

## 8. LONG SERVICE LEAVE (LSL) FLEXIBILITY

### Summary of Core Contentions

- LSL is a significant leave accrual which some employees with extended job tenure become entitled to.
- LSL has always been targeted to allowing employees to meet familial commitments, as well as for evolving purposes such as rest and recreation.
- Employers and employees throughout Australia are already accessing LSL flexibly by agreement, as proposed by ACCI, through:
  - Bargaining at the workplace level.
  - Specific flexibilities under State LSL legislation.
- These flexibilities operate successfully and without significant disputation and complaint from either employers or employees. There is no evidence of any widespread or common complaint or disadvantage in the operation of consensually based approaches to LSL flexibility.
- One of the key groups of employees in Australia to not enjoy flexibilities such as those proposed by ACCI, are those covered by federal award LSL arrangements.
- No loss of LSL (or indeed any variation to LSL entitlements) would be rendered by the proposed clause. Rather the proposed variations would create additional options in how LSL is used and accessed.
- The additional flexibility proposed by ACCI/NFF will clearly operate:
  - Only on the initiation / election of the employee.
  - Only by agreement at all times.
  - Only for the purposes of assisting employees in balancing their work and family responsibilities.

## ACCI/NFF Proposed Clause

[8.1] Long service leave is regulated in Australia primarily through State and Territory legislation and federal awards. ACCI understands federal awards regulate / address long service leave in two ways:

- a. Firstly, there are federal award long service leave clauses that do no more than name or call up the operation of an otherwise universally operating State and Territory long service leave arrangements. For example the *Travel Industry - Agencies - General Award - 1999* provides that:

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Employees are entitled to long service leave in accordance with the long service leave legislation which applies in the State in which they work.

- b. Secondly, there are stand alone long service leave clauses that comprehensively provide long service leave entitlements. Stand alone long service leave clauses address the same topics as State and Territory legislation (for example regulating what the entitlement is, when it applies, when long service leave becomes payable pro-rata, how long service leave may be taken etc). Appendix E to the *Graphic Arts Industry Award 2000* is an example of such a provision.

[8.2] The ACCI/NFF applications in this matter propose to vary federal award long service leave arrangements only in the second scenario, that is where an award contains a stand alone, comprehensive long service leave provision which applies in place of State and Territory arrangements that would otherwise apply.

### Proposed Variation

[8.3] Where a federal award regulates how long service leave is to be accessed, additional wording would be added as a specific additional flexibility for work and family purposes. In the case of Appendix E of the *Graphic Arts Industry Award 2000*, this would make the operative provisions on the taking of long service leave as follows:

#### **6.1 When leave is taken**

Leave is to be granted to the employee as soon as practicable after the employee becomes entitled to long service leave, having regard to the needs of the employer's establishment and the requirements of 6.3, at such time or times as may be agreed between the employer and the employee.

## 6.2 Notice to take leave

Except where the employee agrees otherwise, the employer will give an employee at least 28 days notice of the date from which leave is to be taken.

## 6.3 Method of taking leave

Leave is to be given and taken in one continuous period, or if the employer and the employee agree in not more than three separate periods in respect of the first thirteen weeks entitlement and in not more than two separate periods in respect of any subsequent entitlement.

6.3.1 *Provided that, to assist employees in balancing their work and family responsibilities, an employee may elect, with the consent of the employer, to access accrued long service leave as follows:*

(a) *Long service leave being taken in weekly or daily multiples, including single days.*

(b) *Double the period of long service leave on half pay.*

(c) *Half the period of long service leave on double pay.*

(d) *The employee foregoing his or her entitlement to long service leave under this award, or part thereof, if:*

*i. the employee is given an adequate benefit in lieu of the entitlement; and*

*ii. the agreement is in writing.*

## 6.4 Holidays and annual leave

Long service leave is exclusive of annual leave but inclusive of all Public Holidays occurring during the taking of any period of long service leave.

## 6.5 Restriction on employment while on leave

No employee who is on long service leave may engage in any employment with an employer known by the employee to be bound by this appendix. No employer bound by this appendix may employ any employee during any period when the employee is known by the employer to be on long service leave under this appendix.

## How This Would Work

[8.4] The proposed new clause would provide specific additional capacities for employees with family responsibilities to agree to the flexible use of their long service leave beyond that which applies to all other circumstances.

[8.5] Where an employer and employee are able to reach agreement, the existing provisions of cl.6.3 of the preceding award would not restrict the employer and employee from agreeing more flexible approaches as set out in cl.6.3(a) to (d) above.

### **What this is and is not**

[8.6] As we have made clear throughout this submission, and as is made clear by the witness evidence appended to this submission:

- a. The proposed new capacity to use Long Service Leave more flexibly would only apply where an employer and employee agreed, and where this was at the employee's election.
- b. At all times this would operate based on employee choice and employer agreement. There is no intention that this operate to in any way compel employees to use their long service leave in particular ways, nor to force employees away from the default arrangements contained in awards if that is their choice.
- c. This formulation advanced is fundamental. Any approach which operates other than by employer agreement is not supported.
- d. It is clear from the proposed new clause following conciliation that the proposed new capacity for agreement would operate only *"to assist employees in balancing their work and family responsibilities"*. The flexibilities advocated by ACCI/NFF are in no way proposed as generalised or at large departures from existing award approaches.

### **Atypical awards**

[8.7] ACCI/NFF was not able to discern any award models which provide a general level of flexible long service leave usage in all circumstances. Were it to be the case that there were awards which contained comprehensive long service leave clauses and which provided for flexible usage in all circumstances without reference to work and family, pending an example of each specific circumstance, it would not be proposed that the award be rendered less flexible by virtue of the ACCI/NFF proposal being accepted as a standard.

## LSL Has Always Been About Families

[8.8] Long service leave (LSL) is a uniquely Australian entitlement with its origins in the colonial public services of SA and Victoria. Historically, it was awarded to employees who had provided long service in the colonies to enable them sufficient time to visit the United Kingdom.<sup>1</sup> Thus, it was always from the outset something which was considered to play a function in the relationships between employees and their families.

## The Rationale For and Operation of LSL Is Changing

[8.9] Over time, a number of changing rationales are considered to have underpinned LSL, including: to provide employees with an extended leave of absence in order to renew their energies; to reward long and faithful service with an employer; and to reduce labour turnover.<sup>2</sup>

[8.10] In contemporary Australia, the purpose of LSL has been remained dynamic, changing to reflect changing usage and changing expectations of employees concerning their LSL entitlements. As outlined below, a recent analysis of contemporary LSL by the States and Territories clearly recognises the changing imperatives for LSL usage and the extent to which ACCI's proposed :S: flexibilities reflect the contemporary role of LSL.

[8.11] In 1999, the then Labour Ministers' Council published a research paper on options to create greater flexibility in LSL<sup>3</sup>. It identified a number of options for providing additional flexibility in the usage of LSL:

There are several areas in which flexibility in long service leave entitlements can be pursued:

- a) cashing out;
- b) flexibility in the taking of long service leave; or
- c) other variations, including combining cash payments and/or flexibility in the taking of leave.<sup>4</sup>

[8.12] This is precisely the effect of the variations now sought by ACCI.

<sup>1</sup> (2004) *Long Service Leave In Australia: Towards A National Minimum Standard*, State Departments of Labour for the Workplace Relations Ministers' Council, p.2

<sup>2</sup> (2004) *Long Service Leave In Australia: Towards A National Minimum Standard*, State Departments of Labour for the Workplace Relations Ministers' Council, p.2 – NSW Parliamentary debates prior to the passage of the *Long Service Leave Bill 1955* (NSW).

<sup>3</sup> (1999) Labour Ministers Council, *Flexibility in Long Service Leave*

<sup>4</sup> (1999) Labour Ministers Council, *Flexibility in Long Service Leave*, para 42.

## This is already known to the system through bargaining

[8.13] Unions and employers have already demonstrated a capacity to agree to precisely the flexibilities sought by ACCI in this matter.

[8.14] The *Lonsdale House Aged Care Facility, ANF And HSUA Certified Agreement 2002*<sup>5</sup> provides as follows:

### 34 Long Service Leave

- 34.1 The parties agree that employees, by mutual agreement, may elect to take half of their long service leave at double pay over half the time or, alternatively, double the period of their Long Service Leave at half pay.
- 34.2 Applications under this clause shall be at the initiative of the employee and shall be in writing.
- 34.3 The parties recommend that employees seek independent advice regarding the taxation implications of seeking payment under this clause. The Employer shall not be held responsible in any way for the cost or outcome of any such advice.
- 34.4 The Employer, if required by the employee, shall provide information as to the amount of tax the Employer intends to deduct. The Employer shall not be responsible for the decision made by the employee as a result of this information.

[8.15] ACCI understands that this provision appears in a number of agreements in the health and community services industry, and in agreements in other industries. There are many other examples, including:

#### 16. Long Service Leave<sup>6</sup>

Pro-rata long service leave may be taken after 10 years of service has been completed.

An employee may elect to take half of their long service leave time, but receive payment for the whole period.

#### 29.4 Granting long service leave at half pay<sup>7</sup>

The Company may, after receiving a request from a crew member, grant long service leave to the crew member at half pay for a period not exceeding twice the period of the crew member's long service leave entitlement.

<sup>5</sup> (AG2004/1786)

<sup>6</sup> St John Of God Pathology Victoria And Health Services Union Of Australia (Health Professionals) Enterprise Bargaining Agreement 1998

<sup>7</sup> QANTAS Airways Limited Flight Crew (Long Haul) Certified Agreement 2001 - 2002 (EBA5)

[8.16] It is also interesting to consider what associations and organisations expert in familial research and with clear perspectives on work and family offer to their employees.

#### 64. Long Service Leave

64.1 The entitlement in the Long Service Leave (Commonwealth Employees) Act 1976 is three months long service leave on full pay (or six months on half pay) to employees after 10 years qualifying service with a rate of accrual at 3/10 month per year of service.

64.2 Eligible employees may access long service leave for a minimum period of seven calendar days at any one time.

[8.17] The Institute of Family studies thereby offers in its most recent agreement, not only access to extended leave for adjusted remuneration (one half of ACCI's LSL proposal), but is also applies the second half of ACCI's proposal – scope to apply LSL in blocks less than would other wise apply under the award (potentially up to 13 such blocks in this case).

[8.18] Research in the late 1990s showed that in 1998, 155 federal certified agreements were finalised which contained clauses increasing flexibility in the timing of the taking of LSL.<sup>8</sup>

[8.19] ACCI knows of no basis to conclude that such clauses have operated sub-optimally nor of inherent problems with extending such flexibilities where they can be agreed.

### **The flexibilities sought are already available under State systems / reflect State and Territory analysis**

[8.20] The drafting of the proposed additional flexibility is also directly informed by provisions of State legislation. More than half of Australia's State and Territory LSL systems allow for an exchange of LSL entitlements for an equivalent benefit.<sup>9</sup>

[8.21] Section 5 of the Western Australian *Long Service Leave Act 1958* for example, is as follows:

<sup>8</sup> (1999) Labour Ministers Council, *Flexibility in Long Service Leave*, p.18

<sup>9</sup> (2004) *Long Service Leave In Australia: Towards A National Minimum Standard*, State Departments of Labour for the Workplace Relations Ministers' Council, p.24.

## 5 . Limited contracting-out of long service leave

An employer and an employee may agree that the employee may forgo his entitlement to long service leave under this Act if —

- (a) the employee is given an adequate benefit in lieu of the entitlement; and
- (b) the agreement is in writing.

[8.22] The Statement of Mr Blyth of the Chamber of Commerce and Industry of Western Australia reports on experience with the application of this provision since its commencement in 1996.

[8.23] His statement makes clear that no difficulty has been experienced with the operation of these statutory provisions since their introduction. They have provided some (but far from all) WA employees (and their employers) with additional flexible options for the accessing LSL benefits.

[8.24] Western Australian experience over almost a decade makes clear that:

- a. There are real benefits in incorporating such flexibilities into the operation of LSL, including benefits to employees seeking to reconcile their work with their familial responsibilities.
- b. There are no risks, detriments or derogations by providing additional flexibility akin to that provided for in s.5 of the *Long Service Leave Act 1958* (WA).
- c. Where this flexibility is available to employees and employers by agreement there is no widespread opposition from union or employee interests.

### **The Benefits of Exchanging LSL for an Equivalent Benefit**

[8.25] The benefits of allowing some scope for exchanging LSL for some other equivalent benefit have recently been identified by Australia's State the Territory governments in their 2004 discussion paper *Long Service Leave In Australia: Towards A National Minimum Standard*. Analysing the consequences of prohibiting exchanges of LSL for equivalent benefits, the States and Territories stated that such an approach:

- a. Fails to recognise that cashing out is accepted to varying degrees in half the jurisdictions in Australia;

- b. will disadvantage those employees who may have pressing financial need and/or little need for an extended absence. This option therefore fails to recognise that some employees want access to payment rather than leave;
- c. ...
- d. Would require legislative change in WA, Tasmania, Queensland and SA (being the states that currently allow for cashing out).

[8.26] The States and Territories responsible for administering LSL laws (many of which have comprehensively reviewed their workplace relations systems during recent years) thereby clearly recognise that some employees will place a premium on access to additional flexibility rather than a one size fits all leave model.

[8.27] The States and Territories also specifically recognise various factors underlying contemporary LSL, including:

- a. (Recognising) the reality for some employees that the money is needed more than a break from work and that some employees are already struggling to take their annual leave entitlements.
- b. (Recognising) the reality that industrial agreements are being struck which allow for the cashing out of leave entitlements.<sup>10</sup>

[8.28] The proposed flexibility in LSL usage in whole or in part is allowed under the Western Australian, Tasmanian, Queensland and South Australian systems.<sup>11</sup>

### **Flexibility in the Taking of Leave**

[8.29] State and Territory systems also allow for flexibility in the taking of leave. According to the States and Territories:

The states and territories vary in their approach: Queensland, SA and the ACT are the most flexible, requiring only that the leave be taken by agreement between the employer and employee. In contrast, the other jurisdictions limit the number of separate periods of leave that may be agreed to by the parties. These range from periods of two to four separate periods depending on the quantum of

<sup>10</sup> (2004) *Long Service Leave In Australia: Towards A National Minimum Standard*, State Departments of Labour for the Workplace Relations Ministers' Council, p.25.

<sup>11</sup> (2004) *Long Service Leave In Australia: Towards A National Minimum Standard*, State Departments of Labour for the Workplace Relations Ministers' Council, p.24.

leave accrued. The jurisdictions also vary as to whether the parties can agree to leave being granted in advance or postponed.<sup>12</sup>

[8.30] These are precisely the type of inflexible restrictions which the proposed clause would allow employers and employees to override by specific agreement.

[8.31] Clearly there is nothing inherently objectionable about such flexibility – it is specifically allowed in Queensland, South Australia and the ACT. Such options have also been in place for some time, apparently without complaint or suggestion of amendment.

[8.32] Flexibility in the taking of LSL is also identified by the States and Territories as a specific measure which can contribute to employees reconciling work and family. Such an approach is described as:

(Maximising) flexibilities for both employers and employees. Flexibilities include enabling employees balance work/family commitments (for example, enabling the employee to take leave in short periods to coincide with school holidays or to take leave at half pay) and ensuring employees are not absent for extended periods during key times;<sup>13</sup>

[8.33] Additionally, scope for greater flexibility in the taking of leave is described as:

(Reflecting) contemporary developments regarding flexibility in leave taking, particularly with regard to balancing work and family commitments;

## **There are no known problems with the proposed flexibilities**

[8.34] In 1999, the Labour Ministers Council found the following in relation to the operation of then available flexibilities in the usage and taking of LSL:

It should be noted that in jurisdictions where cashing out of leave entitlements has been permitted by agreement, no known disputes asserting disadvantage to employees have been identified.<sup>14</sup>

[8.35] This reflects the evidence from the Chamber of Commerce and Industry of Western Australia and feedback from ACCI members generally.

<sup>12</sup> (2004) *Long Service Leave In Australia: Towards A National Minimum Standard*, State Departments of Labour for the Workplace Relations Ministers' Council, p.26.

<sup>13</sup> (2004) *Long Service Leave In Australia: Towards A National Minimum Standard*, State Departments of Labour for the Workplace Relations Ministers' Council, p.26.

<sup>14</sup> (1999) Labour Ministers Council, *Flexibility in Long Service Leave*, para 63.

[8.36] With the benefit of a further 5 years of operation since the comments of the Labour Ministers Council in 1999, ACCI has been able to find very little reported difficulty or disputation regarding the operation of the agreed flexibilities proposed to be added through our variations.

[8.37] Based on their historic and wide ranging evaluation of LSL developments, *Burgess, Sullivan and Strachan*<sup>15</sup> specifically evaluate the fairness of providing options to cash out LSL. They conclude that:

...taking all or part of the LSL as a cash payment enhances the flexibility of LSL and should not be an issue if it is agreed to between the parties. The cashing out option may also assist employees who wish to use the entitlement as a saving pool in order to reduce debt, purchase a house and pay for the education of children. Where it does become an issue is if “chasing out” is the only option available to employees. The danger is that cashing out could become a process for eroding and eventually removing the LSL entitlement.

[8.38] Properly examined, there is no negative prospect raised by the ACCI/NFF proposal. Cashing out will not be the only option for employees, nor is any compulsion proposed. At all times, the clause would operate only by agreement. The benefits found by Burgess et al would be delivered by the ACCI proposals without any risk of the posited detriment to employees.

## **More Women Have Access to LSL**

[8.39] *Burgess, Sullivan and Strachan*<sup>16</sup> have analysed ABS Employment Benefits data to discern which employees are entitled to LSL. Despite suggesting some overall decline in overall LSL entitlements, they find that: *“There is an increasing trend of (LSL) coverage for both full time and part time female workers.”*

[8.40] They further find that *“...the shift in the workforce coverage of LSL reflects the workforce trends towards increasing feminisation and part time employment share growth”*.

[8.41] Put simply, more women have access to LSL. This is increasingly part of the battery of leave entitlements which female employees in particular should be empowered to explore by agreement with employers in their efforts to reconcile their work and family responsibilities.

<sup>15</sup> Burgess, J., Sullivan, A. and Strachan, G. (2002) “Long Service Leave in Australia: Rationale, Application and Policy Issues”, *Labour and Industry*, Vol.13, No.1

<sup>16</sup> Burgess, J., Sullivan, A. and Strachan, G. (2002) “Long Service Leave in Australia: Rationale, Application and Policy Issues”, *Labour and Industry*, Vol.13, No.1