Media, Entertainment and Arts Alliance

Submission to Industrial Relations Victoria's Review of the *Long Service Leave Act 1992* (Vic)

MEDIA, ENTERTAINMENT AND ARTS ALLIANCE

The Media, Entertainment & Arts Alliance (MEAA) is the largest and most established union for Australia's creative professionals. MEAA's membership includes journalists, artists, photographers, performers, producers, ballet dancers, symphony orchestra members and musicians, venue, event and racing workers, sportspersons and officials, together with film, television and performing arts technicians. Our membership is divided into four core areas; entertainment, crew and sport workers (ECS), actors and performers (Equity) media workers (Media), and musicians and symphony orchestra musicians (SOMA). We have a diverse and vibrant membership across all spheres of creative endeavour in Australia.

MEAA represents employees across our core industries who are engaged directly as employees in all types of employment – permanent ongoing, casual, contract (fixed term and run of show), seasonal, and increasingly, a significant number of employees engaged as freelancers or contractors. MEAA is concerned that increasing rates of workforce mobility and casualisation will ultimately render vast numbers of workers as ineligible to receive long standing entitlements, without intervention and amendments to various workplace legislation.

In the context of this review, we note in particular, that performers and technicians working within the live performance and film and television (recorded media) industries are almost never eligible for any entitlement to LSL due to the nature of their work: it is nearly always short term, contract based and for the run of a show or production. It is true that few performers are ever able to access LSL; two examples being Alan Fletcher on the serial drama production *Neighbours* or ballet dancers engaged directly by The Australian Ballet. To this end, though outside the scope of this inquiry, we strongly recommend the Victorian Government introduce industry-based portable long service leave on the terms recommended in MEAA's submission to the Victorian Government's inquiry Into Portable Long Service Leave.

It follows that this submission draws mostly on examples found within the media, arts, venue, events and recreation industries.

THIS SUBMISSION

MEAA has read the submissions of the Victorian Trades Hall Council (VTHC) to this review. We adopt broadly the submission of the VTHC and make the following supplementary submissions. We welcome to opportunity to provide a submission to the Review into the *Long Service Leave Act 1992* (Vic).

A. FLEXIBILITY OF LONG SERVICE LEAVE

Issue 1: Allowing employees to take LSL in several periods

MEAA recommends relaxing the existing provisions that states long service leave may only be taken in a single block, or in two or three blocks. The timing and structure of LSL should be granted at the request of the employee, balanced with the needs of the business and not unreasonably refused.

Any relaxation of the existing provisions should maintain the character of LSL, that is: to afford a break from work after a significant period of service to enable the employee to be rejuvenated.

MEAA is cautious that relaxing the existing provisions may lead to employers placing pressure on employees to take their leave in a manner different to their request and there should be safeguards in place to protect employees. For example, MEAA is aware of several recent instances of a large media employer directing employees to take LSL in periods of one week in contravention of the current *LSL Act* and against employee's wishes, in order to get the liability "off the books".

MEAA supports:

- That LSL may be taken in periods of not less than one week at any time at the request of the employee with no application to be unreasonably refused by the employer;
- Transition to retirement provisions should be considered in some circumstances to allow an employee to take LSL in shorter periods, such as one day per week over a period before retiring;
- A simpler dispute resolution procedure regarding the timing of taking leave.

Issue 2: Cashing out of LSL

MEAA views the cashing out of LSL and other leave-based entitlements with caution. MEAA is concerned that cashing out (even at the employee's request) will lead to a disentitlement to LSL over time, particularly when, as the Discussion Paper sets out, fewer employees in the workforce are now entitled to long service leave.

We acknowledge that the *Fair Work Act 2009* allows for the cashing out of annual leave (sections 92-94) in awards or enterprise agreements, under strict conditions. MEAA has mostly rejected attempts by employers to introduce cashing out of annual leave arrangements in enterprise agreements and no modern awards within MEAA's industry coverage contain cashing out provisions.

MEAA considers it is important for employees to access leave and take reasonable breaks from work. The Victorian government should seek to preserve LSL entitlements, to avoid a scenario where Victorian workers were able to cash out both annual leave and LSL or be forced by employers to do so to reduce their leave liabilities.

MEAA supports:

- Retaining the prohibition on cashing out of LSL;
- Retaining capacity to access to LSL at half pay.

B. CONSISTENCY AND EQUITY

Issue 3: Access to pro rata leave

MEAA strongly supports pro rata access to taking vested LSL at seven years' service and access to payment of accrued long service leave where the employment relationship ends after five years' service but before seven years' service.

It is recognised in the Discussion Paper that fewer employees have access to LSL due to labour market changes. This is particularly acute in the traditional media sector where digital disruption and declining advertising revenue structures have increased mobility within the sector and shifted many employees to a freelance model of employment, meaning fewer workers overall have access to LSL, and many others have had a vested entitlement paid out rather than taken or have had to "re-start" their service with a new employer due to redundancy. For many media workers, these significant changes have led to a disentitlement to LSL (and other paid leave).

In the case of event and venue workers, the vast majority of employees, such as event staff ticket sellers, ushers, etc. at the Melbourne Cricket Club or the racing clubs, are employed casually or seasonally. Many have retired from their primary profession and are close to, at, or beyond retirement age. In our submission, it is beneficial for all casual workers who do not have access to annual leave or paid personal/sick leave to have an opportunity to take a break from work before reaching 10 years' service; in many cases this may be their only *paid* break from employment in that time. Further, access to pro rata LSL at seven years would support older workers at these venues to remain in the workforce.

The same reasoning is relevant for access to payment of accrued pro rata LSL leave after five years when the employment ends (in line with the NSW/ACT legislation).

MEAA believes that access to pro rata leave at seven years or payment when the employment ends after five years gives an incentive for an employee to remain in employment with their current employer, thereby reducing business disruption and associated costs of recruitment and training, and retains skills, knowledge, experience and wisdom within a business for the benefit of the employer.

Further, we note that other provisions (such as section 62(2)(C)(g)) of the *LSL Act*) should be amended to reflect the wording of section 72 of the *LSL Act* – "where the employment ends" – to remove reference to dismissal; an employee's access to entitlements should not be conditional on the *reason* for the employment ending. Dismissal is not defined in the *LSL Act* and is only referred to in section 62, and the transfer of business provisions. We consider the amendment would make the *LSL Act* more consistent.

For example, the wording of section 62(2)(C)(g) that deals with what will not count as a break in continuous service, would be updated to read as follows:

> "[t]he end of employment, but only if he or she is re-employed within a period not exceeding three months after the employment ended"

MEAA supports:

- Access to pro rata long service leave after seven years' service;
- Access to pro rata long service leave if the employment ends after five years' service (regardless of the reason for the employment ending);
- Amending the provisions of the *LSL Act* related to dismissal or the end of employment in line with the wording of section 72, to "where the employment ends".

Issue 4: Long service leave payments

In our submission, employees should not be worse off when on LSL (or other paid leave) than they would be if they had worked over the period of the leave. The industries that MEAA covers have always been characterised by, for example, casual weekend and night work in the events, venues, racing and recreation sectors. Further, most employees at large media organisations work to a roster that contemplates morning, evening, weekend, night and public holiday work on most days of the year.

Currently, many employees within these sectors receive penalty payments to compensate for unsociable hours. For example, journalists at large print media organisations receive a 17.5% loading for night work, a 10-15% loading for early morning and evening work and a 10% loading for weekend work. During periods of annual leave, most employees receive 17.5% annual leave loading to compensate for the loss of shift penalties.

Put simply, many employees cannot afford to, nor consider it beneficial, to take leave if it means a reduction in pay for the period of the leave. We consider it is beneficial for employers for payment to be made at the current "real" weekly rate of pay to encourage employees to take leave within a reasonable period after it has accrued rather than accruing a significant leave liability that may eventually be paid at a higher rate.

Similarly, the *Accident Compensation Act 1985 (Vic)* provides workers compensation should be paid at the employee's Pre-Injury Average Weekly Earnings, inclusive of regular payments, to acknowledge the reality of the employee's work and pay.

MEAA supports the inclusion of regular allowances, payments or benefits when they are on leave. For example, MEAA has some agreements that give a mileage allowance to employees (usually photographers) who use their car for work. Often, this makes up a significant portion of their weekly pay and is intended to account for the use of petrol and wear-and-tear on the employees' car. Similarly, many employees are in receipt of a personal margin that, for all purposes, forms the basis of their weekly rate of pay, but is not contemplated by the *LSL Act*. In our view, it is disadvantageous for these employees to take leave and suffer a significant loss of pay.

Further, many MEAA agreements include provisions for averaging of penalties, loadings and other regular payments for other service related payments, such as redundancy payments.

To this end, MEAA supports updating the definition of "ordinary pay" to include shift penalties, loadings regular overtime and any other regular allowances or payments that form part of the

employee's usual earnings. MEAA considers the period over which pay should be averaged is over the previous 12 months immediately before going on LSL or five years, whichever is the greater, exclusive of any periods of unpaid leave.

MEAA supports:

- Employees being paid the same as regular weekly rate of pay – that is, inclusive of shift penalties, loadings, regular overtime and other regular allowances and payments when on long service leave;
- The weekly payments should be averaged over the 12 months or five years, preceding the taking of long service leave.

Issue 5: Changing work hours

MEAA considers that the current provision that averages working hours over the previous 12 months or five years to be generally satisfactory and reflects several provisions in MEAA agreements regarding other service related entitlements but could be improved.

MEAA recognises that mothers returning from parental leave to part-time employment may be disadvantaged by the current provision. Further, we are aware of MEAA members who have worked full-time for their whole career and reduced their days when approaching retirement (within the final few years) and suffered a reduction in their LSL entitlement disproportionate to the change in hours relative to their overall period of employment. Often, the employee is unaware of the effect on their LSL entitlement when electing to reduce their hours.

MEAA supports a provision that averages hours worked over the previous 12 months, five years or the period of employment – whichever is greater. We however recognise that it would be unlikely that some employers have access to records to complete the averaging for the whole period of employment, however this could be implemented prospectively and to cover the period in which records are to have been required to have been kept.

MEAA supports:

- An averaging provision that averages hours over the previous 12 months, five years or the period of employment – whichever is greater, so as to not disadvantage mothers, families or those transitioning to retirement.

Issue 6: Treatment of family leave and what counts as service

The definition of what constitutes "service" needs to be amended to reflect modern standards and consistency with the *Fair Work Act 2009* (Cth), which defines "service" and "continuous service" at section 22. Amendments to the *Fair Work Act 2009* that allow a primary carer parent to take unpaid parental leave (paid or unpaid, uncapped) should be reflected in the *LSL Act*, consistent with the NSW *LSL Act*.

Given that parents, particularly females, are disadvantaged by these provisions, it is incumbent upon the Victorian government to modernise the *LSL Act*. Further, MEAA considers that employees should not be disadvantaged for taking a 12 month period of unpaid parental leave as contemplated by the *FW Act* and that the issue of gender pay could be addressed by counting unpaid parental leave to 12 months as service for accrual.

Further, section 62 provides that any absence from work on account of illness or injury will not break service, yet it is unclear why only 48 weeks of injury leave in any year counts as service under section 63(2). It appears that the Act contemplates that a further period of 48 weeks' leave in a second or subsequent year will count toward the accrual of service.

MEAA supports:

- All paid and unpaid parental/family leave should not break service consistent with NSW legislation;
- All paid parental/family leave and unpaid leave up to 12 months should count as service for the accrual of entitlements;
- All leave for an injury or illness should count as service;
- Any other period of leave agreed in writing between the employee and employer to count as service should count as service.

C. CLARITY

Issue 7: Casual and seasonal workers

Unlike many other industries, work within the events, venues, racing, live performance and recreation sectors has always been characterised by true casual and seasonal work. In fact, it was a test case run by MEAA in 2004 for on behalf of a long-term casual worker at the Melbourne Cricket Club (MCG) was the driver of the amendments to the *LSL Act* in 2005 to include casual and seasonal employee provisions.

In many cases, the work is both casual and seasonal and there is often more than a 3 month break between shifts. For example:

- At the MCG, employees work consistently over the football season, and a smaller group of workers will also work over the cricket season, but for many the break between work extends beyond 3 months;
- At the racing clubs, there is consistent though infrequent work throughout the year and a large peak in work over the Spring Racing Carnival. Most employees work across several race clubs, including Victoria Racing Club, Moonee Valley Racing Club, Melbourne Racing Club, etc.;
- Many other MEAA members work casually across multiple entertainment venues such as Melbourne and Olympic Parks, the Arts Centre, Recital Centre, ACMI, the Melbourne Convention Centre and commercial theatres.

These workers hold casual jobs at multiple venues to sustain a liveable income.

Unlike many other industries, these casual employees do have a reasonable expectation of ongoing employment, however the prospect of *permanent* ongoing employment is often not contemplated, particularly in public-facing roles. It is important that the *LSL Act* recognises the nature of their work as both casual *and* continuous.

Further, we note that due to the nature of work changes over time, there has been a rise in casual employment and other insecure employment within other industries that MEAA covers, such as the media industry.

We consider the *LSL Act* could be strengthened at section 62A to specifically state that it applies to casual workers, rather than it being a sub-set of the meaning of "continuous employment".

Further, the Act should be amended so that employment is continuous unless there is a period of more than 12 months of unapproved leave. This would reflect the provisions in the Commonwealth Act.

This recognises that casual employees have no access to paid annual or sick leave entitlements, and may, over the course of their career, need or seek to take a longer break but do not wish to relinquish their continuous employment under section 62A. Permanent employees have the benefit of doing this by saving accrued annual leave or combining LSL with periods of annual leave, but no such option for a long break exists for casual employees (particularly those working multiple jobs).

Indeed, some MEAA agreements, such as those covering casual symphony orchestra musicians and live performance theatre front of house staff and technicians, include provisions for a break of up to 12 months without breaking continuous service. This reflects provisions in the Commonwealth Act

MEAA supports:

- That the Act be amended to specifically state that it applies to casual employees and seasonal employees who may work casually or on a full-time seasonal basis;
- Employment will be continuous unless there is a break in excess of 12 months of unapproved leave, whether paid or unpaid (for example, when leave is initiated by the employee).

Issue 8: Recognising prior service where a business is sold

MEAA adopts the submission of the Victorian Trades Hall Council in relation to issue 8.

Issue 9. Recognition of prior service

MEAA adopts the submission of the Victorian Trades Hall Council in relation to issue 9.

D. COMPLIANCE AND ENFORCEMENT

Issue 10: Enhance the inspection and enforcement provisions

MEAA adopts the submission of the Victorian Trades Hall Council in relation to issue 10.

OTHER

Working on long service leave

While it has not been listed as within the scope of the discussion paper, MEAA supports removing the prohibition on working while on LSL at section 78 of the Act. It must be recognised that many employees in the modern labour market hold multiple jobs, often casual.

While MEAA recognises the need for employees to take a break from work during LSL, it is often unrealistic for many employees. MEAA receives regular inquiries, particularly from casual workers about whether they can work in their second (or third) job while on LSL with their first employer. In the examples given above regarding casual and seasonal workers, being unable to take LSL at two casual jobs at one time is likely and problematic. In this case, the following scenarios may present:

- The employee takes LSL with the first employer, and consequently breaks continuity of service with the second employer if the leave period exceeds 3 months; or
- The employee takes LSL with the first employer, and does not work over the period for their second employer; their accrued LSL entitlement (average weekly hours and average weekly pay) is therefore reduced with the second employer.

Further, many agreements in the entertainment and venues sector have minimum shift acceptance rates for casual workers that could jeopardise employment if they fail to work over a defined period, particularly if the second employer does not agree to the employee's period of leave.

Finally, many workers in the media may take approved LSL to work on a second paid project for interest or professional development (such as to study or write a book). They should not be penalised by the *LSL Act* for doing so.