Law Council
OF AUSTRALIA

# Inquiry into the operation and adequacy of the National Employment Standards

## House of Representatives Standing Committee on Employment, Workplace Relations, Skills and Training

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- the Law Society of New South Wales;
- the Law Institute of Victoria; and
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# Introduction

1. The Law Council thanks the House of Representatives Standing Committee on Employment, Workplace Relations, Skills and Training for the opportunity to provide a submission on the operation and adequacy of the National Employment Standards (**NES**).

2. This submission principally makes the case for a reform to the long service leave (**LSL**) entitlements currently set out in the NES. It also suggests a re-assessment of the existing redundancy scales, as well as additional minor clarifications and improvements to the termination, public holiday and personal/carer's leave provisions of the NES.

# Long service leave within the NES: The case for reform

## Summary

3. Each of the states and territories operates their own LSL scheme. The NES exclude those state and territory schemes but only to the extent that national system employees would have been covered by awards that contained LSL entitlements that pre-date the commencement of the *Fair Work Act 2009* (Cth) (**FW Act**), or where the Fair Work Commission (**FWC**) made orders preserving long service leave entitlements in historic collective agreements.[1] In addition, there are specific portable LSL schemes that operate in particular industries, including building and construction and black coal mining.

4. The patchwork of provisions that deal with LSL can only fairly be described as complex and, since the commencement of the FW Act, governments and other stakeholders have explored harmonising LSL entitlements at a national level. Unfortunately, those efforts have so far been unsuccessful.

5. The various state and territory schemes have differences as between the amount of LSL that employees may be eligible for, when and in what circumstances employees can qualify for LSL, how an employee's length of service is reckoned for the purposes of whether they qualify for LSL, and what rates of pay apply to LSL when it is taken, among other distinctions. Those differences have obviously contributed to what the Senate Education and Employment References Committee (**Senate Committee**) described in 2016 as 'the glacial rate of progress in developing a national standard'.[2]

6. The Law Council submits that the current review of the NES presents a unique opportunity to revitalise the work undertaken by former governments and various stakeholders toward a national minimum LSL scheme. Such a task will not be

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1 Note, the construction of the relevant provision of the NES is not without complexity: see *Conroy's Smallgoods Pty Ltd v Australasian Meat Industry Employees Union* (2023) 408 ALR 316; [2023] FCAFC 59 ('***Conroy's Smallgoods***').

2 Senate Education and Employment References Committee, Parliament of Australia, Feasibility of, and options for, creating a national long service standard, and the portability of long service and other entitlements (Final Report, 25 February 2016) 17.

straightforward, but it would be entirely consistent with the FW Act's emphasis on productivity and fairness, and the Australian Government's broader productivity agenda.

## LSL under the NES

7. The object of the FW Act is to 'provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians'.[3] It does so by, among various means, 'providing workplace relations laws that are fair to working Australians, … promote productivity and economic growth for Australia's future economic prosperity'; and 'ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the [NES]'.[4]

8. LSL entitlements are dealt with in Division 9 of the NES. However, the FW Act deliberately dealt with LSL in an incomplete way.

9. In broad summary, section 113 of the FW Act provides that national system employees are entitled to LSL in accordance with an '[a]pplicable award-derived long service leave term', being a term of a pre-reform award that 'would have applied to the employee at the test time … if the employee had, at that time, been in his or her current circumstances of employment'[5] and that 'would have entitled the employee to long service leave'.[6] The relevant test time is either 'immediately before the commencement of [Part 2-2]' or, in the case of certain state awards, immediately before the 'Division 2B referral commencement'. Employees will not have award-derived entitlements if, before the commencement of Part 2-2, an enterprise agreement or various categories of pre-reform instruments came into operation.[7] Where such an agreement or instrument ceased to operate, the entitlement of relevant employees would revert to that of the applicable pre-reform award.
In addition, subsections 113(4) to (6), enabled the FWC to make orders enshrining (as terms of the NES) LSL entitlements contained in certain pre-reform collective instruments. Finally, LSL entitlements were also separately preserved (outside the NES) as terms of historic pre-reform collective agreements, the vast bulk of which have now either been replaced or terminated.

10. The LSL provisions of the NES were explained as follows within the Explanatory Memorandum to the Fair Work Bill 2008 (Cth):

> ***Long Service Leave***
>
> *r.76. An entitlement to long service leave is currently provided by state and territory legislation, awards and agreements. The NES will preserve current arrangements for long service leave. Meanwhile, the Government is working with the states and territories to develop nationally consistent long service leave entitlements …*
>
> ***Division 9—Long service leave***

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3 FW Act s 3.
4 Ibid s 3(a)-(b).
5 Ibid ss 113(1) and 113(3).
6 As to what 'would have entitled' means, see *Conroy's Smallgoods.*
7 FW Act s 113(2).

*436. This Division sets out the entitlement to long service leave for national system employees.*

*437. This entitlement is a transitional entitlement, pending development of a uniform, national long service leave standard with the States and Territories.*

*438. This Division preserves long service leave entitlements in pre-modernised awards (referred to as applicable award-derived long service leave terms).*

*439. If an employee does not have applicable award-derived long service leave terms, any entitlement to long service leave will be derived from State or Territory long service leave legislation (subject to its modification or exclusion by certain industrial instruments).*

*…*

*442. To determine whether there are applicable award-derived long service leave terms, it is necessary to consider the award that would have applied to the employee's current employment if the employee had been in that employment immediately before commencement (paragraph 113(3)(a)). (This applies to existing employees and new employees after commencement of the NES.)*

*…*

*444. However, subclause 113(2) provides that an employee's award-derived entitlement will not apply if:*

- *a workplace agreement or AWA that came into operation before the commencement of the Bill continues to apply to the employee after commencement (whether or not that agreement deals with long service leave); or*

- *one of a number of listed industrial instruments that came into operation before commencement applies to the employee and expressly deals with long service leave.*

*445. The legislative note after this subclause makes clear if such an agreement or instrument ceases to apply, the employee will then be entitled to long service leave in accordance with any applicable award-derived long service leave terms.*[8]

11. In other words, unless section 113 applies, LSL entitlements for national system employees continue to be derived from state and territory legislation, including in respect of those employees covered by the NES by virtue of referrals of industrial relations powers made to the Commonwealth by the states (for example, employees of sole traders and partnerships).[9]

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8 Explanatory Memorandum, Fair Work Bill 2008 (Cth), xi; xxi and 73.

9 FW Act s 27(g) and pt 1-3, divs 2A and 2B.

## Stalled progress toward a national LSL scheme

12. At the time of the post-implementation review of the FW Act, the 'Towards more productive and equitable workplaces' review (**2012 Review**),[10] work toward a national standard remained ongoing:

> *The Panel notes Government's commendable goal of introducing a national standard long service leave entitlement and the broad support for such a standard in discussions and submissions during the Review. The Panel notes the significant concern of parties about the complexity and confusion surrounding the transitional arrangements currently in place, and also the advice of two state governments that the standardisation process appears to have stalled. While we note suggestions that we should ourselves develop a national long service leave standard, we consider that the processes already in place for doing so are the most appropriate. The Panel does, however, recognise the importance of this issue to stakeholders and strongly recommends that the Government, together with its state and territory counterparts, expedite negotiations for a long service leave NES with a view to introducing it by 1 January 2015.*[11]

13. On that basis, the 2012 Review contained the following recommendation:

> *Recommendation 7: The Panel recommends that the Commonwealth, state and territory governments should expedite the development of a national long service leave standard with a view to introducing it by 1 January 2015.*[12]

14. The prospect of a nationally uniform standard was then considered by the Productivity Commission in its 2015 'Workplace Relations Framework' Report:

> *… there has not been significant progress towards a national standard since the [Post Implementation] review, largely because the adoption of a standard will entail losers as well as winners. Businesses operating mainly in one state would not want to emulate higher cost arrangements in another, while employees (and their representatives) in a state with more generous entitlements would not want to relinquish these to achieve uniformity.*[13]

15. However, the Productivity Commission's view was that '[w]hile there would be some benefits from achieving a simplified system, their scale is less clear'.[14] It assessed that the quantification of any benefit attributable to national harmonisation was difficult to calculate, but that several factors likely mitigated the extent of such savings.

16. In particular, the Productivity Commission assessed that 'most enterprises operating across a number of states typically have sophisticated management of payroll and entitlement obligations', and that '[m]ost businesses do not operate across state borders'.[15] There is a basis on which both those points may be subject to debate. In

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10 Ron McCallum, Michael Moore and John Edwards, Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation (Final Report, 2012) ('**2012 Review**').
11 Ibid 101.
12 Ibid 102.
13 Productivity Commission, Workplace Relations Framework (Inquiry Report No 76, 30 November 2015) vol 1, 526.
14 Ibid.
15 Ibid.

respect of the latter, while it might technically be correct that, quantitively, the majority of employers do not operate across jurisdictional borders (because the bulk of employers are small to medium sized enterprises), the Productivity Commission's point does not pay sufficient regard to the quantity of employees engaged by large employers and the contribution of those large employers to the national economy. In addition, post-COVID, there has been an increasing trend of employees working in states or territories different to those in which their employer is based.

17. The Productivity Commission proposed reverting back to a scheme whereby LSL entitlements were derived exclusively from state and territory legislation so as to 'strip away of a layer of complexity' of the kind inherent in section 113 of the FW Act. Alternatively, it proposed a national scheme that would 'grandfather existing entitlements' and provide for nationally uniform entitlements moving forward. The Productivity Commission further wrote:

> *For once, a national issue is not really the responsibility of the Commonwealth Government. It is very difficult to envisage effective simplification without some form of in-principle willingness to cooperate amongst them. States should give consideration to collective action perhaps via the Council of the Australian Federation.*[16]

18. The Law Council submits that this point misunderstands the Commonwealth's capacity to legislate in respect of national system employees pursuant to the corporations power in the Constitution.

19. In February 2016, the Senate Committee released a report titled 'Feasibility of, and options for, creating a national long service standard, and the portability of long service and other entitlements' (**2016 Report**).[17] The Senate Committee referred to the important role LSL has played in rewarding employees who demonstrate loyalty to their employers and rewarding employers for having invested in the skills and expertise of their workforce.[18]

20. The Senate Committee summarised that '[t]he current LSL system is by all accounts, complex'.[19] That observation remains apt for reason that are developed further below. The 2016 Report also held that 'criticism and concern about the current arrangements is widespread across both employee and employer groups'[20] and that there was in principle support across employer groups and unions toward a nationalised LSL scheme.[21] Indeed, the Senate Committee stated that:

> *The evidence strongly suggests that there is broad support for a nationalised LSL standard, in light of the non-uniform and complex arrangements currently in place. The key rationale for a nationalised system would be to simplify the current arrangements and ensure that both employers and workers are better able to understand and apply LSL entitlements, regardless of jurisdiction.*

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16 Ibid 528.
17 Senate Education and Employment References Committee, Parliament of Australia, Feasibility of, and options for, creating a national long service standard, and the portability of long service and other entitlements (Final Report, 25 February 2016).
18 Ibid [2.3].
19 Ibid [2.17].
20 Ibid [2.27].
21 Ibid [2.33]-[2.34].

*Nationalisation would be especially helpful to those employers who engage workers across multiple jurisdictions.*[22]

21. However, the Senate Committee relevantly noted that a move toward a national standard would not be straightforward:

> *2.42 Evidence received by the committee suggests almost universal acceptance that current LSL arrangements are unduly complex and that strong support exists for a national approach to be adopted.*
>
> *2.43 The Department of Employment (the department) submitted that a 'national long service leave standard has been considered by governments for some time' and during a 2012 Fair Work Act Review, development of a national standard had broad support with stakeholders expressing a preference to simplify the LSL system.*
>
> *2.44 However, a number of submitters, including the department, point out that achieving a nationalised standard will not be easy at a practical level because of a range of significant challenges, including the multi-jurisdictional nature of the current LSL arrangements, cost to employers and potential loss of entitlements by some workers:*
>
> > *The key challenge in establishing a national long service leave standard is that state and territory governments maintain primary responsibility for long service leave entitlements. In order to achieve a national standard, the state and territory governments will need to reach consensus on the provisions, such as the quantum of leave and qualifying periods. This will be difficult, considering the differences in the entitlements between jurisdictions. Achieving a uniform standard based on an average of the current range of entitlements could, for example, result in some employers having higher costs and some employees receiving lower entitlements than under their current arrangements.*[23]

22. In its submission to the Senate Committee, the Department of Employment summarised the challenges that face a national scheme as follows:

- *state and territory laws also include a range of entitlements relating to termination of employment and other matters, such as cashing out of leave;*
- *a number of possible legislative approaches to developing a national standard, including establishment in Commonwealth legislation or harmonisation through the state and territory systems. Given national system requirements, the state and territory governments would need to be consulted and agree to implement a national standard;*
- *any approach would require appropriate transitional arrangements for employees entitled to long service leave under state and territory legislation or the NES. These may raise constitutional issues, such as obligations in relation to acquisition of property and state based differences;*
- *transitional arrangements are likely to be administratively complex, as they would require employers and employees to comply with multiple legislative*

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[22] Ibid [2.40].
[23] Ibid [2.42]-[2.44] (citing the Department of Employment, Submission 33, 5).

*instruments during the transition period. The transition period would also be prolonged, as long service leave entitlements crystallise and then can be taken over a period of many years; and*

- *depending on the approach, the development of a national standard may continue to require both Commonwealth and state enforcement agencies, as with the current arrangements.*[24]

23. Before the Senate Committee, union parties emphasised the imperative that any national LSL scheme not result in employees being worse off under the new regime. In response, the Senate Committee considered the option grandfathering existing entitlements and adopting a 'highest common denominator' but acknowledged that this would not be 'palatable to all stakeholders'.[25]

24. Although squarely acknowledging that 'nationalising the LSL standard is not a simple matter', the Senate Committee ultimately recommended that:

> *… the states, territories and commonwealth undertake a review of the current LSL system in Australia, and considers developing a nationally consistent scheme. Development of a nationally consistent scheme should involve extensive consultation of both employer and employee groups.*[26]

25. The Australian Government at the time responded to that recommendation in the following way:

> *The Government notes this recommendation.*
>
> *The Government tasked the Productivity Commission with reviewing the entire workplace relations framework, including long service leave laws, in 2015. In its Final Report, the Commission noted some minor difficulties with long service leave for businesses operating across state lines. However, it did not make a formal recommendation for a uniform national standard, noting that 'for once, a national issue is not really the responsibility of the Commonwealth Government'.*[27]

26. Like the views expressed by the Productivity Commission, the Senate Committee's recommendation and the Government's response did not have sufficient regard to the Commonwealth's power to unilaterally legislate pursuant to the corporations power in the Constitution.

27. The Law Council understands that the 2016 Government response was the last occasion on which the Australian Government has publicly considered a national standard for LSL.

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24 Ibid [2.45] (citing the Department of Employment, Submission 33, 5).
25 Ibid [2.60]; see also [2.63]-[2.72].
26 Ibid [2.83] (recommendation 1).
27 Australian Government, Government Response to the Recommendations of the Senate Education and Employment References Committee inquiry into The feasibility of, and options for, creating a national long service standard, and the portability of long service and other entitlements (14 September 2009) 2.

## Why reform should be considered

28. Notwithstanding the potential complexity associated with reform, the Law Council submits that there are two compelling factors (set out below) that weigh in favour of the current review considering, or recommending a further review in relation to, a national LSL scheme.

**The current NES entitlements are overly complex and unworkable for unsophisticated parties**

29. Section 113 of the FW Act was only ever intended by Parliament to be a stop-gap provision. It is therefore unsurprising that it picked up leave entitlements in pre-reform awards, or that it referred to pre-reform collective agreements. In the case of the latter, pre-reform collective agreements have now been largely terminated (as have LSL entitlements contained in those agreements, which were preserved outside of the NES and by the continued operation of those agreements).[28] Continuing to draw on pre-reform awards requires employers and employees to take account of historic awards that may be decades old and of which employers and employees have no knowledge .

30. The Law Council submits that simply ascertaining which pre-reform awards or collective agreements might be relevant in determining an employee's NES LSL entitlement is a matter of significant complexity. Except in respect of sophisticated employers and employees who have the benefit of union representation, section 113 may be proving to be a dead letter.

**There remains an unproductive divergence in the LSL schemes that apply across the states and territories**

31. **Attachment A** sets out, in summary form, the key differences between the LSL schemes that apply across the states and territories. That summary deliberately excludes portable LSL schemes, which are attended by their own complexities.

32. In addition to differences in the quantum of LSL entitlements, how they are remunerated and how they are calculated—which are dealt with in the Attachment—the state and territory schemes also diverge in how they deal with some categories of employees, transfer of businesses and enforcement mechanisms.

33. The complexity inherent in the current state and territory regime is a compelling reason why, in the Law Council's view, the current review presents an opportunity to re-consider national reform of LSL entitlements.

34. Inevitably, a national standard would also have some complexity, not least because it would need to contain transitional provisions. A national standard would also have to deal with how LSL interacts with other categories of leave or absences (for example, due to public holidays), how LSL is accrued (noting that many employees' hours fluctuate week to week) and the conditions for taking and paying LSL. Further, in considering a national long service leave scheme, it may be necessary for the

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[28] The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) provided for a sunsetting date for such 'zombie agreements', unless the FWC approved extensions to particular agreements.

redundancy pay scale contained in subsection 119(2) of the FW Act to be reviewed (see further below).

35. On balance, and notwithstanding the potential complexities associated with a national LSL scheme and the issues required to be worked through in that regard, the Law Council submits that such a national scheme is preferable to the current multi-jurisdictional approach.

## The redundancy standard

36. At present, employees who have between one and nine years of continuous service are entitled to between four and 16 weeks' redundancy pay; once they reach 10 years of continuous service, that entitlement decreases to (and caps out at) 12 weeks' redundancy.

37. Those scales, which are enshrined in section 119 of the FW Act, reflected the redundancy scales set by the Australian Industrial Relations Commission (**AIRC**) in 2004.[29] The decrease in redundancy entitlements upon an employee reaching 10 years of continuous service was explained by the AIRC as follows:

> *The amount of 12 weeks' severance pay for 10 or more years of service, while still greater than the current maximum, has been fixed having regard to the fact that under the standard long service leave provision in federal awards employees with 10 or more years of service whose employment is terminated on account of redundancy are entitled to pro rata payment of long service leave. It would be double counting not to make an allowance for that fact in fixing the amount of severance pay to apply after 10 years of service.*[30]

38. The Law Council respectfully submits that the AIRC's conclusion as to 'double counting' was not satisfactorily explained. We consider that the current review may be an opportune time to consider whether the rationale behind the reduction in redundancy entitlements after 10 years' service remains a valid policy consideration, and whether it should continue to apply.

## Termination notice

39. Currently, under section 117 of the FW Act, an employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination. It may be useful for the NES to require the written notice of termination or payment in lieu (subject to exclusions such as casuals and serious misconduct) to also include a reason, or reasons, for the termination. Providing the reason for termination would provide greater clarity to the employee regarding the basis of their termination and could, among other benefits, potentially reduce the number of unmeritorious claims lodged in the FWC challenging dismissals.

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[29] *Redundancy Case*, PR032004, [2004] AIRC 287.
[30] Ibid [154].

40. In this context, the Law Council notes the recent and significant increase in lodgements of general protections dismissal applications in the FWC. There were 6,209 general protections dismissal applications made in the 2024–25 financial year, an increase of 13 per cent on the previous year and 27 per cent above the 5-year average.[31] In a statement issued in November 2025, the President of the FWC, Justice Hatcher, noted:

> *Over half of applications are made by applicants who do not meet the qualifying period for making an unfair dismissal application. I infer from this many general protections dismissal applications are being used as a substitute for an unfair dismissal application rather than raising a genuine allegation of unlawful dismissal.*[32]

41. By requiring an employer to provide a reason, the Law Council submits that employees may be assisted in better understanding the employer's position and to be able to better assess whether they should contest that decision.

## Reasonableness and work on public holidays

42. Currently, subsection 114(1) of the FW Act provides employees with an entitlement to be absent from work on public holidays.

43. Employers may request an employee to work on a public holiday if the request is reasonable,[33] and employees may refuse the reasonable request if their refusal is reasonable.[34] Subsection 114(4) then sets out the factors relevant to whether an employer's request for an employee to work on a public holiday, or the employee's refusal of that request, is reasonable.

44. The Law Council suggests that it would be beneficial for the Australian Government publish further guidance materials, such as case examples of reasonable requests to work on a public holiday, either by way of a legislative note within the section, or by requesting that the Fair Work Ombudsman (**FWO**) publish them on its website. This would assist employers, especially small business employers, in complying with the provision.

45. Currently, there are no specific examples on the FWO's website. Any further guidance material should include reference to the decision of the Full Court of the Federal Court in *Construction, Forestry, Maritime, Mining and Energy Union v OS MCAP Pty Ltd*, which concerned the meaning of 'request' under section 114.[35]

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31 Fair Work Commission, Reforms to general protections dismissal application processes (President's statement, 12 November 2025) [2].
32 Ibid [14].
33 FW Act s 114(2).
34 Ibid s 114(3)(b).
35 [2023] FCAFC 51; (2023) 297 FCR 323.

## Personal leave: The meaning of 'day'

46. Section 96 of the FW Act provides that, for each year of service, an employee is entitled to 10 days of paid personal/carer's leave; that leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.

47. Prior to the High Court's decision in *Mondelez v AMWU* (***Mondelez***),[36] the entitlement to a day of personal/carer's leave was construed by reference to a calendar day. Under that interpretation, where employees worked, for example, a standard pattern of three 12-hour shifts per week, they could be entitled to up to 120 hours of personal/carer's leave per year notwithstanding that they only accrued an entitlement to 72 hours of personal/carer's leave per year. In *Mondelez*, the High Court overturned that interpretation and held that the reference to '10 days' must be calculated by reference to an employee's ordinary hours of work in a standard working fortnight (that is, 1/26 of the ordinary hours worked by the employee during the year).

48. Notwithstanding the High Court's judgment, the Council has received anecdotal reports that parties in the FWC continue to press a construction of section 96 that is inconsistent with *Mondelez*, and it may be that employers and employees continue to be vexed by the language of the provision. The Council suggests that a legislative note be inserted into section 96 to direct the reader to the *Mondelez* decision (cf. the legislative note to s 370 of the FW Act).

## Coverage of the NES

49. The NES currently provides minimum terms and conditions of employment for permanent, part-time and casual employees. However, it does not cover other types of workers (such as gig economy workers). Those other workers potentially have access to FWC minimum standards orders (for employee-like workers or regulated road transport contractors) or road transport contractual chain orders. In our view, it is not within the scope of this inquiry to review whether the NES should be extended to these "new" categories of workers. However, we would welcome any opportunity to contribute to this issue of minimum standards for workers in future reviews of the NES, including what minimum standards should be relevant across categories.

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[36] *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 271 CLR 495.

# About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its constituent bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice, and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its constituent bodies:

- the Australian Capital Territory Bar Association;
- the Law Society of the Australian Capital Territory;
- the New South Wales Bar Association;
- the Law Society of New South Wales;
- the Northern Territory Bar Association;
- the Law Society Northern Territory;
- the Bar Association of Queensland;
- the Queensland Law Society
- the South Australian Bar Association;
- the Law Society of South Australia;
- the Tasmanian Bar;
- the Law Society of Tasmania;
- the Victorian Bar Incorporated;
- the Law Institute of Victoria;
- the Western Australian Bar Association;
- the Law Society of Western Australia; and
- Law Firms Australia.

Through these bodies, the Law Council represents more than 110,000 Australian lawyers.

The Law Council is governed by a board of 23 Directors: one from each of the constituent bodies, and six Executive members elected by Directors. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President. In 2026, the Law Council Executive comprises:

- Ms Tania Wolff, President
- Ms Elizabeth Shearer, President-elect
- Mr Lachlan Molesworth, Treasurer
- Ms Jennifer Ball, Executive Member
- Mr Justin Stewart-Rattray, Executive Member
- Mr Ante Golem, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple.

The Law Council's Secretariat is based in Canberra. Its website is www.lawcouncil.au.

# Appendix A – Survey of long service leave entitlements across the states and territories

| Jurisdiction and relevant legislation | Summary of entitlements | Other salient features of the relevant scheme |
|---|---|---|
| **Australian Capital Territory**<br>*Long Service Leave Act 1976* (ACT) | **Unqualified entitlement**<br>Employees have an unqualified entitlement to long service leave (**LSL**) after 7 years of continuous service (s 3).<br>The entitlement to long service leave accrues at the rate of 0.2 months for each year of continuous service. Accordingly, after 7 years, employees will be entitled to 1.4 months of leave, and 2 months after 10 years (s 4).<br>**Pro rata entitlement**<br>Employees who have at least 5 but less than 7 years of continuous service are entitled to pro rata LSL on termination, but only where the termination is (s 11):<br>(a) at the employee's initiative because of illness or incapacity or a domestic or other pressing necessity of such a nature to justify the resignation;<br>(b) at the employee's initiative upon or after attaining 'the minimum retirement age', which may be fixed an award or | **Rate of payment**<br>An employee's LSL payments are calculable by reference to their 'ordinary remuneration' (ss 2, 7, Dictionary). However, that term captures essentially all components of a relevant employee remuneration (see the definition of 'ordinary remuneration' in the Dictionary contained within the Act).<br>That formulation is different from other jurisdictions (see, for example, NSW below). It is also different to how the 'ordinary time earnings' are calculated for the purposes of the *Superannuation Guarantee (Administration) Act 1992* (Cth) and how the FW Act distinguishes between an employee's 'base rate of pay' and their 'full rate of pay'.<br>**How the qualification period is calculated**<br>An employee's qualification period depends on their period of 'continuous service' (s 2G and Dictionary). That term has some similarities with but also material differences compared to the same term as defined by s 22 of the *Fair Work Act 2009* (**FW Act**). For example, under the ACT |

| Jurisdiction and relevant legislation | Summary of entitlements | Other salient features of the relevant scheme |
|---|---|---|
| | (presumably collective) agreement, or the age of 65 years.<br>(c) by the employee's death; or<br>(d) at the employer's initiative for any reason other than the employee's serious and wilful misconduct. | Act, any period of leave due to illness or injury that exceeds two weeks in any one year will not count toward an employee's continuous service. |
| **New South Wales**<br>*Long Service Leave Act 1955* (NSW) | **Unqualified entitlement**<br>Employees have an unqualified entitlement to 2 months of LSL after 10 years of 'service' (s 4(2)).<br>**Pro rata entitlement**<br>Employees have an entitlement to pro rata LSL after 5 years' service, payable on the same conditions as in the ACT, save that there is no entitlement upon resignation due to reaching any type of retirement age (s 4(2)(iii). | **Rate of payment**<br>An employee's LSL payments are calculable by reference to their 'ordinary pay' (s 3(1)). However, the meaning of that term depends principally on whether the employee is remunerated 'wholly in relation to an ordinary time rate of pay'. If so, then their ordinary pay is determined by the greater of their 'ordinary remuneration' or the average weekly amount of their ordinary remuneration for the previous five years.<br>If an employee were remunerated otherwise than wholly in relation to an ordinary rate of pay, then their ordinary pay is determined by a further assessment of their average weekly wage (excluding shift work, overtime or other penalty rates) for the last 12 months or 5 years, whichever is higher. Each of the alternatives also |

| Jurisdiction and relevant legislation | Summary of entitlements | Other salient features of the relevant scheme |
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| | | take account of bonuses and the cash value of board and lodgings provided to the employee.<br>**How the qualification period is calculated**<br>The Act defines service as 'continuous service' (s 4(11). Again, that term, as well as the absences that count toward but do not break continuous service, shares some similarities but contains different terminology compared to s 22 of the FW Act. |
| **Victoria**<br>*Long Service Leave Act 2018* (Vic) | **Unqualified entitlement**<br>Employees have an unqualified entitlement to LSL after 7 years of 'continuous employment' (s 6).<br>An employee's LSL entitlement is calculated based on 1/60th of their total period of continuous employment. In other words, based on 10 years of continuous employment (120 months), an employee will be entitled to 2 months of LSL.<br>**Pro rata entitlement**<br>None applicable. | **Rate of payment**<br>An employee's LSL is payable based on their 'ordinary pay'. That sum is calculable by reference to their 'normal weekly hours at the employee's ordinary time rate of pay' but including the cash value of any board or lodging provided to the employee. However, if an employee's ordinary time rate of pay is not fixed by a relevant agreement that applies to them, it will be calculable by reference to the greater of their 'average weekly rate' earned over the prior 52 or 260 weeks, or the entire period of their continuous employment (s 15). |

| Jurisdiction and relevant legislation | Summary of entitlements | Other salient features of the relevant scheme |
|---|---|---|
| | | **How the qualification period is calculated**<br>Section 12 sets out the meaning of an employee's 'continuous service'. Again, there is overlap between that term and the analogue concepts used in other schemes and in the FW Act but with material differences. For example, under the FW Act, a narrower range of unpaid absences count toward continuous service. |
| **Queensland**<br>*Industrial Relations Act 2016* (Qld) – Chapter 2, Part 3, Div 9 | **Unqualified entitlement**<br>Employees other than 'seasonal employees', are entitled to 8.6667 weeks (which equates to 2 months on average) LSL after 10 years continuous service (s 95).<br>**Pro rata entitlement**<br>Employees have an entitlement to pro rata LSL after 7 years' continuous service.<br>Some of the conditions on which pro rata LSL is payable overlap with those that apply in the ACT and in NSW. However, pro rata LSL is not payable where an employee is terminated due to their conduct, capacity or performance, and, unlike in the ACT, there is no entitlement upon | **Rate of payment**<br>An employee's LSL entitlement is calculated on their 'full pay', which is defined as 'payment in full for the time an employee is absent from work' (Schedule 5). However, s 98 then provides that the '[r]ate of payment' for LSL is to be paid at the following:<br>(a) if the employee is, immediately before taking the leave, being paid at a higher rate than the ordinary rate—the higher rate;<br>(b) otherwise—the ordinary rate being paid to the employee immediately before the leave is taken. |

| Jurisdiction and relevant legislation | Summary of entitlements | Other salient features of the relevant scheme |
|---|---|---|
| | resignation due to reaching any type of retirement age (s 96(4)).<br><br>A pro rata entitlement is always payable where an employee is found to have been unfairly dismissed.<br><br>The Qld Act also includes an additional pro rata qualification where the 'termination is because of the passing of time and –<br><br>(i) the employee had a reasonable expectation that the employment with the employer would continue until the employee had completed at least 10 years continuous service; and<br><br>(ii) the employee was prepared to continue the employment with the employer.' | In turn, an employee's 'ordinary rate' is set by the rate payable to them for ordinary time (see Schedule 5).<br><br>**How the qualification period is calculated**<br><br>An employee's LSL entitlement is based on their 'continuous service' (ss 93 and 107, and Schedule 5). That term is defined for the purposes of '[s]easonal employees in [the] sugar industry and meat works' but not for any other categories of employee. |
| **Western Australia**<br><br>*Long Service Leave Act 1958* (WA) | **Unqualified entitlement**<br><br>Employees are entitled to 8.6667 weeks (which equates to 2 months on average) after 10 years 'continuous service' (s 8).<br><br>**Pro rata entitlement**<br><br>Employees are entitled to pro rata LSL after 7 years of continuous service upon the employee's | **Rate of payment**<br><br>An employee's LSL entitlement is based on their 'ordinary pay' (s 7). That is generally their 'remuneration for the employee's normal weekly number of hours of work calculated on the ordinary time rate of pay applicable to the employee as at the time when any period of LSL granted'. Shift premiums, penalty rates and other |

| Jurisdiction and relevant legislation | Summary of entitlements | Other salient features of the relevant scheme |
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| | death or 'in any circumstance' other than where the termination is 'for serious misconduct' (s 8(3)). | loadings or allowances are excluded, save in respect of casual loadings (ss 7A and 7B) and the value of board and lodging (s 7C).<br>**How the qualification period is calculated**<br>An employee's LSL entitlement is based on their 'continuous service' (s 6). There is overlap between that term and the analogue concepts used in other schemes and in the FW Act, although the WA Act provisions are much more complex than the FW Act equivalent. |
| **South Australia**<br>*Long Service Leave Act 1987* (SA) | **Unqualified entitlement**<br>Employees are entitled to 13 weeks of LSL after 10 years of 'service' (s 5).<br>**Pro rata entitlement**<br>Employees are entitled to pro rata LSL after 7 years of service unless the termination is due to the employee's death, 'on the grounds of serious and wilful misconduct' or the 'contract of services is unlawfully terminated by the worker' (s 5(3)-(5)). | **Rate of payment**<br>An employee's LSL entitlement is generally based on their 'ordinary weekly rate of pay', 'exclusive of overtime, shift premiums and penalty rates' but including the value of any accommodation that was provided (s 3(2)). However, in certain circumstances, an averaging mechanism is provided to ascertain an employee's 'ordinary weekly rate of pay' over the previous three years.<br>**How the qualification period is calculated**<br>As with the other schemes, the SA Act deals (in different terms) with the categories of absences |

| Jurisdiction and relevant legislation | Summary of entitlements | Other salient features of the relevant scheme |
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| | | that do not break continuity of service, but which do not count toward service. |
| **Tasmania**<br>*Long Service Leave Act 1976* (Tas) | **Unqualified entitlement**<br>Employees (other than mining employees) are entitled to 8.667 weeks of LSL after 10 years of 'continuous employment' (s 8(2)).<br>**Pro rata entitlement**<br>Employees are entitled to LSL after 7 years of continuous employment on the same terms as apply under the ACT scheme (ss 8(2)(b) and 8(3)). | **Rate of payment**<br>An employee's LSL entitlement is based on their 'ordinary pay in respect of continuous employment with an employer' (s 7A).<br>An employee's 'ordinary pay' is the sum equivalent to the remuneration that the employee 'would reasonably be expected to have received in respect of' the period of LSL which they take. However, the computation of 'ordinary pay' is complicated and, despite the reference to ordinary hours, is apt to include overtime payments that would usually flow to the employee from them working their 'normal weekly number of hours' (s 11). Various other loadings, allowances or bonuses are, however, to be disregarded. Where an employee does not have a fixed ordinary rate of remuneration, s 8(4) provides for an averaging mechanism.<br>**How the qualification period is calculated**<br>As with the other schemes, the Tasmanian Act deals (in different terms) with the categories of |

| Jurisdiction and relevant legislation | Summary of entitlements | Other salient features of the relevant scheme |
|---|---|---|
| | | absences that do not break continuous employment, but which do not count toward it. |
| **Northern Territory**<br>*Long Service Leave Act 1981* (NT) | **Unqualified entitlement**<br>Employees are entitled to 13 weeks after 10 years of 'continuous employment' (s 8).<br>However, where termination is due to serious misconduct, payment of LSL is capped according to the formulas contained in s 10(1A).<br>**Pro rata entitlement**<br>Employees are entitled to pro rata long service leave after 7 years' continuous service, payable upon:<br>(a) the employee 'attaining the age at which he or she may retire', which is not defined;<br>(b) on termination by the employer for a reason other than serious misconduct;<br>(c) on account of illness, incapacity or domestic or other pressing necessity of such a nature as to justify so ceasing to be an employee ;<br>(d) death. | **Rate of payment**<br>An employee's LSL entitlement is calculated by reference to their 'pay', which is defined broadly (s 7) and 'rate of pay' (s 11). The latter is determined either by the 'rate of pay fixed by the terms of employment of the employee' or otherwise an average rate of pay.<br>**How the qualification period is calculated**<br>An employee's entitlement to LSL is deterring by their 'qualifying service', which is determined by s 12. |