



MCKELL INSTITUTE VICTORIA

Insecure Work & Portable Entitlements:

A SOLUTION *for* AUSTRALIA

JANUARY 2021

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EXECUTIVE SUMMARY

Insecure work is a reality for too many Australian workers. Whether they are casuals, fixed term, freelancers or contractors, a substantial part of the Australian workforce lacks the security of permanent, on-going employment.

Many of these workers do not have access to paid leave or other workplace entitlements that Australia's permanent workforce has as a right. Casuals and those working multiple jobs have borne the brunt of job losses during the COVID-19 recession.

The ongoing economic vulnerability of insecure employment has been compounded by the health vulnerabilities that the pandemic has exposed.

COVID-19 has shone a light on how the prevalence of insecure work creates weakness in our community. There has been significant transmission of the virus through workplaces, exacerbated by people turning up to work while sick because they did not have access to paid sick leave.

Without portable entitlements, available workplace entitlements are fixed to your employer, and they accumulate from the commencement of employment. When you move jobs, you start all over again. As more and more workers move between employers, or have multiple employers, they may not have adequate leave available to support them when they need it most.

Our economic recovery from the COVID-19 recession will require us to fix the problems of insecure work. Luckily, Australia already has a unique solution to the problem of many workers not having access to adequate paid leave: portable entitlement schemes. Such schemes currently exist in certain industries strengthening the safety net for workers.

Portable entitlements follow the employee, ensuring an ongoing safety net for more workers. This benefit could also be extended via a portable entitlements scheme to contractors who currently don't have access to the rights of employees, including paid leave.

These portable entitlement schemes exist across Australia and can serve as successful models for wider application. This report argues for the expansion of portable entitlement schemes via industries and leave types, administered in a way similar to our successful superannuation system and existing approved workers entitlement funds.

Portable entitlements are an Australian solution to make our workplaces and community stronger and safer.

KEY FINDINGS

FINDING 1

Insecure work is a significant feature of Australia's labour market.

FINDING 2

Workers being unable to access paid leave has broader health and economic consequences.

FINDING 3

Introducing portability of leave and other entitlements between employers could reduce these risks.

FINDING 4

Australia's workplace system can support the wider introduction of entitlement portability.

FINDING 5

The introduction of portable entitlement schemes could be most effectively done on an industry basis, with specific consideration for each type of leave to be included.

FINDING 6

Further detailed analysis should be undertaken by government based on types of entitlements and industries to be covered in a roll out, including a detailed review of legislative barriers to further portability of entitlements.

FINDING 7

Existing portable entitlement funds should serve as exemplar models.

FINDING 8

Administration of portable entitlements schemes should build on Australia's success with superannuation funds and approved worker entitlement funds, namely:

- run on a trustee model,
- in partnership between employers and employees, and
- protected by fiduciary obligations and regulation through governance and prudential requirements such as those imposed through ASIC.

PART ONE: INSECURE WORK IN AUSTRALIA

KEY POINTS

- 1** Insecure work is a feature of Australia's labour market, growing over the last 30 years.
- 2** One in five workers has changed jobs in the last 12 months.
- 3** Job losses have been significant among casuals as the COVID recession hit — in August 2020 employment for casuals is 13 per cent lower than in February 2020.

The COVID-19 pandemic has brought to bear the fact that many Australians are currently employed in what can be described as “insecure work”. This can be defined as work that involves uncertainty over the length of the job, inferior entitlements such as limited or no access to paid leave, irregular and unpredictable working hours, working hours that are too long or too few, unpredictable pay, and a lack of voice at work on wages, conditions, and work organisation.¹

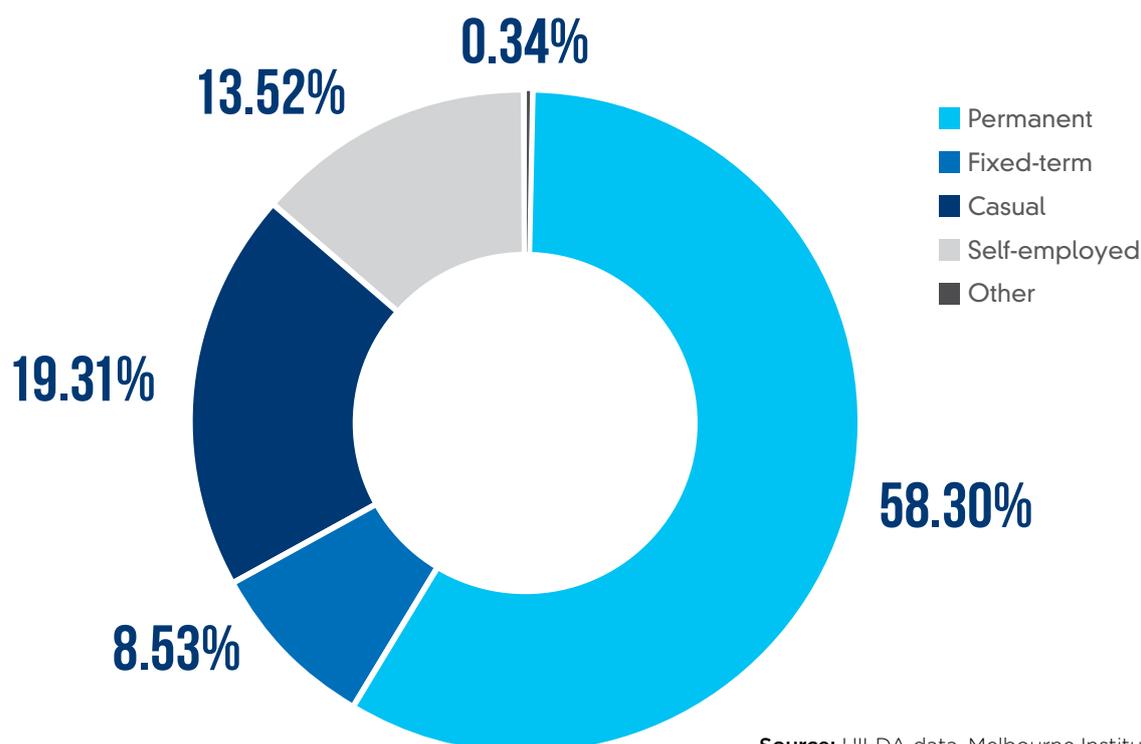
The McKell Institute's 2019 paper, *Understanding Insecure Work in Australia*, articulated many of the worrying trends in relation to insecure work in Australia. Currently in Australia, less than half of those employed work in some kind of full-time permanent role with leave entitlements.² The share of part-time work has risen from 11.3% to 33% in the past few decades.³

Labour demand factors have shifted as Australia's economy has become more service oriented, with industries such as health, education, hospitality, and tourism seeing large increases in employment, all of which involve irregular hours.⁴

Australia's experience is consistent with trends in Europe, where insecure, temporary, or non-standard work has steadily increased.⁵ While comparative data on casualisation of the labour market, or trends in insecure work, is scarce due to definitional and data collection inconsistencies,⁶ the evidence is that the use of temporary, or fixed term contract arrangements, and gig-economy or independent contracting arrangements, are increasing in comparative countries.

In broad terms, insecure forms of employment can be categorised in Australia as casual work, fixed term contracts, and those who are self-employed (as freelancers, gig-workers, or independent contractors). This makes up 42 per cent of the workforce.

FIGURE 1.1 CATEGORIES OF EMPLOYMENT



Non-standard employment is common for many women in Australia. The Household Income and Labour Dynamics in Australia (HILDA) survey shows that there are more women working in these types of employment arrangements than for their male counterparts. In 2017, HILDA data showed that 61 per cent of employed women were in non-standard jobs, compared to 37 per cent of men. Women are overrepresented in three out of the four most common types of nonstandard employment: fixed-term contracts, casual employment and permanent part-time work.⁸

Young people (15–24 years old) are also more likely to have non-standard employment arrangements, primarily as casual or permanent part-time employees, and share of young people in non-standard forms of employment has grown

considerably rising from around 65 per cent in 2005 to more than 75 per cent in 2017.

Casualisation is a feature of the labour force

Casual employment in Australia — that is where the employee has no commitment of further or regular work from their employer and does not get paid sick or annual leave — is a feature of the Australian labour force.

The number of employees without access to paid leave was 21.5 per cent in 1992.⁹ Today, pre-COVID, around a quarter of all employees in Australia are casuals, a figure that has been relatively constant for most of this century (see *figure 1.2*). Women are also more likely to be casuals than men.

FIGURE 1.2 CASUALS IN AUSTRALIA

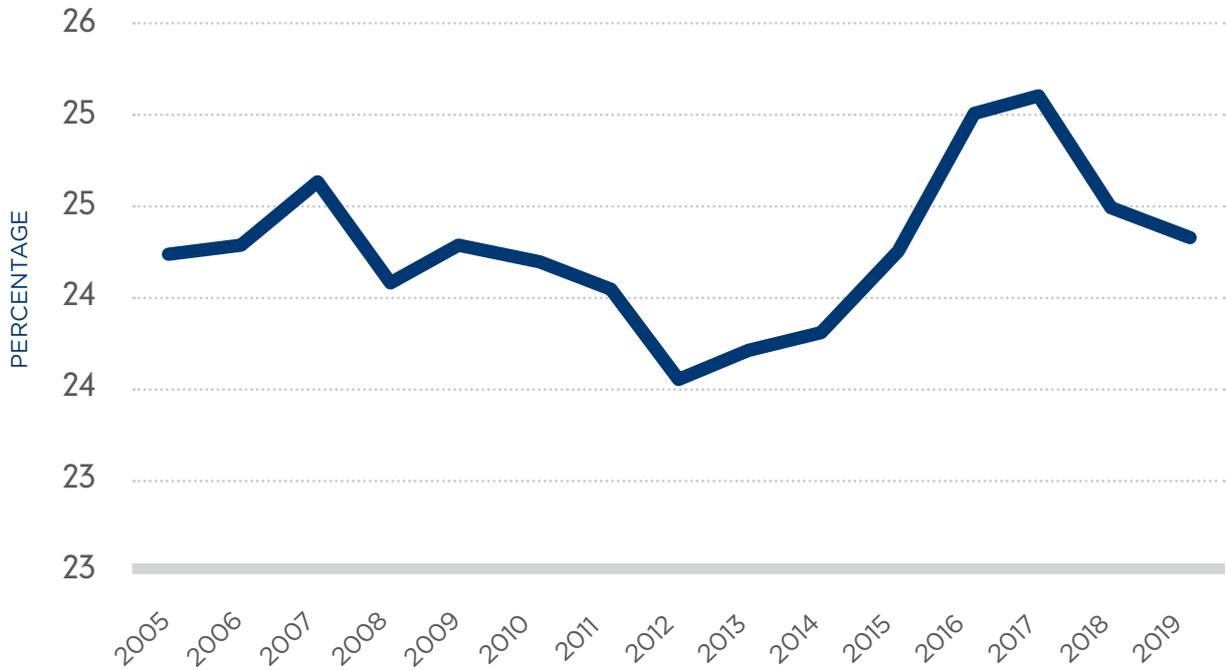


FIGURE 1.3 CASUALS AS SHARE OF TOTAL EMPLOYEES, BY GENDER



Fixed term contracts are most prevalent in the public sector

The number of employees on fixed term contracts — that is with a fixed completion date or event — have remained relatively steady in recent times at just over 5 per cent. According to analysis of ABS data by the Parliamentary Library, permanent employees were just as likely as casual employees to be on a fixed term contract. However, public sector employees are much more likely — more than three times — than private sector employees to be on a fixed term contract. In 2018, public sector employees on fixed term contracts accounted for more than a third of all employees on fixed-term contracts in Australia, yet they are just 15 per cent of all employees.¹⁰ This suggests both a preference for fixed term employment contracts is a feature of public sector employment, rather than the use of casuals.

FIGURE 1.4 NUMBER OF EMPLOYEES ON FIXED TERM CONTRACTS

	AUGUST 2015	AUGUST 2016	AUGUST 2017	AUGUST 2018
Number of employees on fixed-term contracts	522,100	535,600	526,000	547,500
Employees on fixed-term contracts as a share of all employees (%)	5.4	5.4	5.2	5.2
Permanent employees on fixed-term contracts as a share of all permanent employees (%)	4.8	5.2	5.0	5.2
Public sector employees on fixed-term contracts as a share of all public sector employees (%)	12.0	12.8	12.0	12.5

Source: Parliamentary Library analysis of ABS data.

The gig economy and other forms of insecure work are increasing

More than a million Australian workers are being paid through a labour-hire firm or employment agency.¹¹

In August 2016, to the extent that these people are not employees, over one million Australians were working as independent contractors in some capacity. At least 100,000 of these workers are thought to be solely reliant on employment in the gig-economy to make ends meet,¹² with over 4 million Australians having freelanced in some capacity during the calendar year of 2016.¹³

The ABS, in its *Characteristics of Employment Survey*, identified the characteristics of Australia's contractor workforce, finding:

- 93% expected to be with current employer/business in 12 months;
- 32% of those who did not expect to be with current employer/business in 12 months reported that they would be changing jobs/seeking other employment, while 22% said they would be retiring;
- 14% had been with their current employer/business for less than one year, while 40% had been with their current employer/business for 10 years or more;

- 31% of independent contractors reported their highest level of educational attainment was a Certificate III/IV. The most common educational attainment for males was a Certificate III/IV (38%), whilst for females the most common level of educational attainment was a Bachelor degree (26%);
- 55% had more than one active contract in the reference week;
- 74% were usually able to work on more than one active contract;
- 58% were able to (sub)contract their own work; and
- 64% did not have authority over their own work.¹⁴

FIGURE 1.5 FORMS OF EMPLOYMENT OVER TIME

	INDEPENDENT CONTRACTORS	TOTAL EMPLOYMENT	INDEPENDENT CONTRACTOR SHARE OF TOTAL EMPLOYED (%)
November 2008	964,753	10,723,824	9.0
November 2009	1,043,095	10,789,637	9.7
November 2010	1,089,553	11,077,192	9.8
November 2011	1,015,595	11,172,297	9.1
November 2012	973,322	11,348,302	8.6
November 2013	973,179	11,402,031	8.5
August 2014	994,543	11,529,610	8.6
August 2015	1,000,239	11,767,624	8.5
August 2016	1,036,266	11,954,159	8.7
August 2017	1,010,979	12,253,238	8.3
August 2018	1,009,659	12,589,826	8.0

Source: 2001, 2008 and 2001—ABS, Forms of Employment, cat. no. 6359.0; 2014, 2016 and 2018—ABS, Characteristics of Employment, cat. no. 6333.0, Table 13.3.



More than a quarter of the Australian workforce engages in freelancing

Freelancers, independent contractors, and casuals make up over a third of Australia's workforce.¹⁵ Where casuals are compensated for a lack of workplace entitlements, such as leave, with higher base rates of pay, independent contractors (some of whom may have been coerced into contractual labour by employers transforming their businesses in a way to reduce labour costs) receive no such compensation. In the debates surrounding the future of what work will look like, there has been less exploration of how the disruption of work has coincided with this disruption of workplace entitlements. In order to offset the potential negative consequences of disruption caused by automation and a casualisation of the work force, bold initiatives need to be considered to ensure all Australian workers have access to fundamental workplace entitlements. While it is important to recognise that piece work — or work where remuneration is in line with output, not input — and freelancing are not new phenomena,¹⁶ their increased role in Australia's modern economy demands new ideas to ensure those engaging in this kind of work, are not disadvantaged.

Underemployment is significant

The overall positive trend in Australia's unemployment figures over the past four decades is offset by the challenges brought about by underemployment. The underemployment rate measures the percentage of the workforce who are employed but are eager to undertake more work. It should be noted that, while headline unemployment rates have steadied at around 5-6 per cent since the early 2000s, the underemployment rate has continued to rise consistently. In 1978, when underemployment started to be measured by the ABS, only 3 per cent of Australians felt they weren't getting enough work. This figure has continued to steadily increase since data

began being collected, standing at 8.6 per cent in February 2020 before the COVID recession. Again women are much more likely to be underemployed than men — with the female underemployment rate at 10.9 per cent in February 2020, more than four percentage points higher than the male rate.¹⁷ Clearly, during the near three decades of economic growth between the recession of the early 1990s and the COVID recession, while more and more Australians were employed, more than ever also feel they simply do not have access to the amount of work they desire. For workers in the gig economy, this sense of underemployment can be acute.¹⁸

Many Australians frequently change jobs

Around one in five workers changed employers in the previous 12 months — 18.6 per cent of the workforce, or around 2.4 million Australian workers.

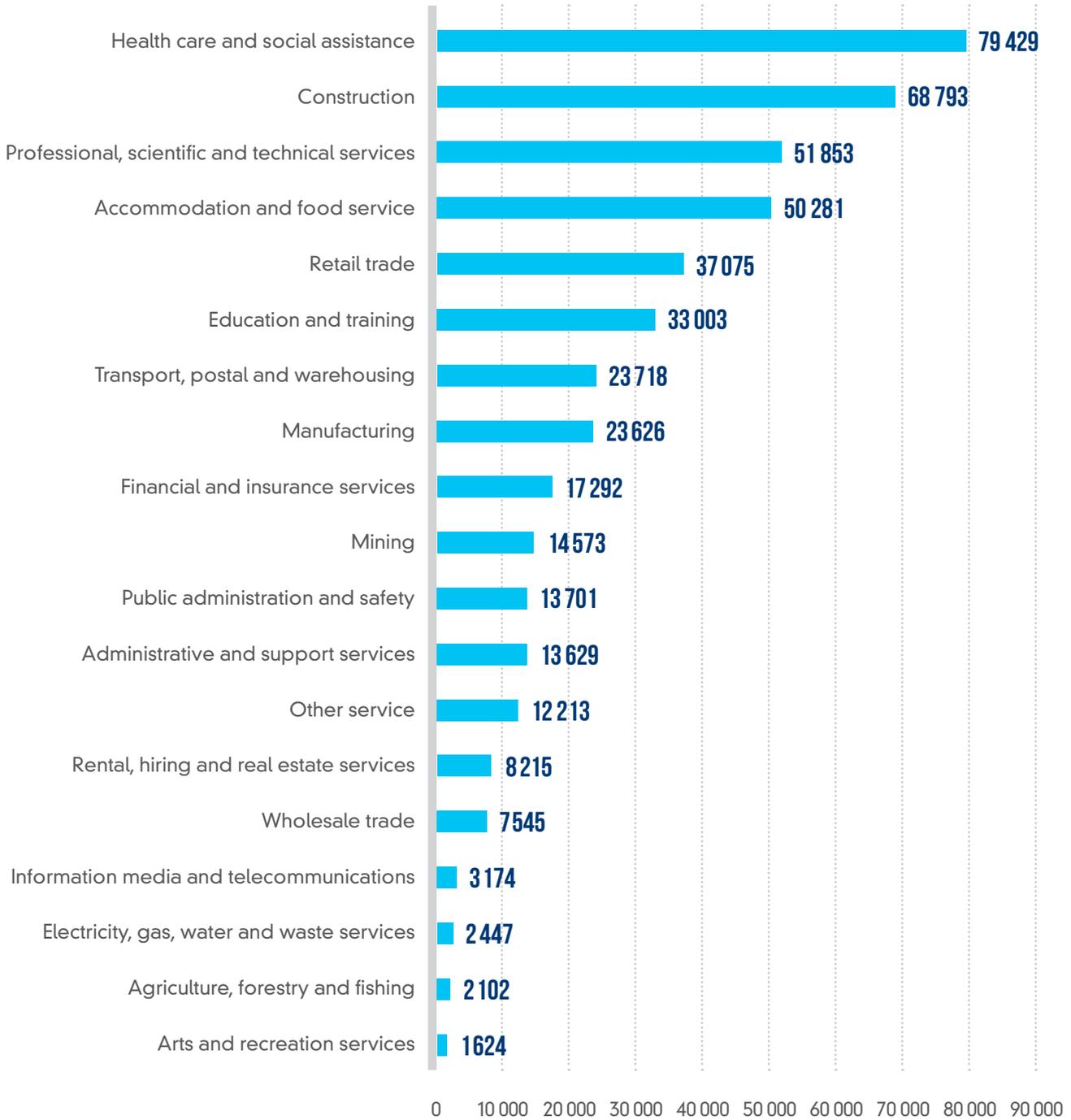
Of these, approximately 1.25 million were not working at the same point of the previous year, suggesting they were first time entrants to, or re-entering, the workforce.

There were about 500,000 workers who changed industries, and 464,000 who were in the same industry but changed employers.

Workers who changed industries (500,000) were most likely now working in retail trade (13%), accommodation and food services (11.5%), professional scientific and technical services (9%) and health care and social assistance (7%).

Workers who changed employers in the last 12 months but were in the same industry (464,000) were mostly from health care and social assistance (17%), construction (14.8%), accommodation and food services (7%).

FIGURE 1.6 WORKERS WITH FEWER THAN 12 MONTHS AT CURRENT EMPLOYER, BY INDUSTRY



In Australia’s labour market where for those who have access to paid leave, the amount of leave you have access to at any point in time depends on how long you have been with your current employer. So, for these 2.4 million Australian workers, they have relatively small amount of paid leave available to them.





Job satisfaction can be related to job security for some workers

The relationship between job security and job satisfaction is an interesting one. Analysis of the Household Income and Labour Dynamics in Australia (HILDA) survey by the Melbourne Institute of Applied Economic and Social Research shows that in 2018, before the COVID recession, there was largely no difference between the job satisfaction levels of people on different types of employment. Satisfaction rates for both men and women in permanent, fixed term and casual employment all have a mean of around a 7.6 (on a 0-10 rating scale).

The self-employed had higher rates of job satisfaction across the board, perhaps reflecting the particular circumstances of self-employment.

However, job satisfaction for prime working age men with casual work is noticeably lower. It is not clear from this research the causes for this lower satisfaction rate; however, it could be related to employment security.

FIGURE 1.7 MEAN OVERALL JOB SATISFACTION SCORES BY EMPLOYMENT TYPE

	PERMANENT	FIXED TERM	CASUAL	SELF-EMPLOYED	ALL EMPLOYED
MEN					
Total	7.58	7.65	7.56	7.87	7.63
Excluding full-time students	7.58	7.65	7.44	7.87	7.62
Prime age (25-54 years)	7.53	7.73	7.19	7.84	7.57
WOMEN					
Total	7.66	7.77	7.76	8.18	7.74
Excluding full-time students	7.67	7.77	7.65	8.16	7.73
Prime age (25-54 years)	7.63	7.69	7.58	8.08	7.67

Notes: All estimates are population weighted. Estimates for prime age workers also excludes any full-time students.

Source: HILDA Survey General Release 18 data with analysis from the Melbourne Institute.²⁰

Job insecurity has an economic cost

Job insecurity has traditionally been defined as 'the fear of losing one's job',²¹ but today's highly mobile modern labour market, and the growth in short term contracting and freelancing, warrant its definition being extended to include the concerns over finding sufficient work. Job insecurity is intrinsically linked to financial stress, which in turn has a significant impact on the health of Australia's workforce, and the health of Australia's economy. 2016 research by The McKell Institute estimated that of those suffering the consequences of job insecurity, around 80 per cent were workers in the bottom half of the income distribution.²² The cost of this financial stress, as a result of job insecurity, was thought to be at least \$1.9 billion per annum.²³ As more workers transition towards more temporary employment, it is integral that further economic security is offered to this growing cohort of the Australian workforce.

Casuals first jobs to go in the recession

When the COVID-19 pandemic shut down economic activity in March 2020, employment of hundreds of thousands of Australians was almost immediately affected.

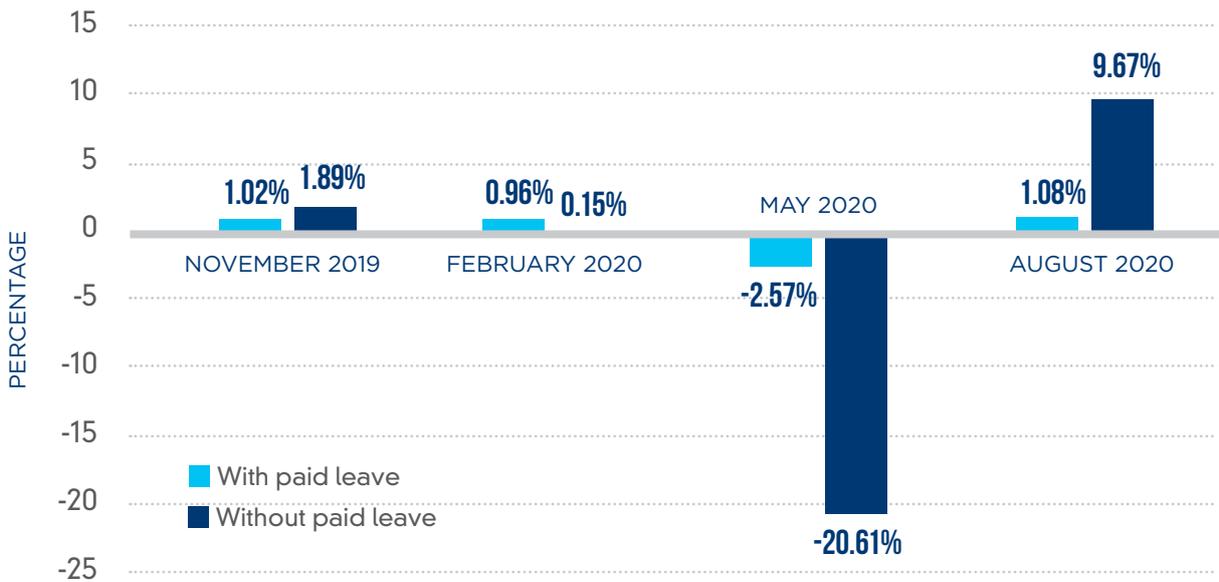
Quarterly labour force data provides some insight into how dramatically the employment of casuals were affected by the pandemic. Between the February and May 2020 quarterly labour force surveys, the number of employees without paid leave (casuals) dropped by 20 per cent, while the reduction for those with paid leave (permanents) dropped by just two and half per cent. The next quarter saw a recovery for casuals of around nine and half per cent. Compared with pre-pandemic February, in August 2020 the total workforce is around 4 per cent smaller, yet the casual workforce is nearly 13 per cent smaller.

FIGURE 1.8 GROWTH/REDUCTION BY TYPE OF EMPLOYMENT (FEB-AUG 2020)

	EMPLOYED TOTAL	WITH PAID LEAVE	WITHOUT PAID LEAVE
Change Feb 2020 to Aug 2020	-4.27%	-1.52%	-12.93%

Casuals now occupy the lowest percentage of the total workforce since the early 2000s, at just over 21 per cent of all employees.

FIGURE 1.9 QUARTERLY CHANGE IN NUMBER EMPLOYMENT BY QUARTER, WITH AND WITHOUT PAID LEAVE.



Source: ABS Labour Force, Australia, Detailed, Quarterly, Table 13.

Secondary jobs significantly affected

In unprecedented times and facing both uncertainty and volatility of economic conditions associated with the public health response to the pandemic, the Australian Bureau of Statistics began releasing new data series to provide better real time insights into the state of the labour market. This involves analysis of weekly payroll data as reported to the Australian Taxation Office using the single touch payroll system, a new technology introduced from 2018. Currently around 99 per cent of large employers, and 77 per cent of small employers are reporting payroll data to the ABS.²⁴ This is a different, experimental, methodology to the survey-based approach that has been our traditional main insight into the state of the labour market.

The pandemic has seen a dramatic decline in the number of secondary jobs held by employees. Before the pandemic, across Australia there were around 2.1 million people who work more than one job, either at the same time, or throughout the year. The multiple job holder rate (that is the proportion of workers with multiple jobs in comparison to the total number of people employed) increased from 14.4% in 2011-12 to 15.6% in 2016-17.²⁵

For multiple job holders, secondary jobs are far more likely to be casual or otherwise insecure. Only around 10 per cent of secondary jobs were classified as permanent.²⁶ Secondary jobs are also for a shorter duration, of those held for less than an entire year, the median duration was 22 weeks.²⁷

Recent research by the McKell Institute, *Many jobs, little support – multiple jobs and the COVID recession*²⁸ details the impact of the recession on secondary employment.

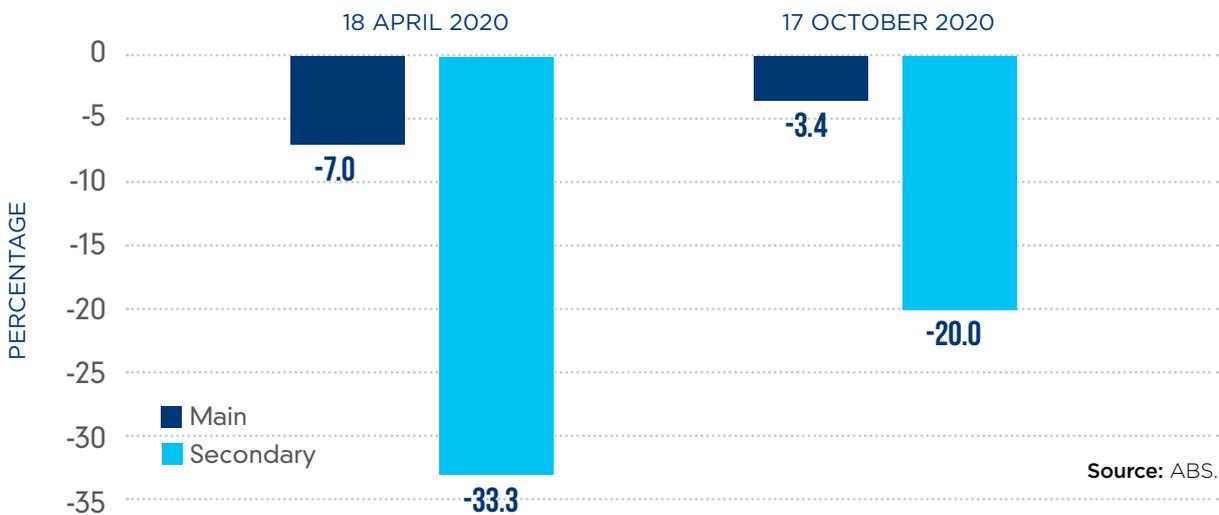
The overall jobs decline since the outbreak of COVID-19 has been precipitous. Total payroll jobs reached their lowest point in mid-April, with an 8.5% decline in the month since the pandemic’s outbreak in mid-March.

Main jobs and secondary jobs were both affected, with ABS analysis of payroll data showing main jobs fell by 7.0% and secondary jobs by 33.4% in period between 14 March and 18 April.

However, there has been a stark difference in the job recovery.

While over half of main jobs lost to mid-April were recovered by mid-September, only around one third of secondary jobs lost were recovered. In September the number of secondary jobs was still 20% lower than in March.

FIGURE 1.10 CHANCE IN PAYROLL JOBS RELATIVE TO 14 MARCH 2020, MAIN AND SECONDARY



Source: ABS.



PART TWO: LESSONS FROM THE COVID-19 PANDEMIC AND THE IMPORTANCE OF PAID LEAVE

KEY POINTS

- 1** Workplaces play a significant role in the transmission and spread of diseases such as COVID-19.
- 2** 3.7 million employees in Australia have no access to paid leave.
- 3** The current National Employment Standards (NES) are inadequate for the provision of sick leave, especially for periods of 14-day self-isolation.

The COVID-19 pandemic has transformed the operation of society, the economy and most businesses. In the short-term, there has been a seismic shift in the prevalence of working from home as a result of advice and requirements from governments. These accompany social distancing requirements, and a constant recommendation to stay home when feeling ill.

In July, The McKell Institute argued for a national scheme for the provision of Paid Pandemic Leave.²⁹ In that piece, two facts of the Australian workplace climate were highlighted. First, workplaces play a significant role in the transmission and spread of disease, especially diseases which are acute respiratory illness such as COVID-19. Secondly, Australia has an inadequacy of leave provisions. The ability for Australia to effectively respond to these two challenges will not only aid in the current situation, but also set up the economy in a more fortified state for the long term.





Role of workplaces in transmission of disease

Workplaces, in bringing people from different geographies together in a shared space, have had a unique role in local transmission of COVID-19. This is evident in the recent second wave of COVID-19 transmission in Victoria. Approximately 80% of the transmissions that have taken place in that second wave occurred at the workplace. The Victorian Chief Health Officer noted that ‘Workplace settings, sometimes with very large workforces who have to be in very close proximity, they can amplify the transmission’.³⁰

International evidence confirms the strong role that workplaces have played in the spread of COVID-19.³¹ The most known example of this is the role Aged Care workplaces have had in the transmission of the disease. The rapid rise in cases in these facilities is shared between both the residents, and the staff.³² In analysing the prevalence of underemployment, split shifts, and insecure work³³ — it is possible to draw a link between the nature of employment in the sector and the associated spread of disease. The facilities provided perfect conditions for transmission of the disease, but workers could not sacrifice another shift, not access paid leave.

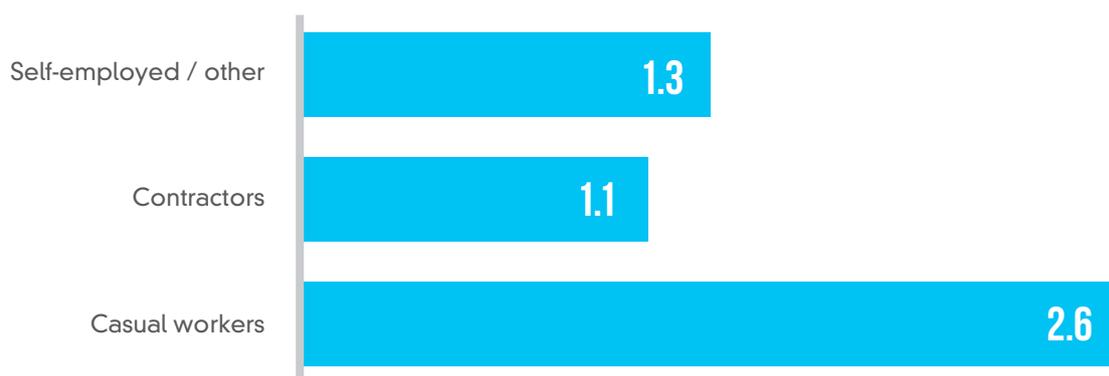
Research from the United States has shown a statistically significant relationship between the availability of emergency sick leave provisions put in place during the COVID-19 pandemic and a reduction in the daily coronavirus infection rate.³⁴

Previous studies have shown that “contagious presenteeism” – working while sick with a contagious disease – decreases when employees gain access to paid sick leave.³⁵

Inadequacy of leave provisions for Australians

Our earlier analysis has detailed how 3.7 million Australians have no access to paid leave. This includes the 2.6 million employees with no paid leave provisions, and the 1.1 million Australians who work under contract, and therefore do not have leave available to them. While the vast majority of those employed in full-time work have leave, 54.4 per cent of all part time workers in New South Wales have no access to paid leave entitlements.

FIGURE 2.1 AUSTRALIANS WITH NO ACCESS TO PAID LEAVE, 2019 (MILLIONS)



Source: ABS Characteristics of employment 2019.

Furthermore, it can be argued that the provision of leave for permanent employees has been exposed as inadequate for the current situation. Under the National Employment Standards (NES), 10 days minimum sick and carer’s leave is available to all permanent full-time employees, with the amount of days decreasing on a pro-rate basis for part-time employees.³⁶ While this is generous by international standards, the standard 14-day isolation period for COVID-19 exceeds the amount of sick/carer’s leave for most Australians. An Australian who has been exposed to COVID-19 and is asked to self-isolate either has to take part of their annual leave or take unpaid leave.

FIGURE 2.2 TIME TAKEN TO ACQUIRE LEAVE, BY TYPE OF WORKER.

TYPE OF WORKER	TIME TAKEN TO ACCRUE 14 DAYS PAID LEAVE
Full-time, 38 hours and 5 days a week	1 year, 21 weeks
Part-time, 19 hours, 5 days a fortnight	2 year, 42 weeks

Estimates calculated based on latest FWC information on Sick and Carer's Leave in the National Employment Standards (NES).

However, the greater problem is the accumulation process of leave. It begins from the start of employment, and slowly accrues on a formula that is based on (1/26) for each hour of work.³⁷ While this is favourable to long-term employees, this places a high burden for recently hired employees. Alternatively, employees who recently have had a long-term period of illness, have “used up” their sick pay, and as such start from a low basis point.

The Victorian Chief Health Officer gave evidence to the Board of Inquiry into the COVID-19 Hotel Quarantine Program that ‘The casualised labour that was involved meant that a number of them had other work that they needed to do, which brought the risk of transmission to other workplaces and other individuals.’³⁸

Entitlements benefit the workers, and the community

The concept of paid leave is not simply one inspired by altruistic policy makers seeking to get the best deal for workers. It has an economic benefit, too. Paid leave, particularly paid sick leave, allows employees to take time off from work to recharge, regain health and return to the workplace refreshed and able to engage in more productive labour. It indisputably makes sense for workers to receive paid sick leave, as it discourages sick employees from remaining in the workplace, which would extend their illness, lower their personal productivity, and risk spreading illness throughout a workplace therefore driving down the productivity of the entire firm.³⁹ No credible observer of the Australian economy would suggest doing away with paid sick leave throughout the permanent labour force because the economic logic that underpins it is indisputable. It is inherent on policy makers, therefore, to identify ways in which such entitlements can be extended to all of Australia’s workforce.

It’s not only paid leave that provides tangible benefits to the economy, but superannuation, too. As

more employers use contracting as a way to avoid paying the superannuation guarantee, Australia’s superannuation balances are being threatened. The core purpose of compulsory superannuation is to provide an alternative to the Commonwealth age pension as a means of funding Australians’ retirement, meaning that the fewer Australians that receive adequate superannuation, greater the age pension costs for the government down the line. While beyond the scope of this report, new ways to extend the superannuation guarantee to Australia’s contractor work force and rising gig economy workers are required.

From stability into risk — the turning tide of economic conditions

Australia’s near 30 years of economy growth masked some worrying trends emerging in the labour market, and the relatively low rates of headline unemployment and jobs growth may have masked some of the fault lines in the labour market that created problematic conditions for employees, especially in relation to security.

In good times, new jobs were easier to find for many active participants in the labour market. Of course, this was not universally true for all labour market participants, as many still faced barriers to employment, and worked fewer hours than they wanted to. However buoyant labour market conditions helped mask the risk people faced from their employment status. When the downturn hit, it hit those in less secure, and work the hardest. Job security emerged as a major risk factor for economic and general health. As our nation considers its economic recovery from the COVID pandemic addressing the fundamental weaknesses that underpinned many parts of the labour market become an even more important task.





PART THREE: PORTABLE ENTITLEMENTS — BACKGROUND AND CONTEXT

KEY POINTS

- 1 There are existing arrangements that offer patchwork portable leave, but none of these schemes adequately address the issues associated with the insecure work force.
- 2 There are a range of options to expand portable entitlements in Australia.
- 3 Existing portable leave models should serve as a template for further expansion.

Paid leave is a right only for Australia's permanent work force

Australian workers in permanent part-time or full-time employment enjoy the economic and emotional security of world-leading workplace rights, such as paid annual, sick, and long-service leave – that many workers throughout the world are not entitled to.

The National Employment Standards, enshrined in the *Fair Work Act 2009* (Cth), outline in broad terms the minimum paid leave entitlements that employees can expect to receive including annual leave, sick or carer's leave, compassionate leave, redundancy (or severance) pay, and long service leave. Various unpaid leave is also available.

For casual workers, these paid leave benefits are not available. However, in compensation casual workers receive a higher base rate of pay, currently usually 25 per cent.

The right to leave is attached to the permanent employment relationship

The right to access paid leave is a consequence of the employer-employee relationship enlivening the protections, rights and entitlements set out in the *Fair Work Act*. This applies to full-time or part-time permanent employees.

Determining that employment relationship is based on the individual circumstances of the work arrangement put in place and are in the end matters to be determined by the courts looking at the totality of the relationship between the parties. This applies to determinations of employee or contractor, and to the determination of whether an employee is a casual or permanent employee.

Employers are required to make financial provision in their company accounts for the leave entitlements of every employee.

In general terms, leave begins to accumulate from the commencement of each employment relationship. Leave balances accrue progressively in the course of service by reference to ordinary hours worked. The High Court of Australia recently determined that personal (sick) leave accrues by the hour, not the day.⁴⁰

Therefore, as workers move between employers — either concurrently or sequentially — their leave begins to accrue for each separate employment relationship, generally from a zero balance. This means some may have insufficient accumulated leave available if they get sick or have different leave balances if working for multiple employers.

Some employers in Australia do have schemes in place that recognise leave accumulated during service with a different employer, thus giving some workers the ability to move their workplace leave entitlements between employers, however the application of this concept has been limited to certain circumstances.

Prior leave can be recognised between different employers making it ‘portable’

Portable entitlements are not a novel idea. In its essence, they simply allow for the transfer of accrued entitlements between sectors, industries and jobs.

The public sector has had a long tradition of recognition of prior service in other public sector agencies at an interstate or Commonwealth level to allow the effective transfer of certain leave entitlements (usually annual or long service leave), generally where that services is continuous and immediately follows and from an approved Commonwealth or interstate agency (see *NSW Government Sector Employment Regulation 2014*). This generally involves each government recognising service and absorbing the cost of this recognition, rather than the transfer of any funds. This is possibly because of the taxpayer funded nature of these workplaces and the importance placed on the concept of an independent public sector.

While commonplace in the public sector in Australia and internationally, schemes that effectively allow the portability of benefits have only been a feature of selected private sector industries. The most common examples are found in the construction industries, where a combination of intra-industry mobility between firms, the risks posed to employee entitlements by rates of employer insolvency, and a history of collective industrial action and the protection of employee benefits and conditions. Construction sector portability has generally been secured through industrial agreements, rather than through legislation, although some jurisdictions with portable entitlement schemes have a legislative underpinning.

Other portable entitlements schemes have focused on certain types of leave — with long service leave being the most common example in Australia (see below). The rise of the so-called gig economy has also created an increasing category of workers classified as “independent

contractors” who, in most circumstances, do not attract benefits such as accrued leave. Various solutions have been proposed to provide greater protection and support to these workers in gig economy, including legislation to bring these workers into the definition of employees.

Other options proposed to address some of the issues created by a lack of benefits for workers in the gig economy are to establish a “fund” of portable entitlements, that would grow with hours worked. This would be paid for by the company, through the company itself or additional fees for customers. The idea is that this “fund” would be built up over time and would be in the hands of the worker - allowing them to take leave when necessary. Such proposals have been proposed, including by the CEO of Uber,⁴¹ but so far none have advanced to legislation.

The other mechanism that allows for a form of “portability” of leave is the withdrawal of all accrued leave entitlements as cash. This is

effectively the mechanism that applies in respect of unused annual leave when an employee changes employer. *The Fair Work Act 2009* (Cth) section 90(2) requires that when employment ends and the employee has a period of untaken paid annual leave, the employer must pay the employee a cash amount equivalent to that payable had the employee taken the leave. Certain circumstances also allow employees to cash out their annual leave without changing employers, however these are somewhat restricted and governed by industrial agreements. While not “portable leave” per se, this proposal allows the benefits to not go wasted, and to potentially be stored as emergency savings that could be used for future periods of unpaid leave. McKell research has already shown how most Australians don’t have funds built up for a short-term emergency.

A brief analysis of these various options summarised in the table below.

FIGURE 3.1 COMPARISON OF DIFFERENT PORTABILITY OPTIONS

ADVANTAGE	GUARANTEED ACCUMULATION OF BENEFITS	APPLIES TO INSECURE WORK	GUARANTEED TRANSFER OF BENEFITS WHEN JOB CHANGES WITHIN INDUSTRY	GUARANTEES BENEFITS WHEN JOB CHANGES BETWEEN INDUSTRIES
Recognition of prior service	✓	✗	✓	✗
Redefining independent contractors as employees	✗	✓	✗	✗
Ad hoc portable entitlement funds	✓	✓	✓	✗
Ability to cash out	✗	✗	✓	✓
Systemic portable entitlement funds	✓	✓	✓	✓



International thinking on shared security

The United States is in some ways the epicentre of today's debate over a new social and economic contract for the middle class. Labour market protections are weaker than in Australia or much of Europe. The 'uberisation' of the workforce in the US has taken root particularly quickly, and a significant section of the US workforce now work as independent contractors, freelancers, and in other forms of non-permanent employment. This changing nature of the work force has abrogated many new employers of the responsibilities for their employees — such as health care and paid leave — that was more common in the past. Accordingly, there is an understanding in the United States that there is a pressing need for new initiatives within industries, and in specific jurisdictions, for new models that provide for workers challenged by the changing nature of the labour market.

One such scheme is the *Shared Security System*, advanced by economists Nick Hanauer and David Rolf. Their national plan proposes:

'a new Shared Security System that endows every American worker with, first, a "Shared Security Account" in which to accrue the basic employment benefits necessary for a thriving middle class, and second, a new set of "Shared Security Standards" that complement and reinforce that account.'⁴²

The Shared Security System is modelled to some extent on the already existent Social Security scheme in the United States, which guarantees age pension payments to all United States citizens after retirement age. Like in all Western nations the United States provides a guaranteed basic income for those past retirement age who have worked in the United States during their lifetime. The Shared Security System envisages a pro-rated payment based on hourly wages for all workers in the United States, irrespective of the category of employment. It would be funded through a direct deduction of the individual's pay roll.

Expansion of existing safety nets to insecure workers

Facing a similar suite of challenges as the Australian workforce, US institutions have sought to identify ways in which existing safety nets in the United States could be expanded to cover workers displaced by technological disruption and the expansion of the gig economy. The Roosevelt Institute, a New York based think-tank, have advanced the idea of combining employer, employee and public finances to fund new safety nets that offer all workers access to truly portable entitlements.⁴³ The US industrial relations framework is inherently complex, with each jurisdiction maintaining significant control over the basic conditions in which businesses operate. Accordingly, identifying a single solution to the growing challenges brought about by the gig economy's rise is challenging. However, The Roosevelt Institute argues that, similar to the shared





security system described above, workers should be able to access an expanded social security system to fund basic entitlements. Through additional contributions from employees, employers and governments, the social security pool could be expanded, and used to fund a range of benefits that extend beyond its currently narrow utility.

While this proposal has merit, the inherently complicated patchwork of workplace laws across the United States makes changing such a fundamental entitlements system politically fraught. In contrast, Australia is uniquely placed to implement a widespread scheme to implement portable entitlements to the non-permanent work force. While the Roosevelt Institute's proposal notes that the social security system is the only vehicle through which an extension of entitlements could be administered, Australia maintains a strong superannuation system which is one medium through which any Australian solution could be administered. Similarly, while Australian states do maintain some control over industrial relations frameworks within their own jurisdictions, the Commonwealth Government has considerable authority to determine basic workplace conditions in Australia.

Entitlement portability can help overcome individualised system design features

Portable entitlements that accumulate over time have also been a feature of providing security and coherence to other policy systems where there has been a fragmentation of centralised operating models and a growth of individualised 'actors'.

The Centre for Future Work released a report in 2018 examining the training needs of the disability workforce under the National Disability Insurance Scheme (NDIS). *Portable Training Entitlement for Disability Services*⁴⁴ recommended that a training entitlement for all disability services workers, including casuals, be created to help meet the skill development needs of a rapidly expanding workforce. Under

the proposal, training entitlement credits would accumulate at one hour of training for every 50 hours of NDIS-compensated work, and these credits would accumulate in a 'bank' administered by a newly created training administration authority. The 1-for-50 accumulation rate could allow employees working average hours across the industry to engage in one 3-day training course per year of accredited training.

The portable training entitlement is the third stage of a proposed three step process, including induction and foundation skills, and the authors propose a five-year implementation period. The authors propose this model because:

This flexibility is essential because of the fluid and insecure work practices that typify the sector, all the more so as the NDIS market system is implemented. Workers employed on a casual basis, or who switch employers (for example, because of changes in personal circumstances for the participants they were working for), or workers providing services directly to NDIS participants (rather than being employed by a provider organisation), are all equally able to accumulate training credits. The portable training entitlement system is also fully compatible with the flexible, individualised model of service which underpins the whole NDIS model. (p.52)

While the goal of the Centre for Future Work's proposal - namely the professional development of the workforce - is different, much of the rationale for the suitability of this type of portability mechanism of a highly casualised workforce with multiple employers is consistent across other forms of workplace entitlements.

Australian portable long service leave schemes

Australia, alongside New Zealand, is unique in having long service leave as an entitlement for permanent workers. One of the earliest entitlements in the Australian economy, long-service leave was originally designed to allow British expatriates living in the recently federated Australia extended periods of leave to return home to the UK during the early twentieth

century.⁴⁵ While long service leave entitlements vary from state to state, in general workers who remain employed by a single employer for an extended period of time accrue long service leave entitlements and can take an extended period of leave after remaining with that employer for the required period. While long service leave is a unique Australian innovation that should be preserved, it is being utilised less frequently than in the past, as job mobility increases, and fewer workers spend more than a few years with each employer.

As a response to job fluidity, industries in which workers frequently transition between projects have implemented portable long service leave schemes that allow workers within an industry to 'bank' long service leave entitlements, transferring them between jobs.

The administration of portable long service leave funds varies depending on the scheme and jurisdiction. Some schemes, such as the ACT Long Service Leave Authority, utilize a simple levy on ordinary time earnings of workers within the affected industries. Within this scheme, businesses pay a levy of between 1.6 per cent and 2.5 per cent of a worker's ordinary time earnings that is banked, administered by the ACT Long Service Leave Authority, and distributed to workers who have worked in these industries for the requisite duration that entitles them to long service leave. Similar levies exist in other industries. The Coal Mining Industry (Long Service Leave Funding) Corporation levies a fee equivalent to 2.7 per cent of coal industry workers' ordinary earnings, which is pooled and used to finance long service leave.⁴⁶ Similarly, QLeave, a Queensland based portable long service leave fund focusing on the construction and cleaning industry, is financed through a quarterly fee equivalent to 1 per cent of their workers' ordinary earnings. Such schemes have proven that there can be a willingness for workers in highly mobile careers to engage with employers to extend basic entitlements across an industry. It is through a similar method that the Portable Entitlements Funds proposed in this report could be implemented.

The McKell Institute's 2013 portable long service leave proposal⁴⁷

In 2013, The McKell Institute launched a major report into the portability of long service leave, and how this could be adopted on a national level, rather than at an industry-specific level. Attempting to identify ways in which Australia's unique system of long service leave could be made portable across the workforce, the report put forward three unique models.

- **MODEL A** — the Approved Deposit Funds Model — would see workers allotted long-service leave remuneration that their employer had been accruing, transferred to that employee's nominated Approved Deposit Fund upon the end of their employment. This would accrue over time and help finance long service leave for the individual when they choose to take it.
- **MODEL B** — the Industry-based Defined Benefit Fund model — based upon existing portable long service leave schemes within specific industries but would not enable the ultimate flexibility required for a national scheme.
- **MODEL C** — the Accumulation Model — would see each eligible employee nominate a personal long service leave fund that would be administered by superannuation funds. This fund would be contributed to on an ongoing basis, allowing for a gradual accrual of funds in an accredited account that will finance an individual's long service leave. Such a model would take advantage of Australians' pre-existing confidence in the integrity of superannuation funds, and benefit from its conceptual simplicity. This was the preferred model of McKell's 2013 report.

These proposals specifically targeted the extension of long service leave to a more mobile, contemporary workforce for which long service leave is more a dream than a reality. But the structural principles around Model C in the *2013 report* offer a template through which additional entitlement schemes, such as the Portable Entitlements Funds put forward in this report, can be considered.



INCOLINK

Incolink was established in 1988 as a joint enterprise of unions and employer associations in the construction industry in Victoria, and in 2013 expanded to cover Tasmanian construction workers. It is the largest manager of redundancy entitlements for workers in the construction industry, and acts as corporate trustee for several trust funds.

It has two core roles — (1) management and administration of workers benefits paid into the fund by employers; and (2) provision of insurance, training, counselling and other member services.

The key benefits managed by Incolink are called redundancy benefits. These are in effect severance payments, although the term redundancy payments is commonly used in the industry and is reflected in the formal title of the trust instruments.

Redundancy, or severance from an employer, is common in construction given the nature of the industry — that is the labour needs fluctuate due to often unpredictable factors, including the variability of industry demand, seasonal variability, project-based work and the small size of the majority of construction companies. Construction has the equal highest rate of redundancy of any Australian industry, and the greatest absolute number of redundancies per year.⁴⁸ (Workers are often moving between jobs, and between employers, and often face periods where no work is available to them. Ensuring access to entitlements in these circumstances would be complex for workers and administratively cumbersome for many employers.

Employers pay into the Fund amounts per worker, per week as determined by Enterprise Bargaining Agreements entered into by employers and unions in the industry. This allows the rates to be set within the overall enterprise bargaining context for wages and other conditions. Incolink has more than 4,000 contributing employer members covering more than 40,000 active employee members.

Workers are eligible to access their funds for an initial severance or redundancy payment when their project or contract is finished. They later become eligible for a lump sum payment of the remaining money held in trust for them.

Incolink processes redundancy payments to approximately 15,000 workers each year. Incolink manages over \$700 million of worker entitlements funded by employer contributions, and funds held by Incolink are managed under an investment mandate approved by the Board as trustees for the funds.

A 2015 economic analysis of Incolink by the Nous Group found that the entitlements scheme had a multilayered economic benefit of \$3.2 million per year, based on faster access to funds in cases of insolvency; reducing the cost of administration in insolvency; and administrative savings from the continuity of entitlements.

The report noted “given high churn rates in the construction industry, [Incolink] offers significant benefits in time saved in administration. All workers who change jobs without claiming redundancy payment entitlements save time because Incolink transfers funds for them. Employers save time for each worker who changes job, whether or not they make a claim to Incolink”.⁴⁹

Incolink also administers a portable sick leave scheme, which allows workers to maintain their sick leave entitlement when they change jobs. When a worker has used their full sick leave entitlement from their current employer, they are then eligible to use their accrued sick leave from previous jobs and claim against a dedicated insurance policy. This insurance is funded by the Portable Sick Leave contribution of \$1.54 per worker per week. A key benefit of the portable sick leave scheme is to remove perverse incentives for workers to take sick leave at the end of each contract. If sick leave was not portable, employees are aware of when their current contracts are due to end and may be incentivised to ‘use it or lose it’ at the end of each contract.

PORTABLE LONG SERVICE LEAVE AUTHORITY IN VICTORIA

Long Service Leave is a workplace entitlement created by state legislation – *the Long Service Leave Act 2018 (Vic)*. Long service leave provides employees with additional paid leave following a lengthy period of service with a single employer – currently seven years. Leave accumulates at one week for every 60 weeks of continuous employment. This is about 0.866 weeks a year.

A 2016 Victorian Parliamentary committee report found that workers in certain industries faced an inequity in accessing that entitlement because of the particular nature of those industries. For example, in community services employees are often not able to work with a single employer long enough to qualify for long service leave because of the short-term nature of funding contracts. Similarly, in the contract cleaning and security industries the contract-based nature of their work often precludes qualification with a single employer despite some employees working in the industry for many years.

The Victorian Portable Long Service Benefits Scheme commenced in July 2019 following the passage of legislation in 2018. The scheme covers the contract cleaning, security and community services (including the NDIS and early childhood services) industries in respect of long service leave entitlements accrued based on service in the industry as a whole, rather than years with a single employer.

The Scheme is administered by the Portable Long Service Authority, a statutory authority overseen by an independent governing board appointed by the Minister for Industrial Relations.

The Authority is responsible for registering employers within covered sectors, maintaining registers of covered employees, and undertaking compliance and enforcement functions.

Employers demonstrate compliance with the scheme by submitting quarterly activity returns and payment of the relevant levy to the

Authority. The Authority makes payments of accumulated benefits to workers who qualify. The scheme is intended to be self-funding.

The quarterly contribution made by the employer to the Authority is based on each worker's ordinary pay multiplied by the levy for their industry. The levy rates are set by industry and care currently:

- 1.65% for community services
- 1.80% for contract cleaning
- 1.80% for security.

After seven years of services, a covered employee can apply to access their accumulated long service leave benefit from the Authority.

The Victorian scheme operates alongside the provisions of the Long Service Leave Act 2018, and, if relevant, under a federal industrial instrument. That is, employees can accumulate entitlements under each. However, the Portable Scheme includes double dipping provisions that allow employers to claim a reimbursement from the Authority if they pay a covered worker directly under a different entitlement scheme.

Credits in the scheme expire if an employee stops working in the industry for more than four years.

The Victorian scheme is also developing reciprocal arrangements to enable workers who are covered by similar schemes in other jurisdictions. A scheme similar to Victoria's currently operates in the ACT.

PART FOUR:

PORTABLE ENTITLEMENTS — A DESIGN SOLUTION

KEY POINTS

- 1** Portable entitlements schemes should expand across industries to better support those in insecure work and workers who move between employers.
- 2** Portability could be apply to different types of leave, with detailed modelling required in each case. Existing pay and entitlements would be protected.
- 3** While different arrangements would need to be applied for employees and independent contractors, the system design works in each setting.
- 4** Portability must be easy to understand for workers, and efficient to administer. Existing approved workers entitlements funds and our superannuation system provide a template.

A solution to the problem of increasingly mobile workers working with multiple employment relationships, or no employment relationship at all, is the creation of Portable Entitlement Schemes.

Portable Entitlement Schemes operate to provide the security of access to leave when workers frequently move between employers.

There are many models by which entitlements portability could operate, and Australia is uniquely placed to further explore these options given our successful experience with portable entitlement funds in limited settings.

A Portable Entitlement Scheme would operate by employers paying an amount (or credit) into a central fund an amount equivalent to designated leave accumulated by workers over the period. This would usually be on a pro-rata basis, at regular intervals.

Workers could then draw down on those account balances to take their leave, subject to normal requirements about taking leave. These usually involve agreement between the parties about when and how much leave is to be taken. In the case of termination or severance benefits, this also takes into account when the employment period ends.





A widespread 'Portable Entitlements Fund' (PEF) would support the ability for workers who change employers/industries to maintain continuity of their workplace entitlements. A Portable Entitlements Fund, or Funds, could be established to provide each individual worker with the ability to transfer their designated entitlements with their employment.

The PEF would be tied to the individual, not the employer, and therefore would allow that individual to change employer without resetting their accrued leave balances to zero. A PEF also ensures that worker entitlements are protected from corporate insolvency in industries where that is common, such as construction.

They would only apply to forms of paid leave benefits, which are provided through the workplace. It does not have ready application to unpaid leave.

The system is uniquely implementable in Australia because of the familiarity Australian workers have with the superannuation system, which allows the ongoing accumulation of individualised retirement savings paid into by employers as people move around the labour market. Australia also has a small number of approved workers entitlement funds that provide portable benefits in certain industries and obtain special status under tax law.

Design considerations for employees

There are several key design elements that warrant further detailed consideration and may result in flexibility in how schemes for Portable Entitlement Fund would operate. This section details how they would apply for those in an employment relationship.

BASIC PRINCIPLES

- Employer pays a credit into the Fund at regular intervals based on time worked.
- Leave entitlements regulated by existing industrial awards and agreements. No new entitlements are created for employees.
- Employee / contractors — draw down credits to take leave at a time agreed with employer.

- Fund pays employee directly or reimburses employer if paid via company.
- Fund operated independently by trustees.
- Interest earned on the Fund pays for the administrative costs, so the value of entitlements is protected.
- Funds regulated by corporate legislation and prudential requirements, overseen by ASIC and the ATO.

INDUSTRY APPLICATION

The efficacy of a Portable Entitlements Scheme is highest in industries with high worker mobility and high rates of casualisation or contracting arrangements.

Workforces with large and relatively stable workforces may see less overall benefit from formal Portable Entitlements Schemes and may be exempt from accumulating credits in a scheme — such as the public sector where existing recognition of prior service arrangements already exist.

An industry-based system design would allow roll out targeting industries with high rates of mobility and insecure work. These should be mapped with further detailed analysis of workplace insecurity.

This approach was adopted in the Victorian Government's portable long service leave scheme, which initially applied to security, contract cleaning and community services (which expanded to include NDIS and early childhood services). Successful non-statutory portable entitlement schemes also exist on an industry basis, such as the approved workers entitlements funds that exist in construction in several states. Workers with unused credits in a fund now working in a non-participating industry could still access accumulated credits held in their name.

TYPES OF ENTITLEMENTS

A PEF could apply to various designated entitlements as guaranteed by the *Fair Work Act* and under awards and agreements. The following table explains how some of these arrangements could work. More detailed investigation would be required, and only some may be included a scheme.

FIGURE 4.1 CONSIDERATION OF LEAVE TYPES

<p>LONG SERVICE LEAVE</p>	<p>Long service leave accumulates gradually over the course of employment and is only accessible after an extended period with the same employer (generally 7 or 10 years). This rewards continuity with employers. However, there are other benefits in allowing the portability of these benefits.</p> <p>Given the gradual accumulation of long service leave, and the time periods required prior to access, this type of leave is not generally as widely accessed as other forms of leave. Many miss out.</p> <p>Expansion of current portable long service leave arrangements already in place in several jurisdictions would be a straightforward expansion of portable entitlements, and they could apply across additional industries.</p> <p>Industry-wide portable long service leave schemes could over time be expanded to create an economy-wide long service leave scheme that would allow workers to access long service leave for periods of continuous employment across a range of employers. The benefits of this approach are further outlined in <i>The Case for a National Portable Long Service Leave Scheme in Australia</i> (The McKell Institute, 2013).</p>
<p>SICK LEAVE</p>	<p>Sick leave accumulates from the first day of employment for permanent full time or part time employees (on a pro-rata basis). The National Employment Standards provide a yearly entitlement of equivalent to 10 days for full-time employees, based on an employee's ordinary hours of work. Awards and agreements can provide for more generous arrangements.</p> <p>Generally sick leave is combined with carers leave to allow flexibility for employees in taking time off to help them deal with personal illness, caring responsibilities and family emergencies.</p> <p>Unused sick leave in each year carries forward to the next year, allowing it to accumulate and be used when the employee needs it most. Unused sick leave is not cashed out at the end of employment, nor is it transferrable.</p> <p>Permanent part time employees who work irregular hours accumulate sick leave which can be determined based on an averaging formula.</p> <p>Sick leave accumulates gradually based on time worked with each employer, meaning employees can start a job with no sick leave available to them, and may face insufficient leave if they get sick early in their employment. Given rates of workplace mobility within and across industries, an accumulation model based on each employment relationship can leave employees without access to enough paid sick leave during the early periods of their employment. Access to adequate sick leave was clearly an issue during the COVID-19 pandemic.</p> <p>To better support those workers who change employers, and to address the system design issues with access to adequate sick leave in the early period of employment, unused sick leave entitlements could be made portable and carry around with employees at the <i>end of their employment</i>.</p> <p>It would also allow multiple jobholders to access an accumulated leave pool to avoid circumstances where they do not have sufficient sick leave with one of their employees when they fall sick.</p> <p>This would enable workers who change jobs to be able to access enough sick leave based on their time in total employment.</p> <p>This could be funded through an entitlement credit model (as for portable long service leave), or through an insurance-based approach whereby employers pay an insurance premium and employees have an ongoing entitlement to access a set amount of sick leave above their basic NES 10 days a year based on need. This could pool risk (and lower costs) but would need a comprehensive cost benefit analysis vis a vis an entitlement credit model.</p>

ANNUAL LEAVE

Annual leave accumulates from the first day of employment, even during a probation period and while on certain types of paid leave. Annual leave accumulates steadily during the year and rolls over from year to year.

Provisions often exist to prevent the accumulation of excessive leave. These are important for the health and wellbeing of employees. The ability to take, rather than just accumulate, paid annual leave is an important part of keeping workers and their family healthy.

Currently the *Fair Work Act* states that annual leave must be cashed out at the end of employment. That means that workers who regularly change employers are unable to accumulate long periods of paid annual leave (for example an employee who moves jobs after 6 months would only have access to at most two weeks of consecutive leave).

Amending provisions that require the cashing out of annual leave and instead amending to provide workers the choice to cash out or to allow unused leave to be accumulated in a portable entitlement fund could help workers who frequently move employers more security in being able to take longer periods of annual leave. Instead of compulsory cashing out, workers could elect to have their unused annual leave credited to their PEF account.

This would enable people to change jobs and keep building their leave balances and take recreational leave consistent with their personal or family circumstances (such as timed with school holidays). Excessive leave accumulation rules could be put in place as exist in many awards and agreements.

SEVERANCE /REDUNDANCY

Standard provisions in many awards and agreements require **severance (or redundancy pay)** at the end of employment periods.

These are most common in industries where employment patterns are driven by project-based work, such as construction. This enables workers to accumulate the security of severance benefits and as general compensation for the uncertainty inherent in project-based work which may be driven by external environmental factors (such as economic demand). This differs slightly from cases of 'genuine redundancy' under the Fair Work Act and has been established as an industrial practice through bargaining and the recognition of the particular nature of the industries to which it applies.

This does not mean, however, that this type of entitlement only has a benefit in those industries where it currently exists.

Industries characterised by high levels of fixed term, or project based, employment (even if permanent, full time, but just non-ongoing) would benefit from employers making provision for payment of severance / termination / redundancy payments. These 'end of contract' payments operate in effect to give workers extra support between jobs and give them resources to fall back if there are unforeseen delays with the initiation of the next project. It provides a degree of industry wide flexibility while allowing security at an individual worker level.

Under the National Employment Standards, redundancy pay is payable where employment ends because the person's job doesn't need to be done by anyone and any required consultation has occurred.

Notice of termination is also required under the NES, and the notice period can be served or 'cashed out'.

Given the unexpected nature of genuine redundancy- it is **not proposed that this type of leave is considered as part of any portable entitlements schemes**. Rather application of portable entitlement funds is more suitable to the severance or termination payments for those industries where project-based work is commonplace as a solution to fixed term employment security issues.

RATE OF PAYMENT

Payment from the fund would be made in proportion to the employee's ordinary earnings.

Investment returns on the managed capital from contributions should be expected to outpace CPI and wages growth over time, and prudential management and fund maturity over time should allow funds sufficient reserves to manage entitlement payouts.

CASUALS

Casuals receive a pay loading (generally 25 per cent) as compensation for job insecurity and lack of benefits.

Casual labour is the most insecure form of direct employment. However, Australia's industrial law does recognise rights for casual workers, and building upon these rights with portable entitlements would be a positive contribution to overall job security.

The *Fair Work Act* already recognises that where a casual employee is engaged on a "regular and systematic" basis, they should be given certain additional rights – for example, the right to claim unfair dismissal if terminated unfairly after a period of "regular and systematic" employment of 6 or 12 months.

The Fair Work Commission has recognised regular and systematic service as a casual as prior service for the purposes of the redundancy in cases of conversion from a casual to permanent employee.

Accumulating the right to portable leave for casuals – such as sick leave – could accumulate from commencement with each employer, and it is clear that current law already recognises additional rights for casuals who are regularly engaged by an employer.

A contribution rate into a portable entitlements fund for benefits for casual workers such as sick leave or annual leave would need to be struck follow more detailed modelling.

Rates of pay for casuals have been established following long fought and extensive campaigns and bargaining should not be undermined by the development of portable entitlement options.

The Federal Court of Australia recently held that long term casuals were entitled to annual, sick and compassionate leave despite being paid a 'casual loading'.⁵⁰ This shows that the mere fact of someone being paid a casual loading is not determinative of their employment status and needs to be further considered in the context of entitlement portability.

BENEFITS TO EMPLOYEES

Employees benefit from portable entitlements schemes by retaining access to sufficient accumulated leave balances when they move between employers. This enables them to take leave when they need it (for example when they are sick, or a family member is sick) even if they haven't spent enough time in that employment to accumulate sufficient leave.

As stated above, there are 2.4 million Australia workers who were not working for the same employer 12 months prior, an economy wide portable entitlement scheme, or schemes, would provide access to leave that they would not otherwise have access to.

500,000 workers who have been with their current employer for less than 12 months are still working in the same industry. As such, portable entitlements schemes can be implemented on an industry basis.

Payments made by employers into Approved Workplace Entitlement Funds under current tax law are exempt from Fringe Benefits Tax. These payments are also considered business input costs and are therefore deductible against income tax payable by companies.

Easier access to leave should decrease stress – emotional and financial – for employees. For example, the Nous Group estimates that if it was



not for their portable entitlement scheme (Incolink) workers in the Victorian and Tasmanian construction industry would 'face greater difficulties in accessing their funds in the event of the insolvency of their employer [and] in this situation would be likely to face financial stress and be forced to pay interest rates on debts at credit card levels'.⁵¹

BENEFITS TO EMPLOYERS

Employers are already required to make adequate provision of short-term and long-term leave entitlements, including termination entitlements, in accordance with the *Australian Accounting Standards Board* (AASB 119). Therefore, there should be no additional entitlement costs borne by employers with the introduction of portable entitlement schemes.

In terms of administrative costs, modern payroll systems enable the automatic calculation of benefits in accordance with relevant awards and agreements. Therefore, the administration of portability arrangements should be no more complicated than running standard payroll. Recent advice from the ATO and ABS shows that around 99 percent of large employers and 77 percent of small employers are now using

single touch payroll reporting for the PAYG obligations.⁵²

Independent analysis by the Nous Group of the redundancy provision administered by Incolink as part of the Victorian and Tasmanian construction industry portable entitlement arrangements show an administrative saving to employers from their participation in the scheme of around \$0.6 million, contributing to the net economic benefit of that portable entitlements scheme.⁵³

BENEFITS TO TAXPAYERS

Through the *Fair Entitlements Guarantee*, taxpayers **already** underwrite certain unpaid benefits to employees who lose their job due to the liquidation or bankruptcy of their employer. Employees may be eligible to claim unpaid annual leave and long service leave, unpaid redundancy pay (up to four weeks per full year of service), and up to 13 weeks unpaid wages and up to five weeks payment in lieu of notice. Not all of these would be covered by a Portable Entitlements Scheme, however some would be and therefore costs to the taxpayer underwriting the costs of corporate insolvency through the FEG could be lower.

FIGURE 4.2
THE FAIR ENTITLEMENTS GUARANTEE IS EXPECTED TO COST TAXPAYERS APPROXIMATELY \$1.6 BILLION OVER THE NEXT FOUR YEARS:

(\$'000)	2019-20	2020-21	2021-22	2022-23	2023-24
<i>Fair Entitlements Guarantee Act 2012</i> special appropriation	180,018	480,225	512,316	382,558	223,631

Source: Attorney General's Department, Portfolio Budget Statement 2020-21, Table 2.2.1



A portable entitlement fund (PEF) for independent contractors

Different arrangements would be required for independent contractors given the different underlying nature of the engagement (no employment relationship), and there is currently no provision made for leave for independent contractors by those who engage them.

A PEF would be established and a linked to an individual worker that employers would be mandated to contribute to if engaging that individual as an independent contractor. Funds would need to operate slightly differently for employees and for independent contractors, given that currently provision is made for leave accumulation by employees. For independent contractors, no existing provision is made, so an additional contribution would be required to be made.

PEF MODEL FEATURES FOR INDEPENDENT CONTRACTORS

- A PEF would be a fund linked to an individual that would be activated once that individual is hired as an 'independent contractor' by company.
- A PEF contribution would be applied to payments made to that contractor by an employer.
- The individual contractor would be able to draw down on this accruing fund to access income when they are forced to take sick leave or choose to take other forms of leave such as annual leave.
- The individual contractors PEF is attached to the individual, not the employer, allowing the fund to be truly portable.
- Payment into the PEF would be coordinated by employers and made into the approved PEF.

The amount of contribution required would depend on the prevailing standard leave entitlements within that industry. Modelling suggests that a contribution of 10.75 per cent of the contractor's Ordinary Time Earnings would give an independent contractor access to guaranteed minimum amounts of leave for full time employees (up to 10 days sick or carer's

leave and 20 days annual leave per year).⁵⁴ However the level of PEF contribution should be set to match the prevailing industry leave standard as set by relevant awards and industrial agreements.

Depending on the circumstances of the industry, PEF contribution rate could be specified for workers within certain classifications of employment. This would provide protection to those workers facing most job insecurity. Insecurity here needs to be understood either due to being low paid and vulnerable to exploitation, or because of prevailing industry conditions such as project-based variations in work availability, or higher rates of company insolvency and phoenixing. This threshold should ideally be determined by each industrial agreement.

PEFS WILL HELP ENCOURAGE TALENT IN INDUSTRIES WITH HIGH RATES OF CONTRACTING

A Portable Entitlements Fund would encourage workers who might otherwise be reluctant to participate in industries with high rates of turnover and high rates of contracting to enter that industry. In occupations with high rates of job mobility and short term contracting, the PEF would provide workers greater financial security and certainty, diversifying the talent pool in certain industries. The PEF would also go a long way towards ensuring the Australian labour market does not become one defined by the 'haves and have-nots'. All Australians who work for a wage should be entitled to receive equal and credible access to the same entitlements as anyone else. Extending these basic entitlements to Australia's contractual workforce would grant workers more flexibility over their career paths, greater financial security, and further enshrine a sense of fairness in Australia's labour markets.

PEFS WILL DISCOURAGE SHAM CONTRACTING

The additional financial contribution that employers of low-paid and lower-skilled workers would face if aiming to re-hire their workforce as 'independent contractors' would provide a disincentive for sham contracting. As noted in this report, sham contracting is often engaged by nefarious employers aiming to minimise their legal and financial obligations associated

with employing staff. Such employers are disingenuously seeking to exploit workers.

Sham contracting, in most notable cases, tends to impact lower-paid workers, rather than higher paid contractors. Accordingly, the imposition of a mandated *Portable Entitlements Fund levy* associated with hiring lower-paid contractors would add a disincentive for employers wishing to exploit contractual labour arrangements to minimise their financial and legal responsibilities to their employees.

Any business wishing to transition their staff from casual or permanent status to contractual labour would have to consider the additional costs that the PEF scheme would incorporate. The imposition of this financial disincentive would potentially discourage sham contracting and exploitation of low-income workers. If an employer still determines the best course of action is to transition their staff to independent contractor status, the employees would face less financial insecurity as a result of having access to their PEF.

PEFS WILL NOT DISCOURAGE EMPLOYMENT, BUT COULD PLACE UPWARD PRESSURE ON WAGES

It would be expected that employers reliant on contractual labour would express an opposition to any proposal that would inflate their labour costs overall. However, the proposed scheme is designed in order to only compensate those at lower income levels, minimising the overall cost burden for employers. Additionally, employers under the proposed scheme could avoid paying the mandated PEF contribution by employing staff on a permanent basis, employing staff as casuals, or employing staff above the earnings threshold mandated.

It is possible that the employer would be unlikely to simply contribute the mandatory payment towards a

PEF and will instead force the contracted employees to accept lower paid contracts instead to make up for the added cost. This is particularly concerning in an industry already wrought with low wages and exploitation of low-income workers, especially for workers with English as a second language who are unable to make the arguments necessary or negotiate for higher compensation. This will have to be considered during the implementation of this fund and proper representation would be offered for employees whose earnings will be adversely affected due to employers not absorbing the contribution as labour costs.

However, for workers whose income is close to the earnings threshold, employers might find it advantageous to increase that worker's pay to above the PEF threshold. That individual worker would still be able to access their PEF and would still be able to contribute to that PEF on a voluntary basis through salary sacrificing or any other means. In this circumstance, the benefits of the PEF are twofold: first, upward press on wages is evident, as employers wishing to avoid PEF contributions could do so by marginally increasing remuneration to employees near the PEF threshold. Secondly, the individual worker still maintains access to the scheme, with accrued PEF funds, as well as any voluntary contributions made by that employee while earning above the PEF threshold, would maintain access to a means of funding their leave.

THE FULL PEF RATE COULD BE PHASED IN

The PEF levy for contractors could be phased in gradually. Beginning at a rate of 1.25 per cent of a contractor's wages and increasing by 1.25 per cent annually, the PEF for contractors could be fully implemented within a nine-year period.

FIGURE 4.3 HYPOTHETICAL SCHEDULED PROGRESSIVE INCREASE IN PORTABLE LEAVE FUND CONTRIBUTION

FROM JULY 1	2021	2022	2023	2024	2025	2026	2027	2028	2029
RATE	1.25	2.5	3.75	5.0	6.25	7.5	8.75	10.0	10.75



THERE IS A PRECEDENT FOR A PHASED-IN WORKPLACE ENTITLEMENT

The proposed phase in period for the Portable Entitlement Fund contribution has a precedent in the implementation of Australia's superannuation guarantee. In the *Superannuation Guarantee (Administration) Act 1992* (Cth), mandated superannuation contributions were phased in over the period of a decade.⁵⁵ Initially, the superannuation guarantee was levied at 3 per cent, with a gradual phase in between 1992-2002 to 9 per cent. Subsequent legislation has attempted to raise the superannuation guarantee to 12 per cent by 2025. This report's central proposal could be implemented in a similar fashion, to allow employers who are mandated to contribute to their worker's PEF time to adjust to this new paradigm. The aforementioned portable long service leave schemes have also demonstrated that in certain circumstances, employers have willingly contributed to workers' entitlement funds in addition to paying their workers' wages. While the political challenge of implementing such a scheme is real, these precedents suggest that through engagement with all affected parties and strong political will, such a scheme could be achieved.

HOW WOULD THIS PAYMENT BE ADMINISTERED, AND ACCESSED BY WORKERS?

The proposed scheme would be funded through a mandated levy paid by employers, at the set rate for the industry taking into account prevailing industry standards on leave. Each contract worker would be required to maintain a PEF, in the same way that all Australian employees are currently required to maintain an account with a superannuation fund. Contractors would then be able to draw down on the funds throughout the year when needed, preferably through an online interface that monitors their PEF balance, and the balance of leave they have remaining. Payments could be administered in such a way that workers could access funds almost immediately and automatically through electronic funds transfers from their PEF provider.

Administration options for Portable Entitlement Funds

This report proposes that Portable Entitlements Funds could be established and administered through existing infrastructure that exists in Australia.

There are three basic models to draw on:

- A. Approved Workers Entitlements Funds model
- B. Superannuation type arrangements
- C. Statutory Authority

Given funds are likely to work best on an industry wide basis, the use of industry-based arrangements makes most sense for portable entitlements.

OPTION A: APPROVED WORKERS ENTITLEMENT FUND MODEL

Approved workers entitlements funds exist in selected industries in some Australian states, most commonly in the construction industry. Generally speaking, these are established under corporations' law. The funds are corporate trustees for the entitlements collected, with accompanying fiduciary obligations. Fiduciary obligations require acting in the best interests of the beneficiaries at all times.

This model enables both employer and employee representation on the corporate trustee company, and using an industry-based framework, can further cooperation for mutual benefit.

Workers Entitlement Funds are approved by the Commissioner of Taxation under s 58PB of the *Fringe Benefits Tax Assessment Act 1986* (Cth), which governs how the trustees must account for money in their care in order to be granted exemptions from fringe benefits tax for the contributions paid. A fund can only be an approved worker entitlement fund if it is limited to making payments to the employee for whom contributions were received or related and approved purposes as set by the relevant Act. Under this tax law approvals process

these funds receive contributions made under industrial agreements.

Approved Workers Entitlement Funds (AWEFs) are required to keep an account for each person in respect of whom contributions to the fund are made; and this account must be kept in a manner that enables entitlements in respect of the person to be calculated. Therefore, existing systems have been created by the AWEFs to ensure each worker's entitlements are calculated and tracked.

Existing legislation (s 58PB) strictly regulates how contributions are to be invested to maintain independence of the investments, and prevent loans being made back to contributors. This existing legal framework could be used as the basis for expanded portable entitlement schemes.

AWEFs operate in similar fashion to a managed investment schemes, however currently these funds are exempted from the managed investment and associated provisions in the *Corporations Act, set out in ASIC Corporations (Employee redundancy funds relief) Instrument 2015/1150*. This exemption is current until 1 October 2021. Should that exemption not be renewed, additional oversight by ASIC would require these funds to:

- hold an AFS licence with appropriate authorisations;
- register the employee redundancy fund as a managed investment scheme; and
- comply with the managed investment provisions contained within Chapter 5C of the Act and other associated provisions contained within the Act including product disclosure statement and ongoing disclosure requirements and the anti-hawking provisions.

AWEFs manage the funds under investment held on trust for workers and their operations and administration are self-funded by the investment strategies adopted.

OPTION B:

SUPERANNUATION TYPE ARRANGEMENTS

Australia's superannuation model, while always capable of further improvement, is amongst the world's leading retirement funding systems. Made compulsory in 1992, all Australian workers are required to maintain a superannuation account that receive either compulsory employer contributions or contributions by individuals if they are working as a contractor. While there remain issues with the equity in the superannuation itself — notably, the discrepancy in holdings between men and women — the structure of the system is robust, familiar to all Australians, and is highly regulated to provide certainty and reliability for consumers.

The advantage of using the superannuation system to administer Portable Entitlements Funds is twofold. Firstly, Australians are at least somewhat familiar with superannuation and how it works. All Australian employees are required to hold a superannuation account with a superannuation fund, and most superannuation funds have demonstrated a consistent rate of return for their customers. This established position in the Australian economy and the successful history of the superannuation system would leave funds well placed to manage a new service for consumers. Secondly, Australian superannuation funds already have significant asset pools that would enable them to finance any immediate up-front costs associated with the administration of PEFs. This would better allow the benefits of such a scheme to be realised soon after its implementation, rather than necessitating a long and gradual phase-in period to allow the PEFs to grow.



OPTION C: **STATUTORY AUTHORITY**

Legislation could create new a statutory authority (or authorities) to manage the Portable Entitlement Funds, both in terms of administration and investment. This would mirror arrangements for portable long service leave in Victorian where a specific Authority has been established under Victorian Law, overseen by a board.

Under this model, legal obligations would be detailed in a specific statute and the funds operations would be governed by regulations as enacted by the relevant Minister and reflecting the policy of the government of the day. Appointments to the board would be made by the Minister of the day.

Creating statutory authorities would vest clear powers and obligations on the PEFs, however it is unclear what additional benefit such an arrangement would bring in terms of governance, investment and other obligations not already provided by a trustee model operating under corporate and general law such as an AWEF or superannuation fund. This model may also render statutory authorities more vulnerable to frequent policy change associated with changes in Ministerial direction, rather than creating an industry-led framework that has cooperation between employers and employees at its core. An trustee model could also be more responsive to the needs of the industry in which it operates. However, there is merit in considering a statutory model.



Detailed design work required

This report's proposal ultimately requires the close collaboration between government, workers, and businesses to ensure its feasibility and accessibility for individuals. Detailed modelling would be required to determine appropriate contribution rates, and to work through the range of legislative changes that might be needed to the Fair Work Act to enable leave portability.

However, it is clear that administratively, a worker linked fund that enables portability of entitlements is possible, and indeed already a feature of current AWEFs and superannuation funds. Ideally, the Approved Workers

Entitlement Funds or superannuation funds that offer Portable Entitlements Funds would be able to provide an online interface through which contract workers can monitor and immediately withdraw from their accrued leave pool with minimal fuss. The ultimate design of this mechanism, however, would require collaboration between the government and fund-managing body.

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