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Inquiry into Portability of Long Service Leave in Victoria

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is the leading voice of business in Australia**

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1. INTRODUCTION

“... the construction industry scheme is not concerned with leave at all, but with payments. In other words, a scheme which was initially promoted on the basis that an employee who faithfully served an employer for an extended period deserved a long break as a reward, has been transformed in the construction industry into a scheme whereby anybody who is employed in the industry for a total of 10 years, no matter many employers are involved or how frequently he or she goes and works temporarily in another industry, will be entitled to a sum of money.”¹

On 12 June 2015 the Victorian Parliament’s Economic, Education, Jobs & Skills Committee (Committee) called for submissions to an inquiry into portability of long service leave entitlements for Victorian workers (Inquiry). The Australian Chamber of Commerce & Industry (ACCI) welcomes the opportunity to make submissions to the Inquiry.

ACCI opposes both the expansion of existing industry based portable long service leave schemes and the creation of new ones. ACCI has concerns that any moves to do so will have the effect of:

- imposing a new tax on employment at least 2.5 per cent to the detriment of employment in Victoria;
- imposing additional labour costs on employers operating in Victoria, placing them at a disadvantage compared with employers in other states and territories and discouraging domestic and international investment in Victoria;
- creating not insignificant additional administrative and financial burdens on employers, impacting cash flow, service levels and operations in sectors impacted;
- creating apprehension about employing people with longer career tenures and experience.

Paid long service leave is unique to Australia and New Zealand with its origins inextricably tied to our colonial past. This submission traces its evolution over 150 years. One key characteristic that tends to be drowned out in contemporary discussion regarding long service leave is the benefit that employers also derive from a scenario in which one of their employees takes long service leave. The benefit is that in accumulating long service long, the employee has given long service to them, not an industry or a state. In that service, the employee has provided the employer with continuity, stability and greater productive benefits, having become progressively more skilled, experienced and integral to the employer’s operations.

¹ Gyles, R. QC 1992, Royal Commission into Productivity in the Building Industry in New South Wales, Final Report, Sydney, NSW, p. 92.

It is one thing to have a robust and worthwhile community discussion about work/life balance and the benefits of rest and recuperation but diluting the concept of long service leave by removing the key benefit that employers derive from it in order to pursue these goals is unfair and economically destructive.

This inquiry takes place in a context where there are existing portable long service leave schemes operating in Victoria for the building and construction industry. Portable long service leave schemes were established in Victoria and other states and territories to recognise the distinctive nature of employment in industries where employees are typically engaged on a project basis. However the rationale for portable long service leave schemes is not supported in other industries, particularly where traditional employment arrangements are commonplace. Furthermore, the cost and administrative burden associated with the establishment and operation of such schemes would significantly outweigh any benefits that some suggest portable long service leave schemes deliver. The claimed benefits are not supported by robust and probative evidence yet the negative impacts that the expansion of portable schemes will have on employment and business competitiveness are clear.

2. HISTORY OF LONG SERVICE LEAVE IN AUSTRALIA

Long service leave in Australia has its genesis from the colonial era, providing public service employees in South Australia and Victoria with a ‘furlough’ to enable them to visit the United Kingdom and in this respect, is generally understood as an entitlement unique to Australia and New Zealand. Legislation passed by South Australia and Victoria in 1862 initially provided between 6 and 12 months paid leave to civil servants after 10 years of service to the colonies at a time where it could take multiple months to travel by sea. The scheme has been described by Burgess et al as providing “*respite for those who were separated by distance between “home” and workplace*” and providing a benefit reserved for those “*relatively high in the colonial administration hierarchy*”.²

In 1911 the first amendments were made to Commonwealth long service leave benefits that enabled access to the benefit for a broadened range of purposes including:

- as an additional form of retirement savings by enabling those who had completed 20 years’ service to take a lump sum payment on retirement in lieu of taking the leave; and
- as a death benefit to dependents of public sector employees.³

It should be noted that this occurred before Australia’s retirement incomes policy was well evolved and well before the introduction of the compulsory

² Burgess J, Sullivan A and Strachan G. (2002). *Long Service Leave in Australia: Application and Reform*, University of Newcastle, p. 1.

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

superannuation guarantee laws in 1992. Social welfare was in its infancy, with age pension schemes non-existent until the early 1900s.

Long service leave was confined to the public sector until the 1940s from which time it began its gradual extension into the private sector via inclusion in private sector awards with entitlements created through the processes of conciliation and arbitration. Entitlements under these provisions were based on continuous service with one employer. State based legislative entitlements to long service leave emerged from the 1950s at a time where the Australian economy was experiencing a post-war boom.⁴ Ferris et al have suggested:

There was strong demand for labour and there was concern about high labour turnover rates. Perhaps this made employers more willing to provide benefits that might help to attract and retain staff (many corporate superannuation schemes were established in the same era).⁵

The New South Wales Government was the first state to introduce legislation to mandate long service leave entitlements and Ferris et al note that when introducing this legislation, the Minister for Labour and Industry identified that the reduction of labour turnover was among the purposes of long service leave.⁶ The Minister also identified that it would be long and faithful service with a single employer that the long service leave entitlement would reward.

In the context of its introduction in the early 1950s, the legislation may have been seeking to give effect to an entitlement that encouraged employees to stay with the one employer and which may have provided some benefit to employers that were struggling to retain their employees due to high demand for labour. However in the modern economy, employer strategies targeted at attracting and retaining employees have evolved significantly and legislation mandating portable long service leave entitlements beyond current arrangements is not an appropriate means of achieving this objective.

There is also an absence of any significant structural change in service patterns that would warrant an expansion of existing long service leave schemes. Ferris et al recently examined ABS and HILDA data in relation to the length of time people have been working with their current employer and found:

- in 2012 about 27 per cent of male workers had been employed in the same job for at least ten years, a figure that has remained stable over the period between 1988 and 2012;⁷
- in 2012 about 23 per cent of female workers had been employed for at least 10 years, increasing from about 15-16 per cent over the same period. Ferris et al expressed the view that “[t]his might reflect improvements in maternity

⁴ Ferris et al., op. cit., p. 8.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid., p.p. 10-11.

leave or increasing female workforce participation rates at older ages, or both”.⁸

The 2012 figures were consistent with HILDA data.⁹ Ferris et al also noted that older workers have lower resignation rates than younger workers and that the percentage of long-serving employees increases rapidly with age and also found:

For those aged 55 to 64, more than half have been employed by their current employer for at least 10 years; for those aged 65 or more, about two thirds have been employed by their current employer for at least 10 years. This suggests that for those who remain in the workforce over the longer term (until age 65), at least two-thirds are likely to become eligible to take LSL.¹⁰

As our population ages and people remain in the one workplace for longer, access to long service leave can be expected to increase. This counters suggestions that employees are ‘missing out’ on entitlements.

Young people in society are also delaying major life events and nearly double the proportion of young people were attending an educational institution in 2011 than in 1976 (26% compared with 14%).¹¹ Many more young people are working part-time hours with 34% of young adults employed to work less than 35 hours per week compared with 11% in 1976. Increased flexibility in the workplace and the existence of forms of work that enable them to balance their work, study and personal priorities has contributed to this outcome. The average young person is now more likely to be living without a partner and children and there is a higher probability of them studying and working casual or part-time hours in a service related industry. Jobs they take on early in life, while providing a foothold into the labour market, will not necessarily be in the industry in which they wish to pursue a career.

3. RATIONALE UNDERPINNING LONG SERVICE LEAVE

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

Over time, a number of rationales have underpinned the provision of LSL – these being: to provide employees with an extended leave of absence in order

⁸ Ferris et al, op. cit., p. 11.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

*to renew their energies; to reward long and faithful service with an employer; and to reduce labour turnover.*¹²

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

*...there has been little change to the structure of long service leave. It is generally regarded now as an opportunity for an employee to take some respite from a long period of service in the one business.*¹³

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

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

- *to reduce labour turnover;*
- *to provide a reward for long and faithful service; and*
- *to enable employees halfway through their working life to recover their energies and return to work renewed, refreshed and reinvigorated.*¹⁴

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

*While LSL may not be an efficient measure for creating employer loyalty, it must have some effect, which would be diluted with full portability.*¹⁵

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

¹² Australian Industrial Relations Commission. (2004). *Long service leave in Australia: towards a national minimum standard*. Available at http://www.airc.gov.au/familyprovisions/aig/TAB_12.pdf, p. 2.

¹³ *Re. Office of the Chief Electrical Inspector Enterprise Agreement 2003* (AIRC) PR942414 (5 January 2004) para. 8.

¹⁴ Markey, Ray, Parr, Nick, Kyng, Timothy, Muhidin, S, O’Neill, Sharon, Thornthwaite, Louise, Wright, Chris F, Lavermiocca, Catriona, & Ferris, Shauna. (2013), *The Case for a National Portable Long Service Leave Scheme in Australia*, available at http://mckellinstitute.org.au/wp-content/uploads/2013/06/McKell_Portable_LongService.pdf, p. 10.

¹⁵ Productivity Commission 2015, *Workplace Relations Framework*, Draft Report, Canberra, p. 178.

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

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

...there are doubts about the magnitudes of some of these benefits. There are several natural experiments on the impacts of LSL portability provided by various existing state-based arrangements...It appears that, notwithstanding the goal of providing a time for recuperation, employees under portable schemes do not necessarily take the leave.¹⁶

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

in many cases, LSL is not regarded as an opportunity for career renewal, but rather as an economic asset.¹⁷

Ferris et al have also observed that:

...it is clear that LSL entitlements are used flexibly, for a wide range of different purposes. LSL can be used for retirement savings; redundancy pay; death and disability pay; to extend parental leave or carers' leave; or as a lump sum resignation payment. In some jurisdictions, LSL payments can be cashed out, which means that LSL is simply a savings account that can be drawn upon in an emergency.¹⁸

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

... the construction industry scheme is not concerned with leave at all, but with payments. In other words, a scheme which was initially promoted on the basis that an employee who faithfully served an employer for an extended period deserved a long break as a reward, has been transformed in the construction industry into a scheme whereby anybody who is employed in the industry for a total of 10 years, no matter many employers are involved or

¹⁶ Productivity Commission, op. cit., p. 176.

¹⁷ Ibid., p.176.

¹⁸ Ferris et al, op. cit., p. 12.

*how frequently he or she goes and works temporarily in another industry, will be entitled to a sum of money.*¹⁹

The ABS has not published data on long service usage since 1990, but Ferris et al observe that the data available suggests that the rates of taking long service leave were low across the board²⁰ and also points to the habit of Australian workers accumulating their leave entitlements.²¹

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

The McKell Report suggests the following potential advantages and disadvantages of portable long service leave:²²

Potential advantages of PLSL schemes	Potential disadvantages of LSL portability
<p>Retention of workers – PLSL schemes address challenges in retaining employees in industries with high levels of labour mobility.</p> <p>Equity – Workers in highly casualised or contract roles otherwise have no practical access.</p> <p>Mobility and flexibility – Workers have more capacity to move between employers or to take short periods out of employment to meet commitments such as carer responsibilities.</p> <p>Productivity and work environment – The capacity to take a sustained period of leave to rejuvenate after a lengthy period of continued work has advantages for boosting productivity and morale.</p> <p>Employee attraction – A benefit for “good employers” as employees feel less compelled to stay in poorly managed workplaces in order to meet LSL eligibility</p>	<p>Administration costs for employers – This factor is pronounced during transitional periods of newly established schemes. However, recent improvements in administrative software and systems were cited by administrators and employer representatives as significantly reducing the administrative burden and cost.</p> <p>Financial costs of providing benefits for employees who leave after a short period of service – In industries where many workers do not achieve the qualifying period under non-portable schemes, PLSL has effectively imposed an additional financial cost for employers.</p> <p>Prefunding impact on business cash flows – Smaller employers may fail to provide for LSL benefits in their accounting systems and simply pay LSL payments from consolidated revenues</p>

¹⁹ Gyles, R. QC 1992, Royal Commission into Productivity in the Building Industry in New South Wales, Final Report, Sydney, NSW, p. 92.

²⁰ Ferris S et al, op. cit, p. 12.

²¹ Ibid., p. 12.

²² Markey et al, op. cit., p. 12.

<p><i>requirements.</i></p> <p>Non-compliance problems reduced – Employers pay for entitlements as they accrue.</p> <p>Free-riding problems reduced – Industry based LSL schemes mean that all employers are obliged to fund LSL entitlements, regardless of whether they retain employees who reach the resting period for taking leave.</p> <p>Administrative benefits for employers – Industry funds effectively remove from employers the responsibility for administering LSL arrangements and payment for employees.</p> <p>Cost certainty – Greater cost stability is provided to employers because the pay-as-you go operation limits the potential for employers to accumulate liabilities and not being able to pay employees their entitlements if they become insolvent or have trading difficulties.</p> <p>Tax benefits – Employers can claim a tax deduction for payment of the levies, and the portable industry funds are not required to pay tax on their investment income.</p>	<p><i>as required. The PLSL schemes require employers to prefund these benefit payments, which impacts the employers' cash flows.</i></p>
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It is questionable as to whether all the benefits identified above materialise in practice and in a meaningful way. While retaining employees in 'industries' is perceived to be a potential advantage, there is no recognition of the dividend that employers (who fund the entitlements) currently derive from retaining a stable workforce of experienced, loyal and long serving employees or the fact that it would be lost. The potential 'employee attraction' advantage is based upon suppositions that a cohort of employees working in 'poorly managed workplaces' will now move to 'good employers' because of portability of long service leave entitlements.

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

capacity. Career decisions are very personal and regulating to influence choices through such a discrete employment entitlement is unlikely to be effective.

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

*In many cases, it would appear that portability schemes are more a direct result of bargaining power by parties in select industries, than of significant evidence of the benefits of such schemes for productivity.*²³

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

- *the strategic nature of the building and construction industry;*
- *high union density and industrial strength;*
- *a well-established industry focus;*
- *patterns of employment in the industry* (references omitted).²⁴

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

4. POTENTIAL IMPACTS ARISING FROM THE EXTENSION OF PORTABLE LONG SERVICE LEAVE

4.1 Competitiveness

Legislated long service leave is generally considered a uniquely Australian and New Zealand entitlement arising from a colonial heritage, notwithstanding that some countries do provide some linkage between other forms of paid leave and length of service. The 2003 Report of the Royal Commission into the Building and Construction Industry noted that despite some countries such as Britain and Greece providing additional annual leave entitlements as a reward for continuity of service “Australia’s approach to long service leave is distinctive in that long service leave is a legislated right of the entire workforce”.²⁵ Given its uniqueness, any expansion of this

²³ Productivity Commission, op. cit., p. 178.

²⁴ Royal Commissioner The Honourable Terrence Rhoderic Hudson Cole RFD QC, 2003, [Final Report of the Royal Commission into the Building and Construction Industry](#), Reform Funds, Vol. 10, p. 219.

²⁵ Cole, op. cit., p. 217.

entitlement will have the effect of increasingly already high labour costs by global standards, impacting Australia’s international competitiveness and attractiveness as a location for investment.

At a domestic level, imposing the cost of a portable scheme on Victorian employers would obviously disadvantage them against their interstate counterparts in terms of the cost of doing business.

4.2 Financial and employment impacts

The extension of the operation of long service leave beyond its current scope will result in significant cost increases to employers as a result of the broadened pool of employees who would become entitled to the leave. Portable long service leave schemes are effectively a tax on employment and noted by the Productivity Commission:

A move to mandate portability at the current level of LSL entitlements would entail a significant increase in LSL costs to business. Under current arrangements, the total costs of LSL for an employer depend on the tenure distribution of its workforce. As many employees leave before the qualifying period, the total claims under the current arrangements are much smaller than would apply under a portable scheme (where employers’ tenure would be based on their working lives, not their specific tenure with an employer). The greater coverage of employees would be reflected in the levy imposed on employers with one estimate suggesting that portable LSL costs could be up to 2.5 per cent of work costs (McKell Institute 2012). In the absence of any counteracting wage reductions, this would have some dampening effect on employment and encourage businesses to use more capital instead of labour.²⁶

The levies payable in relation to existing schemes are set out below:

State	Industry	Start date	Key Legislation	Levy
NSW	Building and construction	1986	<i>Building and Construction Industry Long Service Payments Act 1986</i> <i>Building and Construction Industry Long Service Payments Regulation 2011</i>	3.5 % of the value of building and construction work where the cost of building is \$25,000 or more (inclusive of GST)
	Contract cleaning	2011	<i>Contract Cleaning Industry (PLSL Scheme) Act 2010</i>	1.7% of total remuneration
ACT	Building and construction	1981	<i>Long Service Leave (Portable Schemes) Act 2009</i>	1.25% of ordinary wages (no levy on apprentices)
	Contract cleaning	1999		2% of ordinary wages paid
	Community services	2010		1.67% of ordinary wages

²⁶ Productivity Commission, op. cit., p. 178.

	Security	2012		1.47% of ordinary wages
QLD	Building and construction	1992	<i>Construction Industry Long Service Leave Act 1987</i> <i>Building and Construction Industry (PLSL) Act 1991</i> <i>Building and Construction Industry (PLSL) Regulation 2002</i>	0.3% of total of all costs relating to construction work (if over \$80,000)
	Contract cleaning	2005	<i>Contract Cleaning Industry (PLSL) Act 2005</i>	2% of ordinary wages paid
VIC	Building and construction	1976	<i>Construction Industry Long Service Leave Act 1997</i> <i>Rules of the Construction Industry LSL Fund as at 7 April 2009</i>	2.7% of every workers' ordinary rate of pay
SA	Building and construction	1987	<i>Construction Industry Long Service Leave Regulations 2003</i>	2.25% of total remuneration paid
WA	Building and construction	1986	<i>Construction Industry Portable Paid Long Service Leave Act 1985</i> <i>Construction Industry Portable paid LSL Regulations 1986</i>	2% of ordinary rate of pay for all workers (except apprentices) for all days engaged on site
TAS	Building and construction	1971	<i>Construction Industry (Long Service Leave) Act 1997</i>	2% of ordinary pay
NT	Building and construction	2005	<i>Construction Industry Long Service Leave and Benefits Act 2005</i> <i>Construction Industry LSL and Benefits Regulations as in force at 3 August 2012</i>	0.3% of cost of project for work started on or after 1 April 2012 (0.4% for work started prior)
CTH	Coal mining	1949	<i>Coal Mining Industry (LSL) Administration Act 1991</i> - Amended by <i>Coal Mining Industry (LSL) Legislation Amendment Act 2011</i> . - Two related Coal Mining Industry Payroll Level Acts also apply.	2.7% of eligible wages paid

Employers are also required to implement contingent arrangements for extended periods of leave which may include allocation of overtime, sourcing contingent labour and training. Such arrangements not only result in direct costs but also impact the productivity of the workplace.

The impacts upon small business are particularly acute as small businesses are less able to source and train temporary staff, reallocate work, or otherwise cover absences over an extended period, resulting in less than optimal business performance. While the impacts of an employee taking long service leave under state based legislation or federal awards are already felt by these businesses, to help offset the burden, employers have the benefits of a loyal and long serving employee. However the impact of an absent employee is not mitigated by these factors under portable schemes.

4.3 Operational impacts

The extension of portable long service leave to industries where employees are more commonly employed on an ongoing basis (rather than on a project basis) would see such schemes operate in a manner contrary to the intended purpose of long service leave and has the potential to create a number of undesirable consequences.

Staff retention is a key concern for most employers and is a particular concern for small business employers given that the cost of turnover is more acutely felt. While long service leave currently requires management, particularly where employees in essential roles take leave, the vesting of the entitlement will have meant that the employer has had the opportunity to plan ahead and of course will have already had benefit of the employer's loyal service over a considerable period. However in the case of portable schemes, this is not the case. The entitlement provides no incentive for an employee to remain with one employer and employees may take leave as a result of service accrued with other employers. An employer may be required to meet the operational costs associated with the absence notwithstanding an employer's short service with them. This could have a number of unintended consequences, including creating employer apprehension of employing people with experience acquired from other employers. As recognised by the Productivity Commission:

Some employers may be reluctant to hire workers with accumulated entitlements as these would be more likely to request protracted leave close to their commencement date.²⁷

Portable schemes are not appropriate for industries where ongoing employment is the norm or industries that are not structured around project based employment.

4.4 Cost of administration

Where portable schemes exist, payment to eligible workers are distributed and administered by portable long service leave funds and not by employers. While this mitigates to some extent direct additional administrative and compliance costs created by these schemes, the administration costs of the fund still have to be met.

Expanding the current reach of portable long service leave in Victoria will increase the cost of fund administration and require levies payable by employers, at very least during an establishment phase. These levies would be in addition to the contributions payable on behalf of employees.

The establishment of a new fund, or indeed the expansion of the quantum of funds currently managed by ColInvest in administering the construction industry portable long service scheme raises legitimate considerations regarding the governance arrangements. Obviously, ColInvest provides a working example but the scale of funds under management would increase significantly, if a universal scheme was introduced.

Recent history relating to ColInvest is instructive. ColInvest's 2014 annual report indicates that an amount of \$137.4 million was collected during the financial year and also states that in 12,558 claims from workers and working subcontractors to the value of \$110.71 million. As at June 2014, the fund's liabilities exceeded its assets

²⁷ Productivity Commission 2015, *Workplace Relations Framework*, Draft Report, Canberra, p. 178.

by \$11.977 million (compared to \$128.471 million in 2013). Data provided in the annual report for the five years prior to the reporting date suggests a trend of the number of claims increasing (up to 12,558 in 2013-14 from 8,379 in 2009-10) and the value of claims increasing (up to \$110.7 million in 2013-14 from \$63.71 million in 2009-10).

The impacts of increased expansion should not be underestimated. By way of example, in 2001 the Governor in Council approved exercise of trustee powers to enlarge the class of persons who could access the fund, with this power providing for:

- access to pro-rata long service leave after seven years (instead of ten);
- access to an entitlement of 13 weeks' long service leave after 10 years (instead of 15); and
- payment of all accrued benefits of 55 days and over to estates of deceased workers.²⁸

After this power was exercised in 2001, which the 2003 Report of the Royal Commission suggests was the result of 'industrial pressure', ColInvest's 2001 annual report indicated that the changes had resulted in an increase of \$36.2 million in fund liabilities.²⁹ The impact is described in the 2003 Report of the Royal Commission as follows:

As a direct result, employers in Victoria, who have not needed to contribute to the fund since 1993 because of the sufficiency of returns on investment of the fund to meet their long service leave obligations to their employees, will commence paying a levy to the fund of 1.5 percent of each worker's ordinary pay from 1 July 2003. Clearly that cost will be passed on as a part of the cost of building and construction work in Victoria.³⁰

While the impact of increasing taxes on employment in the building and construction industry is a key concern for matters such as housing affordability and the cost of providing key infrastructure, it is also a key concern for employment outcomes. Where employers are unable to pass on these costs to consumers they are forced to adopt other coping strategies which can include a reduction in the number of people employed and/or the hours they work.

As noted in the 2003 Report of the Royal Commission:

The continuing provision of various benefits has steadily and incrementally widened the class of workers who can access a payment from the fund, to the point that long service leave schemes in each of the participating jurisdictions

²⁸ Cole, op. cit., p. 243.

²⁹ Ibid.

³⁰ Ibid.

now concern an additional payment to workers, and have little to do with 'long service'.³¹

In addition to opposing any further expansion of portable long service leave funds, ACCI considers it crucial that any funds collected for the purposes of portable long service leave under existing funds should continue to be managed to the highest standards, with quarantining of entitlements and minimising industry costs and the rate of contribution.

4.5 Negative impact on community services

ACCI notes that the community services sector is specifically identified in the terms of reference for this Inquiry. The ACT is the only jurisdiction to have implemented a portable long service leave scheme for this sector, through legislation passed in 2009. The McKell Report has summarised the employer concerns raised during the consultation process as follows:

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

Some employers were also concerned about the difficulties of finding staff to "fill in" while others were on leave. They suggested that employers might be reluctant to hire people who already had accrued LSL entitlements from prior jobs, since this would cause staffing difficulties.³²

Such impacts would be amplified across the larger economy of Victoria. It should also be noted that the Victorian Government has previously considered the implementation of a portable long service leave scheme 'aimed at strengthening the sector and encouraging workforce retention'³³ and the grounds of employer opposition to the scheme at that time remain relevant today. These concerns are summarised in a report prepared by PricewaterhouseCoopers for the Department of Human Services (PWC Report) and include (but are not limited to):

- the cost of implementing such a scheme of which potential impacts include:
 - *community services organisations (CSO)s having to decrease services provided;*

³¹ Cole, op. cit., p. 243.

³² Markey et al, op. cit., p. 54.

³³ PricewaterhouseCoopers for Department of Human Services, Community Sector Investment Fund, *Community Services Sector Portable Long Service Leave*, May 2010, p. 1.

- *a decrease in staff or hours worked;*
- *postponement of capital investment;*
- *potential insolvency;*³⁴
- administrative complexity with the PWC Report finding 90 per cent of employees were on awards or agreements stipulating a different entitlement resulting in the need to administer two long service leave systems, the portable scheme and the employer-specific scheme.³⁵

The PWC Report also noted that:

*employers generally lacked any clear sense that portable long service leave would bring benefits to their own organisations. Many employers regarded the proposed benefits generated by portable long service leave of retention and recruitment to be unproven and only likely to be realised (if at all) in the long term.*³⁶

ACCI strongly recommends against introducing a new tax on the employment of workers who provide important services to our community and has serious concerns regarding the impact that such a tax will have on the provision of those services and the sustainability of community services organisations. The increase in labour costs would either have to be passed onto the Government for the taxpayer to bear or, failing this, result in cuts in current levels of service in order to meet the increased expense.

5. PRACTICAL IMPEDIMENTS

The introduction of more portable schemes, in addition to existing long service leave schemes that already vary considerably, would create even further complexity and confusion, particularly where employees move between roles, employers and industries and where employers operate across multiple jurisdictions.

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

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

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

³⁴ PricewaterhouseCoopers, op. cit., p. 11.

³⁵ Ibid., pp. 11-12.

³⁶ Ibid., p. 12

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

- (a) terms of award, or a State reference transitional award, that (disregarding the effect of any instrument of a kind referred to in subsection(2)):
 - (i) would have applied to the employee at the test time (see subsection (3A)) if the employee had, at the time, been in his or her current circumstances of employment; and*
 - (ii) would have entitled the employee to long service leave; and**
- (b) any terms of the award, or the State reference transitional award, that are ancillary to or incidental to the terms referred to in paragraph (a).*

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

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

A number of federal awards that are transitional instruments pursuant to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) set out an applicable award-derived long service leave term as they establish long service leave entitlements that would have applied to employees prior to 1 January 2010 (the test time). While these provisions operate to the exclusion of entitlements drawn from state based legislation, some employers already employ a mix of people who derive their entitlements from the relevant federal award and people who do not (i.e. because they are not covered by the transitional instrument). As noted by the Productivity Commission:

This complicates the task of determining the specifics of a worker’s entitlement. The employer must first check whether the worker is covered by either an agreement made prior to January 2010 that remains in effect, or by an ‘award-based transitional instrument’. Where an agreement has lapsed, and so does not cover the worker, and/or where the relevant instrument does not specify the worker’s LSL entitlement, as it is commonly the case, the employer must abide by the relevant state or territory’s legislation instead (references omitted).³⁷

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

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

³⁷ Productivity Commission 2015, *Workplace Relations Framework*, Draft Report, Canberra, p. 173.
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Furthermore, long service leave arrangements are also reflected in enterprise agreements and the introduction of another scheme has the potential to disturb those negotiated arrangements.

For the record, in our submission to the Productivity Commission Inquiry into the workplace relations framework, ACCI highlighted that the experience of ACCI and its members during the process of Award Modernisation, when various federal and state entitlements were consolidated, was largely unsatisfactory. The results of that process tended to be common standards with increased costs for employers. Given that the overwhelming majority of employers only operate in one jurisdiction, it is reasonable to ask whether the transitional costs that would be incurred if a national long service leave standard was introduced, are justifiable. ACCI has stated and states again that we would not be able 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.

Notwithstanding this, as observed by Casey et al the “existing long service leave provisions in Australia are complex and prescriptive, differing considerably in operation and level of entitlement across jurisdictions”.³⁸ The introduction of more portable schemes or the extension of existing ones would simply create further complexity.

6. CONCLUSION

As the Productivity Commission has recently stated in relation to its consideration of long service leave:

*Overall, it is not clear that the benefits of either the typical model of portable LSL or the alternative proposed above, would be sufficient to justify the costs and complications entailed. Submissions to this inquiry are yet to provide compelling evidence of major and widespread concern about present non-portability of most LSL arrangements.*³⁹

ACCI does not support the expansion of long service leave entitlements beyond current arrangements and considers that any move to do so would negatively impact on the cost of doing business and employment in Victoria. While the benefits of extending or creating new portable schemes are not well made out, the negative impacts of scheme implementation are clear. As a new tax on employment, any increase or extension of long service leave levies will increase the cost of labour and impact the cash-flow and competitiveness of Victorian businesses. As a recent *VECCI-Bank of Melbourne Survey of Business Trends and Prospects* indicated, employers are not in a position to be able to absorb the costs of such a tax on employment. Almost sixty per cent of survey respondents indicated that if they were required to contribute 2.7 per cent of their total gross wage bill to a central scheme,

³⁸ Casey R., McLaren J. and Passant J. (2012). Long service leave in Australia: an examination of the options for a national long service leave minimum standard. *Journal of Applied Law and Policy*, 17-37, p. 19.

³⁹ Productivity Commission 2015, *Workplace Relations Framework*, Draft Report, Canberra, p. 179

they would seek to reduce employee wages, benefits or hours. These results illustrate the negative impact that a scheme expansion would have on Victorian jobs, employers and workers.

7. ABOUT ACCI

7.1 Who We Are

The Australian Chamber of Commerce and Industry (ACCI) speaks on behalf of Australian business at a national and international level.

Australia's largest and most representative business advocate, ACCI develops and advocates policies that are in the best interests of Australian business, economy and community.

We achieve this through the collaborative action of our national member network which comprises:

- All eight state and territory chambers of commerce
- 37 industry associations
- Bilateral and multilateral business organisations.

In this way, ACCI provides leadership for more than 300,000 businesses which:

- Operate in all industry sectors
- Includes small, medium and large businesses
- Are located throughout metropolitan and regional Australia.

7.2 What We Do

ACCI takes a leading role in advocating the views of Australian business to public policy decision makers and influencers including:

- Federal Government Ministers & Shadow Ministers
- Federal Parliamentarians
- Policy Advisors
- Commonwealth Public Servants
- Regulatory Authorities
- Federal Government Agencies.

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.

Our specific activities include:

- Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and globally;

- Business representation on a range of statutory and business boards and committees;
- Representing business in national forums including the Fair Work Commission, Safe Work Australia and many other bodies associated with economics, taxation, sustainability, small business, superannuation, employment, education and training, migration, trade, workplace relations and work, health and safety;
- Representing business in international and global forums including the International Labour Organisation (ILO), International Organisation of Employers (IOE), International Chamber of Commerce (ICC), International Chamber of Commerce and Industry Australia (ICCA) Business and Industry Advisory Committee (BIAC) to the Organisation for Economic Co-operation and Development (OECD), Asia-Pacific Economic Cooperation (APEC) through the Australian ASEAN Business Council, Confederation of Asia-Pacific Chambers of Commerce and Industry (CACCI) and Confederation of Asia-Pacific Employers (CAPE) and Indian Ocean Rim Association (IORA) through the Indian Ocean Business Alliance (IORBA);
- Research and policy development on issues concerning Australian business;
- The publication of leading economic business surveys and other information products; and
- Providing forums for collective discussion amongst businesses on matters of economic and policy reform.

ACCI MEMBERS

ACCI CHAMBER MEMBERS: BUSINESS SA **CANBERRA BUSINESS CHAMBER** CHAMBER OF COMMERCE & INDUSTRY QUEENSLAND **CHAMBER OF COMMERCE NORTHERN TERRITORY** CHAMBER OF COMMERCE & INDUSTRY WESTERN AUSTRALIA **NEW SOUTH WALES BUSINESS CHAMBER** TASMANIAN CHAMBER OF COMMERCE & INDUSTRY **VICTORIAN EMPLOYERS' CHAMBER OF COMMERCE & INDUSTRY ACCI MEMBER**

NATIONAL INDUSTRY ASSOCIATIONS: ACCORD – HYGIENE, COSMETIC AND SPECIALTY PRODUCTS INDUSTRY **AGED CARE AND COMMUNITY SERVICES** AIR CONDITIONING & MECHANICAL CONTRACTORS' ASSOCIATION **ASSOCIATION OF INDEPENDENT SCHOOLS OF NSW** AUSTRALIAN BEVERAGES COUNCIL LIMITED **AUSTRALIAN DENTAL INDUSTRY ASSOCIATION** AUSTRALIAN FEDERATION OF EMPLOYERS & INDUSTRIES **AUSTRALIAN FOOD & GROCERY COUNCIL** AUSTRALIAN HOTELS ASSOCIATION **AUSTRALIAN INTERNATIONAL AIRLINES OPERATIONS GROUP** AUSTRALIAN MADE CAMPAIGN LIMITED **AUSTRALIAN MINES & METALS ASSOCIATION** AUSTRALIAN PAINT MANUFACTURERS' FEDERATION **AUSTRALIAN RETAILERS' ASSOCIATION** AUSTRALIAN SELF MEDICATION INDUSTRY **AUSTRALIAN STEEL INSTITUTE** AUSTRALIAN SUBSCRIPTION TELEVISION AND RADIO ASSOCIATION **BUS INDUSTRY CONFEDERATION** CONSULT AUSTRALIA **COMMERCIAL RADIO** FITNESS AUSTRALIA **HOUSING INDUSTRY ASSOCIATION** LIVE PERFORMANCE AUSTRALIA **MASTER BUILDERS AUSTRALIA** MASTER PLUMBERS' & MECHANICAL SERVICES ASSOCIATION OF AUSTRALIA **MEDICAL TECHNOLOGY ASSOCIATION OF AUSTRALIA** NATIONAL ELECTRICAL & COMMUNICATIONS ASSOCIATION **NATIONAL FIRE INDUSTRY ASSOCIATION** NATIONAL RETAIL ASSOCIATION **NEW SOUTH WALES TAXI COUNCIL** OIL INDUSTRY INDUSTRIAL ASSOCIATION **PHARMACY GUILD OF AUSTRALIA** PLASTICS & CHEMICALS INDUSTRIES ASSOCIATION **PRINTING INDUSTRIES ASSOCIATION OF AUSTRALIA** RESTAURANT & CATERING AUSTRALIA **SCREEN PRODUCERS AUSTRALIA** VICTORIAN AUTOMOBILE CHAMBER OF COMMERCE