Ai GROUP SUBMISSION

Portable Long Service Leave Expansion: a proposal to establish long new service leave schemes in the ACT

Chief Minister, Treasury and Economic Development Directorate

ACT Government

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About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

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Introduction

Ai Group makes this submission in response to the ACT Government's Consultation Paper, *Portable Long Service Leave Expansion: A proposal to establish new long service leave schemes in the ACT* (**Consultation Paper**) released in June 2022.

The Consultation Paper proposes that the ACT's Portable Leave Schemes (ACT PLS) be expanded to cover employers and employees in the industries of:

- Hairdressing; and
- Contract catering.

The Consultation Paper also seeks views as to whether the ACT PLS should be expanded to cover other industries and occupations such as:

- Personal and other services (including hairdressing and beauty services);
- Retail trade;
- Accommodation and food services (including contract catering);
- Rental, hiring and retail services; and
- Administrative and support services (includes travel agency services and general administrative support services including labour hire).

The ACT PLS, contained in the ACT's *Long Service Leave (Portable Schemes) Act 2009* (**LSL Act**) presently identifies covered industries as the building and construction industry, contract cleaning industry, community sector industry, and security services.

Ai Group strongly opposes the further expansion of the ACT PLS beyond the current covered industries. The proposal to expand the nominated industries and occupations is ill-conceived and should not proceed.

The proposal to expand the ACT PLS to other industries and occupations is inconsistent with the fundamental purpose of long service leave which is to reward employees for a period of extended service with one employer.

Portable long service leave schemes are significantly more costly to the community than accruing LSL in the traditional manner under workplace laws. Ai Group's analysis in response to a 2015 inquiry into whether a national portable LSL scheme should be introduced for all Australian workers, estimated that the cost burden on employers would be more than **four times** the cost burden imposed by the general long service leave laws in Australia.

The expansion is inconsistent with the Australian Productivity Commission's conclusions that the costs and complexity of portable long service leave schemes outweigh any community benefit.

Further, the industries and occupations identified for ACT PLS extended coverage are inappropriate and based on broad concepts of labour mobility, including high levels of voluntary labour mobility. This is not a valid basis for expanding ACT PLS, particularly given that the original and fundamental purpose of LSL is to reward extended service with one employer.

In addition, the proposed expansion of ACT PLS would be a set-back to gender equality in respect of female small business owners in those nominated industries, such as hair and beauty services. The PLS expansion into female-dominated industries to support time out of the workforce for caring responsibilities, is likely to broaden the gender pay gap and limit women's economic security later in life.

Together, these reasons should be considered by the ACT Government as grounds not to expand the ACT PLS. The proposal should not proceed.

Further, we do not consider there to be reasonable grounds upon which the Minister may be satisfied to declare that the LSL Act apply to a person, work or activity not covered by the LSL Act.

The fundamental purpose of long service leave

The fundamental purpose of long service leave is to reward an employee with a period of rest after a long period of loyal service with one employer. Consistent with this fundamental purpose, long service leave was conceived in Victoria in the 1860s to give the workforce of that time the opportunity to periodically make the long journey back to their home countries.[1] In 1953 the Victorian Parliament passed the *Factories and Shops (Long-Service Leave) Bill*.

The fundamental purpose of long service leave was described by Justice Haylen of the NSW Industrial Relations Commission in *TWU of New South Wales v AJ Mills & Sons t-as Mills Transport CDM Logistics* [2008] NSWIRComm 245 (emphasis added):

> *"64 Before dealing with the particular matter before the Court, it is convenient to make some general remarks about the nature of long service leave. The Long Service Leave Act 1955 is described as an Act to make provisions entitling workers to long service leave; to amend the Industrial Arbitration Act 1940 and for purposes connected therewith. On the introduction of the Long Service Leave Bill in Victoria in 1953, the responsible Minister described the purpose of long service leave as being "a period of rest for the employee, so that he might recuperate after a long period of continuous service". It has otherwise been described as having the purpose of providing a rest to employees to re-energise and recuperate after many years of loyal service to an employer. These general descriptions were encapsulated in the statement of Hungerford J in Kaal Australia Pty Ltd v Federated Clerks' Union of Australia [2001] NSWIRComm 6; (2001) 103 IR 344 where his Honour said at [26] when rejecting a proposal for payment in lieu of leave on the basis that it was contrary to the fundamental and inherent purpose of the Long Service Leave Act, namely being a period of paid leave for long service."*

[1] Productivity Commission, Workplace Relations Framework – Productivity Commission Draft Report, August 2015, p.172.

Long service leave (in the 'traditional way') was a claim sought by unions and considered by the Conciliation and Arbitration Commission and State industrial tribunals, with respect to private enterprise in some industries around the time of the miners' strike in the 1940s. It generally was not awarded if opposed by the employer.[2]

The *Industrial Arbitration (Amendment) Act 1951* (NSW) was the first piece of legislation in Australia (and the world) to provide an entitlement to long service leave to employees more generally. The Act provided the NSW industrial tribunal with the power to insert a model long service leave term into awards on application by the industrial parties. The primary purpose of the amendment was to reward *good and faithful service* to an employer and to *provide an opportunity for employees to recuperate after rendering good and faithful service for that long period*. This was noted in the Second Reading Speech to the bill:

> *"The Labour Party considers that long service leave is a reward for good and faithful service. Another aim of the provision is to avert labour turnover, and thirdly, to provide an opportunity for employees to recuperate after rendering good and faithful service for that long period."*[3]

Later, in 1955, the NSW Parliament passed the *Long Service Leave Act 1955* (NSW), which is still, save for a number of amendments, in operation today. The Second Reading Speech to the corresponding bill emphasised, like the *Industrial Arbitration Amendment Act 1951* (NSW), the principle of long service leave is to provide a *recognition of the necessity for greater leisure* and for *employers to realise their obligation to reward employees for many years' standing*:

> *"The principle dealt with in this bill, that of long service leave, is one on which I do not think there is any dispute. Throughout the world there is an ever-increasing recognition of the necessity for greater leisure. Employers also realise their obligation to reward employees of many years' standing."*[7]

Both these purposes are lost with the provision of portable long service leave entitlements. The reality is that portable long service leave schemes conflict with the fundamental purpose of long service leave, in so far that:

- Portable long service leave provides no reward for service with the one employer; and
- The focus of portable long service leave schemes is on an employee's entitlement to a lump-sum payment, not on an entitlement to a period of rest. For example, in the *Jemina v Coinvest Case,*[4] the Federal Court, the Full Federal Court and the High Court of Australia accepted the arguments of CoINVEST that the *Construction Industry Long Service Leave Act 1997* (Vic) is not a law about long service leave and does not provide any entitlement to leave; but rather it is a law which requires the payment of a levy – much like a taxation law.

[2] See The Australian Tramway and Motor Omnibus Employees Associations v The Commissioner for Road Transport and Tramways, New South Wales and Another 1948 CAR 323 at 335. Here, Blackburn C says "I am not prepared to order long service leave otherwise than now provided in awards, as it is not the practice of the arbitration authority to order same when opposed by employers".

[3] Mr Colborne, Second Reading speech: Industrial Arbitration (Amendment Bill) 1951 (NSW), 6 June 1951

[4] Jemena Asset Management (3) Pty Ltd v Coinvest Limited [2009] FCA 327 at para [10]; Jemena Asset Management Pty Ltd v Coinvest Limited [2009] FCAFC 176 at para [26]; and Jemena Asset Management (3) Pty Ltd v Coinvest Limited [2011] HCA 33 at par [33].

Given that portable long service leave schemes conflict with the fundamental purpose of long service leave, and impose much higher costs upon employers and the community, Ai Group strongly opposes such schemes being extended beyond those industries where portable long service leave currently exists. This includes any expansion of the ACT PLS by the ACT Government beyond those covered industries.

The cost burden and its impacts on employers and employees

It is vital that portable long service leave is not extended beyond those portable long service leave schemes already in operation.

In 2015, Ai Group made a submission[5] to the Senate Education and Employment References Committee's inquiry into the portability of long service leave and appeared at the public hearing. A detailed analysis in Ai Group's submission highlighted that portable long service leave schemes are **more than four times as costly** as traditional long service leave schemes. Ai Group estimated that the implementation of a national portable long service leave scheme would cost Australian businesses over $16 billion per annum.

This cost burden on employers operating in the ACT or covered by an expanded ACT PLS should be avoided. The expansion of the ACT PLS will add to the labor and operating costs of businesses in the nominated sectors, many of whom are facing significant challenges as set out below.

The industries and occupations proposed for PLS are inappropriate

The Consultation Paper's identification of proposed industries and occupations for expanded PLS include hairdressing, contract catering, retail, accommodation and food services, personal care services, rental, hiring and retail services and administrative support services.

These industries are significantly different to the current covered industries under the PLS in respect of:

- The high proportion of small businesses within these sectors, where such small businesses have limited resources and time to comply with more costly and complex administrative obligations under PLS.
- Reliance on revenue from household consumers (rather than business or Government), making the nominated sectors more vulnerable to pressures on household income (such as high inflation) impacting regular cash flow needed to fund PLS levies.
- The prevalence of younger workers engaged in study or vocational commitments relating to a different career path in another industry.
- An increased exposure to public health orders and pandemic lockdowns resulting in many workers leaving the sectors.

[5] Ai Group Submission (sub 7), *Inquiry into the feasibility of, and options for, creating a national long service standard, and the portability of long service and other entitlements*, Senate Education and Employment Reference Committee, 2015

- A lesser prevalence of work that is inherently short-term or non-ongoing based on the nature of the work itself.

In respect of the latter point, the motivation for PLS in the building and construction industry in NSW, was driven by acknowledgement that work in the industry was inherently short-term because of the attachment to the limited, non-ongoing supply of building and construction project work.

Similarly, the ACT Government has noted the rationale for selecting industries to be covered by a portable scheme on the basis of frequent changes in working arrangements. In 2013, the then Attorney-General and Minister for Workplace Safety and Industrial Relations Mr Corbell, in the course of arguments in favour of amendments to the *Long Service Leave (Portable Schemes) Act 2009* (ACT), noted with respect to industries covered by the scheme:[6]

> *The reality is that, for many workers, moving between employers and between contracts is a fact of life. In establishing past schemes, the government has selected industries characterised by frequent changes in working arrangements. This is indicated by factors such as a high proportion of short-term, casual and part-time work as well as contract work.*

In 1974 when the *Building and Construction Industry Long Service Payments Act 1974* (NSW) was passed by the New South Wales Parliament, the second reading speech for the NSW Bill:

> "*The introduction of a scheme to provide for long service benefits for workers in the building and construction industry has been sought for many years since the introduction of the Long Service Leave Act in 1955. Due to the nature of the industry, which requires mobility of its work force for employment by different employers at different places as building activities wax and wane, many workers in the industry have not been able to achieve continuity of employment with one employer which is necessary qualification under the Long Service Leave Act*."[12]

During the Parliamentary debate over the NSW legislation, the building and construction industry was characterised as:

> "*In the building industry we are on what is known as hourly hire. The employer can give the worker the sack at an hour's notice and similarly the employee at an hour's notice can tell the employer that he wants to terminate his employment. By the very nature of the industry men are engaged to build a cottage and when the cottage is finished they are given the sack. They have to "follow the job" until they find other employment. In serving fifteen years in the building industry an employee could literally work for 300 or 400 employers. Under the old long-service leave provisions, workers in the building industry would never have been eligible for long-service leave*."[13]

The sectors nominated by the Consultation Paper are markedly different in that involuntary labour mobility is not a discernible industry feature. Unlike the current covered industries, the nominated sectors do not provide work structured by the prevalence of non-ongoing Government building projects or service contracts.

[6] ACT, *Legislative Assembly*, Thursday, 31 October 2013, p. 4068 (Mr Corbell).

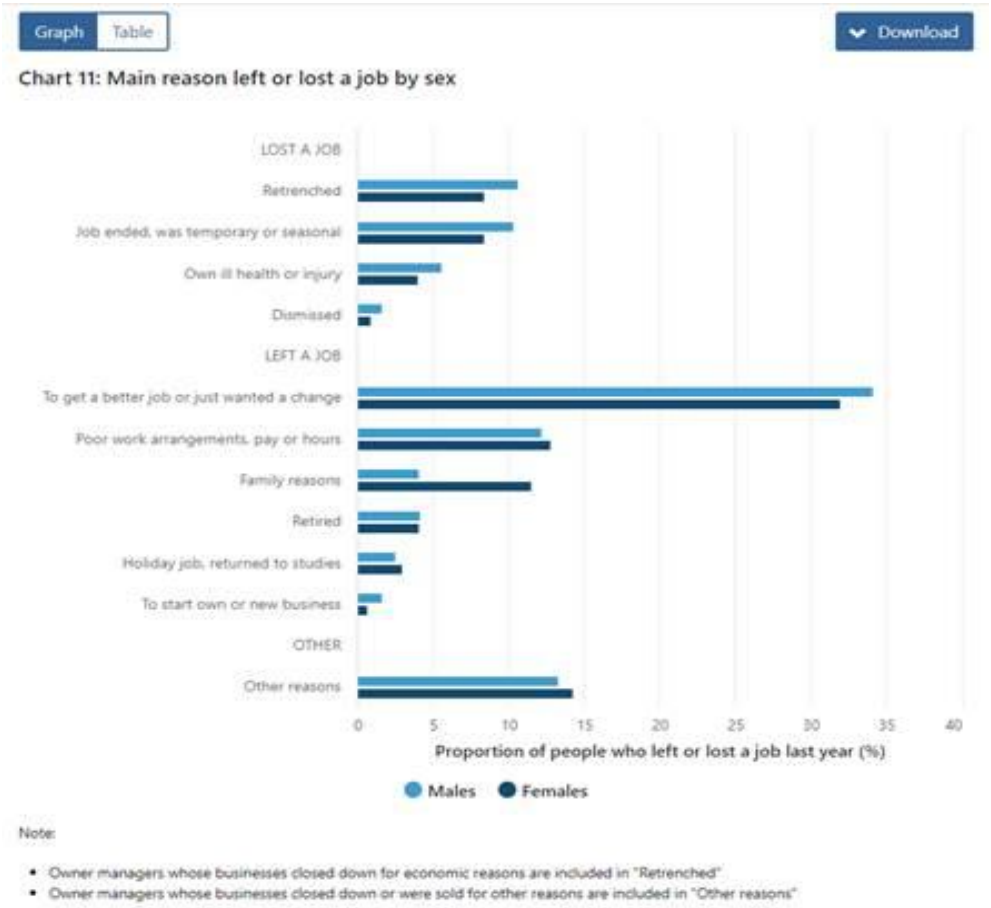
Expanded PLS based on high labour market mobility is flawed

The proposed ACT PLS expansion is based on broad concepts of labour mobility, including industries and occupations with higher voluntary mobility. This approach is flawed and undermines the original purpose of LSL in rewarding service with a single employer.

The Consultation Paper relies on ABS labour mobility statistics across various industries in February 2020 as a basis for expanding PLS to certain industries with a higher incidence of labour mobility. The Paper notes that back in 2020, labour mobility was highest for professionals, followed by trades and technicians, with clerical, administrative and sales employees experiencing only a moderate level of mobility.

Recent ABS Labour Force Mobility data from February 2022[7] show job mobility at its highest since 2012 and across all occupational groups. Almost all industries saw a rise in job mobility in the second year of the pandemic, with the largest increases seen in Professional, scientific and technical services (7.4 per cent to 11.7 per cent) and Wholesale trade (5.9 per cent to 10.0 per cent). It was also observed that more people (57%) changed industries altogether than their occupation (45%). Importantly, the annual retrenchment rate was 1.5%, the lowest annual rate on record since 1972.

The reasons for high job mobility is clearly employee driven. The ABS Chart 11 below[8] shows that the main reason workers are leaving their job is "*to get a better job or just wanted a change*." (approx. 33%).



[7] ABS, Participation, Job Search and Mobility, Australia, February 2022

[8] https://www.abs.gov.au/statistics/labour/jobs/job-mobility/latest-release

The latest job mobility data also shows that the ACT, more than any other Australian State or Territory, recorded the largest increase in job mobility in the year to February 2022.[9] It is unnecessary and inappropriate to implement expanded PLS when employees are the initiators of ending their employment with their current employee, and where job mobility levels are a record high.

While the Consultation Paper's labour mobility figures appear to pre-date the pandemic in February 2020, there is no indication that labour market working arrangements or mobility levels will return to these pre-pandemic levels, particularly as hybrid and working from home arrangements will remain a feature of various industry working arrangements and influence the job and industry choices of many Australian workers.

Broad concepts of labour mobility, including voluntary labour mobility, is not a valid basis for expanding ACT PLS, particularly where the original and fundamental purpose of LSL is to reward extended service with one employer. Consequently, the proposed expansion is also likely to serve as a disincentive for employees to remain with a single employer and undermine the fundamental purpose of LSL.

In current circumstances where voluntary labour mobility is high and retrenchments are at an all time low, an expanded ACT PLS will only promote labour mobility at a time when this is clearly unnecessary, and the result of which is not in the interests of the ACT or national economy.

Expanded ACT PLS is inconsistent the Productivity Commission's assessment of portable long service leave schemes

The benefits to the community from portable long service leave schemes have already been assessed by the Productivity Commission when it reviewed Australia's workplace relations framework in 2015. On 5 August 2015 it published a Draft Report acknowledging the propensity of portable long service leave to dilute the purpose of long service leave and the negative impact that portable long service leave would have on employees and employers.

Below is a relevant extract from the Productivity Commission's draft report (emphasis added):[10]

> *"… It appears that, notwithstanding the goal of providing a time for recuperation, employees under portable schemes do not necessarily take the leave. For example, in a submission to a review of a New South Wales scheme for contract cleaners, for instance, the Australian Industry Group argued that:*
>
> > *… the experience in other States shows that it is rare for employees to actually take*

[9] https://www.abs.gov.au/statistics/labour/jobs/job-mobility/latest-release

[10] Productivity Commission, Workplace Relations Framework – Productivity Commission Draft Report, August 2015, p.176-178.

leave under these schemes; rather the emphasis has been on the employees accumulating money. … [The schemes] do not, in practice, have the effect of giving workers a period of rest and recuperation. (Ai Group 2013)

Similarly, according to the NSW Industrial Relations Advisory Council, 'in many cases, LSL is not regarded as an opportunity for career renewal, but rather as an economic asset' (2013).

…

Further, while the argument that LSL portability may improve dynamic efficiency is sound in principle, it is not clear that the effects are significant.

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.

There are still likely to be some benefits from making LSL portable, although in considering the merits of introducing a portable scheme, those benefits must be compared with the costs entailed:

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

(ii) 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.

(iii) 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 employees' 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 wage 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."

In its Final Report, the Productivity Commission concluded that the costs and complexities of portable LSL schemes outweigh the benefits to the community:

Assessment

Overall, the Productivity Commission is not convinced that the benefits from portable LSL schemes would be sufficient to justify the costs and complications entailed. Submissions to this inquiry have not provided compelling evidence of major and widespread concerns about the present non-portability of most LSL arrangements or include widespread support for greater flexibility or the alternative design. (emphasis added)[11]

An expanded PLS, as proposed by the ACT Government, is clearly inconsistent with findings from the Productivity Commission and should not be pursued.

Expanding portable long service leave is a set-back for gender equity

The expansion of PLS would be a set-back for gender equality and women's economic security.

Firstly, as referred above, PLS has been recognised as a more costly mechanism to provide LSL than current LSL workplace laws. Affected businesses are required to pay a levy into a fund for each affected employee and absorb the costs of compliance and administration of obligations under the scheme.

The industries and occupations identified by the Consultation Paper contain a high prevalence of small business owners and such owners who are women. This is particularly true in the hairdressing and personal care industries where there are many female hair and beauty salon owners.

Policies supportive of gender equity must consider the role that women play in establishing small businesses and find ways to support these businesses. Expanded PLS fails to do this, and instead imposes more administration and cost on women in small business, making it less attractive for women to pursue business ownership in these sectors.

Secondly, the Consultation Paper states that a benefit of an expanded PLS is the added mobility and flexibility where "*Employees have more capacity to move between employers or to take short periods out of employment to meet commitments such as caring responsibilities."* This objective, combined with the deliberate targeting of female-dominated industry sectors identified in the Consultation Paper will be set-back to gender equality.

It has been well established and indeed recognised by the Consultation Paper, that women are more likely than men to experience time out of the workforce caring for children and others, in addition to undertaking unpaid domestic work. This will only continue under a PLS targeting industries with high proportion of women and will further entrench lower levels of female workforce participation that we know harms women's economic security particularly later in life.

[11] Productivity Commission, Workplace Relations Framework, Final Report, p.525

The recent KPMG Report *She's Price(d)less; the economics of the gender pay gap* identified that interruptions from the workforce for women with caring responsibilities was one of three main drivers of the national gender pay gap. Policy settings, such as PLS targeting female-dominated sectors, are likely to entrench time out of the workforce by women, are likely to broaden the gender pay gap.

The parental leave entitlements in the *Fair Work Act 2009* (**FW Act**), including their specific application to long-term casual employees, is a means to retain a parent's employment with their employer. This entitlement, coupled with the Australian Government's Paid Parental Leave Scheme (**PPLS**) should not be overlooked in addressing ways to improve female work participation and connection to the workforce. While both the FW Act and the Federal PPLS are expressed in gender neutral terms, attention is increasingly being given at the public policy level to ensure that access to parental leave (and time out of the workforce) is more equitably accessed by both men and women in respect to their children or adopted children. A PLS that facilitates and rewards time out of the workforce for caring responsibilities in female dominated industries, is likely to counter other gender equity efforts to increase equality in domestic and caring arrangements and flow-on consequences to improved equality at work.

To the extent that there is concern that time out of the workforce on parental leave is depriving more women of their long service leave entitlements, other options such as reviewing the ACT LSL Act in respect of how periods of parental leave are treated for the purpose of long service leave may be a more appropriate mechanism rather than PLS. We note the Victorian Government addressed this issue in amendments to the Victorian *Long Service Leave Act 2018 (Vic)* in respect of the definition of service for the purpose of long service leave entitlements.

Conclusion

For the reasons outlined above, the ACT Government should not proceed with expanding its PLS beyond current covered industries.

The basis for doing so has not been properly established.

An expanded PLS would undermine the purpose of LSL as a workplace law; inappropriately promote already high levels of voluntary labour mobility; impose cost burdens and complexities recognised by the Productivity Commission as reasons not to deem PLS as beneficial for the community; and finally, would be a set-back to gender equality.

Ai Group strongly opposes the expansion.

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