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Flexibility in Long Service Leave

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Preface

Flexible leave arrangements are a key issue for all governments in Australia as they develop labour market structures to meet economic and social changes.

This paper on long service leave flexibility is intended to provide an overview of the flexible options which exist in Australia and to point the way ahead for the introduction of further changes that are mutually beneficial to both employers and employees.

The paper was prepared for the Labour Ministers' Council by the WA Department of Productivity and Labour Relations in liaison with the federal Department of Employment, Workplace Relations and Small Business.

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Contents

Introduction	7
Background	7
What is long service leave?	7
History of long service leave	7
How many employees are entitled to long service leave?	8
The changing nature of the workforce	9
Casual employment	9
Which countries have long service leave?	10
Overview	11
Rationale for providing flexibility in long service leave	11
Taking of leave	11
Existing flexibilities	12
Exploring options for flexibility in long service leave	13
Cashing out	13
Flexibility in taking of long service leave	13
Other variations	14
Benefits for employers from providing flexibility in long service leave entitlements	15
Mutual benefits of flexibility	15
Benefits for employees from flexibility in long service leave entitlements	15
Benefiting from available opportunities	17
Case history–flexibilities available through agreement-making	18
Long Service Leave clauses in AWAs	18
'Double dipping'	19
Portability	19
Conclusion	21

Attachment One - Matrix of long service leave entitlements in Australia

Attachment Two - Long service leave flexibility in the federal jurisdiction

Introduction

1. The critical challenge for governments, employers and employees as we move into the next millennium is to resolve the struggle against long-term unemployment. The intensification of global competition and its employment consequences have necessitated businesses and employees developing more flexible and innovative work practices and structural arrangements.
2. Annual and long service leave entitlements can have significant financial and resource planning effects on business. A variety of leave provisions are now emerging as part of a broader and more flexible approach to employment planning.
3. Arrangements can be put in place which allow employers and employees to better manage access to leave entitlements for the purpose of work planning, whilst at the same time ensuring employees can better meet their personal needs and circumstances. This is particularly important in the case of long service leave, given that where it applies it can mean employers are without a staff member for a considerable period of time.

Background

What is long service leave?

4. Long service leave is a period of paid leave granted to employees after a period of continuous employment with the one employer. In certain industries, such as construction, stevedoring and coal mining, policy makers in the past have allowed the entitlement to vest after a period of continuous service in that industry, regardless of the number of employers.

History of long service leave

5. The entitlement has its origins in the 19th century Victorian and South Australian Civil Service Acts. These provided for civil service officers who had completed at least 10 years service to be granted leave of absence with pay for periods of six or 12 months. The purpose of the leave was to reward those who had performed long and faithful service in the colonies by providing an opportunity for them to visit the United Kingdom.
6. All State and Commonwealth public servants were subsequently granted the entitlement. It was then gradually extended to other public sector employees. Long service leave began to be included in federal awards, by consent, in the late 1940s. It did not become a standard employment condition for all employees until the passage in the 1950s of long service leave legislation in all States.
7. The purpose of such legislation, according to Parliamentary debates prior to the introduction of the Long Service Leave Bill 1955 in NSW, was to:

- reduce labour turnover;
 - provide a reward for long and faithful service; and
 - enable employees halfway through their working life to recover their energies and return to work renewed, refreshed and re-invigorated.
8. In 1964, the Commonwealth Conciliation and Arbitration Commission arbitrated its first long service leave award to provide what has become the standard provision for non-public service employees: 13 weeks leave after 15 years service, with pro-rata payment in lieu on termination of employment after 10 years service.
 9. State legislation and existing awards were amended to provide the same entitlement. South Australia later introduced a 10 year qualifying period for the full 13 week entitlement but this has not been followed by the other States. Public sector employees generally have more favourable long service leave entitlements.
 10. An issue addressed in different ways by State long service leave legislation is how the entitlement under each Act should operate when there are other entitlements, under other legislation, or in particular State or federal awards or agreements. Different State Acts make different provisions. For example, some Acts enable a State commission to provide exemptions on a discretionary basis; some State Acts provide automatic exemption if there is any provision under a federal award, or a more favourable provision under a State award.
 11. While long service leave entitlements are predominantly provided for under State laws, the Commonwealth makes legislative provision for long service leave entitlements for those employed in the Commonwealth public service. The Federal Workplace Relations Act also provides scope for federal workplace agreements and, currently, federal awards¹ to override State legislative entitlements. Details of long service leave entitlements in the States and the Commonwealth are shown at **Attachment 1**. More detail on long service leave flexibility in the federal jurisdiction is set out in **Attachment 2**.

How many employees are entitled to long service leave?

12. ABS statistics on labour mobility suggest that approximately one quarter of the Australian workforce will remain with an employer long enough to qualify for the entitlement. The statistics for 1998 show that just over 24 per cent of employed persons in Australia have been in their current job for 10 or more years. With public service and pro-rata entitlements being available in less than 10 years in some jurisdictions and continuous employment with the one employer not being a prerequisite in industries with portable long service leave schemes, the percentage of employees qualifying for the entitlement may be slightly higher than the overall employment duration averages suggest.

¹ The *More Jobs, Better Pay* Implementation Discussion Paper issued by the federal Minister for Employment, Workplace Relations and Small Business on 6 May 1999 foreshadowed the removal of long service leave as an “allowable matter” under federal awards, leaving such arrangements to be decided by federal agreements or State legislation/agreement.

The changing nature of the workforce

13. Australian industry is undergoing major structural change. The pattern emerging is that 72 per cent of Australia's GDP is coming from the service industries. Information-based and household service-based industries are in ascendancy, whilst the importance of primary and secondary industry, such as agriculture, mining and manufacturing is diminishing.
14. It is predicted new industries will account for more than 80 per cent of all new jobs in the next decade. Technology has transformed the very nature of work. Many jobs have disappeared. Whole new industries have emerged to replace jobs that no longer exist. The telecommunications, software, environmental engineering, health products, services for the ageing population and education industries are cases in point.
15. The era of 'one job — one company for life' has all but disappeared. The emerging reality is that workers of the future will characteristically have:
 - several career changes in their working lives and working lives that are shorter;
 - an increase in non-standard hours of work;
 - working patterns which may include casual, part-time, job-sharing and contract work;
 - an increased reliance upon electronic communications and work processes;
 - a portfolio of skills which can be adapted to serve the needs of many working environments which cross industry boundaries; and
 - an increase in self-employment.
16. Over time, therefore, long service leave can be expected to diminish in its importance as an entitlement for employees as the proportion of employees who are entitled to it will gradually shrink.

Casual employment

17. Another key feature of the changing nature of the workforce has been the growth in the number of employees employed on a part-time and casual basis. Although recently this trend has stabilised, over the past decade at least, the proportion of employees working part-time rose by over nine percentage points from 18.9 per cent in August 1988 to 28 per cent in August 1998. The number of employees employed on a casual basis has also risen from 17.6 per cent in August 1988 to 26.9 per cent in August 1998. There has been a slight fall in the proportion of part-time employees employed on a casual basis over the same period from 68.3 per cent in August 1988 to 65.4 per cent in August 1998.
18. Employees employed on a regular part-time basis, will generally have access to the full range of entitlements provided to full-time employees, including long service leave, on a pro-rata basis (commensurate with the ratio of their regular hours of work compared to the ordinary hours of work for full-time employees).

19. Within most State and the Commonwealth jurisdictions, long service leave has also been made available to casual employees, although they must accumulate sufficient continuous service to qualify. Given that casual employment has traditionally been on a day-to-day basis and that a casual loading is applied in compensation for normal benefits of continuous employment, such as long service leave, the question can be asked whether a casual employee should accrue rights to long service leave.
20. At the same time, the incidence of regular and ongoing casual employment is growing and hence the eligibility of the employee to accrue rights to long service leave will require examination of the relevant award or agreement.

Which countries have long service leave?

21. There appear to be very few countries with entitlements directly comparable to Australian long service leave. However, many countries reward their employees for length of service. It should also be noted it is problematic to make international comparisons about employment entitlements on the basis of a single employment condition. Rather, more meaningful comparisons are made between overall employment conditions packages. This takes better account of the diversity of packages as there may be entitlements provided for elsewhere which do not apply in Australia.
22. In Britain, one of Europe's more deregulated frameworks for workplace relations, there is a link between the period of service and the amount of annual leave, as the latter may increase for long serving employees. Similar arrangements exist in many European Union member states, for example, in Greece the annual holiday entitlement is increased by one day for each additional year of employment up to a maximum of 26 working days for those on a six-day week and 22 working days for those on a five-day week. However, these practices may alter with the transposition of EU working time directives aimed at harmonising conditions across member states.
23. In the US, a similar situation exists to that in Britain with leave not generally mandated by state or federal law, but again leave may be proportional to length of service. In Canada, labour regulation is a provincial not federal responsibility and some provinces have regulated to ensure extra annual leave after an extended period of continuous service. An example of this occurs in British Columbia, where minimum labour standards include two weeks annual leave rising to three weeks leave after five years of continuous service.
24. In New Zealand, there is no statutory requirement for long service leave. However, prior to the introduction of the *Employment Contracts Act 1991*, long service leave was a feature of awards and it remains widespread in contracts. Both the eligibility for and quantum of leave varies but research by the New Zealand Department of Labour reveals long service leave to be of comparatively shorter duration than that provided in Australia, typically two or three weeks after either 10 or 15 years. Data for 1997/98 showed that 77 per cent of employees were entitled to paid long service leave in New Zealand and this represented a slight fall indicating an increasing trend towards replacing the benefit with other arrangements as agreed by the parties, such as increasing annual leave or other compensations.

25. In Malaysia, employees with one to two years service are entitled to eight days of annual leave per year, increasing after two to five years to 12 days a year and for employees with five years service an entitlement of 16 days accrues.

Overview

Rationale for providing flexibility in long service leave

26. Long service leave legislative provisions are generally not written in a language employers or employees find easy to understand. They are also hedged with qualifications, inclusions and exceptions as to what constitutes an employee, what amounts to continuous employment, when and how leave can be taken and what remuneration is payable during or in lieu of leave.
27. Long service leave has been criticised by employers as constituting a significant labour cost burden. This burden is often intensified if an employee defers the taking of the leave for any significant period after it falls due.
28. It is therefore necessary to focus on developing approaches to managing long service leave which ensure flexibility for employers and employees in accessing the entitlement. This will be assisted if the entitlement provisions are modernised to suit the more flexible approach to labour market regulation which is occurring more generally.
29. Critical to the success of such an approach will be to ensure that any long service leave provisions:
- are written in plain English to ensure employers and employees understand their rights and obligations and are not overburdened with red tape, consistent with the approach being taken in award simplification under the Workplace Relations Act (and in other State jurisdictions);
 - provide the means of managing the entitlement which are transparently fair to both parties;
 - enable employers and employees to jointly determine the timing, quantum and opportunity cost of any leave that is taken; and
 - enable cashing out.

Taking of leave

30. Existing long service leave statutory provisions usually:
- require leave to be taken as soon as practicable after becoming vested and provide a timeframe in which it must be taken;
 - prescribe the period or periods in which the leave can be taken eg continuous period or periods of not less than one week;

- prohibit employees from taking other employment during the period of leave; and
 - require notice of when leave is to be taken. In some jurisdictions, leave may be taken in advance of the entitlement vesting, with adjustments being made once leave vests or if the employee leaves prior to the vesting date.
31. The legislation in all jurisdictions, apart from Queensland, requires that once the leave becomes due it is to be taken as soon as practicable or at a time otherwise agreed between the employer and the employee.
32. In Queensland, long service leave is taken either in accordance with award or agreement provisions or, in the absence of any provision, by agreement with the relevant union. In the absence of agreement with the union, leave is taken by the employer giving three months notice of when the employee is to take at least four weeks leave.
33. Award provisions also provide timeframes for the taking of leave but don't generally allow individual employees and employers to contract out of those requirements.
34. In addition, in some jurisdictions, there are issues arising out of the interaction of long service leave with other types of leave, such as sick leave, annual leave and maternity leave.
35. Any endeavour by the employer and employee to provide for flexibility in the taking of long service leave, is likely to be limited by the constraints outlined in paragraph 30. Options for exploring flexibility in the taking of long service leave are discussed below. However, to ensure certainty and clarity to the entitlement, some elements of long service leave appear best set within the relevant statute. The definitions of *continuous employment* and *employee* could be set by the statute and not be negotiable. Other matters could be open to negotiation.

Existing flexibilities

36. In some State jurisdictions, it is already possible for employees and employers to enter contractual arrangements whereby an employee may access a benefit in lieu of taking long service leave.
37. Such a benefit is most commonly taken as cash. Alternatively, employers and employees may agree on some other form of reward such as the pro rata accrual of additional days of annual leave
38. Employees in Western Australia whose employment is governed by a workplace agreement or common law contract are able, through the provisions of the Long Service Leave Act, to cash out all or part of their long service leave. The entitlement may be cashed out only by written agreement for an adequate benefit.
39. The long service leave legislation for South Australia (applying throughout the private sector but excluding most of the public sector) and Tasmania (private sector) also enable flexibility through cashing out of the leave.

40. Under the federal Workplace Relations Act, a workplace agreement (either collective or individual) also allows parties to cash out long service leave entitlements, for employees in the private sector and subject to a 'no disadvantage test'. The workplace agreement would generally override state legislation.
41. If there is the ability to cash out long service leave, it would generally be expected that this would be mutually beneficial or that there would be an 'adequate' benefit in lieu. The determination of 'adequate' should be made in a global sense, taking into account the total employment package.

Exploring options for flexibility in long service leave

42. 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.

Cashing out

43. Cashing out of long service leave could take two forms:
- cashing out once the employee becomes eligible for leave; or
 - paying an employee a proportion of the long service leave as part of their pay on an on-going basis.
44. Cashing out once an employee becomes eligible for the leave is a current practice in a number of jurisdictions and is a straightforward approach.
45. The incorporation of a compensating premium in an employee's ongoing pay raises some difficulties. It also relies on a confidence the employee will remain employed by the firm for an extended period. This difficulty may be allayed by the premium being introduced after, say, nine or 10 years employment.
46. Such an initiative would normally involve some discounting of the benefit to compensate for the time factor ie. a week's leave now is worth more than a week's leave in 15 years time. The option may only be viable in limited or particular circumstances.

Flexibility in taking of long service leave

47. Flexibility in taking long service leave could be obtained through removing all the traditional constraints (as outlined in paragraph 30) and leaving it to the parties to negotiate how and when and in what form leave will be taken and/or what cashing out arrangements are reached.

48. Under this arrangement, where parties cannot agree about the conditions attached to the taking of the leave, the arrangements would default to the basic leave entitlement – as applies in the relevant State jurisdiction – and those core non negotiable matters conditions as described in paragraph 35.
49. This arrangement offers the advantage of simplicity and would be consistent with current practice and provisions which provide for the leave, when due, to be taken “as soon as practicable or at a time otherwise agreed between the employer and the employee”.
50. A balance needs to be struck between minimising the potential costs of reaching agreement and conferring adequate flexibility. It is also necessary to ensure that the provisions do not unduly favour one party or inhibit achievement of the purpose of the entitlement. Any disagreement about proposed flexibility in taking long service leave should be dealt with through the organisation’s workplace or enterprise agreement dispute settlement procedure.
51. At the same time, the parties should be free to trade off or cash in all or part of the entitlement if they wish to do so.
52. An overall balanced approach would seem to require the following long service leave parameters to be specified by statutory provision in any agreement:
- a) the leave may be taken:
 - i) in whole or in part by the employee at a time and in a manner agreed to by the parties;
 - ii) where agreement cannot be reached, at a time and in a manner determined by the employer or the employee in the employment agreement; or
 - b) may be cashed in or traded off:
 - (i) in whole or in part, by agreement between the parties, at a price and in a manner agreed to by the parties, but at not less than the value of the entitlement if taken in the form of leave; and
 - (ii) where agreement cannot be reached on the price or the manner, at a price and in a manner to be determined by an independent third party agreed to by the employer and employee.

Other variations

53. Cashing out options could also be combined with options providing flexibility in how the leave can be taken by allowing the employee to choose to:
- take part of the leave entitlement and receive a cash payment for the remainder; or
 - halve the period of leave and double the pay;
 - double the period of leave and in effect halve the payment; or
 - trade off long service leave so the benefit accrues over a longer period, but the employee receives compensation for this as part of an agreed pay increase.

54. Another approach would be an agreement to allow the employee to take a proportion of the leave within an earlier time period. For example, an employee may accrue an entitlement to one third of the 13 weeks leave after five years or to two thirds of the leave entitlement after 10 years.

Benefits for employers from providing flexibility in long service leave entitlements

55. Provisions relating to leave have a major impact on the availability of employees to undertake work at any particular time. Arrangements can be put in place which allow managers to better regulate access to leave entitlements for the purpose of work planning, whilst at the same time ensuring employees can better meet their personal needs and circumstances. This is particularly important in the case of long service leave, given that where it applies, it can mean employers are without a staff member for a considerable period of time.

56. This can be negated to some extent if it is agreed the employee take long service leave during a quieter period, which is already the case in some industries, in particular building. There is also the potential cost of a replacement employee, or the alternative of doing without the employee by putting the extra workload on other employees.

57. However, allowing employees to partially or fully cash out long service entitlements ensures that employers are not without their valued staff members for an extended period of time.

58. Generally, another benefit of cashing out is that the employer's liability is realised at a rate of pay which will be lower than if the leave is taken at a later date.

59. At the same time, however, it should be recognised that allowing employees the opportunity to take a period of long service leave can also have benefits for the employer. The employee can use the leave as an opportunity to recharge their batteries, enhance their skills or pursue studies, allowing them to return to the workplace refreshed and recharged with new ideas.

60. Flexibility in long service leave provisions should be directed towards enabling the requirements of both parties at the workplace to be met more effectively.

Mutual benefits of flexibility

An employee in a WA government department wanted to have every Friday off work to take care of his young son. His wife needed to return to work on a part-time basis to maintain her skills.

The employee was able to take one day's long service leave each week. The arrangement allowed him to maintain his income and meet his family commitments. In addition to the benefit the employee derived from this arrangement it allowed the department to continue to benefit from this employee's skills which were very marketable and in short supply.

Benefits for employees from flexibility in long service leave entitlements

61. Flexibility in long service leave entitlements has a number of potential attractions for employees. Cashing out, for example, could provide the following benefits for employees:

- an employee's take home pay is increased, through a lump sum or a regular payment in lieu arrangement. A significant lump sum may be preferred at a time when money may be more important to the employee than the leave. Depending on the tax bracket of the employee, such a transaction may have costs for the employee in extra taxation;
- not being absent from work for a significant period and thus missing out on work or career opportunities;
- ensuring one keeps up-to-date in a period of change.

62. In other circumstances, allowing employees flexibility in how they may take long service leave may allow them to better meet their work/life requirements. For example, employees may use it in conjunction with periods of parental leave or it can be used by employees who are pursuing a career change or nearing retirement, as a way of smoothing the transition.

63. 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.

64. A further and important benefit of providing more flexible access to long service leave is that it may give employees more security over the benefit. For example, an employee who is receiving the benefit through an increase in take home pay, or who has received the benefit through cashing out, and whose employer subsequently becomes insolvent has, at the time of insolvency, received the whole or part of their benefit. This may mean that the employee is less exposed to the processes of administration of insolvent business and the priorities that apply to secured creditors on insolvency.

Benefiting from available opportunities

A printing company in New South Wales found that employees were asking for payment in lieu of their accrued long service leave. Employees found that with a partner at work and children at school, extended leave had only limited value compared to the increased income that can be used to benefit all the family. The organisation listened to these concerns and when their collective agreement was being negotiated, the parties agreed to incorporate provisions that allowed, with agreement from the parties, for the entitlement to either be cashed out completely or for the leave to be halved and the pay doubled.

Since then other printing companies have included long service leave flexibilities in their collective agreements and employees have been taking advantage of the new flexibilities in a variety of ways:

- one employee took half the entitlement as leave and the double pay enabled them to afford a holiday overseas;
- one employee cashed out their entitlement and used the lump sum to help pay for a swimming pool;
- another used the money to pay for improvements to their home and garden.

These types of experiences help illustrate how flexible long service leave provisions can really be a boon for both employees and their families, providing benefits that can be enjoyed for many years.

Employers also spoke of the advantages of more flexible long service leave arrangements that meant valuable employees were not absent for extended periods. Organisations face considerable difficulties and expenses when trying to replace experienced employees and many would prefer to utilise the options now available to them under the agreement making process.

This example and the many like them highlight how difficulties in continuity of production and service provision can be overcome while at the same time providing more choice to employees.

Flexibilities available through agreement-making

In 1998, 158 federal certified agreements were finalised which contained clauses increasing flexibility in the timing of the taking of long service leave.

Some agreements allowed the proportion of long service leave accrued to be available after five years, while others allowed the accrual to extend well beyond 10 years without forcing the employee away from work. The advantages of this are numerous, for example; an employee may wish to utilise long service leave, either before or after accrual, for special family events, school holidays, or simply to coincide with good weather. This flexibility is possible and by discussion with the employer, who may have seasonal variations in demand and more flexibility at certain times of the year, a win-win situation can be achieved.

Long Service Leave clauses in AWAs

Employers and employees are taking advantage of the opportunities available to them under Australian Workplace Agreements to incorporate more flexible long service leave arrangements.

Specific examples of flexibilities in long service leave incorporated in AWAs include:

- a motor vehicle, boat and leisure-craft wholesaling company which allows employees to cash in five to 20 days of their long service leave entitlement each calendar year, once the long service leave entitlement has been accrued. This gives the employee more choice as to the form in which the benefit is taken and the employer greater security in staffing arrangements without a large lump sum pay out (cashing in, while positive for the employer is also a financial burden particularly for small businesses with small cash flows);
- a number of publishing and printing businesses in one state are allowing staff to opt for long service leave at double pay, halving the period they are away from work, or to cash it in entirely. Leave which is not taken or cashed out within six months of falling due is cashed out at the employer's discretion; and
- an AWA in an interior design company has only one clause, which provides for the employee's long service leave to be cashed out into a significantly higher base salary.

Double dipping

65. In providing flexibility in long service leave entitlements, it is important that the new arrangements do not give rise to additional problems. One area of potential complexity is the interaction between workplace and enterprise agreements and the statutory entitlement to long service leave. It may be possible for an employee to move from one employment instrument to another, such as from a workplace agreement back to an award, while remaining with the same employer. The subsequent instrument usually does not recognise any arrangements applying under the preceding instrument.
66. An employee could have agreed under an agreement to trade off long service leave for another benefit. However, long service leave depends only on continuous employment, not on the instrument under which all the employment or service was completed. Unless care is taken in drafting legislation and agreements, a party who trades off long service leave under an agreement may find that under a subsequently applying award, the full long service leave entitlement is revived and the previous trade off is not legally recognised.
67. The issue will require some consideration by the State and Federal Governments to ensure the regulatory frameworks recognise the differing treatments of long service leave and that double dipping is precluded. An option referred to earlier occurs in the WA public sector where it is quite common to trade off long service leave so the benefit accrues over a longer period, but the employee receives compensation for this as part of the agreement quantum.
68. It is also important to address the issue of casual employees 'double dipping' by receiving a loading in lieu of certain entitlements, such as long service leave, and yet being entitled to take the leave on account of continuous service. Employers in these circumstances pay twice, and employees receive a double benefit. This issue can be addressed by more flexibility in both legislation and through agreement making, as discussed earlier in this paper.

Portability

69. Portability of long service leave has emerged as an entitlement in some industries.
70. It should be recognised that, portability of leave between employers is at odds with the long service leave concept and should only be countenanced in exceptional circumstances. There is a strong case for some of these arrangements to be standardised to comply with general industry behaviour, or pursued through agreements.

71. Nonetheless, an area which requires attention is the provision of similar flexibility arrangements in portable long service schemes. They likewise must ensure they are made simpler to understand and more flexible in their application.
72. All States have introduced portable schemes for the construction industry on the basis that the short-term nature of work projects means a person is unlikely to accrue sufficient time with any one employer to gain an entitlement to long service leave. Similar schemes are found in the stevedoring and coal mining industries. The coal industry scheme, at a federal level, was recently the subject of a thorough review, with a report to the federal Minister and recommendations having been released earlier in 1999.
73. It is essential that portable long service leave schemes, where they exist, are also simple and flexible and this could be encouraged by:
- voluntary registration of employees for the entitlement;
 - provisions in plain English;
 - flexibility in when leave can be taken and in how many periods;
 - the ability to cash out leave entitlements for an “adequate benefit”; and
 - discretion to grant long service leave in exceptional circumstances where entitlement is not fully accrued.
74. Portability provisions in the States’ legislation should be sufficiently harmonious to facilitate the interstate transfer of employees with the same employer. Different entitlements and qualifying periods for taking the first and the subsequent periods of long service leave are provided in the States’ legislation.
75. For instance, in New South Wales and the ACT employees are entitled to two months leave after serving 10 years whereas in Victoria, Queensland, Western Australia and Tasmania 13 weeks is provided after 15 years service. In South Australia and the Northern Territory, 13 weeks are provided after 10 years service. The entitlement will occur in the place where it arises but whether service with an employer in another State will count will depend on the provisions of the legislation.
76. Clearly, there is potential for anomalies and inequities and these will need to be addressed by all States reviewing their legislation to ensure that through agreements, employees and employers can overcome these disparities.

Conclusion

77. Workplace relations reform can deliver significant benefits to employers and employees, and the community generally. Increased labour market flexibility and reduced regulation contribute to greater productivity and competitiveness. They are important for sustained economic and employment growth and improved living standards. Such reform is also necessary to enable small businesses to thrive and create employment.
78. Moving away from prescriptive approaches in the determination of working arrangements such as long service leave can enable employees to have better access to their entitlements; to have more of a say at work; to have their interests catered for in more flexible work arrangements; and to be better rewarded for their particular efforts and skills. Freeing up traditional restrictions on long service leave entitlements will have benefits for those employees who are eligible for it, as well as their employers, in the same way that the introduction of flexibility in the application and use of annual and sick leave arrangements has benefited those in the workplace, and in turn the economy overall.
79. Providing flexibility in long service entitlements is of course complicated by the fact that long service leave entitlements are typically governed by a mix of legislative, agreement and award arrangements. It is also an entitlement which only affects a relatively limited part of the workforce.
80. However, for the approximately one quarter of employees who do remain with an employer long enough to qualify for the entitlement, the management of it may be made more beneficial to both employers and employees if the provisions conferring the entitlement:
- were clear, simple and easy to use; and
 - enabled the parties to adapt how the leave is used or applied in a manner that meets their needs more appropriately.

Long service leave entitlements in Australia

	Private sector						Public sector			
	First leave			Subsequent leave			First leave		Subsequent leave	
	Qualifying period (years)	Leave period	Pro-rata leave - years	Qualifying period (years)	Leave period	Pro-rata leave - years	Qualifying period (years)	Leave period	Qualifying period (years)	Leave period
Federal	15	13 weeks	10	10	8 2/3 weeks	0	10	3 months	1	0.3 months
ACT	10	2 months	7	5	1 month	1	10	3 months	1	0.3 months Min 15 days
NSW	10	2 months	10	5	1 month	nil	10	44 working days	1	11 days
NT	10	13 weeks	7	10	13 weeks	nil	10	3 months	1	0.3 months Min 2 weeks
Qld	15	13 weeks	10	15	13 weeks	5	10	13 weeks	1	1.3 weeks Min 4 weeks
SA	10	13 weeks	7	1	1.3 weeks	nil	10	90 days	1	9 days 11-15 years 15 days 16 years on
Tas	15	13 weeks	7	10	8 2/3 weeks	nil	10	13 weeks	1 month	1.3 weeks per year
Vic	15	13 weeks	10	5	4 1/3 weeks	nil	10	3 months	5	1.5 months
WA	15	13 weeks	10	10	8 2/3 weeks	nil	7	13 weeks	7	13 weeks

LONG SERVICE LEAVE FLEXIBILITY IN THE FEDERAL JURISDICTION

Entitlement to long service leave for employees is predominantly provided for under State laws. This legislation is generally complex and highly prescriptive, providing little scope for the parties to tailor the entitlement to their needs.

Under the federal *Workplace Relations Act 1996* (WRA) leave entitlements, including long service, sick and annual leave, can be cashed out or varied to suit the needs of individual workplaces through agreements.

The federal WRA makes it clear that the no disadvantage test (NDT) for agreements is a global one. While agreements must not result in employees being worse off overall compared to their pre-existing award and legislative entitlements, the 'no disadvantage' test allows entitlements to be traded off or repackaged and so allows employers and employees to make genuinely innovative and flexible agreements without artificial restrictions.

The global test means that award or State legislative conditions can be varied. Subject to the statutory minima, State law that deals with OH&S, workers' compensation and apprenticeship and non-prescribed federal legislation, every condition is open to variation to tailor it to the needs of the enterprise.

Therefore under the WRA, annual leave, sick leave and long service leave may be cashed out subject to the agreement taken as a whole passing the NDT.

The particular scope to 'cash out' entitlements such as long service leave or annual leave in federal certified agreements made under the WRA is determined, in instances relating to the interaction with the State jurisdictions, by the operation of subsection 170LZ(1) which provides that:

'Subject to this section, a certified agreement prevails over terms and conditions of employment specified in a State law, State award or State employment agreement, to the extent of any inconsistency.'

Where there is an inconsistency the agreement will prevail, except that State legislative provisions identified in subsection 170LZ(2) (listed above) of the Act will continue to operate.

Thus, provisions that provide for payment in lieu of long service leave will prevail over the terms of State legislation to the extent of any inconsistency. Where State legislation does not provide for the cashing out of long service

leave, federal agreements may do so, and the certified agreement provisions will prevail to the extent of this inconsistency.

A number of approaches have emerged in agreements under the Workplace Relations Act to tailor long service leave to the needs of employers and employees. These have included:

- cashing out or partial cashing out of long service leave;
- allowing staff to access long service leave on double pay, thereby reducing entitlements at twice the normal rate;
- paying out on resignation before the qualifying period is reached; and
- varying the rate of entitlement and/or qualifying period.