



Submission to the Parliament of Victoria's  
Economic, Education, Jobs and Skills  
Committee

*Inquiry into Portability of Long Service  
Leave Entitlements*

*August 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 Australia<sup>1</sup> (double its share of a decade ago).

Australia's earnings from resources and energy commodities are forecast to increase to around \$178 billion in 2015-16<sup>2</sup>.

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

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

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## EXECUTIVE SUMMARY

- AMMA welcomes the opportunity to make a submission to this inquiry.
- For the reasons set out throughout this submission, resource industry employers would strongly oppose any proposal to extend LSL portability to additional industries, or the creation of any community-wide entitlement to take a sabbatical after a given number of years in employment.
- This would do little to increase investment, jobs or the appetite to do business in Victoria.
- At a time of growing economic uncertainty, emerging unemployment, and the risk of a significant economic downturn, the imposition of additional labour costs and disincentives to employ would be precisely the wrong course of action to pursue.
- Whilst portable LSL may be part of the policies of particular trade unions, its economic and labour market impact must be properly understood before any recommendations in its favour are even countenanced. The feasibility of introducing any scheme in an industry or more widely must be thoroughly examined by robust cost-benefit analysis.
- With that in mind, AMMA's recommendations to the committee are as follows:
  - The Committee urgently clarify whether this inquiry and the focus of any report and recommendations will be solely directed to portability of LSL for the community services sector in Victoria or whether there is the potential for wider application.
  - If the fundamental purpose of this inquiry is the extension of the portable LSL approach to the government-funded and charitable community services sector, then any recommendations should be clearly confined to that sector.
  - There should be no extension of portability or continuity of LSL between employers, beyond the limited and exceptional areas in which it has currently and historically been applied in particular industries, including current statutory schemes administered at the state level.
  - The Committee not recommend the extension of portable LSL to additional industries, or to all work in Victoria.
  - Rather than solely focus on portability of LSL, the Committee should have some regard to options to reform LSL more generally.
  - The Victorian Minister for Industrial Relations should commence discussions with state and federal counterparts towards the creation of a single, uniform national long service leave (LSL) standard to be contained in the National Employment Standards (NES) under the *Fair Work Act 2009* (Cth), provided:

- Discussions proceed towards a balanced rather than highest common denominator approach.
- A national LSL scheme remain contingent on long service with a single employer and not operate on a portable basis, and portability only apply to industries already subject to such schemes where that is still deemed to be appropriate in a modern workplace context.

Any national LSL scheme should offer suitable scope for flexible accrual and use by agreement between an individual employee and his or her employer, appropriate to meeting changing and more diverse employee needs and priorities.

# 1. INTRODUCTION

1. The Economic, Education, Jobs and Skills Committee has been asked to inquire into, consider and report no later than 1 May 2016 on employer schemes that provide portability of long service leave entitlements for Victorian workers, with particular consideration of a range of identified considerations / terms of reference (TOR).
2. In particular, the Committee is requested to investigate employer schemes that provide portability of long service leave entitlements for workers as they move between jobs in the same or similar industry, including:
  - a. the objectives of portable long service leave schemes;
  - b. which sectors, industries or occupations may benefit from such schemes;
  - c. the rationale for any difference in treatment between sectors or groups of employees;
  - d. funding arrangements applying to existing portable long service leave schemes;
  - e. governance, compliance and enforcement arrangements applying to existing portable long service leave schemes;
  - f. the key components that should apply to any portable long service leave scheme for the community services sector including coverage, eligibility for and the calculation of long service leave benefits;
  - g. whether alternative mechanisms or arrangements could better meet the objectives of a portable long service leave scheme for sectors of the workforce including the community services sector;
  - h. the capacity to operate such schemes within or across jurisdictions, including recognition of service;
  - i. the appropriate role for Government in facilitating portable long service leave schemes; and
  - j. relevant implementation issues and options.
3. In making its recommendations the Committee should have regard to:
  - a. constitutional or other legal issues or impediments arising from interaction with the Fair Work Act 2009 (Cth), agreements and awards operating under the Fair Work scheme;
  - b. the distinction between schemes for portability of LSL entitlements and legal structures underpinning other leave entitlements;

- c. the financial impacts or benefits of portable long service leave entitlements on employers, employees and taxpayers; and
- d. the economic impact on Victorian jobs, employment and investment and whether such schemes may disproportionately affect urban or regional areas.

## Community services sector only?

4. The inquiry's terms of reference (a)(vi) ask the Committee to have regard to "the key components that should apply to any portable long service leave scheme for the community services sector including coverage, eligibility for and the calculation of long service leave benefits".
5. AMMA believes there are a number of threshold issues that need to be identified and clarified upfront, namely:
  - a. Is this an inquiry into the introduction of portable LSL for Victoria's community services sector?
  - b. Is this an inquiry into the possible introduction of portable LSL for other or additional specific industries in Victoria on an industry-by-industry basis?
  - c. Is this an inquiry into the possible introduction of portable LSL for all Victorian employees?
6. If this is (a) – an inquiry solely directed to the community services sector in Victoria, AMMA would make the following comments, and leave the majority of input to those representing employers and employees in that sector.
7. If social and community service (SACS) workers, social workers etc are doing the same work with the same clientele for many years, or are only failing to be entitled to LSL due to the vagaries of government contracting in the social and community services sector, this is an issue for the Victorian and Commonwealth governments to solve, without impacting on other industries.
8. However, from the published terms of reference it is not clear that this inquiry is solely directed to the community services sector, and this submission therefore also addresses scenarios (b) or (c), and the range of considerations raised in the TOR.

**Recommendation 1:**

The Committee urgently clarify whether this inquiry and the focus of any report and recommendations will be solely directed to portability of LSL for the community services sector in Victoria or whether there is the potential for wider application.

**Recommendation 2:** If the fundamental purpose of this inquiry is the extension of the portable LSL approach to the government-funded and charitable community services sector, then any recommendations should be clearly confined to that sector.

## The Victorian economy and jobs

9. Victoria, as with all Australian jurisdictions, needs to be doing all it can to encourage and support investment and job creation.
10. Whilst Victoria may be outperforming most other states financially, the vulnerability of the economy (and jobs) that confronts our nation also confronts Victoria. For example, in Victoria:
  - a. The unemployment rate is at 6% for June 2015<sup>3</sup> and threatens to increase further.
  - b. Significant shifts away from the manufacturing sector are ongoing.
  - c. Youth unemployment is at its highest level since the 1990s<sup>4</sup>.
11. Business has been very clear that the last thing it needs from state governments is the imposition of additional labour costs that are entirely devoid of improvements in productivity or competitiveness and would only serve to make it harder to create and retain jobs.
12. Of course, minimum wages increase, and there are often agreed milestone payments under enterprise agreements, but labour on-cost increases are of particular concern as they are divorced from productivity returns. There are very few exclusions or exemptions under existing schemes, which warrants caution when considering introducing a new portability scheme.
13. It would be of great concern if investment and job creation were discouraged by extending a novel or isolated on-cost (ie portable LSL) and applying it more widely.
14. The fact is that portable LSL makes a contingent liability strict, and forces employers to pay LSL for all hours worked.

<sup>3</sup> [http://lmip.gov.au/default.aspx?LMIP/LFR\\_SAFOUR/VIC\\_LFR\\_LM\\_UnemploymentRateTimeSeries](http://lmip.gov.au/default.aspx?LMIP/LFR_SAFOUR/VIC_LFR_LM_UnemploymentRateTimeSeries)

<sup>4</sup> <http://www.theage.com.au/victoria/youth-unemployment-in-victoria-reaches-highest-rates-since-the-90s-20150311-141ce5.html>

## The Victorian resource industry

15. Six per cent of national resource sector GDP is generated from Victoria, yet 10% of resource sector employment occurs in Victoria<sup>5</sup>. This means for our industry:
  - a. Labour costs are already higher in Victoria per unit of resource output than they are in competing Australian jurisdictions.
  - b. Were an additional on-cost applied to employment in that state (and that's what portable LSL boils down to for employers) it would disproportionately impact a labour-intensive industry like the Victorian resource industry.
16. The internationally respected Fraser Institute Report<sup>6</sup> compares sentiment with regard to doing business and investing in resource jurisdictions throughout the world.
17. It shows that the key mining states of Australia - Qld and WA - are falling out of favour with mining executives globally, and other states such as Victoria are seen as less attractive places to invest than Russia, Nicaragua, the Ivory Coast and the Democratic Republic of Congo.
18. AMMA is not suggesting that Australia should align its regulatory framework with that of the above countries. Rather, it is to highlight that global trade requires competition with other global producers and exporters, requiring a constant focus on the cost of production. In recent years, Australia's competitiveness has declined, as the cost of production for many commodities has risen faster than the global average.
19. Adding to labour on-costs through a new levy and impost, such as a new portable LSL scheme, can make employment and investment in this part of the country even less attractive.

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<sup>5</sup> According to the ABS cat no. 5220 and 6291 respectively, cited in KPMG [report](#), *Workplace relations and the competitiveness of the Australian resources sector*, published in March 2015

<sup>6</sup> Fraser Institute, [Survey of Mining Companies: 2014](#)

## 2. CONTEMPORARY PURPOSE AND RELEVANCE

20. A great deal could be written on LSL, going back to its origins as home leave for English civil servants posted to the colonies in the 19th Century, and the lengthy sea travel to and from the “old country”.
21. In contemporary Australia, LSL is a well-understood and recognised part of employment entitlements, but importantly is understood and accepted throughout the community as something that is contingent on extended service with a single employer. Australians understand they need extended service with an employer to get long service leave and there is no widespread expectation to the contrary.
22. Only in very isolated pockets of work, such as transfers between public sector agencies, local government or in the unique circumstances of onsite construction, is there any expectation of transferability or portability of LSL entitlements between different employers.
23. The following table shows current portability of LSL entitlements schemes by jurisdiction<sup>7</sup>.

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<sup>7</sup> Productivity Commission Draft [Report](#) on the Workplace Relations Framework, August 2015

**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>
WA	Contract cleaning	2005	<i>Contract Cleaning Industry (PSLS Scheme) Act 2005</i>
	Building & Construction	1986	<i>Construction Industry Paid Portable Long Service Leave Act 1985</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	<i>Long Service Leave (Portable Schemes) Act 2009</i>
		2012	<i>Long Service Leave (Portable Schemes) Act 2009</i>
		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>

<sup>a</sup> 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. Arrangements which permit the portability across well-defined employers through awards and agreements are not included in the table.

Source: McKell Institute (2012).

## The objectives of portable LSL

24. The objectives of LSL (TOR (a)(i)) as a broad concept have changed over time quite markedly and in all likelihood we are in the midst of another fundamental shift.

25. What was originally a uniquely colonial dispensation for British civil servants to return home by ship to the old country shifted over time to become LSL for Australian employees completing extended service with a single employer.
26. However, at all times LSL has had two indivisible and essential requirements:
  - a. Extended years of service.
  - b. That service being with a single employer.
27. At its heart, LSL is fundamentally not portable. Like all employee benefits that are contingent on service, and indeed all forms of leave, when termination of employment results one of two outcomes occurs:
  - a. The leave is taken or paid out on a pro rata basis where the minimum number of years of accrual has been reached.
  - b. Where the minimum number of years of service has not been reached for the entitlement to be triggered, the employer is not obliged to pay anything towards those entitlements upon termination. This is simply self-evident - there is no LSL payment as there has been no long service.
28. In an isolated subset of industries, based on unique and industry-specific considerations, the community standard for LSL does not apply and instead the portable scheme model applies.
29. CoINVEST, the portable scheme for the Victorian construction industry, explains its operation and rationale as follows<sup>8</sup>:

*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.*

*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*

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<sup>8</sup> <http://www.coinvest.com.au/about-coinvest/how-coinvest-works>

Service Leave scheme administers the Construction Industry Long Service Leave Act, 1997 (amended 2004).

30. The objective of portable LSL is unique and fundamentally remedial (AMMA is not saying employers endorse this rationale, merely that it should be correctly understood).
31. Portable LSL was created in the 1970s because construction workers worked from employer to employer, job to job. Due to the nature of their industry, and even with extended service doing the only work on offer to them, they would not become entitled to LSL.

## The Victorian community standard

32. The prevailing community entitlement under the Victorian Long Service Leave Act 1992 is explained on the Business Victoria website<sup>9</sup> as follows:

*“An employee will be entitled to take long service leave after 10 years of continuous employment with one employer (see phasing in arrangement). The date of commencement of long service leave is to be agreed between the employee and the employer.*

*An employee ceasing employment after at least seven years of continuous employment with one employer is entitled to be paid long service leave at the accrual rate of one week for each sixty weeks of continuous employment, regardless of the reason for termination of the employment...”*

33. This is the LSL model which has applied to the vast majority of Victorian employees for decades, save for increases in the entitlement (payable at 10 years where it was formerly 13, and pro rata LSL on termination of employment after seven years where it was formerly 10).
34. As the Productivity Commission (PC) has indicated in its draft report into Australia's workplace relations system<sup>10</sup>, LSL is ultimately a uniquely Antipodean entitlement and does not form part of the employment safety net in almost any other country. It is an anachronism but, like so many parts of the Australian employment system, one that has become ingrained and accepted in the wider community.

## Challenges

35. Employers and employees do confront real considerations in regard to LSL which are relevant to consideration of any new schemes. There are challenges involving the cost (ie. levy charges), administration and the practicalities when a worker accesses an entitlement through the authorised fund administrator. These include the following issues:

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<sup>9</sup> <http://www.business.vic.gov.au/hiring-and-managing-staff/long-service-leave-victoria/calculate-long-service-leave>

<sup>10</sup> Productivity Commission Draft [Report](#) on the Workplace Relations Framework, August 2015

- a. National employers face the challenge of differing accruals when employees work in different states during their service with the company. AMMA members in the resource industry also face the challenge of applying periods of international service to Victorian LSL laws.
  - b. Employees work more variably in regard to extended paid and unpaid leave (e.g. parental and study leave) that further complicates the administration of LSL.
  - c. Employers want employees to use LSL when it falls due, as the 'price' will be lower now than at some date in the future. Anecdotally, AMMA members have experienced scenarios where an employee will "bank" their LSL until they receive a promotion and then immediately upon getting their new, more highly-paid job, apply for 12 or so weeks' leave at the higher rate.
  - d. Many employees understandably wish to stockpile LSL leave (to synchronise with a partner, for a rainy day, as a financial nest egg, to facilitate early retirement, etc).
  - e. Employees want to use their LSL contrary to the limitations imposed by legislation. Some employees want to use their LSL not in long blocks, but more gradually.
36. The above issues require caution in designing any new portability schemes which would operate in addition to existing LSL schemes.

### 3. UNION CALLS FOR PORTABILITY

37. Portable LSL is a creation of the 1970s and had its genesis in the unique nature of the construction industry, and the need for construction employees to “follow the job” from project to project, often changing employers.
38. The only way for construction employees to take extended leave in a labour market characterised by low labour mobility / extended service was quite uniquely to not sign on for a project, and the fund model helped them finance such leave.
39. That’s the theory as we understand it behind the creation of portable LSL in the era of glam rock and flares – the question is how relevant this is in the era of social media and expectations of high job mobility.
40. A limited and very stable set of industries (building and construction, stevedoring, black coal mining<sup>11</sup>, cleaning and parts of the health and aged care sectors<sup>12</sup>) have “portable” LSL under state and territory legislation, and in the case of black coal, Commonwealth legislation.
41. Unlike annual leave loading and many other “union gains” of the 1970s, portable LSL did not spread like wildfire to further industries, and has remained for three decades a very marginal, atypical and quarantined entitlement in particular industries.
42. Whilst unions may argue that securing legislative amendments was much harder than award arbitration, we argue there has long been a recognition that the portable model is applicable only to a very small subset of work / industries and no valid basis exists to extend it more widely.
43. Portable LSL works through contributory schemes administered by government / statutory authorities and created by legislation that compel employers to pay contributions on behalf of each of their employees. The employee gains credits or contributions across their working life / duration of employment within an industry and after a given period of contributions made on their behalf / in an industry, can draw upon their contributions.
44. 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 has been in the Australian workforce for seven or 10 years. This is included in the draft policies taken to the May 2015 ACTU Congress<sup>13</sup>, and is a long-standing ‘blue sky’ aspiration of unions throughout the country.
45. Calls for general or at large LSL portability are actually calls for a general right to take a “sabbatical” after a given number of years in the workforce, regardless

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<sup>11</sup> i.e. the coal being mined and transported outside the State of Victoria.

<sup>12</sup> In states other than Victoria.

<sup>13</sup> ACTU Congress 2015 - draft [policies](#)

of how long an employee has been with their “final” employer at the point of the leave entitlement manifesting.

46. This would be a significant imposition that would alter the nature of employment in Australia. The costs of such an approach would include but not be limited to:
  - a. The replacement of a currently contingent liability with an absolute liability to make LSL contributions for all employees’ service.
  - b. The impact on our economy and community of every single working Victorian taking a period of months off work after 7 or 10 years in the labour market.
  
47. There are a number of fundamental flaws in many portable LSL concepts which have been pursued by some trade unions which need to be addressed. These include:
  - a. The competitive disadvantage that such additional labour costs would impose on Victoria compared with competing states, territories and other countries (but this in no way justifies portability being rolled out nationally for the sake of consistency).
  - b. How this can be funded, and why a long-standing 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 payable in 100% of cases, 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. In bald terms, portable LSL is a greater cost impost than the existing community standard.
  - d. The signal this sends to employers about hiring people reaching the seven or 10 year period of career tenure, at which they would have a right to an extended period of absence:
    - i. Why would any employer hire someone who some weeks or 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 holiday).
    - ii. In the event a business chooses to hire someone as described above because they value their experience, why should they take on an often unknown liability for LSL that becomes clear only after the employment relationship has commenced? Greater visibility of accrued entitlements is necessary in relation to current portability schemes so that employers know the extra liabilities they are taking on when hiring an experienced employee.

- e. Uncertainty as to how any general or universal right to take a sabbatical would work in practice. Administratively, contributions could be possible, but how would an employer work out when an employee has a right to trigger their sabbatical?
48. AMMA made the following recommendation to the PC on LSL portability, identifying and responding in advance to the quite predictable calls for LSL portability the PC would receive. We repeat this recommendation and commend it to the Committee:

**Recommendation 3:** There should be no extension of portability or continuity of LSL between employers, beyond the limited and exceptional areas in which it has currently and historically been applied in particular industries, including current statutory schemes administered at the state level.

## Funding of portable LSL

49. Funding of portable LSL is referred to in this inquiry's terms of reference (a)(iv).
50. **Community LSL standards:** In financial and accounting terms, an employer 'makes provision' for entitlement liabilities such as annual leave, sick leave and LSL. Critical to the nature of this is that:
- a. The employer retains its funds until such time as they become payable to an employee. The employer can invest and enjoy the returns on monies it is provisioning to meet employee entitlements until such time as they become payable.
  - b. If employee entitlements never become payable, monies employers have been setting aside to meet those entitlements are retained by the employer. This is entirely legitimate and proper; a contingent liability has not been triggered, and thus monies set aside to meet that liability can be redirected.
51. Generally speaking, LSL is unique in that it is contingent on a service threshold being met, both for being paid out pro rata on termination and for triggering an actual leave entitlement. Where employment terminates prior to the pro rata payout threshold being met, monies remain with the employer.
52. In the normal course of events, employers do not put monies "away" for LSL from day one of employment, but rather begin to put money away after a threshold number of years of service which make the actual payment of LSL more probable. This is regularly from the fourth or fifth year of employment to make provision for a possible payout or taking of LSL from the seventh year onwards.

53. **Portable LSL:** Employers fund portable LSL schemes by way of a regular payment to a LSL fund. Obligations to pay into such funds are triggered from the first day of service and are not contingent on minimum service thresholds being reached.
54. **Government funding:** A question the Committee needs to consider is what it costs government to set up and administer a portable LSL scheme for an industry or all industries. Such funds are established under statute and as organisations appear to be some form of quango (ie semi-public administrative body) what does it cost governments to establish, administer and oversee such schemes?

## Governance, compliance and enforcement

55. The simpler and more widely-applied that any leave entitlement is, the more easily it can be promoted to employees and explained to employers. The Business Victoria website provides as simple and straightforward an explanation of entitlements and obligations under the community standard for LSL as possible, including calculation tools and examples of various scenarios.
56. Portable LSL is of its nature atomised to the industry level, with the requirements for each scheme differing by industry. Any further spread of portable LSL schemes to additional industries will further complicate advising businesses on LSL, and undermine the simplicity and clarity of determining employee entitlements. The more industries that have bespoke arrangements that differ from the community entitlement, the harder compliance and enforcement becomes.
57. Arguably, the portability model is only able to be applied in an area such as construction for the CoINVEST fund because:
  - a. The construction industry works with a degree of standardisation and homogenisation unknown in any other area, through for example pattern enterprise bargaining agreements, industry-wide RDOs, and the Incolink redundancy fund<sup>14</sup>.
  - b. Employees do actually “follow the job” and work from project to project.
  - c. The CFMEU seeks to enforce non-safety provisions as mandatory in the industry and is a major force for standardisation of entitlements.
58. The situation with construction employees was at one time unique which is why portable LSL was applied to that area in the first place. AMMA is not conceding that portable LSL should apply in any industry, but is pointing out that the criteria for such an atypical approach are not met in industry generally, or in any industry beyond construction.
59. Even in the construction industry, the days of an “hourly” or even “daily” hire construction worker are long gone, which puts a question mark under the continued rationale for portable LSL even in that industry.

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<sup>14</sup> <https://www.incolink.org.au/About-Incolink.aspx>

60. It is not enough to argue that as employees become more mobile, and new generations of employees become more likely to change employers and industries during their careers, that fewer employees will be entitled to LSL to justify portability.
61. The portability model was applied as a function of the unique structural nature of employment in the construction industry at that time, and we know of no evidence that other industries would meet the criteria for such a scheme to be extended.
62. The 'onus of proof' in any claim to extend portable LSL must lie with the proponents. It is unions and any others arguing for the creation of new portable schemes that must show why the existing community standard for LSL in the State of Victoria is not sufficient and how that industry materially differs and qualifies for unique and costly treatment.

## Constitutional and legal issues

63. TOR (b)(i) asks the Committee to have regard to "*constitutional or other legal issues or impediments arising from interaction with the Fair Work Act 2009 (Cth), agreements and awards operating under the fair work scheme*".
64. As mentioned earlier in this submission, the resource industry would like all states to abandon their rump LSL jurisdictions in favour of a single national LSL standard to apply as a National Employment Standard under the *Fair Work Act 2009 (Cth)*.
65. Victoria referred its industrial relations powers to the Commonwealth during the 1990s, and notwithstanding this, the *Fair Work Act 2009* has application by virtue of the Commonwealth's powers to make laws in respect of corporations.
66. At present, there is only minimal federal award provision for LSL, meaning LSL is one of the few areas of employment regulation in Victoria that is governed by Victorian law for most employees.
67. Without exploring the detail of the Victorian referral legislation and the 'acceptance' provisions of the current and transitional Fair Work legislation, it is substantial and merit-based considerations that should lead to clear recommendations against any extension of portable LSL beyond its current very limited application.
68. That said, employers can be very clear that were Victoria to pursue an approach that significantly increased cost and prescription in this area, and which paid no heed to contemporary employment and the interests of employers, we would unashamedly seek remediation at the Commonwealth level, at least for employers who are corporations.
69. Were any general right to a sabbatical for all employees under consideration in the State of Victoria, employers would seek to have this overridden through federal legislation, and rendered an effective nullity.

## Legal structures for leave

70. TOR (b)(ii) asks the Committee to have regard to *“the distinction between schemes for portability of long service leave entitlements and legal structures underpinning other leave entitlements...”*
71. AMMA is not clear what is sought / intended through this aspect of the TOR.
72. However, one thing is clear – with all forms of leave, including LSL in all but a few instances, it is the responsibility of the employer to make financial provision within their accounts as an ordinary part of running a business and meeting employment obligations.
73. This works in the following ways:
- a. Employers put aside monies to meet all leave entitlements, including LSL. Where this doesn't occur, there are high penalties and recovery for employees possible through the Office of the Fair Work Ombudsman and other procedures.
  - b. Employers and employees have access to information and compliance services, through governments, community organisations, trade unions, employer associations, etc. In the online era, and in the wake of legislative developments in the past decade at the federal level, employment entitlements have never been so well-enforced.
  - c. Where provision is not made by an employer, there is a safety net through the Fair Entitlements Guarantee (FEG) scheme and its predecessor the GEERS scheme<sup>15</sup>. This is a legislated Commonwealth scheme under which the Australian Government provides financial assistance to cover certain unpaid employment entitlements to eligible employees who lose their jobs due to the liquidation or bankruptcy of their employer. This includes unpaid LSL.
74. The Committee has no ground to recommend extending LSL portability on the basis that this is somehow necessary to ensure entitlements are paid to employees.
75. There is no such wrong and that would be a flawed and baseless conclusion given that:
- a. There is no endemic or widespread pattern of employers not making provision for LSL or becoming bankrupt / insolvent and leaving LSL unpaid. It is rare, and to the extent that this is a concern, it would be far more of a concern for unpaid wages and annual leave than for LSL (applying as they do to more employees).

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<sup>15</sup> <https://www.employment.gov.au/general-employee-entitlements-and-redundancy-scheme-geers>

- b. In fact logically, employers that have been around long enough to have a LSL liability (seven years plus) are more likely to be viable businesses and less likely to fail and leave employee entitlements unpaid.
  - c. The Commonwealth's Fair Entitlements Guarantee (FEG) scheme already provides an effective safety net for instances where LSL is not provided.
76. A legal structure in which funds must be secured against a leave liability and held in trust by a statutory agency (one characteristic of the portable LSL model) is simply not required in regard to employee leave entitlements in Victoria, be they for LSL or any other form of leave.

## 4. ALTERNATIVE MECHANISMS

77. For the reasons set out in this submission, resource industry employers strongly oppose any extension of LSL portability to additional industries, or the creation of any community-wide entitlement to take a sabbatical after a given number of years in employment.

**Recommendation 4:** The Committee not recommend the extension of portable LSL to additional industries, or to all work in Victoria.

78. The Committee is asked at TOR (a)(vii) to consider “*whether alternative mechanisms or arrangements could better meet the objectives of a portable long service leave scheme for sectors of the workforce including the community services sector...*”

### PC findings on LSL

79. During 2015, a major priority for resource industry employers has been the current Productivity Commission (PC) inquiry into Australia's workplace relations framework (which issued its interim report in August and is due to provide its final report to government in December 2015)<sup>16</sup>.
80. AMMA's submission<sup>17</sup> to the PC review addresses LSL and identifies options for reform in the interests of employers and employees.
81. Released in early August 2015, the PC's draft report<sup>18</sup> made the following comments in relation to portable LSL:

*“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 a scheme for productivity.”*

And:

*“Submissions to this inquiry are yet to provide compelling evidence of major and widespread concern about the present non-portability of most LSL arrangements.”*

82. In relation to the feasibility of moving to a national standard for LSL, as separate and distinct to portability of entitlements, the PC draft report said:

*“Overall, there remains some uncertainty about the net benefits of moving to a uniform system, the appropriate transition to any such standard, and the scope for some minor simplification of the current*

<sup>16</sup> <http://www.pc.gov.au/inquiries/current/workplace-relations>

<sup>17</sup> [http://www.pc.gov.au/\\_data/assets/pdf\\_file/0006/187827/sub0096-workplace-relations.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0006/187827/sub0096-workplace-relations.pdf), Chapter 6.

<sup>18</sup> Productivity Commission Draft [Report](#) on the Workplace Relations Framework, August 2015

system. In that light, the Productivity Commission is hesitant about proposing changes in this area, and seeks information on its benefits, costs and practicality.”

## Broader options for reform

83. With respect, this inquiry's TOR (a)(vii) is too narrowly-framed and raises considerations and alternative considerations not just for LSL portability but for LSL in Victoria more generally (i.e. revisions to the non-portable community standard under the *Long Service Leave Act 1992 (Vic)*).

<b>Recommendation 5:</b>	Rather than solely focus on portability of LSL, the Committee should have some regard to options to reform LSL more generally.
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84. To be very clear, reform in this context is not intended to mean an increase in LSL quantum or any further change to the period of eligibility (i.e. extended service with one employer). This was revised in the mid-2000s and no further increase should be countenanced.
85. AMMA also argued in its submission to the PC inquiry the need to eliminate interstate differences between LSL through the creation of a single national LSL standard.
86. The following table shows the differences in LSL entitlements on a state by state basis<sup>19</sup>.

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<sup>19</sup> Productivity Commission Draft [Report](#) on the Workplace Relations Framework, August 2015

**Table 4.1 Long service entitlements<sup>a</sup>**

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

<sup>a</sup> 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).

87. Given the complexity of LSL entitlements at a state level, AMMA maintains that discussions should continue between state and federal ministers towards the creation of a single uniform national LSL standard.

**Recommendation 6:**

The Victorian Minister for Industrial Relations should commence discussions with state and federal counterparts towards the creation of a single, uniform national long service leave (LSL) standard to be contained in the National Employment Standards (NES) under the *Fair Work Act 2009 (Cth)*, provided:

- Discussions proceed towards a balanced rather than highest common denominator approach.
- A national LSL scheme remain contingent on long service with a single employer, and not operate on a portable basis, and portability only apply to industries already subject to such schemes where that is still deemed to be appropriate in a modern workplace context.
- Any national LSL scheme should offer suitable scope for flexible accrual and use by agreement between an individual employee and his or her employer, appropriate to meeting changing and more diverse employee needs and priorities.