

# CORRECTED VERSION

## ECONOMIC, EDUCATION, JOBS AND SKILLS COMMITTEE

### Inquiry into portability of long service leave entitlements

Melbourne — 14 September 2015

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#### Witness

Mr Ian Scott, Principal Lawyer, JobWatch.

**The CHAIR** — Welcome to the public hearing of the Economic, Education, Jobs and Skills Committee’s Inquiry into the portability of long service leave entitlements. All evidence taken at this hearing is protected by parliamentary privilege. Any comments you make outside the hearing are not afforded such privilege. Hansard staff are recording today’s proceedings. We will provide a proof version of the transcript so you can correct any typographical errors. I invite you to make an opening statement. After you have finished, the Committee will have questions. We will take over after that. Welcome.

**Mr SCOTT** — My name is Ian Scott. I am the Principal Lawyer at JobWatch Inc., which is a community legal centre. It is part of the Federation of Community Legal Centres and is a member of the National Association of Community Legal Centres. We are an employee rights community legal centre. We operate a telephone information service—it takes about 8000 to 10 000 calls per year—and we have a very small legal practice of two full-time equivalent lawyers, one of whom is myself. We engage in law reform where appropriate—submissions to committees like this one. We have a community education service as well, where we go to TAFEs, universities, high schools and community groups and provide information about employee rights, and we have made a small submission to this Inquiry.

**The CHAIR** — Thank you, Ian. Your submission argues that portable long service leave will mitigate against workers being terminated before they can access their entitlements. How common is this practice in your experience?

**Mr SCOTT** — It is very hard to say how common it is in the sense that employers do not say that this is the reason for the dismissal. The reason for the dismissal is usually cloaked in performance reasons or misconduct reasons. It is very suspicious, though, when a worker who has been employed for, say, about six and a half years suddenly has performance issues and is performance managed out the door prior to becoming eligible for their long service leave under the Victorian Long Service Leave Act. It is only by inference that we can deduce that the reason must have been because they will be coming up to their long service leave entitlements.

**The CHAIR** — Your submission also notes that portable long service leave would encourage women to return to the workforce after having children. Has this been observed in existing portable long service leave schemes, such as the ACT’s scheme for the community services sector?

**Mr SCOTT** — I cannot answer that question statistically. Anecdotally that would seem to be a fair assumption. Any encouragement or inducement for a woman worker who has taken parental leave—maybe extended parental leave—to return to work would be the benefit of coming back to having their entitlement still sitting there.

**Mrs FYFFE** — What would you say would be extended parental leave—three years, five years, two years?

**Mr SCOTT** — I guess that is one of the questions for the scheme itself: what would be the gap that turns into a cut-off, where the return to the industry, for example, is starting from zero length of service ...

**Mrs FYFFE** — Would you think six years would be too long?

**Mr SCOTT** — These things are ultimately a matter of compromise, are they not? Right now under the Fair Work Act a person is entitled to 12 months parental leave, extended to two years by agreement with the employer, and that still gives them the right to return to work—the return-to-work guarantee. I understand that in the teaching services you can have up to a seven-year gap, so anywhere between one year and seven years is in the ballpark.

**Ms RYALL** — Obviously there is a cost involved in implementing any new change to what previously was an entitlement or existing even now, with the exception of the construction industry here in Victoria. It only becomes a realised entitlement at the seven-year mark, so that is where particularly small business has focused on what occurs. Any change to that is going to be an impost, whether it be in the community services sector, community service organisations or small organisations, where there is no room to move. Where do you think that money should come from?

**Mr SCOTT** — Presently under the Victorian Long Service Leave Act there is no exemption for small business. Although it may be small, a business that has the right financial, accounting or legal advice should be accruing those entitlements anyway along the course of the person’s employment. Maybe not in the first year or

so, but once they realise this person is going to be a long-term employee, they need to start making provisions for it, because they have to find it, legally speaking.

**Ms RYALL** — From other discussions we have had with witnesses today and in submissions with small businesses, I suggest that if it got to about the five-year mark, you would start to think, ‘Okay, this person is likely to stay on’, so when they go on leave you look at ways so that the cost of leave does not change, but you look at ways of allocating work to other staff members and maybe bringing somebody in for a short time. But in this situation you are suddenly saying, ‘Right, you’re going to start paying for everybody who works in your organisation and any new staff that come along. This is what you are going to do’, so there is a cost imperative. Certainly if there was a scheme involved, usually it is greater than what you would pay anyway or provision if you did. I guess the question is: how does small business do that?

**Mr SCOTT** — I guess by forward planning. If the scheme comes in the way that JobWatch has imagined it, then it is a repeat of the CoINVEST scheme. There are a lot of small businesses in building and construction that pay their percentage of wages to the scheme. If it is a percentage of wages, then it is a lower percentage for a small business to pay into the scheme that reflects the ...

**Ms RYALL** — But more than the current provision?

**Mr SCOTT** — Not necessarily, because the factual reality is that it depends. A small family business might have three or four employees that last for 15, 20, 25 years.

**Ms RYALL** — And they might not.

**Mr SCOTT** — But they might, and they often do.

**Ms RYALL** — Just knowing small business, very, very tight margins and with increasing costs—those variable costs, if you like—the ability to absorb a hit is often difficult.

**Mr SCOTT** — Granted.

**Ms RYALL** — So I guess my question was: where should the money come from?

**Mr SCOTT** — As I said, small businesses, however defined—100 or less, 25 or less, 14 or less—is not exempt from the Long Service Leave Act as it is.

**Ms RYALL** — No, I am not suggesting that.

**Mr SCOTT** — In the sense of being fair and reasonable in the whole scope of the concept of a portable long service leave scheme, some cost is added to all employers but that is counterbalanced by the benefits of the scheme.

**Mrs FYFFE** — You talk about the aggregation of service, such as in the coalmining industry. I know nothing about that. Could you just explain to me how that works?

**Mr SCOTT** — I think what the JobWatch submission is talking about is that currently under the CoINVEST scheme—and I cannot remember exactly—it does not talk about an aggregation of service where service accrues in aggregates regardless of the length of any gap, whereas under the CoINVEST scheme you are more talking about continuous service where a certain gap will break the length of service for calculating the portable long service leave scheme, so the person coming back into building and construction after six or seven years—off the top of my head, or it may even be three—is starting at zero. Whereas if you go in and out of the industry over time, those aggregates stay there.

**Mrs FYFFE** — In coalmining how long would they, on average? You do not have to be exact; it is just the first I have heard about it.

**Mr SCOTT** — It is just a different way of calculating the entitlement. One is based on, as I said, a version of continuous service.

**Mrs FYFFE** — The other one was one with breaks. What would the breaks be in the coalmining industry roughly—three months, six months, a year?

**Mr SCOTT** — I do not know. It could be a long time, could it not?

**Mrs FYFFE** — Okay, I will find out.

**Mr SCOTT** — If someone is in a town where there is a coalmine or a mine that closes down and they go and work doing whatever they need to do to live, such as cleaning, and a new mine opens and they come back ...

**Mrs FYFFE** — I will find out. Yes, thanks.

**Mr CRISP** — Regional employment: we note that many of the submissions thought that portable long service leave would encourage workers to leave regional areas to work in the cities, whereas in your submission you argue that long service leave would attract workers to regional areas. Could you further comment on how you arrived at that observation?

**Mr SCOTT** — Workers will tend to go where there is demand for their skills. Whilst the city is obviously bigger, it is not a fait accompli that people will move from rural towns to the city if there is no demand for their skills. Whereas, vice versa, I can imagine and think it is a reasonable assumption that if there is demand for jobs or skills in rural towns but people are not going there for a number of reasons, this might be one reason that further ameliorates that issue. There has to be demand for the skills—I mean, I would like to go and work in a tropical town or something like that, but there is no demand for my skills there.

**Mr NARDELLA** — That is Mildura.

**Ms RYALL** — In the middle of summer.

**Mr SCOTT** — That would be good.

**Mrs FYFFE** — I think you were thinking of Port Douglas.

**Mr NARDELLA** — In your submission I found the case study of Amy on page 6 really interesting, and I do not know whether this is the wrong way of looking at it, but if she was pregnant and got the bullet, she got the sack, that would be just pure discrimination and there would be hell to pay for that, would there not? So why did you put that case study in there? I just found that really strange. Amy's manager terminated her job because she was pregnant, I mean that would be just pure discrimination.

**Mr SCOTT** — Correct, and as we were saying earlier, often that is not the express reason given for a dismissal. But it is not about the dismissal, that is a different issue. Amy could make an unfair dismissal claim, a general protections claim or a state or federal anti-discrimination complaint. These case studies are real calls, so we can only work with what we get. We do not make them up or change them. The point would be—under paragraph 4 above—that it would encourage Amy to come back into that industry because her five years' service would be preserved. When she is ready to come back into the workforce, it is encouraging her to come back into an industry where she has already got the skills and qualifications rather than thinking, 'What is the point of going back there? I have lost my five years. I will go and work in a shop or something'.

**Mr NARDELLA** — The other thing is you have to keep stats and stuff for lots of things because of your funding, is my understanding.

**Mr SCOTT** — Correct.

**Mr NARDELLA** — The thing that I thought of after reading your submission was—and this builds on what was asked before, and I understand what you are saying by it being insinuated or you have got to try to deduce this stuff—how many of these situations will you have got, because you have to take 1000 calls a year, where somebody phones up and actually says, 'I've been given the bullet. I've just been given the sack, a pink slip. I've worked 9 years and 8 months or 9 years and 11 months at a particular workplace, coming up to my long service leave and I am going to get the bullet'. How many of those do you get?

**Mr SCOTT** — I can report back to you on the actual stats if it is not in the submission.

**Mr NARDELLA** — Can you? Either in the last 12 months or the last three or five years, I reckon.

**Mr SCOTT** — Yes, we can do that.

**Mr NARDELLA** — If it is not too hard.

**Mr SCOTT** — It is not too hard and should have been in there. But I can say, because I do speak to all our workers on the phones every day, it is not a high statistic at all. But, you know, like with all these things that are very important to people's livelihoods, their career, even though it is not very high does not mean it is not important. That is our position.

**Mrs FYFFE** — It is important to someone.

**Mr SCOTT** — Yes, exactly.

**Mr NARDELLA** — Yes, absolutely.

**Mr CRISP** — I have a question regarding older workers. Some submissions we have received have indicated that the portable long service leave may discourage employers from employing workers with many years of experience because they are on the cusp of taking their long service leave, which means they would have trained them for the position, have them for a short period, then be back filling, retraining or managing. How do you think employers, from your experience, would deal with this situation?

**Mr SCOTT** — I would like to think that 99 per cent of employers out there want to be model employers or even employers of choice. One, obviously, not hiring someone because they have got the benefit of an industrial instrument is unlawful, so they need to have some training around that. Under the Fair Work Act, if a worker has the benefit of an industrial instrument and adverse action is taken against them because they have the benefit of that industrial instrument, it is a breach of their general protections under the Fair Work Act. This would be most likely an industrial instrument that would be covered by that definition, the long service act in Victoria is. I do not think any portable long service leave act should be a blunt instrument. There might be provisions to say that where a new worker is hired, although they have accrued the amount of leave, that they are not entitled to take it within the first year or two of service with that employer. That could be a compromise that seems fair and reasonable. That makes sense to me.

**Mr CRISP** — Thank you.

**The CHAIR** — Your submission notes that superannuation funds could be used to deliver portable long service leave entitlements. What practical and legal issues would need to be addressed in order for this to work?

**Mr SCOTT** — I think we put as one of our options that we could model a superannuation payment scheme. I do not know, really, of any particular legal or practical problems; it is just an idea to try to think about how could this scheme work ...

**Mrs FYFFE** — To save duplication.

**Mr SCOTT** — Best in practice to be more efficient, to save duplication. I think ultimately JobWatch came down to saying that the CoINVEST model seems to be working well. It has been around for a while; the earth has not come to an end—and that model could be followed. Superannuation is a similar scheme. It is a Commonwealth scheme, so there is a problem there. I do not think we are advocating that the superannuation model should be the primary model. It is just an example of how these sorts of entitlements ...

Superannuation is paid on top of wages—9.5 per cent currently. It is paid by employers into a superannuation fund. It is manageable. There are no exclusions for small businesses. Everyone is entitled to superannuation so long as they earn \$450 a month.

**The CHAIR** — What is your view on the alternative mechanisms to portable long service leave that could be implemented to attract and retain staff in industries with high mobility?

**Mr SCOTT** — Off the top of my head, the only solution is better wages.

**Ms RYALL** — On that point, though, the bureau of statistics—the ABS—states that young people tend to move around a lot. They like moving around—they like change—and often do. I think it is 3½ years or so, that

is sort of the maximum, and they actually change industries. If that is a trend just based on the nature of younger people, then it totally eradicates—not eradicates, but defies—the assumption that seems to be that this needs to be implemented. Therefore you have will have employers, often small business people, putting into a fund that is actually never going to have a benefit realised, and the fund will get to use that for its own purposes.

**Mr SCOTT** — Those young people will not be young forever.

**Ms RYALL** — The ABS shows that as they grow older they tend to stay more with their employers—in fact stay there for more time. It is just interesting that the data shows these trends.

**Mr SCOTT** — I think that is part of the reason for looking at bringing in a portable long service leave scheme—that employees who want to stay in their industry and have employers utilise their skills and experience ...

Where it is fair and reasonable to do so, between the competing interests of employers and employees, we do not want them to miss out on long service leave where they have essentially stayed within the industry and developed their skills and attributes for the benefit of that industry. I think that is also an argument why it should come in. Maybe it is the case that where employers have contributed to the scheme but have never had to draw down on it there might be some sort of rebate for that. Like I said, I do not think any bill should be a blunt instrument. That would have to have its own checks and balances too. I am thinking of if no-one ever made their seven years, for example, then the employer gets the benefit of that, but they did not make their seven years for ulterior purposes. That is a different question. But those ulterior purposes are protected in, as I said, other laws—unfair dismissal or discrimination general protections under the Fair Work Act. The current Victorian Long Service Leave Act does have in it, as I am sure you are aware, a section that talks about it being unlawful to dismiss someone when they are coming up to their entitlement. I think that is less litigated than unfair dismissal and general protections, but it is there.

**The CHAIR** — Mr Scott, on behalf of the Committee I would like to thank you for coming and giving evidence to us.

**Mr SCOTT** — Thank you very much. Thanks for having me.

**Mrs FYFFE** — Thank you, Ian. Your organisation has helped a few of my constituents over the years.

**Mr SCOTT** — That is good. We are open to all Victorian workers.

**Mrs FYFFE** — Terrific.

**Committee adjourned.**