

VACC Submission regarding Long Service Leave

Dated 1 April 2016



About VACC

The Victorian Automobile Chamber of Commerce (VACC) is the peak body for the repair, service and retail sector of the automotive industry in Victoria and Tasmania. VACC is a Registered Organisation operating under the *Fair Work (Registered Organisations) Act 2009*.

First established in 1918, VACC now represents the interests of over 5,000 businesses in the automotive industry. VACC members employ over 50,000 people and have an annual turnover of around \$50 billion. Our members range from new and used vehicle dealers (passenger, truck, commercial, motorcycles, recreational and farm machinery), repairers (mechanical, electrical, body and repair specialists, i.e. radiators and engines), vehicle servicing (service stations, vehicle washing, rental, windscreens), parts and component wholesale/retail and distribution and aftermarket manufacture (i.e. specialist vehicle, parts or component modification and/or manufacture) and recycling.

The Victorian automotive industry is largely made up of small businesses. Small businesses with between one and 19 employees comprise approximately 54% of all Victorian automotive businesses. Medium to large business make up just 4% of the Victorian automotive industry, with the remainder operating as sole traders. About 14% of businesses have an annual turnover of less than \$50,000.

Key messages

This submission starts by explaining some of the added complexities surrounding long service leave within the Victorian automotive context. The submission then responds to each issue raised in Appendix 1 of the *Victorian Government Long Service Leave Discussion Paper 2016* (Discussion Paper) produced by the Victorian Department of Economic Development, Jobs, Transport and Resources.

In the Minister's Foreword at the beginning of the Discussion Paper, The Hon Natalie Hutchins MP states that the purpose of the current review by the Victorian Government is to:

“... determine whether the LSL Act meets the expectations of the community, or can be made fairer for women and people with parental responsibilities, part-time and casual employees, as well as simpler for employers to administer.”

VACC supports the inquiry on the basis of the joint imperatives of fairness and simplicity. The current Victorian *Long Service Leave Act 1992* (LSL Act) is in many places overly complicated and technical, which makes it difficult for employees and employers to navigate.

VACC supports the addition of greater flexibility within Victoria's long service leave framework. Changes such as allowing employees to take their long service leave across more than three periods and to cash out their long service leave are generally positive for employees and employers alike.

Long service leave currently strikes a balance between employees' interest in taking an opportunity to rest and recuperate after a long period of continuous service with an employer and employers' interest in incentivising employees to stay in their business long term. Some of the proposed changes, such as decreasing the length of service required for an employee to take their long service leave or counting unpaid parental leave as service, are unnecessary and risk shifting the balance too far towards employees.

A summary of long service leave in the Victorian automotive industry

The vast majority of employees employed by the Victorian automotive industry are covered by one of two modern awards: the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* (VMRSR Award) and the *Clerks – Private Sector Award 2010* (Clerks Award). Large sections of the Victorian automotive industry are also covered by the pre-reform *Vehicle Industry – Repair, Services and Retail (Long Service Leave) Award 1977* (VIRSR Award).

In Victoria, the VIRSR Award covers employees who are also covered by the VMRSR Award and employed by a business that has been a continuous member of VACC since prior to 27 March 2006. The continued operation of the VIRSR Award was confirmed in the Full Court of the Federal Court in South Australia in the case of *Maghan Thiem Auto Sales Pty Ltd v Cooper* [2014] FCAFC 94. The VIRSR Award currently covers the long service leave entitlements of employees at over 2,500 Victorian businesses.

The VIRSR Award serves a useful purpose as an industry tailored long service leave award. However, the existence of two separate long service leave entitlements does cause some confusion, particularly amongst employees who are not aware that the LSL Act does not apply to them. Care should therefore be taken to minimise differences between the two long service leave systems and increase simplicity, for the mutual benefit of employees and employers alike.

At present, the LSL Act and VIRSR Award provide for the same overall fully accrued long service leave entitlement (13 weeks' long service leave after 15 years' continuous service). The single most significant difference is that the VIRSR Award restricts payment on termination of employment to 10 years, rather than seven as provided for in the LSL Act. VACC believes that any reform to the LSL Act should not alter the essential long service leave entitlements, to ensure substantial consistency continues to exist between both schemes.

Removing limitations on agreements to take any period of leave

VACC supports amendments to Section 67 of the LSL Act that provide greater flexibility in how long service leave is taken while protecting the interests of employees and employers. The current restriction that long service leave may be taken in no more than three periods is inflexible and ignores the many and varied ways that employees may wish to take their leave. VACC members report that, in the majority of cases, it is employees who request to take their long service leave in smaller periods, rather than employers.

Victoria, and Australia more generally, faces an aging population. Despite this demographic shift, Australia's mature aged workers still have significantly lower labour force participation rates than for younger workers. In 2014, just 35% of people aged 55 and over were working or looking for work.¹ Greater incentives to encourage people to remain in the workforce for longer can increase productivity and take pressure off the pension system.

A more flexible long service leave system is an example of a cheap and effective mechanism whereby an employee can remain in work by, for example, taking one day of long service leave per week and working the other four days. This is particularly beneficial for employees transitioning into retirement or who have acquired additional caring responsibilities for family members and who want to continue social interaction by remaining in the workforce in a reduced capacity. Employees benefit by continuing to draw an income and remain in the workforce, employers benefit from retaining important skills within their businesses and the wider economy benefits from greater workforce participation rates and increased productivity.

Section 67 of the LSL Act serves a beneficial purpose in that it protects employers from employees taking leave at inconvenient times and encourages employees to take an extended break from work to properly rest and recuperate. It is important to preserve a status quo that long service leave should be taken all together except with the mutual agreement of both the employee and employer. Many employers, particularly small businesses, lack the resources to cover for repeated short absences taken by an employee. This difficulty is particularly apparent for long serving employees. Mutual agreement is therefore an important safeguard to assist businesses manage their workloads.

Recommendation:

1. Amend Section 67 of the LSL Act to allow employees to take long service leave in periods of no less than one day on the request of the employee and with the mutual agreement of the employer.

¹ Australian Institute of Health and Welfare, 'Older Australian staying at work', *Australia's welfare 2015*, <<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129552301>> viewed 21 March 2016.

Cashing out leave

The inability to cash out long service leave is a common complaint amongst VACC members. Requests to cash out long service leave generally originate from employees rather than employers. This puts the employer in the difficult position of having to refuse an employee's request to cash out their leave, even when the employer would be willing to do so.

Case study

One VACC member had an employee who urgently needed access to more funds to repay a personal debt. The employee had been with the business for over 10 years and had accrued significant amounts of annual leave and long service leave. However, because the employer was not able to cash out either of these leave entitlements, the employee resigned as the only means to gain immediate access to his entitlements. The business rehired the employee a few months later.

It is important that the option to cash out long service leave should only be possible with the mutual agreement of the employee and employer. Employees should obviously be entitled to take their long service leave, but equally employers should not be forced to regularly pay out long service leave in a lump sum. Employers, small businesses in particular, may lack the cash flow to make a single or multiple payments in addition to wages. Consideration should be given to a minimum encashment period to prevent regular small encashment requests by employees.

VACC does not believe that any additional safeguards beyond those of mutual consent and existing provisions of the Commonwealth's *Fair Work Act 2009* (FW Act) are necessary regarding the implementation of a cashing out system for long service leave. Section 340(1) of the FW Act states that:

“A person must not take adverse action against another person:

(a) because the other person:

- (i) has a workplace right; or
- (ii) has, or has not, exercised a workplace right; or
- (iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or

(b) to prevent the exercise of a workplace right by the other person.”

Protections therefore already exist should an employer attempt to treat an employee unfavourably for refusing to cash out his or her long service leave or require an employee to cash out their long service leave.

Recommendation:

2. Section 74 of the LSL Act should be repealed and replaced with a new section stating that an employee may cash in their long service leave at the employee's written request subject to mutual agreement between the employee and employer.

When can leave be taken?

VACC does not believe it is appropriate to move the entitlement to take long service leave down to just seven years.

It is true that an inconsistency arises where an employee is entitled to take his or her long service leave on termination after only seven years of continuous service, while that same employee cannot take his or her leave until 10 years of continuous service if he or she remains employed. However, the argument that this inconsistency should be rectified by bringing the overall entitlement down to seven years of continuous service disregards the interests of employers. An equally persuasive case can be made that the inconsistency of entitlement would be resolved by increasing the long service leave entitlement on termination to 10 years, in line with the entitlement for existing employees.

VACC submits that, on balance, it is better to amend Section 58 of the LSL Act so that the entitlement to long service leave on termination of employment is extended to 10 years of continuous service. Such an amendment would increase the consistency between the LSL Act and the VIRSR Award, which also provides for long service leave on termination of employment after 10 years of continuous service. As previously stated, greater consistency between long service leave instruments will reduce confusion for both employees and employers and simplify the administrative processes. Reducing the entitlement of pro rata long service leave to seven years would add significantly to the existing confusion.

Recommendation:

3. Section 58 of the LSL Act should be amended to provide for employers to pay pro rata long service leave on termination of employment after at least 10 years of continuous service with one employer.

Calculating payment whilst on leave

VACC supports the simplification of long service leave to ease the administrative burden on employers. Small businesses in particular lack the payroll services to calculate lengthy and often complex long service leave entitlements. VACC provides a free long service leave calculation service for members. However, many other businesses do not have the additional resources of an employer organisation or perform their calculations in house.

Section 56 of the LSL Act provides for employers to pay an employee's long service leave at his or her 'ordinary pay'. Ordinary pay is a simple and effective term which has been given an unfortunate and overly complicated definition as set out in Section 64 of the LSL Act.

VACC submits that long service leave should be treated the same as annual leave, which is paid: "at the employee's base rate of pay for the employee's ordinary hours of work".² This simple and unmistakable payment phrase provides for an employee to receive leave on their base hours at their base rate of pay and does not include allowances, overtime or penalty rates. While VACC operates an annual leave calculation service similar to that for long service leave, requests for annual leave calculations are significantly less frequent. The vast majority of businesses, including small businesses, understand how annual leave is calculated and are able to perform those calculations quickly and easily themselves. Increased consistency between leave entitlements would also have the additional advantage of minimising mistakes in calculating different entitlements.

Unlike annual leave, casual employees are entitled to long service leave in the same manner as permanent part time and full time employees. As such, the phrase 'ordinary hours of work' as used in Section 90(1) of the FW Act would require clarification in a corollary subsection. Section 64(4)(a) of the LSL Act already provides a simple and effective, albeit overly wordy, method for calculating an employee's 'normal weekly number of hours of work' using an average over the past 12 months or five years, whichever is greater. A simplistic rewording of this provision would be an appropriate means for calculating 'ordinary hours of work' for casual employees.

Recommendations:

4. Payment for long service leave should use the same wording as provided for in the FW Act for annual leave. An employee's long service leave should be paid at his or her 'base rate of pay' for their 'ordinary hours of work in the period [of long service leave]'.
5. 'Ordinary hours of work' should be separately defined where an employee has no fixed hours of work as meaning the greater of the average number of weekly hours worked over a 12 month and five year period.

² Section 90(1), *Fair Work Act 2009* (Cth).

Change in the hours worked

The current means for calculating long service leave entitlements where an employee's hours of work have changed in the last 12 months is to calculate an average over the past 12 months and five years, then use whichever figure is greater. This arrangement is effective and well understood. VACC do not consider any changes to this area as necessary or called for. Furthermore, we are concerned that any changes could possibly have unexpected implications or consequences beyond what was intended.

Recommendation:

6. There should be no change to the existing methodology for calculating average hours of work where an employee's hours of work have varied.

Treatment of family leave

Amending Section 63 of the LSL Act to ensure that parental leave of up to 24 months does not break continuity of service could create additional costs for some businesses. The automotive industry is currently undergoing a significant skills shortage, making it difficult to source replacement employees over longer periods of leave. The industry predominantly comprises male employees due to the physical nature of the work, who are less likely to take extended parental leave.

A larger proportion of female employees work in clerical and administrative roles within automotive businesses and these employees are more likely to benefit from the proposed amendments. Businesses can currently use extended parental leave as a justification not to pay long service leave in some circumstances, but general practice amongst VACC members is to resume long service leave entitlements from where they stopped at the commencement of parental leave.

VACC considers it a quirk of history that Sections 62 and 63 of the LSL Act provide that parental leave will not break continuity of service for a period of up to 12 months, but that parental leave under Sections 70 and 76 of the FW Act can be extended to up to 24 months, the second half of which does not count as service. Where employees and employers agree to extend a period of parental leave, it is reasonable for the employee to return to his or her previous long service leave entitlement.

VACC opposes counting parental leave as service for the accrual of long service leave. Parental leave should be seen as effectively putting service on hold for a period of time, rather than counting as actual service. An employee can take parental leave at the birth of each child and each year of service equates to 0.8667 weeks of long service leave under the LSL Act. An employer could therefore find themselves liable for significant amounts of long service leave after a comparatively short period of actual service if parental leave was counted as service.

Case study

An accounts officer had three children over many years of service with a motor vehicle dealership and VACC member. After the birth of each child, the mother took her full entitlement to 12 months of unpaid parental leave.

The employer asked the employee whether she would be willing and able to return to work earlier, including on a flexible working arrangement, but the employee declined on each occasion. The employer was not able to cover for the loss of their employee over each extended period and therefore recruited a temporary maternity leave replacement on two of the three occasions.

Had parental leave counted as service, the employer would have been required to pay 2.6 weeks of long service leave for the three years the employee did not work at the company.

Recommendations:

7. Where an employee and employer mutually agree to extend a period of parental leave for a total of up to 24 months, this should not break continuity of service.
8. Unpaid parental leave, for any duration, should not count as service.

What counts as service for casual and seasonal employees?

The Victorian automotive industry does not regularly employ seasonal employees. Those casual employees that are employed within the industry generally work frequently on a rostered basis, such as driveway and roadhouse attendants and service station console operators. Other employers, particularly in the automotive repair and service sectors, use casual employees to trial potential permanent employees or assist with workload during periods of high demand.

VACC supports the existing provision that service for a casual employee is considered as continuous for up to three months except where the length of absence is due to the terms of engagement of the employee by the employer.³ Any change to the meaning of continuous employment for casual and seasonal employees should be limited to, at most, a simplification of the existing wording.

Recommendation:

9. Section 62A of the LSL Act should not be changed except as to simplify and modernise the existing wording.

³ Section 62A, *Long Service Leave Act 1992* (Vic).

Recognising prior service where a business is sold

VACC often receives calls from members who are selling their business regarding which employee entitlements continue with the transfer of a business. The question of transferrable entitlements is often quite confusing, especially for small businesses who cannot afford dedicated human resources staff, as other entitlements such as annual leave do not necessarily transfer.

Long service leave that continues after a transfer of business can create significant administrative problems for purchasers of businesses. Purchasers sometimes find that vendors failed to either keep or transfer sufficient records of employee entitlements going back many years. VACC finds that inadequate handover of employment records is a common problem, particularly amongst small businesses. VACC also finds that some lawyers handling transfer of business do not adequately consider or advise purchasers regarding issues surrounding long service leave in completing the sale contract.

Case study

VACC's Industrial Relations Department provides a long service leave calculation service for members using both the LSL Act and VIRSR Award. One small business owner called requesting a long service leave calculation for an employee who had been with his business since before he purchased it. The purchaser had not received employment records from the business' vendor at the point of sale and could not find evidence of the employee's start date. The purchaser was unable to contact the vendor. Without any evidence, the employer had no choice but to accept the commencement date as stated by the employee.

It is not the appropriate time for the Victorian Government to make changes to long service leave entitlements. At the time of writing, the Commonwealth's *Fair Work Amendment (Remaining 2014 Measures) Bill 2015* is currently before the House of Representatives. Amongst other amendments, the Bill proposes a number of changes to employee entitlements during a transfer of business. In the interests of consistency and cohesion between State and Federal legislation, VACC believes that any amendments to the LSL Act's transfer of business provisions should wait until there is additional clarity regarding the Commonwealth Government's intentions.

Recommendation:

10. Business Victoria should increase its focus on educating employers and lawyers on the long service leave implications arising from the transfer of a business.

Right to seek an exemption

VACC supports the revocation of Section 65 of the LSL Act. Any existing operational arrangements previously established under predecessors to this provision should be preserved.

Recommendations:

11. Repeal Section 65 of the LSL Act.
12. Insert a new section into the LSL Act to preserve any existing and operational arrangements.

Quantum of penalties, enforcement and record keeping

VACC does not support the introduction of stronger investigatory and enforcement powers for long service leave. Emphasis should remain on employee and employer education as a more effective means for addressing non-compliance.

VACC has found high rates of general compliance with the LSL Act. We do not consider that there is sufficient evidence of non-compliance in the automotive industry to justify a stricter enforcement and investigation regimen. Where an employer does make an error regarding an employee's long service leave entitlements, this tends to occur primarily due to a lack of awareness rather than deliberate malfeasance.

Complying with investigations by the Fair Work Ombudsman is often confusing and resource intensive. Employers sometimes feel that an investigator is biased towards their employee before hearing their side of the story, or that the investigator is 'out to get them'. VACC accepts that this burden is justified given the number and nature of breaches across industries. However, there is insufficient evidence of breaches of the LSL Act to justify new onerous investigation and penalty provisions for long service leave.

Recommendation:

13. Maintain existing investigatory and enforcement provisions within the LSL Act.
14. Continue and expand education campaigns targeted at employees and employers regarding long service leave laws and entitlements.