

VTA Submission to the Economic, Education, Jobs and Skills Committee Inquiry into Portability of Long Service Leave Entitlements

The Victorian Transport Association is opposed to the extension of the prevailing statutory long service leave regime to one where an employer is required to manage/contribute to a fund/scheme established to enable long service leave portability ,whether industry based or a Victorian wide scheme.

Such an arrangement would change completely the rationale behind the existing long service leave regime, that is, to reward long serving and loyal employees who have worked for a single employer over a period of at least seven years.

Background

A. Who we are

1. The Victorian Transport Association (VTA) is the pre-eminent representative of employers and prime contractors in the freight and logistics industry in Victoria and has been since the early 1900s. Prime contractors are those transport companies that employ transport workers directly or engage the services of sub-contractors, including owner-drivers, to assist in the conduct of the freight task. The VTA has around 700 members and has a close affiliation with the Australian Road Transport Industrial Organization (ARTIO), an Organization registered under the Fair Work Act 2009. This organization operates in Victoria as the ARTIO (Vic) Branch.

B. Long Service Leave (LSL)

2. Long Service Leave (LSL) is unique to the Australian and New Zealand jurisdictions. LSL was introduced to reward an employee for loyalty and, as the name suggests, long and continuous service with one employer.
3. It is different to annual leave, personal leave etc which are specific and begin to accrue immediately to an employee.
4. In Australia, LSL was codified in the late 1940s/early 50s by each State Parliament legislating to introduce 'standard' entitlements which initially were an entitlement to take LSL for thirteen weeks after fifteen years continuous service, as defined.
5. Some Federal Awards did introduce LSL in the 50s, but by and large, the issue was left to the State Parliaments to regulate.
6. Subsequent amendments over 50 odd years have improved an employee's entitlements to the level where, in Victoria now, an employee is entitled to two months LSL after ten years continuous service with the one employer. This can be accessed on a pro-rata basis after seven years if the employment relationship ends, irrespective of resignation or termination, including summary dismissal.
7. Victoria is the only jurisdiction which allows an employee to keep their LSL entitlement if summarily dismissed. It has led, in one case at least, to an employee being instantly dismissed for stealing \$20K then requesting payment of their LSL entitlement on the way out.
8. In Victoria, LSL is regulated by the Long Service Leave Act 1992, which was substantially amended in 2005 by Act No: 23/2005 (Long Service Leave (Amendment) Act 2005).
9. In simple terms, an employee's LSL entitlement is calculated by the number of weeks of continuous service divided by 60. So, if an employee

has eleven years continuous service, which is 572 weeks, then their LSL entitlement is 9.53 weeks.

10. LSL is generally paid at the 'ordinary time rate of pay'. This is determined by the applicable industrial award or enterprise agreement, if one applies. Where there is no specified 'ordinary time rate' then it is determined by averaging the employee's earnings over the preceding twelve months or five years, and applying the higher of those two figures.
11. Interestingly, some breaches of the Victorian LSL Act are treated as criminal offences and could therefore give rise to custodial sentences – see Parts 15 and 16 of the Victorian LSL Act 1992.
12. Further, in most jurisdictions, and certainly in Victoria, it is illegal to 'cash out' LSL, other than at the time of termination of the employment relationship.
13. Thus, it is unlawful for both an employer to grant LSL to an employee knowing that such employee will continue to work, either at their normal place of employment or elsewhere. It is also unlawful for an employee to accept LSL payment and continue to work.
14. Following the Melbourne Cricket Club case early last decade and subsequent statutory amendments, it is now well-established law that in Victoria a casual or seasonal employee has an entitlement to LSL if there is a pattern of regular and continuous work over the statutory qualifying period.
15. Across the six state jurisdictions, 'portable' LSL has been introduced into the following industries:
 - a. Building and construction generally
 - b. Contract cleaning in some states
 - c. Coal industry in some states

16. Although LSL is regulated at the state level, it was included as one of the National Employment Standards (NES) introduced by the Federal Government in the Fair Work Act 2009.

Costing/Accrual Issues

17. The current Australian Accounting Standard dealing with LSL accrual is AASB 119. It sets out the protocols to be followed by business in accruing LSL. It is a complex document but essentially requires an employer to show LSL accruals in their financial reporting documents.

18. Specifically, it stipulates that the expected present value of an employer's long service leave liabilities be recognised on their balance sheet.

19. An actuarial technique is then applied towards calculating those liabilities. The following table details the probability of an employee accruing an LSL entitlement based around their length of service :

Table 1

Employee Years of Service		Probability of taking LSL
<1 yr	0.00	10%
1-2yrs	1.00	25%
2-3 yrs	2.00	35%
3-4 yrs	3.00	70%
4-5 yrs	4.00	80%
5-6 yrs	5.00	90%
6-7 yrs	6.00	100%
7+ yrs	7.00	100%

20. This clearly shows that there is only a one in three probability of an employee, who has worked with the same employer for less than three years, accessing LSL.
21. Once again referring to Table 1 only one in ten employees who commence work with an employer will go on to access an entitlement to LSL. Or the corollary of that conclusion is that ninety per cent of employees do not reach an LSL entitlement.
22. These actuarial estimates have been borne out by actual figures obtained from VTA members which support similar conclusions. In particular, one member had 34 employees separate in 2014/15 and of those only 2 or 5.88% had an LSL entitlement.
23. If a 'portable LSL Scheme' were introduced then this would have an immediate and substantial effect on employment costs.
24. Using the actual data in paragraph 22 above the employer would have had to contribute to a statutory or industry LSL fund for those thirty two employees. This would equate to around \$35K or a cost of just above \$1,000 per employee – assuming an annual salary of \$60K and using an actual LSL 'on cost' accrual of 1.7%.
25. These figures are consistent with what an employee who had worked for ten years and then accessed their LSL entitlement would receive, that is about \$10,000 or around \$1,000 per week in today's terms.
26. These figures are from a several medium sized businesses operating in the freight and logistics industry.
27. The 2011 Census reported that there are around 2.53M employees working in Victoria with an average wage of just above \$50K. It also advised that 4.7 per cent, or about 120,000, were engaged in Transport Postal & Warehousing. Accessible at:

http://stat.abs.gov.au/itt/r.jsp?RegionSummary®ion=2&geoconcept=REGION&dataset=ABS_REGIONAL_ASGS&datasetLGA=ABS_REGIONAL_LGA&datasetASGS=ABS_REGIONAL_ASGS®ionLGA=REGION®ionASGS=REGION

28. Once again extrapolating the data from paragraph 22 above, it could mean that the cost to the freight and logistics industry of introducing portable long service leave would be around an additional \$15 million every year.
29. It is important to remember that these figures are four years old and both wages and the number of workers has increased since then. Using a conservative figure, that amount would now be closer to \$20M annually for the freight and logistics industry.
- 30. Using the ABS figures, the cost of introducing a portable LSL scheme, with immediate accrual and vesting benefits, would be over \$425 million annually across the Victorian economy.**

General Issues

31. Beyond the narrative above, there are several very important issues to consider should the Government make a decision to introduce 'portable long service leave'. These include:
- a. Would any such scheme operate in specific industries only or across the total economy? In other words, could an employee change both employer and industry every six months or so and still 'accrue' or have paid into an account a LSL entitlement.
 - b. When would any such funds accrued be accessible to an individual – when leaving a job, after a defined period or after seven years?

- c. Currently, 'work experience' as a school student counts for LSL accrual – would such an arrangement continue under a 'portable scheme and how would it be funded?
- d. What would happen if a Victorian worker under a portable scheme moved interstate? Would the accrued monies be paid out? Would his account be maintained? Would such service count with the same employer in another state?
- e. Will the standard casual loading of 25%, to compensate for non-entitlement to annual leave and personal leave, set under the Federal system be increased to 30% or more to compensate casual employees, who do not work regular and systematic patterns over a ten year period, for their inability to access an LSL accrued entitlement.

32. Given the potentially large numbers of both employees and monies involved, how would any portable scheme be implemented and governed?

- a. Initially, it is submitted that it would have to be government funded and run and such officials would be holding monies in trust, similar to a superannuation fund, and would then be required to exercise fiduciary responsibilities and all that entails.
- b. If 'portable industry schemes' were established what governance models would apply?
- c. When would any monies be paid – weekly, monthly, quarterly or annually as such monies would impact an employer's cash flow?
- d. How would monies be transferred between them?
- e. Would investment decisions and returns be homogenous across all funds?

- f. Would these industry bodies or funds be regarded as financial institutions under the supervision of the Australian Prudential Regulatory Authority (APRA)?
 - g. Who would enforce the payment of such entitlements and through which Court system would any actions be litigated?
 - h. What additional resources would the Victorian Government provide to ensure any scheme(s) operated efficiently and fairly?
33. The VTA also has serious concerns that the implementation of any portable scheme for employees in the freight and logistics industry would flow on to owner-drivers who perform around 25% of the road freight task.
34. The Victorian Government enacted the Owner Drivers and Forestry Contractors Act 2005 (Act No 49/2005) to provide some regulation to owner drivers and contractors working in the forestry industry.
35. This Act mandates the preparation and publication of Rates and Costs Schedules for various vehicle classes commonly used by owner drivers.
36. These schedules currently include award wage rates and, as well, cost employee leave entitlements into those guidance schedules.
37. Section 31 of that Act specifically prohibits 'unconscionable conduct' which is defined as "the amount for which.....the contractor could have supplied identical or equivalent services to a person other than a hirer, **including as an employee.**" (emphasis added)
38. More directly, in any order made by the Tribunal, it must have regard to "the amount to which the contractor would have been entitled if the contractor had provided the services as an employee" - (s. 45 (3) (b) of the Act).

39. Therefore, if an employee became entitled to an LSL contribution being made to a fund on their behalf under a portable scheme, then such amounts would, in all probability be added to owner driver costs, and need to be factored into the Rates and Costs Schedules published by the Minister on the advice of the Transport Industry Council.

Conclusion

40. The VTA opposes the introduction of any portable LSL scheme beyond those currently applying and detailed in paragraph 15. The minimum cost of doing so, being in the order of \$20M per annum to the freight and logistics industry, would limit funds available for new investment and job growth.

41. The cost to the Victorian economy of around \$425M is extreme and when added to the similar cost for the two recently gazetted and extra public holidays, the economy will lose around \$1 billion.

42. The national standard is ten public holidays. In Victoria, there are now thirteen. To increase the entitlement of employees to LSL from commencement of employment, will simply add to the cost of doing business in Victoria.

43. As detailed in the narrative above, there are many complex and difficult questions to be addressed before any extension to the LSL entitlements are mandated in Victoria.