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**ACTU Submission to
Parliament of Victoria
Economic, Education, Jobs and Skills Committee**

**INQUIRY INTO PORTABILITY OF
LONG SERVICE LEAVE ENTITLEMENTS**

7 August 2015

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The Australian Council of Trade Unions (ACTU) is the peak body representing almost 2 million working Australians. The ACTU and its affiliated unions have a long and proud history of representing workers' industrial and legal rights and advocating for improvements to legislation to protect these rights.

The ACTU is pleased to make this submission to this Inquiry.

In the days before Federation, the colony of Victoria was at the forefront of the introduction of Long Service Leave (LSL) in this land. In 2015, it would be a tremendous act of civil and political leadership for Victoria to once again chart the path to progress by delivering genuine portability of long service leave entitlements to all workers.

Under Victoria's first legislation providing long service leave, *An Act to Regulate the Civil Service 1862 (Vic)*, the Governor in Council could grant up to twelve months leave on half salary to any Civil Service officer, provided that the officer had completed ten years' continuous service.

While this instrumental initiative was explicitly made to enable officers to 'return home' to Britain at a time when the only travel option was sailing ship, barely ten years later Victoria's Royal Commission on the Civil Service recommended provision of six months leave on full pay after 15 years' service (with a further six months unpaid on request) for the sole purpose of recreation. The following year, Victorian legislation provided this quantum of leave for civil servants after 10 years' service. Other jurisdictions soon followed suit so that by Federation some form of long service leave entitlement for civil servants was common across most of the colonies.

During the Second World War, entitlements to LSL began to spread to groups of workers outside the public service by decision of industrial tribunals at state and federal level. In the 1950s, LSL entitlements continued to spread and, once again, following Victoria's statutory prescription of the entitlement in 1953, by 1960 a LSL entitlement under law existed in all states and territories, albeit with some variation in the quantum of leave and qualifying period.

Whereas the initial provision of long leave was to enable civil servants to return home to mother Britain after extended service in the colonies, a century later the entitlement was recognised and accepted simply as an entitlement to rest and an opportunity to refresh after an extended period of work.

Notably, of course, in the Australian labour market of the mid-twentieth century, it was predominantly men who worked for wages; women who worked were entitled to a fraction of the male minimum rate and typically received a correspondingly fractional wage, and most left the workforce upon marriage or when children arrived. The single-income family was the norm and the norm in most industries was for long, and often life-long, service with a single employer.

The contemporary Australian labour market is vastly different from that of fifty years ago. The proportion of women in the labour force has risen sharply; two-income families outnumber single-income families; the share of part-time employment in total employment has risen dramatically; casual and fixed-term employment is widespread; the digital age and globalisation has seen whole skill sets become obsolete, old jobs disappear, and life-long learning has replaced the old paradigm of school – work – retirement.

The essential rationale for long service leave – the entitlement to an extended period of rest and refreshment after many years at work – is not confined to workers serving a single employer. The existence of the entitlement has not apparently reduced labour turnover (one of the ostensible justifications for it in distant times) – indeed it may have hastened it to the extent that some employers may terminate staff prior to completion of qualifying periods, with a view to cutting costs.

Over the past half century, initially in the coal mining and later in building and construction and a limited number of other sectors, the inherently discontinuous nature of employment and the high probability of workers in the industry moving from employer to employer saw the inception of portable long service leave provisions in certain industries. In recent years, portable LSL provisions have been extended to contract cleaners (in the ACT, Queensland and NSW) and the community and security sectors (ACT), with eligibility extended to casual workers and apprentices and removal of continuity of service requirement in the black coal mining industry.

It is time for portability of LSL to be extended generally, reflecting the inherent and emerging nature of the employment relationship in today's labour market.

The number of workers in insecure work, especially casual employment, has risen dramatically in the last 30 years. As highlighted in the report of the Independent Inquiry into Insecure Work in Australia, *Lives on Hold: Unlocking the Potential of Australia's Workforce*, commissioned by the ACTU, 23.9% of the Australian workforce were in casual employment in 2012¹. A copy of the report is attached (Attachment A). In some industries, the rate was much higher than average. For example, 64% of employees in accommodation and food and 40% of employees in arts and recreation services were in casual employment. Women and young people are far more likely to be engaged as casual employees. Casual employees usually receive lower overall remuneration and entitlements than their permanent counterparts.

In Victoria, casual employees are much less likely than permanent employees to receive long service leave. In order to qualify for long service leave under the *Long Service Leave Act 1992 (VIC)*, a casual employee must accrue 15 years of continuous service with one employer (pro rata at 10 years' service) but the nature of casual employment is that it is usually shorter in duration and often irregular. Hence, casual employees are far less likely to accrue enough service with the one employer. A portable long service scheme will go some way towards addressing this inequity.

The *Fair Work Act 2009 (Cth)* recognises that LSL is part of the National Employment Standards (NES) and further anticipates that in due course an appropriate NES standard will be formulated and implemented. The Explanatory Memorandum accompanying the *Fair Work Bill 2008* explains the intent as follows:

This Division sets out the entitlement to long service leave for national system employees.

This entitlement is a transitional entitlement, pending development of a uniform, national long service leave standard with the States and Territories.

¹ (2012) at page 14.

This Division preserves long service leave entitlements in pre-modernised awards (referred to as applicable award-derived long service leave terms).

If an employee does not have applicable award-derived long service leave terms, any entitlement to long service leave will be derived from State or Territory long service leave legislation (subject to its modification or exclusion by certain industrial instruments).²

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.

Table 1 below summarises the entitlements contained in the statute-based schemes. Table 2 summarises the provisions of current portable LSL schemes.

Table 1: Features of Statutory Long Service Leave Schemes

JURISDICTION	KEY LEGISLATION	ENTITLEMENT
NSW	<i>Long Service Leave Act 1955</i>	2 months after 10 years' service. Then 1 month leave for each subsequent 5 years' service.
NSW	<i>Long Service Leave (Metalliferous Mining Industry) Act 1963 No 48</i>	3 months after each 10 years' service.
VIC	<i>Long Service Leave Act 1992</i>	8.67 weeks after 10 years' service. Then 4.33 weeks after each additional 5 years' service.
QLD	<i>Industrial Relations Act 1999</i>	8.67 weeks after 10 years' service. Then further leave after each additional 5 years' service.
SA	<i>Long Service Leave Act 1987</i>	13 weeks leave after 10 years' service. Then 1.3 weeks leave for each subsequent year.
WA	<i>Long Service Leave Act 1958</i>	8.67 weeks leave after 10 years' service. Then 4.33 weeks leave after additional 5 years' service.
TAS	<i>Long Service Leave Act 1976</i>	8.67 weeks leave after 10 years' service. Then 4.33 weeks leave for each additional 5 years employment.
NT	<i>Long Service Leave Act 1981</i>	13 weeks leave after 10 years' service. Then 6.5 weeks after each additional 5 years' service.
ACT	<i>Long Service Leave Act 1976</i>	0.2 months leave for each year of service, with leave available to be taken after 7 years' service.

² **Fair Work Bill 2008** Explanatory Memorandum at paragraphs 436 to 439.

Commonwealth	<i>Long Service Leave (Commonwealth Employees) Act 1976</i>	3 months after 10 years' service, pro-rata for part-time employees.
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Table 2: Portable, industry-based Long Service Leave Schemes

STATE	PLSL SCHEME	ENTITLEMENT
NSW	Building and Construction	8.67 weeks for each 10 years' service; 4.33 weeks for each subsequent 5 years' service.
	Contract Cleaning	Cleaning – 8.67 weeks after 10 years' service (3650 days); 4.33 weeks for each 5 years' service thereafter (1825 days)
ACT	Building and Construction	13 weeks after 10 years' service
	Contract Cleaning	6.067 weeks after 7 years' service
	Community Services	4.333 weeks after 5 years' service
	Security	8.667 weeks leave after 7 years' service
QLD	Building and Construction	8.67 weeks after 10 years' service (2,200 days); pro rata entitlement after 7 years' service
	Contract Cleaning	8.67 weeks after 10 years' service; pro rata after 7 years' service
VIC	Building and Construction	42.4 days after each 7 years' service
SA	Building and Construction	13 weeks after 2600 days (260 days p.a.)
WA	Building and Construction	8.67 weeks after 10 years' service (2200 working days); 4.33 weeks after 5 years' service thereafter (1100 days)
TAS	Building and Construction	13 weeks after 10 years' service (2200 working days); 4.33 weeks after each 5 years' service thereafter (1100 days)
NT	Building and Construction	65 days after 10 years' service (2600 days) (i.e. 13 weeks), 32.5 days for each 5 years' service thereafter
Commonwealth	Coal Mining	13 weeks for each 8 years' service

The Terms of Reference for this Inquiry refer specifically (at point a. vi.) to the key components of any portable LSL scheme for the community services sector, including coverage, eligibility and the calculation of benefits. In our submission, regard should be had by this Inquiry to the existing provisions for portable LSL for the community services sector in the ACT, which provide for 4.333 weeks leave after 5 years' service.

More generally, it is our strong submission that all sectors, industries and occupations in the contemporary labour market will benefit from the creation of a generalised entitlement to portable long service leave. We believe it is a clear role of government to facilitate the introduction of a generalised system of portable LSL entitlements. A national portable LSL standard should build on and supplement a generalised national LSL scheme.

What does a generalised national LSL scheme look like?

Provision of LSL is inherently beneficial to workers. LSL is unambiguously about the interests and well-being of the employee. It is based on the notion that long service is of itself deserving reward and recognition by way of additional leave entitlements and that refreshment and renewal of workers through accessing a LSL entitlement contributes to national productivity and social well-being.

Accordingly, any generalised LSL standard should maintain existing LSL entitlements that apply to employees in various States and industries throughout Australia and must ensure the continued successful operation of existing industry portable LSL schemes ('IPLSL') and preserve more generous State or Territory provisions where they exist.

This can be achieved by adopting a 'highest common denominator' approach in respect of the Statutory LSL schemes. This means the adoption of a scheme based on the legislated standards applying in South Australia and the Northern Territory in relation to the core entitlement, with elements of other statutory schemes being picked up in areas such as access to pro-rata entitlements, the rate of payment of LSL and the extent of entitlements for casual employees.

This is the preferred option of the ACTU. Under this approach, workers would receive 13 weeks long service leave after 10 years' service with an employer. LSL would accrue at the rate of 1.3 weeks' for each year of service and pro rata for part years.

In normal circumstances, LSL would be available after 10 years' service and the timing of the leave would be by agreement between the employee and employer, subject to a reasonableness test in respect of the operational requirements of the business. In the case of pressing domestic necessity, illness or injury, access to LSL entitlements would be available on a pro-rata basis after five years. Similarly, accrued LSL would become available after five years on termination of employment by the employer, except by reason of serious and wilful misconduct of the employee. Pro-rata access to LSL on termination would be available after 7 years, regardless of the reason for termination, or initiator of the termination.

Other than in the circumstances described above, LSL cannot be "cashed-out".

The LSL scheme would apply to all national system employers and employees, with relevant exclusions pertaining to the coverage of existing IPLSL schemes. The scheme would also provide for coverage of casual and seasonal employees, based on the formula utilised by in the Victorian *Long Service Leave Act 1992*.

The rate of pay applicable to long service leave as taken, would be the employee's normal or actual weekly rate of pay, including shift loadings, regular bonuses, allowances and rostered or compulsory overtime. This position is broadly consistent with the approach in relevant Tasmanian and Queensland legislation.

Under the proposed scheme, 'continuous employment' with an employer would encompass a transfer of business to a new employer, as well as the transfer of an employee's employment from one corporate entity to an associated entity within a corporate group. Also, the termination and subsequent re-hiring of an employee by the same employer or an associated entity within a

period of three months would result in the reinstatement of continuous service for the purposes of accruing LSL.

Similarly, 'service' for the purposes of accrual, would include normal working hours and the all types of leave, plus unpaid parental leave. Unpaid leave, including periods of industrial action, would neither count as service nor break the continuity of service. Employer stand down due to slackness of trade would not break service and would count as time worked or a period of service. Interruptions in employment caused by the employer with the intention of avoiding LSL obligations, would count as service.

Finally, as is the case with most existing jurisdictions, a public holiday falling within a period of long service leave will lead to the LSL being extended by that the duration of the public holiday and LSL can be taken in advance, by agreement between an employer and employee.

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.

A national portable LSL entitlement

A single-employer based LSL model is not sufficient to meet needs and realities of the modern workplace.

The existence of well-functioning and long established portable *industry* long service leave schemes evidences the clear need to provide for workers whose form of employment (casual, contract, owner-operator) or sector (mining, construction, security, care) stands in the way of their ever achieving long-term engagement with a single employer. Contemporary labour market trends are raising the share of such workers in total employment.

The ACTU is considering a range of models for providing portable accesses to a range of leave entitlements, including long service leave.

Of particular note in this regard is the 2013 report produced by the McKell Institute and the Macquarie University Centre for Workplace Futures entitled *The Case for a Portable Long Service Leave Scheme in Australia* ('McKell Report'). The McKell Report is a comprehensive and wide-ranging study on the operation of existing industry portable LSL (PLSL) schemes in Australia. It also identifies three possible models for a future portable *national* long service leave scheme, as follows:

OPTION A – The Approved Deposit Fund (ADF) model

“The ADF model is based on the system of Approved Deposit Funds (ADFs) established in the superannuation industry during the 1980s (also known as Rollover Funds). Employers make their own internal provisions for LSL until an employee leaves or is eligible for LSL. Employees who leave service can roll over a lump sum PLSL benefit into any ADF they nominate. The accrued benefit payable at exit from an employer would be calculated using a defined benefit formula, based on the employee’s wages at the date

of exit, in line with existing legislation, awards and/ or workplace agreements. The lump sum benefit would not normally be payable in cash (unless the employee met a LSL condition of release). The ADF invests the money on behalf of the employee, in an accumulation-style account, until the employee is eligible to receive LSL.”³

OPTION B – The Industry-based Defined Benefit Fund Model

“An alternative model involves the creation of a range of industry-based defined benefit funds. There are already more than a dozen established industry based PLSL arrangements, however, each of these provides only limited portability. Workers only accrue LSL benefits while working within the industry, and may forfeit their entitlements if they cease working in the industry prior to completing the vesting period of service. Workers who complete the vesting period, and then leave the industry are usually entitled to claim a cash payout.

Employers in the industries covered by existing schemes are required to be registered with the relevant fund. The employers periodically provide information about each employee and periodically pay levies to the fund administrators. Each fund is invested in line with a strategy determined by the Board and/or approved by the Minister or Trustee. When an employee becomes eligible for an LSL payment, a benefit may be payable directly from the LSL fund; or may be payable by the employer, who then claims reimbursement from the fund. The benefits payable are calculated in accordance with the relevant legislation and/or award. This currently means that LSL benefits are defined benefits.

Each fund is periodically reviewed by an actuary, who assesses the adequacy of the fund’s assets, relative to the fund’s liabilities, using reasonable assumptions about the future experience of the fund. The actuary might recommend an increase or a decrease in the levy rate, in order to maintain an acceptable level of solvency. The fund administrators play a role in ensuring that employers comply with their obligations, for example, educating new employers, inspecting records of registered employers and imposing financial penalties for late payments.”⁴

OPTION C – The Accumulation Model

“Employers would be required to make regular contributions for all eligible employees into designated LSL accounts administered by superannuation funds and/or authorised financial institutions. (The minimum contribution would be determined by the National Employment Standards.)

Account funds would be invested on behalf of the account holder and investment earnings would be credited. Administration fees would be deducted. The account-provider would be required to maintain records sufficient to determine the worker’s

³ Markey et al (2013), at p.14

⁴ Markey et al (2013) at pp 15-16.

eligibility for LSL cash payments in the future. The LSL benefit would not become payable in cash until the worker met an “LSL condition of release”, similar to the preservation requirements applicable to superannuation benefits. The LSL account provider would be required to meet registration, reporting, and corporate governance requirements, similar to those imposed on the financial institutions that hold superannuation savings. APRA would set standards for authorisation and monitor account providers. Banks, life insurers, and superannuation funds would be eligible to offer LSL accounts, as long as they met the authorisation standards.”⁵

The possible introduction of any portable national LSL scheme involves important and complex reform of existing industrial arrangements. It is therefore essential that the widest possible input and consultation be sought before the specific direction of fundamental reform is determined.

The ACTU would welcome a high-level expert independent inquiry into options for a generalised portable national LSL scheme, with submissions sought from all interested stakeholders. For example, such an Inquiry could be conducted by a senior serving member of the FW Commission as chair and four ordinary Panel members with appropriate expertise (two nominated by the ACTU and two by the peak employer groups ACCI, and AiGroup) with secretariat and research services provided by the Department of Employment. The Terms of Reference for the Inquiry would be to report on and make recommendations for both a generalised national LSL standard and its supplementation by a national portable LSL scheme.

The Inquiry would seek consensus and a narrowing of differences on key issues, based on a consideration of relevant evidence, submissions and experience. To the extent that members of the Inquiry Panel could not agree on recommendations concerning these issues, it would be the job the Inquiry Chair to fairly put the case of the respective interest groups with the right to recommend a preferred position.

None of this should inhibit this Victorian Parliamentary Inquiry making recommendations regarding the key components of a portable LSL scheme for community services sector in Victoria, including coverage, eligibility and calculation of benefits. This Inquiry should have regard to the existing provisions for portable LSL for the community services sector in the ACT, which provide for 4.333 weeks leave after 5 years' service.

⁵ Ibid at p.17.

ADDRESS

ACTU
365 Queen Street
Melbourne VIC 3000

PHONE

1300 486 466

WEB

actu.org.au

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