

# **Inquiry into Portability of Long Service Leave Entitlements for Victorian Workers**

**Submission to the Economic, Education, Jobs and Skills  
Committee**



**Jointly prepared by the National Retail Association and the Hardware  
Federation of Australia Inc (in conjunction with the Hardware Association of  
Victoria and Tasmania)**

**August, 2015**

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## About the Submitters

The National Retail Association (NRA) is a not-for-profit industry organisation providing professional services and critical information and advice to the retail, fast food and broader service industry throughout Australia. NRA is Australia's largest and most representative retail industry organisation, representing more than 19,000 stores and outlets.

This membership base includes the majority of national retail chains, as well as independent retailers, franchisees and other service sector employers. Members are drawn from all sub-categories of retail including fashion, groceries, department stores, home wares, hardware, fast food, cafes and personal services like hairdressing and beauty.

The NRA has represented the interests of retailers and the broader service sector for almost 100 years. Its aim is to help Australian retail businesses grow.

### **The Hardware Associations of NSW, Queensland, Western Australia, Victoria and Tasmania**

The Hardware Federation of Australia (HFA) is a not-for-profit organisation that provides many benefits, professional services and hardware specific advice to hardware suppliers and retailers nationally, through the network of dedicated State Hardware Associations that deliver a tailored service to the members of each region.

The Hardware Association of Victoria and Tasmania (HAVT) is a unified body representing hardware retailers, promotional buying groups, and suppliers in Victoria and Tasmania. HAVT is an autonomous not for profit organisation dedicated to promoting the interests of the hardware sector in Victoria and Tasmania and to delivering key services to its members.

### **Joint submissions**

These submissions are made jointly by the above associations.

For the sake of convenience, all references to "the Associations" in these submissions, are intended to include the abovementioned National Retail Association and the Hardware Associations.

## Outline of Submissions

The Associations' submissions regarding the Committee's inquiry into the portability of Long Service Leave ("LSL") entitlements are made in the context of the following matters:

- a) the origins and rationale for LSL;
- b) the unintended consequences of introducing portable LSL in Victoria;
- c) the general performance of the retail service sector throughout Australia; and
- d) practical considerations.

## The Origins and Rationale for LSL

In a decision handed down by the Australian Industrial Relations Commission (as it then was) in 2004<sup>1</sup>, Senior Deputy President Lacy concisely outlined the origins of LSL in Australia as follows:

*It appears from my own research that the entitlement to long service leave generally originated in the colonial service administration of the colonies of South Australia and Victoria. It gained statutory recognition throughout the several States of Australia commencing with New South Wales in 1951. Since that time 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.*

We have set out below extracts from various literature which provides further insight into the origins of LSL and the rationale behind this leave:

- *Long service leave was introduced in Australia in the 1860s. The idea was to allow civil servants the opportunity to sail home to England after 10 years' service in 'the colonies'. It was 13 weeks for every ten years of service, comprising of five (5) weeks to sail back to England, three (3) weeks of leave and five (5) weeks to sail back.*<sup>2</sup>
- *In its origins and application, a few features about LSL stand out. First, it was to provide respite for those who were separated by distance between "home" and workplace. Second, it was a benefit for those who were relatively high in the colonial administration hierarchy. Third, it was confined to the public sector. Fourth, it was implicitly confined to full-time and male workers. Overall the application and eligibility was very restrictive and confined to an elite of the workforce.*

*While the precedent served other public service workers the reason for the eventual spread into the private sector remain unclear. Given the spread of LSL into awards in the 1940s and 1950s, largely periods of labour shortage, it may have made sense to employers who wished to secure and reward long-term job attachment. In 1951 the New South Wales government legislated that LSL be extended into all agreements and awards for the purposes of reducing labour turnover, reward continuous service with the one employer and to provide a respite from work in order to return to work with renewed commitment (QCCI, 1999, 5).*

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<sup>1</sup> Office of the Chief Electrical Inspector v the Association of Professional Engineers, Scientists and Managers, Australia and another re Office of the Chief Electrical Inspector Enterprise Agreement 2003 (AIRC) PR942414 (5 January 2004) para 8.

<sup>2</sup> Glen Langton, Chris Latham, Janet Linklater, Colin Westman, Darren Wickham, 'Protection of Employee Entitlements in the Event of Employer Insolvency' (Discussion Paper, 2003) pgs 2-3:

*LSL is an entitlement that is fairly unique to Australia, though there are other countries that reward continuity of service.*

*In Britain and Greece there is a link between continuity of service and the length of annual leave. In Canada some provinces (eg British Columbia) have legislated for extended annual leave after set periods of continuous service. New Zealand does have LSL provisions in some employment contracts but the required length of service is typically longer and the length of the entitlement typically shorter than found in Australia (Labour Ministers Council, 1999).<sup>3</sup>*

We can appreciate the historical reasons for LSL having been introduced in Australia in the 19<sup>th</sup> century, particularly given the remoteness of Australia from the rest of the world at the time. Because the journey to and from England would have taken many months, it was necessary for a suitable period of time to be granted to colonial workers who had the privilege of earning and taking LSL, to visit their friends and family in England.

However, since those colonial times, Australia has progressed into the 21<sup>st</sup> century. The “tyranny of distance” has been substantially tempered by modern international air travel which enables quick travel between Australia and most parts of the world - usually in under a day (as opposed to a total of 10 weeks that were required to sail to and from England in the 1800s).

Not only have centuries of Australian settlement loosened the bonds between colonial Australian settlers and their English roots but Australia has become a cosmopolitan country with a diverse, multicultural, population. There is therefore no longer a need for overly-lengthy periods of leave to be granted to employees to visit family and friends overseas. Australia now competes on an international level and Australian businesses need to be able to adapt to the times in order to survive.

Given the highly regulated industrial relations framework that businesses in Australia currently operate in, not only at a Federal level but also at State level, for the reasons set out in this document we submit that the proposal to introduce a portable LSL in Victoria will add a further layer of cost and complexity to Victorian businesses. This will merely serve to further reduce the ability of our members in Victoria to compete on an even playing field, particularly compared to those competitors:

- located in other Australian states and which do not impose this additional obligation; and
- who operate on-line businesses based in other Australian states, or even outside of Australia.

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<sup>3</sup>John Burgess, Anne Sullivan and Glenda Strachan, ‘Long Service Leave in Australia: Application and Reform’ (2002) 1 Labour & Industry 13, pgs 1-2.

## The unintended consequences of introducing portable LSL in Victoria

Viewed in its historical context, the continued relevance of LSL is debatable. As indicated earlier, in the early 1950s, the NSW government legislated to include LSL in all agreements and awards for three primary reasons, namely to reduce labour turnover, to reward continuous service with the one employer and to provide a respite from work in order to return to work with renewed commitment (“**Current LSL Purpose**”). The remaining states and territories in Australia enacted similar legislation, arguably for the same purpose.

We do not propose to argue the merits of the current LSL scheme, but rather to question whether the proposal to extend its operation in Victoria by passing legislation to make it portable, is consistent with a state that is part of a modern, progressive country, operating in a globalised economic environment. We respectfully submit that the answer to this question is a very resounding “no”, particularly in respect of those employees who work in our industries. It would be anachronistic for the Victorian Government to extend this scheme, particularly in industries where there has historically been no portability of LSL.

We submit that if portability of LSL was to be introduced in Victoria, particularly in our industries where there is a large component of casual and part-time employees, that it will seriously undermine the Current LSL Purpose in that:

- it is likely to result in an increase of labour turnover, given the increased ability that employees will have to move from one employer to the next without this impacting on the accrual of their LSL entitlements. Each time employers have to engage new employees they incur increased costs in training those employees and a resultant loss of productivity to their business which will not only impact on their profitability, but ultimately on the Victorian economy;
- the incentive for employees to be loyal to one employer and to work continuously with one employer for a lengthy period of time will be dramatically reduced which will result in the same consequences as those described above;
- ultimately, all employees will reach a point at which they will be entitled to either take LSL, or to terminate their employment and be paid out their accrued LSL entitlement. We note that in practice, not all employees exercise their right to take LSL on completing the required period of service<sup>4</sup> and that many workers use their LSL as a de facto redundancy payment, to cover living expenses while looking for another job<sup>5</sup>. The option of receiving a relatively large LSL payment that has accrued inevitably results in many employees opting to terminate their employment in order to receive that payment. For those employees, this effectively defeats the object of receiving any respite from work and also has the effect of their employers losing the experience of long serving employees.

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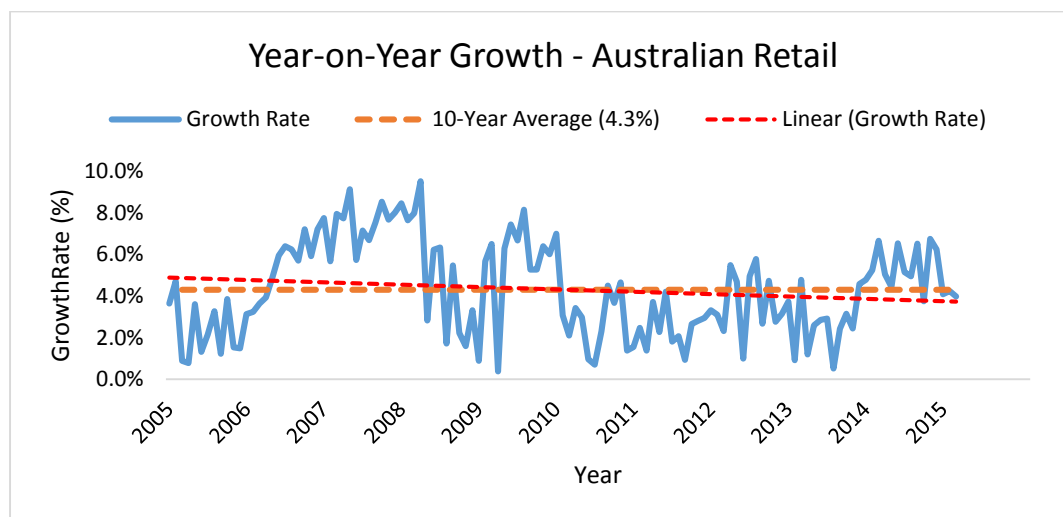
<sup>4</sup> Ibid, pg 2.

<sup>5</sup>McKell Institute - Ray Markey, Nick Parr, Tim Kyng, Salut Muhidin, Sharon O'Neill, Louise Thornthwaite, Chris Wright, Catriona Lavermicocca, Shauna Ferris, 'The Case for a National Portable Long Service Leave Scheme in Australia' (Discussion Paper) July, 2013, pg 66.

In these circumstances, the primary purpose for LSL will be reduced to giving some employees the opportunity to take an extended holiday. In the long term, we consider that the introduction of portable LSL schemes will also serve to weaken the justification for LSL continuing to exist in a modern, progressive country operating in a global economy.

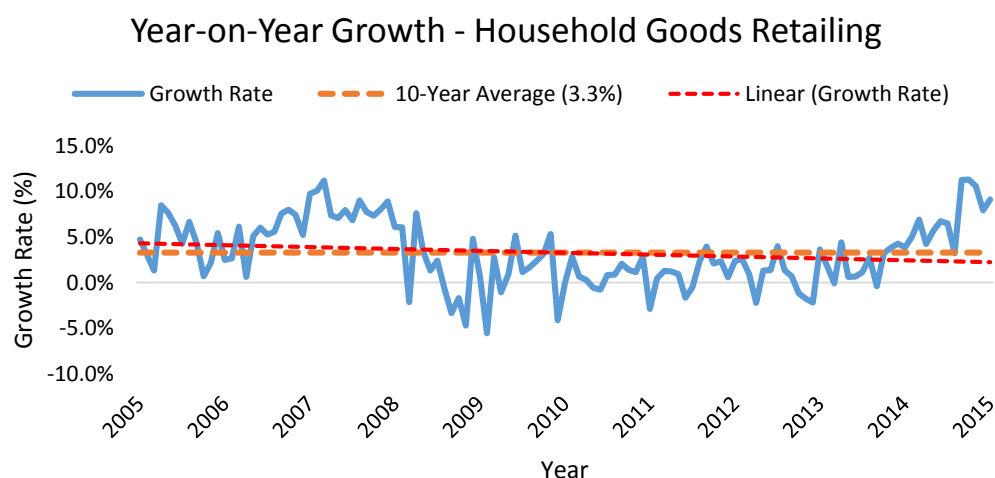
## General Performance of the Australian Retail Service Sector

The long-term performance of the Australian retail sector suggests that business operators have faced incredibly challenging economic conditions for a protracted period of time. For the past ten years, a clear, downward trend has become evident in the retail trade turnover data, released by the Australian Bureau of Statistics. Although strong growth was experienced throughout 2006 and 2007, the Australian Retail industry has had sustained periods of poor sales performance, only recently returning to above average sales growth. However, our analysis conducted indicates that this trend may not continue into 2015, with the possibility of a return to below average sales growth.



Source: ABS 8501.0 – Retail Trade, Australia, Jan 2015

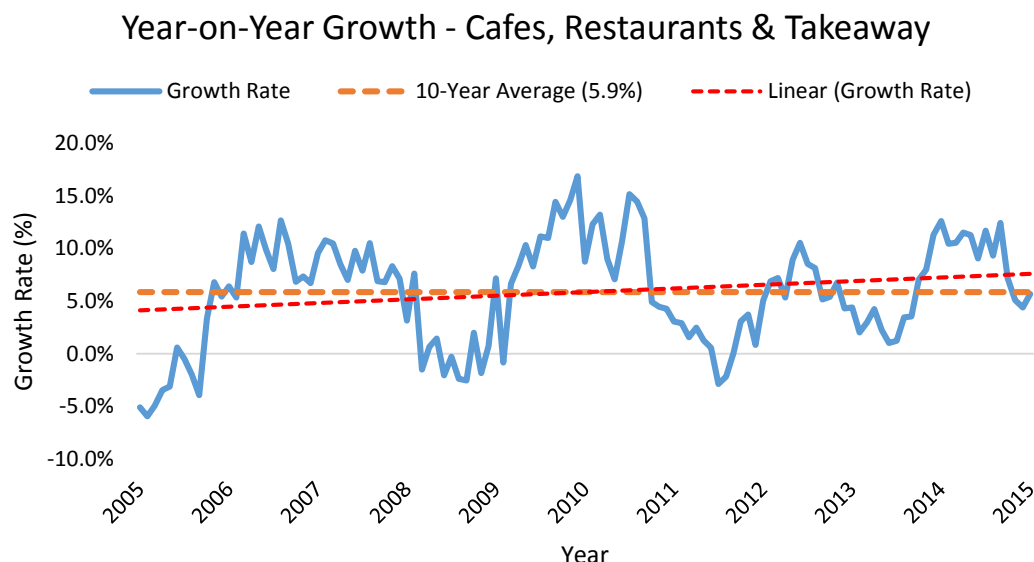
The downwards trend in retail trade turnover is reflected in a number of category sub-divisions, which are key to the Australian Retail industry. In particular, those businesses that are largely dependent on discretionary expenditure, have experienced a clear downward trend in sales growth across the past ten years. While recent retail trade turnover data suggests short-term improvement, especially for household goods retailing (See below), it is uncertain whether this will develop into a sustained growth trend through 2015. Regardless, most categories in the Australian Retail industry are currently experiencing significant challenges in achieving sales growth that exceeds the 10-year average.



Source: ABS 8501.0 – Retail Trade, Australia, Jan 2015



At present, the only Retail category experiencing a positive, long-term trend in sales growth is cafes, restaurants and takeaway food services. With a 10-year average growth rate of 5.9 per cent, this category experienced double-digit growth, at multiple time points, across the past five years, relative to other industries, which have been growing at an average of less than 3.5 per cent.



Source: ABS 8501.0 – Retail Trade, Australia, Jan 2015

Our research also indicates that, relative to historical standards, consumer spending is weak. Indeed, as a result of reduced consumer confidence, the viability of many retail businesses have been impacted by a decline in consumer demand, and increases in operating costs including labour, rents, and utilities.

The most recent business data available from the Australian Bureau of Statistics indicates that 3.1 per cent of retail businesses ceased trading in the twelve months to June 2013, with all of these closures occurring in small business (1-19 employees)<sup>6</sup>.

Service industry employment now dominates the Australian economy. In 1966 46% of all employed persons in Australia worked in production industries. Today 77% of all employment is attributable to the service sector, rising from 54% in 1966.

In the 1960s, Australia was evolving from a nation of largely primary industries – of sheep, cattle and wheat – to one of manufacturing. By the late 1960s refrigerators, washing machines, vacuum cleaners and cars had become increasingly available to Australians. This is reflected in the industries which employed most people in August 1966; Manufacturing (26%) and Wholesale and retail trade (21%).

In August 2011, manufacturing was a relatively much smaller component of the economy than it was in the past (accounting for just 8% of employed people). The Health care and social assistance industry was the largest industry (employing 12%), followed by Retail trade (11%) and Construction (9%), while Agriculture and Mining only accounted for 3% and 2% respectively of all employed people.

The growth in some service industries also reflected a changing Australia; some 77% more people worked in the child care industry compared with just 10 years ago. [ABS 4102.0 Australian Social Trends, December 2011]

<sup>6</sup> 8165.0 - Counts of Australian Businesses, including Entries and Exits, Jun 2009 to June 2013

The Australian Retail industry, however, has experienced a sustained, long-term decline in employment growth across the past ten years. Analysis conducted by the National Retail Association reveals a 10-year average growth rate of 1.2 per cent, which ranks the Retail industry as one of the lowest performing sectors in terms of employment growth, and well below the national average of 2.6 per cent for all other industries. While the sheer size of the retail workforce means that any growth means significant numbers of new jobs, nonetheless the declining rate of growth should be a significant concern for policy makers.



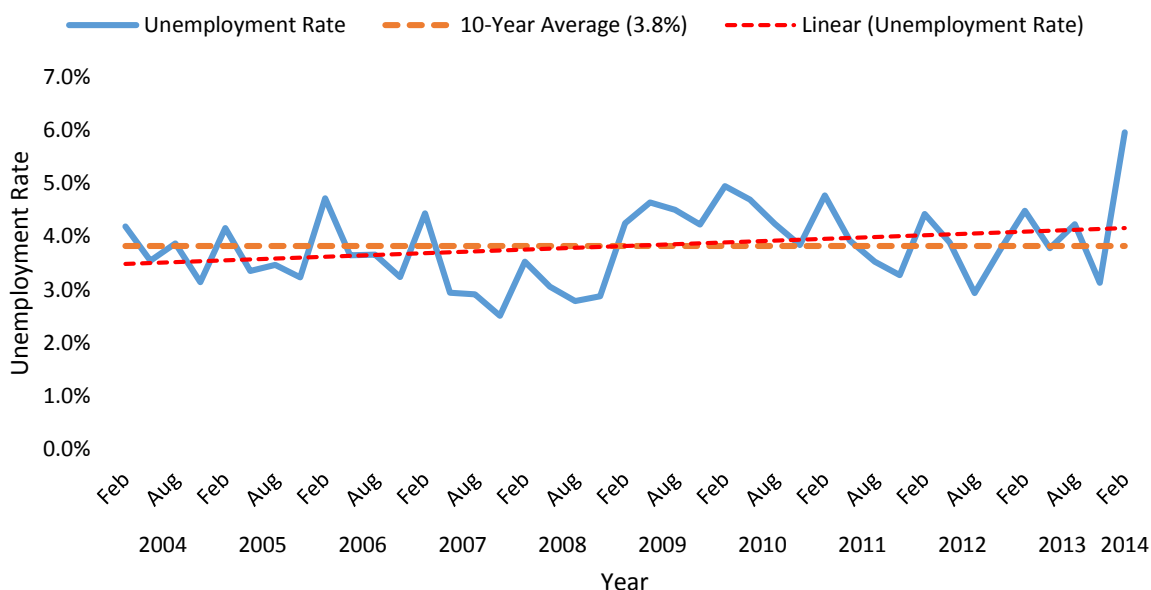
6291.0.55.003 - Labour Force, Australia, Detailed, Quarterly, Feb 2014

Unemployment statistics for the Australian Retail industry also suggest a linear trend towards an increased number of retail workers that are unemployed. Analysis conducted by the National Retail Association indicates that across the past ten years, the Retail industry has had the fourth highest average unemployment rate, at 3.8 per cent, which is higher than the national average for all other industries (3.1 per cent)<sup>7</sup>.

This evidence, combined with a decline in consumer spending, increase in operating costs, and a contracting rate of employment growth, highlights the sustained economic pressure that has been placed on retail businesses in the past ten years.

<sup>7</sup> The industry unemployment rate was calculated using unemployed people who were employed in an identified industry within the past two years. It does not include people that have been unemployed for more than two years, or have never been in the labour market. As a result, within industry unemployment figures will be lower than the labour force-wide unemployment rate.

## Unemployment Rate - Australian Retail



6291.0.55.003 - Labour Force, Australia, Detailed, Quarterly, Feb 2014

These challenging trends for the industry are certainly partially attributable to the structural changes and pressures being experienced in the Australian retail sector. Many of these structural changes have been well-documented in previous reports by the Productivity Commission, such as the *Economic Structure and Performance of the Australian Retail Industry* (2011) and *Relative Costs of Doing Business in Australia: Retail Trade* (2014).

For example, in recent years, the Australian Retail industry has also experienced an increased level of competition from online, overseas-based retail businesses, which operate in low-wage economies. It is extremely difficult for business owners to pass on any additional wage cost to customers, particularly in an environment where heavy discounting has become the norm in recent years.

Additionally, unlike production or manufacturing, demand is considerably more dynamic where operational requirements are significantly influenced by fluctuations in demand, changing consumer preferences and seasonal factors.

Finally employment is geared towards the young and dominated by casual engagements.

Given the above factors, we submit that the introduction of a portable LSL scheme in our industries in Victoria will merely serve to increase the challenges that our members face in improving profitability and employing additional staff.

## Practical Considerations

### Distinctive industries

In a 2002 article by John Burgess, Anne Sullivan and Glenda Strachan in the Labour & Industry Journal titled “Long Service Leave in Australia: Application and Reform”<sup>8</sup>, the authors state as follows:

*Portability has been recognised as being legitimate in those industries where the nature of production means that long-term employment continuity is not possible. Sectors that recognise portability include construction and mining.*

In a more recent discussion paper by the McKell Institute<sup>9</sup> titled “The Case for a National Portable Long Service Leave Scheme in Australia” the following statements were made about the reasons for the introduction of portable LSL schemes in certain industries:

*Notwithstanding the potential benefits of LSL schemes to both employers and employees, many workers have found it increasingly difficult to qualify for a LSL entitlement in the context of increasingly short-term employment arrangements (as discussed in Section 2). Although these patterns have become much more prevalent since the 1980s, the use of short-term contract-based commercial arrangements have characterised industries such as construction, mining and property services, for much longer periods. One solution used increasingly in those industries, and established throughout the public sector, enables workers to receive their statutory entitlements to LSL by allowing them to gain credit for their long service in the industry, rather than to an individual employer, through the use of Portable LSL (PLSL) schemes.*

The McKell Institute Discussion Paper goes on to state that:

*PLSL entitlements are widely available to public sector workers in the State and Territory public sectors and the Australian Public Service<sup>10</sup>.*

We submit that the circumstances of the public sector and the construction, mining and property services sectors are very different to those of the industries that we represent. This is particularly so given that:

- it is very uncommon for employees in our industries to be employed on short, fixed term contracts and it is even less common for them to be employed for the duration of a project;
- as stated earlier, employment in the retail industry is geared towards the young and dominated by casual engagements. A large bulk of those employees are students or employees who merely seek employment for a limited period of time and do not intend to continue to work in the retail industry for a sufficient period of time in order to qualify for LSL;
- for those employees who enter the retail or hardware industries with the intention of establishing a career, those industries offer them greater opportunities for stable and continuous employment with one employer compared to the construction, mining and property services sector. With time, those employees reach the point of qualifying for LSL;

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<sup>8</sup> op. cit, pg 8.

<sup>9</sup> op.cit, pg 38.

<sup>10</sup> Ibid, pg 38.

- businesses in our industries operate in a highly competitive environment, including having to manage competition from on-line business. Because they operate within very tight profit margins any additional LSL levies that may be imposed on them will merely serve to reduce their ability to operate in a productive and competitive manner;
- it is relatively easy for workers to enter our industries and to remain in our industries given that the skills required in a retail environment are negligible, compared to those in the construction, mining and property services sector;
- in practical terms, a retail environment is substantially less hazardous and more pleasant to work in compared to the construction and mining environment; and
- as far as the public sector is concerned, this cannot be fairly compared to the private sector.

Because of the different nature of the industries that we represent compared to those industries which currently cater for the portability of LSL, and because of the adverse impact that we consider that the introduction of such a scheme would have in our industries (as set out in these submissions) we do not consider there to be any justification for seeking to extend the application of such schemes to our industries.

### **Portable LSL model**

Existing portable LSL models usually require employers to make contributions towards portable LSL by way of a levy, usually based on a percentage of an employee's remuneration. However, other schemes base this levy on a percentage of the total cost of particular projects or of total wages<sup>11</sup>.

Whichever model may be proposed, this will result in employers in our industries having to bear additional imposts which they would not have otherwise had in relation to the bulk of their employees who are not likely to remain in the relevant industry in order to qualify for LSL. This burden will be increased should a model be adopted based on the total cost of wages or any similar calculation.

### **Rural Victorian businesses**

Because of the freedom of mobility that a portable LSL scheme will offer to workers we consider that this will negatively impact businesses in our industries located in rural areas of Victoria – particularly small to medium sized businesses. Given the difficulties that they experience in attracting and retaining talented workers, this scheme will merely operate to encourage some of those workers to move to urban environments. This will further reduce the pool of suitable workers and the ability of rural businesses to operate productively.

### **Contextual considerations and impact on investment**

It goes without saying that the introduction of a portable LSL scheme in Victoria will result in increased administration and labour costs for Victorian businesses in our industries – particularly those who operate on thin margins and smaller businesses. The requirement for employers to pay a levy to provide for portable LSL will have a direct impact on their cash flow and result in unnecessary increased costs given that many workers in our industries (usually students or casual workers) leave before qualifying for LSL.

Considering the relatively high labour costs that businesses already face, this scheme, together with the following matters will likely discourage investors from establishing businesses in Victoria, or from continuing to operate in Victoria:

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<sup>11</sup>Ibid, pg 44.

- the proposed introduction of two new public holidays in Victoria (in respect of Easter Sunday and the AFL Grand Final); and
- the pending decisions of the Fair Work Commission's four yearly review of Modern Awards, which commenced in 2014 pursuant to s.154 of the *Fair Work Act 2009* and which could result in the imposition of additional labour costs on employers (notwithstanding the fact that this will operate at a Federal level) (**"Additional Factors"**).

Those businesses that operate across state borders will also experience additional administrative and difficulties and incur additional costs in managing separate LSL obligations in respect of their Victorian employees, particularly where they have a large workforce.

Victorian businesses are likely seek to pass on these increased labour costs to the consumer which will result in a disparity of pricing merely because of the location in which a business is based. The practical implications of this disparity will be more pronounced in areas within close proximity to each other but on separate sides of the state border (such as Albury and Wodonga).

### **Economic effects**

In order to manage the additional costs arising out of an accumulation of increased labour costs arising out of the proposed portable LSL scheme (and the Additional Factors referred to above) we envisage that Victorian employers will look for ways to better manage those costs, including by employing fewer workers, relying on labour-hire arrangements and reducing their trading patterns. This will result in:

- reduced job security for workers;
- increased labour turnover with resultant reductions in service levels and productivity; and
- reduced business profitability.

These matters will therefore have a direct negative impact on the Victorian economy. It is also likely that there will be an indirect negative impact on the Victorian economy as a result of reduced tourism arising out of reduced trading activity, reduced service/product levels, and increased labour costs that are passed on to the consumer.

## Conclusion and final submissions

For the reasons set out above, the NRA submits that the Victorian Government should not introduce a portable LSL scheme to our industries as it will have a detrimental effect on productivity and will negatively impact on employment.

We note that the Fair Work Commission, in the course of conducting its review of modern Awards, is considering introducing provisions into Modern Awards that will enable employees to purchase additional leave ("**Purchased Leave**")<sup>12</sup>. The Commission will hold a hearing about this on the 7<sup>th</sup> August 2015. If the outcome of this hearing is that Purchased Leave will be included as an entitlement for all employees whose employment is covered by a Modern Award, this will present those employees who seek a respite from a long period of service with an additional avenue for doing so and there will be fewer reasons for seeking to introduce portability of LSL.

We finally submit that the Commission's decision regarding Purchased Leave, as well as the Additional Factors referred to in these submissions should be taken into consideration before any decision is made to introduce portable LSL in Victoria.



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<sup>12</sup> s. 156 Fair Work Act 2009 (4 yearly review of modern awards—Annual leave) AM2014/47.



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