, considering the differences in the entitlements between jurisdictions. Achieving a uniform standard based on an average of the current range of entitlements could, for example, result in some employers having higher costs and some employees receiving lower entitlements than under their current arrangements.³⁶

34 Health Workers Union, *Submission 29*, p. 37.

35 Department of Employment, *Submission 33*, p. 4.

36 Department of Employment, *Submission 33*, p. 5.

2.45 The department set out other potential challenges that would need to be considered in nationalising a LSL standard:

- state and territory laws also include a range of entitlements relating to termination of employment and other matters, such as cashing out of leave;
- a number of possible legislative approaches to developing a national standard, including establishment in Commonwealth legislation or harmonisation through the state and territory systems. Given national system requirements, the state and territory governments would need to be consulted and agree to implement a national standard;
- any approach would require appropriate transitional arrangements for employees entitled to long service leave under state and territory legislation or the NES. These may raise constitutional issues, such as obligations in relation to acquisition of property and state based differences;
- transitional arrangements are likely to be administratively complex, as they would require employers and employees to comply with multiple legislative instruments during the transition period. The transition period would also be prolonged, as long service leave entitlements crystallise and then can be taken over a period of many years; and
- depending on the approach, the development of a national standard may continue to require both Commonwealth and state enforcement agencies, as with the current arrangements.³⁷

2.46 The Media, Entertainment and Arts Alliance (MEAA) notes the complexity of the process has probably led to a delay in dealing with the issue of nationalisation of LSL, however, it suggests this delay can be positive, in that it will allow more time to properly consider all of the issues:

As is well-known, there are current national minimum standards for a range of leave entitlements under the National Employment Standards (NES). The absence of such a protection for LSL is regrettable. The lack of activity in developing a standard from 2010 to the present date has delayed what all interested parties believe will be a complex process requiring extensive consultation.

It is possible, however, that the delay in developing a uniform national LSL standard will enable greater consideration of the need for more equitable thresholds to LSL entitlements and considered treatment of the question of how to ensure Australia's highly mobile workforce are able to access LSL when working for a single employer over an extended period is impossible.³⁸

2.47 Master Builders Australia has shared feedback from its members about the current LSL arrangements:

37 Department of Employment, *Submission 33*, p. 5.

38 Media Entertainment and Arts Alliance, *Submission 9*, p. 4.

Feedback from our members has suggested the current administrative models, across the jurisdictions, work well and are not considered overly burdensome in their current form.

The key challenge remains, however, to take exiting State based construction industry LSL schemes, some of which function very well, to a national level, without forfeiting the benefits which have already accumulated under existing autonomous State based schemes.³⁹

2.48 The HWU has set out the challenges it sees in standardising LSL arrangements:

The impact of varying state and territory long service leave arrangements on a NPLSL scheme administered by the Commonwealth will prove to be a particularly difficult matter to resolve. There [are] a number of considerations that must be carefully thought through and negotiated between the states and the commonwealth.

From a practical point of view, are we going to establish a uniform legislation or will we be asking the states to refer their powers to the commonwealth?

This issue may prove difficult to resolve given that Western Australia have not referred their workplace relations powers (in relation to constitutional corporations) to the Commonwealth. All the other states have done this. All the states will need to refer their long service leave laws to the Commonwealth if we are to have any chance of creating uniform legislation.⁴⁰

2.49 The Health Services Union (HSU) clearly articulated the view that the Commonwealth must overcome constitutional difficulties with legislating for LSL by working with states and territories to come to an agreement about a national LSL standard.

While the remainder of this submission focuses on the elements of our preferred PLSL scheme, it is worth dwelling briefly on the overdue need for a uniform long service leave standard within the NES. Indeed, a uniform LSL standard remains a key piece of unfinished business leftover from the introduction of the Fair Work Bill 2008.

At present, there are three ways an employee's LSL entitlement is determined:

- State and Territory LSL Laws
- A Federal Pre-Modern Award (which would have covered an employer and their employees before 1 January 2010)
- A registered agreement

39 Master Builders Australia, *Submission 10*, p. 9.

40 Health Workers Union, *Submission 29*, p. 42.

We recognize that the Commonwealth's power to legislate in this arena is constitutionally questionable. As such, we recommend that the Commonwealth stay fast to the commitments made during the introduction of Fair Work Bill and work with state and territory governments to develop a uniform minimum LSL standard.⁴¹

No worker should be worse off

2.50 In spite of widespread support for nationalisation of LSL standards, some submitters expressed a view that consistency should not come at the cost of any worker being worse off under new arrangements, for example, because changes result in an increase in qualifying period or decrease in leave period.

2.51 The Productivity Commission discussed the glacial rate of progress in developing a national standard since the 2012 review, indicating that a national standard will involve compromise that may not suit all stakeholders:

However, there has not been significant progress towards a national standard since the review, largely because the adoption of a standard will entail losers as well as winners. Businesses operating mainly in one state would not want to emulate higher cost arrangements in another, while employees (and their representatives) in a state with more generous entitlements would not want to relinquish these to achieve uniformity.⁴²

2.52 In considering how to mitigate the risk of negative effects on some workers, the ACTU suggests that a 'highest common denominator' approach should be adopted to ensure that no worker is worse off under any new scheme, arguing:

It is imperative that any generalised national LSL scheme should not be introduced to the detriment of workers who already have the benefit of a superior LSL scheme; it must not disentitle classes of employees already entitled to something better. Such an outcome would be perverse and contrary to the goal of generalising an inherently beneficial scheme.⁴³

2.53 The ACTU explained further at the committee hearing on Friday, 5 February 2016 in Canberra:

We say that, in a developed country like Australia, workers' conditions ought to progressively move forwards, not backwards. Any national long service leave standard ought not to displace any superior entitlements in existing state and territory schemes. Our preferred option is that a national standard be developed that incorporates the highest common denominator approach, drawing on the South Australian and Northern Territory schemes

41 Health Services Union, *Submission 34*, p. 6.

42 Productivity Commission, *Workplace Relations Framework: Report No. 76*, 30 November 2015, <http://www.pc.gov.au/inquiries/completed/workplace-relations/report/workplace-relations-volume1.pdf> (accessed 17 February 2016), p. 526.

43 Australian Council of Trade Unions, *Submission 19*, p. 20.

regarding the core entitlements and elements of other state and territory schemes regarding elements such as the level of pro rata access.⁴⁴

2.54 United Voice articulated its support for the ACTU's argument:

The ACTU also notes that any generalised national scheme should not be introduced to the detriment of workers who already have access to a superior long service leave scheme. United Voice supports that recommendation.⁴⁵

2.55 The ANMF noted the Productivity Commission draft report which suggested that 'any change would produce winners and losers,' and stated:

The ANMF submits that a national NES based LSL standard must, as a minimum, maintain existing LSL entitlements for current and future employees and, as a consequence this effectively means a national standard must adopt the 'highest common denominator' in respect to the existing statutory schemes. To do otherwise will result in a reduction for some existing and/or new employees.⁴⁶

2.56 The MEAA also adopted this view:

MEAA supports the development and implementation of a (long-awaited) National Long Service Leave standard that also provides for portability of 'Accrued Employment Leave' on an industry-by-industry or generalised basis. This would require a condition that where the Standard is less beneficial than a current employee is entitled to, the standard will not apply.⁴⁷

2.57 Similarly, the Australian Manufacturing Workers Union (AMWU) stated:

No worker should be worse off, or have a reduced entitlement for Long Service Leave under any new arrangements. It is vital that workers who have accrued an entitlement under the current arrangements are able to maintain those entitlements.⁴⁸

2.58 The HSU stated:

With regard to what a final standard might look like, the HSU recommends a 'highest common denominator' approach, whereby the most generous elements of current state and territory statutory LSL schemes are amalgamated into a new minimum national standard. This approach would

44 Mr James Fleming, Legal and Industrial Officer, Australian Council of Trade Unions, *Committee Hansard*, 5 February 2016, p. 2.

45 United Voice Australia, *Submission 28*, p. 3.

46 Australian Nursing and Midwifery Federation, *Submission 14*, p. 6.

47 Media, Entertainment and Arts Alliance, *Submission 9*, p. 4.

48 Australian Manufacturing Workers' Union, *Submission 16*, p. 11.

ensure that workers currently living in jurisdictions with more generous LSL provisions would not be left worse-off.⁴⁹

2.59 One of the ways in which a national LSL standard could be achieved without negatively affecting any current employees, would be to grandfather existing entitlements. This would mean that any new national standard would apply only to new workers. The Productivity Commission explained:

One option, which may bring any proposal for a nationally uniform LSL entitlement closer to consensus, would be to agree to 'grandfather' existing entitlements. Grandfathering would mean that the new national standard, once agreed, would apply only to new hires, *not* to existing jobs. This would remove the prospect of current workers losing their present entitlements, and of course employers having to countenance sudden increases in what they might owe to their workforce. The proportion of workers initially covered by the new national standard would be low. However, it would expand over time, as some workers move to new jobs and as new workers enter the labour force and others retire.⁵⁰

2.60 While grandfathering may provide an elegant solution for achieving consistency across jurisdictions, it is not palatable to all stakeholders. For example, the QNU noted the PC's report and added:

This would mean that once the states agree to a new national standard, these arrangements would only apply to new employees, not to existing employees. The current workforce would not lose its entitlements, but new employees would attract the new national standard. While we welcome further discussions around LSL with other state and territory governments, we reiterate we would not accept any reduction in entitlements for existing or new employees.⁵¹

2.61 The ANMF also indicated that it 'would only be supportive of a national LSL standard subject to the following conditions':

1. The ANMF would not support any harmonisation arrangements that would see a decrease in current entitlements for current or future employees.
2. The ANMF would not support 'grandfathering' existing entitlements for current employees.⁵²

2.62 While there is clearly an appetite amongst stakeholders for nationalisation of LSL, it is unlikely to be supported by employee groups if it resulted in workers being

49 Health Services Union, *Submission 34*, p. 6.

50 Productivity Commission, *Workplace Relations Framework: Report No. 76*, 30 November 2015, <http://www.pc.gov.au/inquiries/completed/workplace-relations/report/workplace-relations-volume1.pdf> (accessed 17 February 2016), p. 528.

51 Queensland Nurses Union, *Submission 3*, p. 6.

52 Australian Nursing and Midwifery Federation, *Submission 14*, pp 6-7.

worse off because their entitlements are less beneficial under a new system. This is irrespective of whether other workers gain in a nationalised system.

Cost to employers

2.63 Some submitters indicated that they would not support nationalisation of the LSL standard if it resulted in increased costs for employers.

2.64 Queensland Advocacy Incorporated (QAI) is an 'independent, community based systems and individual advocacy organisation and a community legal service for people with disability'.⁵³ QAI articulated its support for a nationalised LSL scheme, but raised concerns about costs to employers, pointing out that some employers in the social and community service sector already operate on slim or no profit margins:

While we support the validity and importance of both a national long service leave standard and the portability of long service leave entitlements, we consider that issues concerning who pays for these entitlements are issues of vital significance that must be addressed. The resolution of these issues is important for employers within the social and community service sector, many of whom operate on slim or no profit margins. It is particularly important for people with a disability, so that it does not become a further stumbling block to the ability to employ skilled workers.⁵⁴

2.65 The Australian Hotels Association (AHA) indicated that it supports ACCI's submission and notes that many of its members are small, locally owned businesses serving their surrounding communities. Further, that 'AHA members operate highly labour-intensive businesses and as such are significantly impacted by cost increases relating to employment'.⁵⁵

2.66 In its submission, the Motor Trade Association (MTA) emphasised the importance of small businesses to employment in Australia and the relative effects that sudden and significant changes in cost can have to those businesses. The MTA expressed a preference 'for a national system that emphasizes consistency, transparency and minimises the cost to small and medium sized businesses, particularly in the automotive trades'.⁵⁶

2.67 The MTA further suggested that '[m]ajor workplace entitlement changes must be thoughtfully managed to ensure the ongoing health of the small business sector is front of mind throughout the transition process'.⁵⁷

53 Queensland Advocacy Incorporated, *Submission 5*, p. 2.

54 Queensland Advocacy Incorporated, *Submission 5*, pp 3-4.

55 Australian Hotels Association, *Submission 18*, pp 1-2.

56 Motor Trade Association of South Australia, *Submission 24*, p. 4.

57 Motor Trade Association of South Australia, *Submission 24*, p. 5.

2.68 These submissions raise an important point - any additional operational costs for employers can have a disproportionate impact on small businesses.

2.69 However, concerns about cost to business was not limited to small or medium enterprises, but applied more broadly. For example, ACCI stated that it would 'be unable to support the establishment of a national long service leave standard that would impose additional costs on businesses which would be in no better position as a result'.⁵⁸

2.70 ACCI further suggested the transitional costs to an employer of moving to a nationalised LSL standard should be considered, and questioned whether these costs are justifiable, given that 'the overwhelming majority of employers only operate in one jurisdiction'.⁵⁹

2.71 The Housing Industry Association (HIA) outlined how the building and construction industry is unique in terms of both its employment structure and LSL scheme. In discussing a national LSL standard, the HIA provides a non-exhaustive list of issues that would need to be considered, and indicates qualified support:

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

HIA does not support a nationally consistent long service standard being achieved at any cost, particularly if merely leads to the highest common dominator [sic] being adopted as the new minimum entitlement.⁶⁰

2.72 The evidence received suggests that the potential costs to employers of nationalising the LSL system – particularly small businesses - could have a significant impact that could have a flow-on effect on workers. Thus, any new system should be balanced so that it does not disproportionately affect employers.

Alternative views

2.73 While the committee noted that amongst submitters there is generally strong support for a nationalised LSL scheme, it also noted that a number of submitters do not support nationalisation. The lack of support is based on a perceived lack of need because the current system working as it should, and also because nationalising LSL would increase costs and be unduly complicated to achieve.

2.74 For example, the Victorian Automobile Chamber of Commerce (VACC) stated in its submission:

58 Australian Chamber of Commerce and Industry, *Submission 20*, p. 4.

59 Australian Chamber of Commerce and Industry, *Submission 20*, p. 4.

60 Housing Industry Association, *Submission 6*, p. 9.

The MTAs are not aware of any collective support between State and Territory Governments towards a single national long service leave scheme. Movement towards a unified model would inevitably lead to the question of which model should be applied. The MTAs (and likely other employer organisations) consider the South Australian model, for example, as uncompetitive and too generous to employees at industry's expense. On the other hand, unions are likely to support a model similar to South Australia and oppose more balanced entitlements.

The MTAs are highly sceptical of attempts to further nationalise employee entitlements after the Modern Awards experience. Despite promises at the time that employers would be no worse off under a federal Modern Award, the reality has seen the introduction of significant new employee entitlements in the automotive industry without any move towards compensation through productivity increases. For example, a recent decision by Justice Buchanan in the Federal Court of Australia interpreted the National Employment Standards to override provisions relating to annual leave loading on termination that have existed in the Vehicle Manufacturing, Repair, Services and Retail Award 2010 (VMRSR Award) and its predecessors since the early 1970s.⁶¹

2.75 Based on the actuarial data it supplied in its submission, the Australian Road Transport Industrial Organisation (ARTIO) states:

ARTIO submits that the current state legislative regimes are working precisely as intended, in that around 40% or just over 4 million workers can expect to take long service leave at some time during their working life.⁶²

2.76 Finally, the Australian Federation of Employers and Industries (AFEI) argues:

The process of amalgamation of existing employment provisions, either through the ever ongoing making of modern awards or via legislation (including work health safety legislation) has resulted in a 'cherry picking' approach and a highest common denominator outcome in Australian workplace regulation. This outcome would be replicated in the formulation of any national long service leave standard. This unwarranted cost impost on employers is unacceptable. Formulating a national long service leave standard is a high risk process, even if undertaken to 'harmonise' the provisions of different jurisdictions, and can only produce an outcome that is detrimental to employers.⁶³

2.77 While not explored in this report, the committee notes that a number of submitters have suggested preferred national LSL standards. For example, ACTU has suggested a standard of 13 weeks' leave after 10 years;⁶⁴ AiGroup suggests the

61 Victorian Automobile Chamber of Commerce, *Submission 23*, p. 4.

62 Australian Road Transport Industrial Organisation, *Submission 4*, p. 11.

63 Australian Federation of Employers and Industries, *Submission 12*, pp 3-4.

64 Australian Council of Trade Unions, *Submission 19*, p. 28.

'national standard should reflect the previous federal award long service leave standard, i.e. 13 weeks long service after 15 years of service, with pro-rata entitlements after 10 years;⁶⁵ the NFF suggests the standard should reflect 'the most common entitlement of one month's leave for each five years of service, with a qualifying period of 7 years'.⁶⁶

2.78 The committee notes these suggestions, but makes no findings in relation to a preferred national standard.

Committee view

2.79 The committee notes the complexity of the current LSL arrangements and accepts that inconsistencies across jurisdictions have the potential to cause confusion and lead to unintentional errors in calculating LSL entitlements. The committee is of the view that a nationally consistent LSL standard would help alleviate this problem.

2.80 However, the committee also acknowledges that nationalising the LSL standard is not a simple matter, and that states, territories and the commonwealth would need to work together to reach an agreement that should not impose a prohibitive cost burden on employers or result in any workers being worse off under a new scheme.

2.81 The committee is persuaded that grandfathering is a sensible solution that should be explored in developing a nationalised LSL standard, because all new workers (nationally) would start out on the same footing. Over time, the differences between old and new workers would diminish as people leave the workforce. This would be an equitable approach that would see no worker worse off, and many likely to be better off in the future.

2.82 The committee is of the view that any changes to LSL arrangements should be carefully considered and managed in a thoughtful way designed to minimise negative effects on business, being particularly mindful of the vulnerability of the small business sector.

Recommendation 1

2.83 The committee recommends that the states, territories and commonwealth undertake a review of the current LSL system in Australia, and considers developing a nationally consistent scheme. Development of a nationally consistent scheme should involve extensive consultation of both employer and employee groups.

65 Australian Industry Group, *Submission 7*, p. 8.

66 National Farmers Federation, *Submission 31*, p. 9.

