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Ai Group's response to CoINVEST's Supplementary Submission of 3 September 2015 to the Inquiry into Portability of Long Service Leave Entitlements

Ai Group Comment	CoINVEST's Response	Ai Group's response to CoINVEST's Response
Ai Group and its members are currently experiencing a number of major problems with the CILSL Scheme. The problems are getting worse, not better, and, include: • Key terms in the CILSL Act such as "construction industry", "construction work" and "ordinary pay" are not defined in the Act. Consequently, these terms are defined in Rules which are made and amended by CoINVEST with the oversight of the CoINVEST Board. The CoINVEST Board comprises representatives of construction industry employers and employees, but does not represent the interests of employers adversely affected by any expansion in coverage, e.g. manufacturers. • The CILSL Scheme presents significant cost risks to manufacturers, labour hire providers and many other employers outside the construction industry due to the unreasonably expansive interpretations which have been adopted by CoINVEST of the coverage Rules, and frequent changes to the Rules to lock-in CoINVEST's interpretations.	When the government of the day created the Act, it took into account the changing nature of the construction industry. The intention of the government in establishing the Act was to give responsibility to the industry to manage the scheme by giving it flexibility to make necessary changes without relying on the long winded process of government to make changes to the Act. In recognising this, the government included a safety clause that requires CoINVEST to seek Governor in Council approval prior to making any changes to coverage. In any event, the employer representatives on the Board of CoINVEST take into account the interests of all employers whose workers fall within the scheme, when exercising their powers. The Rules of the scheme do not extend to cover the manufacturing industry. Coverage does include some workers who may carry out repairs and maintenance to machinery which is used in the manufacturing industry and to the assembly of some electrical installations, such as switchboards, but not to the manufacturing sector itself. Labour hire workers have always been covered by the scheme when they are carrying out work as defined under the Rules. Coverage extends as far back as 1987 when labour hire first became established as a sector in its own right. CoINVEST has always managed the scheme in accordance with its coverage Rules. This is evident by the fact that to date, CoINVEST has not lost any legal matter where coverage has been contested by an employer or an employer association.	The comments in Ai Group's 7 August 2015 submission are correct (see pages 17 to 21). The key terms "construction industry" and "construction work" have been defined by CoINVEST in its Rules in a very expansive manner which extends far beyond any legitimate definition of these terms. For example, as stated in its response, CoINVEST regards electrical assembly work in factories as covered by the scheme. This is manufacturing work – not construction work. This type of work is the subject of the *Baytech v CoINVEST* case which has been heard by the Court of Appeal. The decision is reserved. With regard to CoINVEST's assertion that it has never lost any legal matters where coverage has been contested, Ai Group is aware of only one court case which has focussed on the interpretation of the CoINVEST coverage rules. That is the *Baytech v CoINVEST* case which is still before the courts. The *Jemina v CoINVEST* case concerned a constitutional issue. The *Bestaff v CoINVEST* case concerned the definition of "ordinary pay" and whether the 2.7% levy includes overtime earnings.

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The dispute settling and enforcement processes are costly, inappropriate and ineffective: • When CoINVEST identifies an employer which it believes may be covered by the Scheme but is not paying the levy, at an early stage it routinely uses Notices served under Section 10 of the CILSL Act demanding information on every hour worked by every past and present employee over the past decade or more. The compilation of this information often requires that the relevant employer devote hundreds of hours of time to the task. CoINVEST's standard Section 10 Notice threatens criminal charges against individual managers, as well as charges against the company, if the information is not provided within 30 days. • The dispute resolution process routinely adopted by CoINVEST is to demand payment of the levy including back-pay and penalty interest and, if the demand is not met, to pursue Court action to recover the amounts alleged to be owing. In some cases these demands have extended to hundreds of thousands of dollars or more, and have threatened to financially cripple the company concerned.	CoINVEST acts in accordance with the provisions of the Act. CoINVEST makes every endeavour possible to discuss coverage with the employer involved and encourage employers to register with CoINVEST as required by the Act. In instances where CoINVEST is confident that an employer should be registered, but the employer refuses to register, then a Section 10 Notice will be issued to ensure that the employer provides information so that further assessment of the employer's potential liability can be established. Given that some employers may have not been registered with CoINVEST since the company initially commenced operations, there may be some occasions where the employer does need to spend a significant amount of time to go through their employment records to provide the information required. Legal action is only taken against an employer when they refuse to provide the information. CoINVEST has openly stated that it has a zero tolerance of non-complying employers. Many employers support this approach as it ensures a level playing field for all employers in quoting for work. CoINVEST always offers employers the opportunity to settle matters prior to any court action and will routinely enter into payment arrangements where an employer is having difficulty meeting their obligations.	The comments in Ai Group's 7 August 2015 submission are correct (see pages 22 to 24). If CoINVEST regards an employer as being covered by the scheme, it will advise the employer of its view and seek information on every hour worked by every past and present employee in the business (or the relevant parts of the business) over the past decade or more. If the employer fails to provide the information, CoINVEST typically implements the following process: **Step 1:** Serve a section 10 Notice on the employer demanding the information. **Step 2:** Threaten or take legal action until the information is provided. **Step 3:** Send the company an invoice (often for a six or seven figure sum) for the levy payable, including penalty interest. **Step 4:** If the invoice is not paid within the time specified by CoINVEST, pursue debt recovery proceedings in the relevant court. While CoINVEST may be prepared to enter into payment arrangements with an employer, any such arrangements invariably involve full payment of all amounts that CoINVEST alleges it is owed plus full penalty interest.

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CoINVEST has excessive powers and there is lack of oversight on the exercise of those powers by the Victorian Ombudsman or another appropriate body.	CoINVEST does not have any decision-making powers for which the oversight of the Ombudsman would be warranted. The Act provides for matters in dispute to be resolved through the legal system. Whilst the Act gives CoINVEST information gathering and prosecutorial powers, the exercise of those powers is subject to the oversight of the Courts. If CoINVEST were exceeding its information-gathering or prosecutorial powers or using them improperly, the Courts would have made this finding, which they have not. Additionally, there is a complaints process provided under the Rules which is open to any employer, potential employer or worker/working subcontractor.	The comments in Ai Group's 7 August 2015 submission are correct (see page 25). The Courts are not an appropriate body to provide oversight of CoINVEST. The complaints process in the Rules involves parties making complaints to CoINVEST and then CoINVEST deciding whether the complaint is valid. Ai Group members have used this process on several occasions. On each occasion, CoINVEST has decided that it was right and the employer was wrong.
The current inappropriate funding model for the scheme provides an incentive to CoINVEST to pursue unreasonably expansive interpretations of the coverage rules to achieve more revenue. If CoINVEST can force, say, a manufacturer to pay the 2.7% it will derive revenue from that company for at least seven years before the employees of the company have any entitlement to be paid from the Fund. The funding model for the New South Wales, Queensland and Northern Territory Schemes is much better.	An actuarial assessment of the sufficiency of the fund is carried out annually. The intention is to ensure that liabilities match assets. The rate has varied considerably over the last 2 decades. From December 1993 until June 2003 the contribution rate was set at zero because the scheme was, at that point, fully funded. This meant that the scheme was effectively free to employers for just under 10 years.	The comments in Ai Group's 7 August 2015 submission are correct (see pages 25 to 27). While it is true that there was a contribution holiday for a period many years ago, since the holiday ended 12 years ago, the levy increased from 1.5% (1 July 2003 to 30 June 2006) 2% (1 July 2006 to 30 June 2009) to 2.7% (1 July 2009 to the current date). There is no sign of any reduction in the levy in the foreseeable future.

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The CILSL Scheme results in employers being subject to two sets of conflicting long service leave obligations (e.g. obligations under the LSL Act 1992 and under the CILSL Act).	The Victorian Long Service Leave Act 1992 is expressed not to apply to workers who are covered by the CILSL Act. As a result, the vast majority of employers only have obligations under the Construction Industry Long Service Leave Act. Only in cases where a worker performs work for the same employer which is covered by the CoINVEST scheme and work which is not covered by the CoINVEST scheme would the two different Acts come into play. In recognition of this, the Rules provide for any worker that carries out two thirds or more of their time in a month carrying out construction work, the full amount of time would be taken as being construction work. This reduces the potential impact on the employer applying two different sets of legislation. Whilst it is the case that an employer may simultaneously have obligations to an employee under both a federal award or enterprise bargaining agreement and under the CILSL Act, the Jemena High Court decision confirmed that federal instruments and enterprise bargaining agreements and the Construction Industry Long Service Leave Act 1997 can work harmoniously alongside each other. Where a worker receives a long service leave benefit from his or her employer pursuant to an award or enterprise bargaining agreement entitlement, the employer is able to seek reimbursement from CoINVEST of the amount of long service leave paid by the employer if charges have been paid into the scheme.	If CoINVEST is correct that the *Victorian Long Service Leave Act 1992* does not apply to employers or employees who are covered by the CILSL Act, this reinforces the unfairness of the Victorian construction industry long service leave scheme to Victorian workers. On CoINVEST's argument, most of the workers covered by the Scheme have no entitlement to long service leave at all. In the *Jemina v Coinvest Case,*[1] the Federal Court, the Full Federal Court and the High Court of Australia accepted the arguments of CoINVEST that the CILSL Act is not a law about long service leave and does not provide any entitlement to leave; but rather it is a law which requires the payment of a levy – much like a taxation law. This is unfair to employees who would prefer to take leave rather than having a lump-sum payment, including many employees with caring responsibilities. CoINVEST's assertion that the *"Victorian Long Service Leave Act 1992 is expressed not to apply to workers who are covered by the CILSL Act"* is not correct. There is no reference to the CILSL Act in the 1992 Act. The reference to which CoINVEST is probably referring is section 65(1)(a) which provides an exemption to an employee who *"is entitled to long service leave under any Act other than this Act"*. While it may be that the intention of s.65 is to exclude the CILSL Act, CoINVEST's argument that the CILSL Act is not a law about long service leave and does not provide any entitlements to leave raises obvious problems for the operation of s.65. The interaction between industrial instruments which provide for leave and the CILSL Scheme is highly complex and problematic, as discussed on pages 27 and 28 of Ai Group's 7 August 2015 submission.

[1] *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* [2009] FCA 327 at para [10]; *Jemena Asset Management Pty Ltd v Coinvest Limited* [2009] FCAFC 176 at para [26]; and *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* [2011] HCA 33 at par [33].

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CoINVEST routinely adopts extremely expansive interpretations of the coverage Rules. The problem is further exacerbated because CoINVEST regularly amends the coverage Rules to lock-in the expansive interpretations which it has devised, most recently in April 2015.	CoINVEST applies the legal interpretation of the Rules, and obtains legal advice where necessary. To date CoINVEST has been successful in having its legal interpretations upheld in court. The amendments made to the Rules in April 2015 do not expand the coverage of the scheme. They were about the charging of penalty interest.	See comments above regarding coverage issues and court cases. See also the comments in Ai Group's 7 August 2015 submission (pages 17 to 21). It appears that the completely rewritten Rules to which Ai Group refers on page 20 of its 7 August 2015 submission came into operation in November 2014, rather than April 2015. Despite this change in date, the comments in Ai Group's submission about the inappropriate actions of CoINVEST in implementing the rewritten Rules when the *Baytech v CoINVEST* case was before the Court of Appeal are accurate. These proceedings were underway before November 2014.
The coverage Rules are so vague and uncertain that it is impossible for employers to understand who is and who is not covered by the CILSL Scheme.	CoINVEST believes that the coverage Rules are not vague or uncertain. In 2013, CoINVEST undertook a project to re-write its Rules so that the words used and expressions were in plain English and to remove any ambiguity which may have existed. In re-writing the Rules, the Board was adamant that there was to be no increase or decrease to coverage. The rewritten Rules were adopted by the Board in November 2014. Prior to adoption of the Rules, a draft copy was circulated to the industry for comments. Any comments which were received were fully considered and responded to.	See comments above regarding coverage issues and court cases. See also the comments in Ai Group's 7 August 2015 submission (pages 17 to 21). It is correct that a draft copy of the rewritten Rules was circulated to industry for comment, but seven industry groups (including Ai Group) strongly opposed the Rules given the significant expansion in coverage that occurred. See Annexure D and Annexure E to Ai Group's 7 August 2015 submission.
CoINVEST regularly takes Court action to pursue large back- pay claims against employers.	CoINVEST only takes Court action against non-complying employers. Every endeavour is taken to have a matter resolved prior to initiating legal action. Legal action is only taken as a last course of action once all discussions fail to reach a resolution.	See the comments above regarding dispute settling and enforcement processes. See also pages 22 to 24 of Ai Group's 7 August 2015 submission.

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Despite the obvious merit in the Labor Government's amendment in 2004, the amendment has not had the intended effect and the coverage of the CILSL Scheme has continued to creep since that time at great cost to Victorian manufacturers and other employers outside of the construction industry.	The Rules of the scheme only cover workers who are carrying out construction work in the construction industry as defined in the Rules. The Rules do not purport to cover the manufacturing industry. There are some workers who do work in both the construction industry and the manufacturing industry while employed with the same employer. Employers are only required to pay the charge for the time the worker carries out construction work. To qualify a worker must work for 5 days or more in a month carrying out construction work. Any work of less than 5 days in a month is not included.	The comments in Ai Group's 7 August 2015 submission are correct (see pages 17 to 21). The key terms "construction industry" and "construction work" have been defined by CoINVEST in its Rules in a very expansive manner which extends far beyond any legitimate definition of these terms. For example, as stated in its response, CoINVEST regards electrical assembly work in factories as covered by the scheme. This is manufacturing work – not construction work. This type of work is the subject of the *Baytech v CoINVEST* case which has been heard by the Court of Appeal. The decision is reserved.
In *Jemena Asset Management Pty Ltd v CoINVEST Limited*, the Full Federal Court criticised the coverage Rules of the Scheme: *"The rules of the fund contain some inconsistencies. Sufficient care has not been taken in their drafting over successive amendments, particularly taking into account the terms of the State Act."*	In 2013, CoINVEST undertook a project to re-write its Rules so that the words used were in plain English and to remove any ambiguity which may have existed. The full text of the Full Federal Court comments is as follows: 'The rules of the fund contain some inconsistencies. Sufficient care has not been taken in their drafting over successive amendments, particularly taking into account the terms of the State Act. ***However, we consider that the rules fundamentally provide for the entitlement to be paid monies out of the fund, and not the entitlement for actual long service leave or payment in lieu.'*** As can be seen, the comments were not about coverage as intimated by the AiGroup.	Clearly the Full Federal Court criticised the drafting of the coverage rules in the two sentences highlighted by Ai Group. The Court went on, in the sentence highlighted by CoINVEST, to accept CoINVEST's argument that the CILSL Act does not provide any entitlement to leave. The Act entitles workers to a cash payment. As discussed above and on pages 28 and 29 of Ai Group's 7 August 2015 submission, the Act operates unfairly for those workers who want to take long service leave to rest and recuperate after a period of lengthy service, or have caring responsibilities and wish to access long service leave for this purpose.

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CoINVEST has taken court action against a number of Ai Group members in the manufacturing and labour hire industries for payment of the 2.7% levy, including several years of back-pay. At least one Ai Group Member has been driven into insolvency as a direct result of CoINVEST's litigation.	It is true that CoINVEST has taken some employers, who happen to be Ai Group members, to court for failing to register with CoINVEST and pay charges to the Fund on behalf of its workers. Prior to court action, many hours were spent with the employer (Bestaff) and the Ai Group discussing the matters in dispute. Unfortunately, Bestaff (with the support and involvement of Ai Group) made the choice to dispute the application of the Rules and the calculation of the charges owing against it and did so, well knowing the risk that it would not succeed in court and would be required to pay charges owed and costs. Ultimately, the court found in CoINVEST'S favour and awarded costs accordingly. Bestaff subsequently voluntarily appointed a liquidator. It was evident from the liquidator's list of creditors that Bestaff had significant back taxes owed to the ATO and that CoINVEST was a minor creditor in relation to other debts owed by the company. The business known as 'Bestaff' still exists but is operated by a company that is different to the one that was put into liquidation.	Ai Group had no involvement in the insolvency of Bestaff and has no knowledge of the company's creditors or taxation affairs. However, the comment that CoINVEST was a minor creditor would appear to be incorrect given the hundreds of thousands of dollars that CoINVEST alleged that Bestaff owed to it for past levies and legal costs. The comments in Ai Group's 7 August 2015 submission are correct including the following comments on page 21: *"In 2012 CoINVEST pursued a case in the Country Court of Victoria against labour hire provider Bestaff Australasia Pty Ltd (Bestaff),[2] an Ai Group member, in an attempt to require the company to pay the 2.7% levy on overtime earnings as well as ordinary time earnings. For many years Bestaff had paid the levy on ordinary time earnings for its construction workers but consistent with widespread industry practice Bestaff had not paid the levy on overtime earnings. CoINVEST targeted Bestaff in order to flow on the new expansive interpretation of "ordinary pay" that it had devised across the labour hire industry.* *Despite the fact that the County Court rejected the interpretation of the term "ordinary pay" which CoINVEST pursued in the case, the litigation eventually forced Bestaff into insolvency. In a highly improper move that was opposed by a group of seven industry groups, including Ai Group, rather than accepting the Court's decision CoINVEST changed its Rules to lock-in a new interpretation of "ordinary pay" which included overtime earnings in some circumstances. See pages 6, 7 and 12 of the submission in Annexure D, and pages 5, 6, 11 and 12 of the submission in Annexure E."*

[2] *CoINVEST Limited v Bestaff Australasia Pty Ltd* [2012] VCC 1474

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Also included (Annexure F) is a response from the then Victorian Minister for Industrial Relations, The Hon Robert Clarke MP, confirming that CoINVEST had not sought approval from the Governor in Council to the changes to the Rules	Care was taken when the redraft of the Rules occurred in 2013 and passed in late 2014 to ensure that no amendment caused an expansion of the class of persons to whom the Rules would apply. Consequently, the approval of the Governor in Council was not necessary (and in fact could not have been sought where no expansion in coverage could be identified, as the Governor in Council has no power to approve amendments to the Rules unless that amendment causes an expansion of coverage). Ashurst, solicitors acting for the Victorian Government, verified that no increase in coverage had occurred.	See Annexure D and Annexure E to Ai Group's 7 August 2015 submission which highlight numerous examples where coverage has been expanded in the rewritten Rules. The rewritten Rules are referred to in those Annexures as the "Revised Rules (Draft 8 – 5/7/2013)". For example, the following extract from Annexure E is relevant. This example is directly relevant to the *Baytech v CoINVEST* case, which is the subject of a reserved decision of the Court of Appeal: ***2.1.3 Inclusion of labour hire services within the definition of "Electrical Services"*** *There is no difficulty with labour hire workers being generally covered under the Scheme where the workers are carrying out similar work to workers of a client company which is covered by the Scheme. However, this is not the effect of the re-drafted Rules.* *Under the current Rules, the work included within the definition of "Electrical Services" is subject to the qualification in the Electrical Contracting Award 1992 that the employer be an "Electrical Contractor". Accordingly, under the current Rules, labour hire workers who carry out work for a client which is an "Electrical Contractor" undertaking work which falls within the definition of "Electrical Services" would generally be covered. However, the Revised Rules (Draft 8 – 5/7/2013) substantially extend coverage through the inclusion of all labour hire workers who carry out work for a client which undertakes any of the work falling within the very wide definition of "Electrical Services", regardless of whether the client is an "Electrical Contractor". This would mean that labour hire workers carrying out work for manufacturers of an extremely wide variety of electrical, telecommunications and other equipment would be covered.* *The proposed definition of "Electrical Services" breaches section 7 of the Act and clause 5 of the Trust Deed.*

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		Ai Group has not seen the legal opinion from Ashurst but to the extent that CoINVEST's assertion regarding its content is accurate, the Ashurst opinion is wrong.
The terms "construction work" and "construction industry" need to be defined in the CILSL Act. This is the fairest approach for all employers and employees, including both those in the construction industry and those in other industries such as manufacturing which are adversely affected by any expansion in coverage.	CoINVEST can only change the definition of "construction work" and "construction industry" as they appear in the Rules in a manner that expands coverage if it first obtains approval from the Governor in Council. In addition, to amend the Rules also requires a special resolution to be passed by the Board. This requires 7 of the 8 elected directors and 2 of the 3 independent directors to pass the resolution. Prior to all of this, CoINVEST seeks the views of the industry to determine an industry position. If there is a lack of industry support for the change, CoINVEST will not progress the matter.	See comments above regarding coverage issues. See also the comments in Ai Group's 7 August 2015 submission (pages 17 to 21). The CoINVEST Board comprises representatives of construction industry employers and employees but does not represent the interests of employers adversely affected by any expansion in coverage, e.g. manufacturers. See page 24 of Ai Group's 7 August 2015 submission. A draft copy of completely rewritten coverage Rules was circulated by CoINVEST to industry for comments in September 2013, but seven industry groups (including Ai Group) strongly opposed the Rule changes given the significant expansion in coverage that would occur. See Annexure D and Annexure E to Ai Group's 7 August 2015 submission. Despite this, CoINVEST proceeded with the Rule changes. Therefore, it is not correct that CoINVEST does not proceed with Rule changes if there is a lack of industry support.
A term which needs to be defined in the CILSL Act is "ordinary pay". The 2.7% levy is payable on "ordinary pay" and the CILSL Act (subclause 4(3)) specifies that a levy of no more than 3% of "ordinary pay" can be imposed on employers. By allowing "ordinary pay" to be defined in the Rules, CoINVEST can circumvent the 3% levy limit in subclause 4(3) by implementing an unreasonably expansive definition for the term.	The definition of 'Ordinary Pay' in the Rules, reflects, and has always reflected, a similar approach to that taken in industrial law and in state long service leave schemes to the meaning of that phrase. That is, the phrase is defined to include payments for leave, but excludes additional allowances and loadings. Amendments made by CoINVEST a few years ago to the calculation of ordinary pay for workers who don't have fixed hours did not expand the concept of ordinary pay for those workers but in fact more tightly defined it, making the calculation of ordinary hours easier for employers and for CoINVEST.	CoINVEST's comments are not correct. Ai Group has long argued that the definition of "Ordinary Pay" needs to reflect the approach taken in industrial laws and awards and CoINVEST has long argued in numerous discussions with Ai Group that the CILSL Act is a piece of commercial law, not an industrial law, and industrial interpretations are irrelevant. The notion that CoINVEST tightened the definition of ordinary pay after the *CoINVEST v Bestaff*[3] County Court decision is not correct. While it may have made the calculation of ordinary pay easier, the amended definition was costly for employers. See Annexure D (page 12) and Annexure E (pages 4 and 5) to Ai Group's 7 August 2015 submission.

[3] *CoINVEST Limited v Bestaff Australasia Pty Ltd* [2012] VCC 1474

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Despite the fact that the County Court rejected the interpretation of the term "ordinary pay" which CoINVEST pursued in the case, the litigation eventually forced Bestaff into insolvency.	The Ai Group is mistaken in this assertion. The County Court found in CoINVEST's favour in its interpretation and ordered Bestaff to pay CoINVEST's costs. The order for costs in favour of CoINVEST was upheld by the Court of Appeal. This would not have occurred if CoINVEST had not been held to be correct in its application of the Rules. See our previous comments regarding Bestaff.	On 31 October 2012, Judge Kennedy of the County Court of Victoria handed down her decision in the *Coinvest v Bestaff* case concerning the meaning of the term "Ordinary Pay" under the Rules. Bestaff argued that the 2.7% levy was to be calculated under Rule 11.7 on the basis of ordinary hours as defined in the company's enterprise agreement. CoINVEST argued that the levy was payable on the basis of the average hours worked over the previous 12 months including overtime under Rule 11.8. Bestaff's interpretation was consistent with the interpretation widely applied within industry and consistent with advice given by CoINVEST to Bestaff and other companies in the industry for many years. CoINVEST changed its interpretation and targeted Bestaff to establish its new interpretation which would have required the levy to be paid on overtime earnings in many circumstances. The Court held that due to the fact that ordinary hours of work were not *"fixed"* for Bestaff's employees under the terms of their employment but rather they varied from week to week depending upon the needs and work patterns of Bestaff's clients, the method of calculation in Rule 11.8 applied. However, the Court rejected CoINVEST's proposed method of calculation for Rule 11.8. When the Court applied the correct method of calculation under Rule 11.8, the amount of levy already paid to CoINVEST by Bestaff (for a sample group of employees) exceeded the amount payable by $866.03. When the calculation was applied across all of the relevant Bestaff employees, CoINVEST was required to reimburse Bestaff a substantial sum for overpaid levy. For most labour hire and contracting companies the Court's judgment was a favourable one which required that less levy be paid than what the companies were currently paying. The reason why CoINVEST changed the definition of "Ordinary Pay" in its Rules immediately following the *CoINVEST v Bestaff* decision was because of the burden that the decision imposed on CoINVEST. If

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		CoINVEST was acting in the interests of the labour hire industry it would have not have made the Rule change. The Rule change was targeted at labour hire companies and the three representative organisations for the labour hire industry (Ai Group, RCSA and LHCGV) all opposed the Rule change. See Annexure D (page 12) and Annexure E (pages 4 and 5) to Ai Group's 7 August 2015 submission. The reason why Bestaff was driven into insolvency by the *CoINVEST v Bestaff* decision was because Judge Kennedy ordered Bestaff to pay several hundred thousands of dollars in legal costs as a result of the decision. Even though Judge Kennedy did not accept the interpretations of either of the parties and instead decided upon a different interpretation, Bestaff was ordered to pay the costs. This was despite the fact that the Court determined that Bestaff had overpaid the levy. Judge Kennedy's Order for Costs was upheld by the Court of Appeal because the Court took the view that Judge Kennedy had the discretion to decide which party should pay the costs.
The information gathering powers in Section 10 of the CILSL Act are far too broad and allow CoINVEST to regularly embark upon fishing expeditions which impose a very costly and unreasonable burden on employers.	Section 10 requires CoINVEST to form a belief that an employer is employing workers in the construction industry. The basis of the "belief" is open to testing by a magistrate in court. CoINVEST has never been accused in court or by any potential employer that it is going on a "fishing expedition". The power to obtain information and documents is necessary to determine coverage and to calculate any unpaid long service leave charges. Accordingly, it is fundamental to the operation of the scheme.	The comments in Ai Group's 7 August 2015 submission are correct (see pages 22 to 24). Numerous employers have expressed very strong concerns to Ai Group about CoINVEST's inappropriate use of section 10 notices. The reforms proposed in Ai Group's submission are sensible and in the community's interests. Such reforms would still provide information gathering powers to CoINVEST but it would be required to exercise them in an appropriate manner.

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The following intimidatory wording in CoINVEST's standard Section 10 Notice to employers threatens criminal charges against individual managers, as well as charges against the company, if the information is not provided within 30 days: *"If the company fails to provide all the required information within 30 days of recipt of the notice, CoINVEST may commence criminal proceedings against the company for breach of section 10 of the Act without further notice. Further, if a director or manager knowingly authorises or permits the company's failure to comply, that person may also be prosecuted. Such proceedings may result in a criminal conviction, a fine of other $2,000 (against both the company and the director or manager) and a court order for legal costs which are typically between $850 and $1,300."*	It is appropriate, and not intimidatory, that employers be made aware that failure to comply with a Section 10 notice is in fact a criminal offence for which penalties and costs may be ordered. Employers who are unfamiliar with the scheme would be unaware that failure to comply with a Section 10 notice is a criminal offence, unless it was pointed out to them. The wording was included in the Section 10 Notice following comment by His Honour Magistrate Goldberg when he commented in the Melbourne Magistrates Court that "CoINVEST could not expect to receive an order for its cost in prosecuting the Section 10 Notice unless the Notice included details of the penalty and likely costs for not complying with the Notice". Since this paragraph has been included in the Notice, CoINVEST has been issued with a Costs Order on each occasion where it has applied for one.	The comments in Ai Group's 7 August 2015 submission are correct (see page 22).
The following changes to section 10 of the CISLSL Act are needed: *Subsection 10(1) should be amended to require that the trustee have a "reasonable belief" that an employer is required to pay the levy under the Act before it is entitled to serve a section 10 Notice on the employer.*	This is unnecessary. The burden of proof already exists for CoINVEST to demonstrate that it has a belief that an employer is operating in the industry before issuing a Section 10 Notice. There is no basis to assert that CoINVEST has abused the issuing of a Section 10 Notice. Having to have a "reasonable belief" will only add to the time taken to resolve matters which are usually straight forward and increase costs to employers.	CoINVEST's information gathering powers are wider than the powers of numerous statutory bodies. For example, the Fair Work Ombudsman has information gathering powers but an employer is not required to provide information if the employer has a *"reasonable excuse"* (see s.712(4) of the *Fair Work Act 2009*). CoINVEST's information gathering powers are wider than those of the administrator of the Coal Mining Industry Portable Long Service Leave Scheme. Under s.52A of the *Coal Mining Industry (Long Service Leave) Administration Act 1992*, the Coal Mining Industry (Long Service Leave Funding) Corporation can require persons to produce information *"if the Corporation believes <u>on reasonable grounds</u> that a person has information, or a document containing information, of any of the following kinds…".* Numerous employers have expressed very strong concerns to Ai Group about CoINVEST's inappropriate use of section 10 notices.

Ai Group Comment	CoINVEST's Response	Ai Group's response to CoINVEST's Response
		The reforms proposed in Ai Group's submission are sensible and in the community's interests. Such reforms would still provide information gathering powers to CoINVEST but it would be required to exercise them in an appropriate manner.
If an employer asserts that it is not covered by the Act, the dispute over coverage should be required to be resolved before the employer is required to provide detailed information about other matters such as the names of its current and past employees, the hours worked by the employees etc.	CoINVEST always endeavours to resolve a matter prior to taking legal action. CoINVEST will only take legal action when all endeavours to fully resolve the matter have been extinguished. Coverage can only be resolved once each worker's role and work classification has been provided. Also, were it to be the case that details regarding days and wages are not provided until after a coverage dispute was resolved, this could result in a second dispute regarding the calculation of any unpaid long service leave charges. This would be a slower and more costly method of resolving the dispute for both CoINVEST and employers. It is unfortunate that the Ai Group has taken a philosophical position in determining what it believes to be the "construction industry" rather than openly interpreting the Rules in a legal manner.	The comments in Ai Group's 7 August 2015 submission are correct (see pages 17-24). Ai Group is not taking a philosophical position, but Ai Group will not stand by and allow CoINVEST's unreasonable actions to inflict damage upon manufacturers and many other employers outside of the construction industry. It is not just employers that are damaged by CoINVEST's actions; employees are also harmed because they risk losing their jobs through company decisions to close down, offshore, or move interstate. In Ai Group's view, CoINVEST does not interpret its coverage Rules in "a legal manner". It adopts extremely expansive and invalid interpretations, rather than applying fair and sensible interpretations.
The first dispute resolution process is found in Rules 59 and 60. This process involves making an application to CoINVEST to have a relevant matter in dispute reviewed by CoINVEST. Ai Group has used this process on a number of occasions over the past decade in representing Ai Group member companies faced with CoINVEST claims. On each occasion CoINVEST adopted the view that it was completely right and the relevant employer was completely wrong, notwithstanding Ai Group's view that in each case the company had a strong argument that it was not covered by the Scheme.	To date, the courts have found in CoINVEST's favour in all cases where the Ai Group has been known to have a contrary view. CoINVEST's position has been vindicated on each and every occasion.	CoINVEST has not cited even one example of an application under Rule 59 or 60 which has led to CoINVEST changing its view. Ai Group is aware of only one court case which has focussed on the interpretation of the CoINVEST coverage rules. That is the *Baytech v CoINVEST* case which is still before the courts. The *Jemina v CoINVEST* case concerned a constitutional issue. The *Bestaff v CoINVEST* case concerned the definition of "ordinary pay" and whether the 2.7% levy includes overtime earnings.

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A second dispute resolution process is contained within section 12 of the CILSL Act. This process involves arbitration in accordance with the *Commercial Arbitration Act 2011 (Vic)* with the costs of arbitration generally borne equally between the employer and CoINVEST. This mechanism has been used relatively rarely.	Every employer, worker or working subcontractor is able to seek arbitration in accordance with Section 12 of the Act.	The comments in Ai Group's 7 August 2015 submission are correct (see pages 22-24). In Ai Group's experience, CoINVEST actively discourages employers from using the dispute resolution process in section 12 given the time and cost involved for CoINVEST.
Subsection 12(2) of the CILSL Act 'deems' the parties to have agreed to entered into arbitration. The employer may strongly disagree with arbitration yet be deemed to agree. This is inconsistent with the spirit and objects of the *Commercial Arbitration Act 2011* which are premised on the parties to the dispute agreeing to the arbitration in accordance with the processes under the Act. The deeming provision is particularly unjust for employers covered by the CILSL Act given that appeal rights under the *Commercial Arbitration Act 2011* are very limited on the basis that the parties have agreed to submit their dispute to arbitration and agreed to be bound by the outcome.	Where an employer has sought arbitration, CoINVEST has attended the arbitration. In circumstances where Ai Group concedes that the arbitration mechanism has rarely been used, the argument that an employer may be forced unwillingly into arbitration seems to be a purely theoretical argument, rather than one based on the actual practices of CoINVEST or employers over the history of the operation of the scheme.	The comments in Ai Group's 7 August 2015 submission are correct (see pages 22-24). Ai Group is not arguing that employers have been forced into commercial arbitration against their will, but rather that the dispute resolution processes in the CILSL Act and the Rules are unfair to employers and are not working. CoINVEST widely uses the unfair four step dispute resolution process set out on page 23 of Ai Group's 7 August 2015 submission, rather than the dispute resolution processes in the Rules and the Act.

Ai Group Comment	CoINVEST's Response	Ai Group's response to CoINVEST's Response
The two dispute resolution processes described above are not commonly used by CoINVEST to resolve disputes. Instead, CoINVEST routinely used the following unfair dispute resolution process which it has unilaterally devised and implemented: Step 1: Serve a section 10 Notice on the employer demanding information on every hour worked for the past decade or more by every current and former employee in the business or the relevant parts of the business. Step 2: Threaten or take legal action until the information is provided. Step 3: Send the company an invoice (often for a six or seven figure sum) for the levy payable, including penalty interest. Step 4: If the invoice is not paid within the time specified by CoINVEST, pursue debt recovery proceedings in the relevant Court.	A Section 10 Notice is only served on an employer where CoINVEST has formed a belief that an employer is or was operating in the construction industry and where the employer refuses to provide any information. The information permitted to be sought in the Notice is <u>only</u> that information which is necessary to ascertain any entitlements of the workers and corresponding liabilities of the employer. CoINVEST does not threaten employers. It notifies them, as it ought to do, that failure to comply with a Section 10 notice is an offence and that legal proceedings may result, with the risk of penalties. It also appropriately informs employers that the Act provides that interest accrues on unpaid charges. CoINVEST, as the trustee of the scheme, has a strict fiduciary duty to pursue unpaid long service leave charges. Not to do so would be to permit unfunded liabilities, contrary to its fiduciary duties. Where the sum sought to be recovered from an Employer is a large amount, this is because the employer has failed to pay a large amount of charges over a long period.	The comments in Ai Group's 7 August 2015 submission are correct (see pages 22-24). CoINVEST has not denied that its standard approach with any employer that it regards as covered by the portable long service leave scheme is as follows: • Obtain information on every hour worked for the past decade or more by every current and former employee in the business or the relevant parts of the business (often through serving a Section 10 Notice. • Send the company an invoice (often for a six or seven figure sum) for the levy payable, including penalty interest. • If the invoice is not paid within the time specified by CoINVEST, pursue debt recovery proceedings in the relevant Court. The above is consistent with the four step process described by Ai Group. Many employers have expressed the view to Ai Group that CoINVEST's actions have been threatening.

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The following changes are essential: *"The Victorian Civil and Administration Tribunal (VCAT) should be empowered to deal with disputes arising under the CILSL Act, including coverage disputes."*	There is no current list within VCAT that has the requisite expertise to resolve a dispute regarding coverage. Those disputes usually require the interpretation of the Rules and the Prescribed Awards (so far as the Rules apply for work carried out prior to the passing of the new Rules in late 2014), together with the consideration of detailed evidence. VCAT is an inappropriate forum for those kinds of legal issues.	What is needed is a low cost and timely mechanism for coverage and other disputes to be resolved. Ai Group has proposed VCAT but we are open to other alternatives. Prior to the CILSL Act being implemented, disputes about coverage under the construction industry portable long service leave scheme were typically referred to the Industrial Relations Commission of Victoria. Under the *Coal Mining Industry (Long Service Leave) Administration Act 1992*, the Fair Work Commission has a role in dispute resolution regarding the coal mining industry portable long service leave scheme. The following extract from the Act is relevant: *"Division 4—Remedies relating to long service leave* *Subdivision A—The Fair Work Commission* *39D FWC may deal with disputes relating to long service leave* *(1) Despite subsection 595(1) of the Fair Work Act 2009, the FWC may deal with a dispute (an **LSL dispute**) about matters in relation to long service leave under this Part.* *(2) For the purposes of the FWC dealing with an LSL dispute, the Fair Work Act 2009 applies as if:* *(a) the dispute were a dispute in relation to the National Employment Standards; and* *(b) subsection (1) of this section were a term referred to in section 738 of that Act; and* *(c) a reference in subsection 739(5) of that Act to "this Act" were a reference to "the Coal Mining Industry (Long Service Leave) Administration Act 1992".*
CoINVEST should not have the power to take Court action against an employer to recover a debt that it alleges is owing until the VCAT processes have been exhausted.	This would serve only to increase the costs of both parties and would considerably increase the time it would take for CoINVEST to recover even a minor debt. It would imperil the stability of the Fund if the process of pursuing unpaid long service leave charges was made unreasonably difficult.	The process proposed by Ai Group is designed to reduce costs for all parties and to resolve disputes in a timely manner. CoINVEST's argument that such a process would imperil the stability of the Fund is nonsense.

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A time limit of no more than six years should apply for back-pay claims against employers under the Act. (Note: a similar time limit of six years applies under section 544 of the FW Act).	This provision already applies. The Limitations of Actions Act provides for debts due under an enactment to be recovered for up to six years from when the debt arises. The Rules provide that a charge will become payable from 14 days after the end of each financial quarter in which a worker carried out work covered by the scheme. Consequently, CoINVEST can only pursue debts that accrued less than 6 years ago.	While CoINVEST's acknowledgement of this limitation is welcome, on many occasions it has demanded backpay of the levy for a longer period. For example, prior to CoINVEST filing a claim against Bestaff in the County Court of Victoria, CoINVEST's section 10 Notice demanded information on every hour worked by every current and previous worker employed by Bestaff from 19 December 2001. Assembling such information is obviously a massive task for any labour hire company. Also, CoINVEST was demanding backpay of the additional levy (based on its interpretation that the levy was payable on overtime earnings) from 1 July 2003 when the contribution holiday for the levy ended. The six year limitation needs to be included in the CILSL Act. The limitation needs to apply to claims for backpay and information demands under section 10.
The CILSL Act needs to clarify that CoINVEST has the ability to waive or reduce back-pay of the levy. In order to resolve disputes, often compromises and flexibility are needed.	The charge to employers was accepted by the High Court to be similar to a tax. Regardless of the position of the employer, any tax owing must be paid. To not pay the charge would encourage other employers to deliberately avoid their obligations. Employer organisations have demanded that all employers pay the charge to ensure a level playing field when quoting for jobs. CoINVEST will enter into a payment plan for any employer who is facing financial difficulties.	CoINVEST has confirmed that it will not negotiate on the amount that it alleges is owing, including payment of full penalty interest on all backpay of the levy. The employer organisations to which CoINVEST refers are no doubt the construction industry organisations represented on its Board. These organisations have different interests to organisations which represent manufacturers and other employers outside of the construction industry faced with CoINVEST claims that would potentially put them out of business. Unlike the position adopted by CoINVEST, the Coal Mining Industry (Long Service Leave Funding) Corporation has demonstrated a preparedness to not charge penalty interest in appropriate circumstances.

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The criminal penalties in the Act should be replaced with civil penalties. The existing level of 20 penalty units is appropriate.	The ability of CoINVEST to bring prosecutions and seek criminal penalties for an employer's failure to comply with the Act is vital to the proper functioning of the scheme in that the risk of facing a criminal penalty ensures that employers provide the information and documents in a timely way so that the scheme can be administered without delay and difficulty.	CoINVEST's comments add weight to the concerns that Ai Group has expressed in its submissions regarding threats by CoINVEST that criminal charges will be pursued against managers if the information demanded is not provided within 30 days. See page 22 of Ai Group's 7 August 2015 submission. In numerous statutes, criminal charges have been replaced by a modern system of civil penalties, and this should also occur in the CILSL Act.
Only industrial inspectors employed by the Victorian Government should be empowered to pursue penalties under the Act, not CoINVEST.	Ai Group is unable to demonstrate any situation where CoINVEST has inappropriately pursued any employer who is not carrying out 'construction work' in the 'construction industry'. Nor can it demonstrate any occasion where CoINVEST has pursued a debt which was not legally owing to it.	Baytech is an example of an employer who has been pursued when the relevant employees are not carrying out construction work in the construction industry. Bestaff is an example of a debt pursued by CoINVEST that was not legally owing. The outcome of the County Court Case was that CoINVEST was ordered to refund overpaid levy to Bestaff. (However, as discussed above, Judge Kennedy ordered Bestaff to pay hundreds of thousands of dollars in legal costs which led to the company becoming insolvent).
The Victorian Government should implement a litigation policy for the CILSL Act drawing upon the policies implemented by the Fair Work Ombudsman and Fair Work Building and Construction.	CoINVEST has always adopted a careful and conservative approach to litigation that reflects the 'model litigant' principles adopted by government authorities. Its successful outcomes in court show that it does not pursue proceedings unless it is clear that it is justified in doing so.	Ai Group does not agree that CoINVEST adopts a careful and conservative approach to litigation for the reasons set out in this submission and our 7 August 2015 submission.
There are a number of problems with this structure: There is no requirement for the independent Directors to have any particular degree of independence from the organisations represented on the Board;	The assertion by Ai Group is incorrect. Under CoINVEST's Articles of Association, an Independent Director must have specific experience and expertise 'which is derived substantially from outside the Construction Industry'. This is to ensure that the director is in fact independent. All independent directors appointed to the Board have met this criterion.	Ai Group's comments in its 7 August 2015 submission are correct (see page 24). The reference in the Articles of Association is not a test of independence. A person could derive their experience substantially outside of the construction industry but still be heavily involved with one or more of the organisations on the CoINVEST Board, e.g. through financial, training, superannuation or other interests of these organisations.

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The employer organisations represented on the Board operate in the construction industry and their interests are not aligned with those in other industries like manufacturing which have often been faced with claims by CoINVEST;	CoINVEST only covers workers who are employed to carry out work in the 'construction industry' as defined. CoINVEST does not purport to cover workers in the manufacturing industry. In any event, the employer representatives on the Board represent the interests of all employers who are covered by the scheme, not just those from their own particular industry. Any employer organisation whose members employ more than 3000 workers in the construction industry are eligible to be nominated to seek a position on the Board. Consequently, Ai Group is eligible to seek nomination for a position on the Board. During the 1990's and early 2000's, Ai Group did have one of their employees who was a member of the Board. The member was replaced by another industry representative when the Board member resigned from the Board. Ai Group is still eligible to seek nomination for a position on the Board. They have failed to nominate for the last two positions even though they have been advised that a vacancy on the Board exists.	It is correct that Ai Group has not sought nomination on the CoINVEST Board for several years. Ai Group has major concerns about the direction of, and approach of, CoINVEST. While CoINVEST continues to target manufacturers and other Ai Group members outside of the construction industry, Ai Group will continue to work hard to protect the interests of those employers and the thousands of people they employ.
In Ai Group's experience the unions represented on the Board have a high degree of influence.	CoINVEST refutes this assertion which has been presented without any supporting evidence. As previously stated, there are an equal number of employer and union representatives on the Board with three completely independent directors. Since its inception, all Special Resolutions except one have been unanimously agreed to. On the occasion where the support was not unanimous, the Director did not vote for or against the Special Resolution.	Ai Group's comments in its 7 August 2015 submission are correct (see page 24).
Ai Group proposes that Board Members be appointed by the relevant Minister for a period of three years. The independent Directors should be required to be completely independent with no links to the unions or employer organisations represented on the Board.	See previous comment regarding the already-existing requirement that independent directors have not obtained their experience or expertise substantially from the construction industry.	See above comments and the comments in Ai Group's 7 August 2015 submission (page 24).

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The appointment of Board Members by the Minister works well in the schemes in operation in other States (e.g. Queensland, New South Wales and South Australia).	There is no evidence to support the argument that the current method of appointment of Board Members does not work well. Of the three states mentioned, Queensland has two independent directors neither of whom has the experience of CoINVEST current independent directors, New South Wales does not have a Board and South Australia has one independent Board Member who has no expertise in finance, law or investment.	See above comments and the comments in Ai Group's 7 August 2015 submission (page 24). In NSW, the former Board of the Building and Construction Industry Long Service Payments Corporation was recently replaced by the Construction Industry Long Service Payments Committee. The following extract from section 8 of the *Building and Construction Industry Long Service Payments Act 1986* sets out the composition of the Committee: *"(2) The Committee shall consist of 11 members, of whom:* *(a) one, who shall be the Chairperson of the Committee, shall be the Chief Executive Officer or a person for the time being nominated by the Chief Executive Officer,* *(b) 3 shall be persons appointed by the Minister from a panel of 6 persons nominated by Unions NSW,* *(c) 3 shall be persons appointed by the Minister from a panel of 6 persons nominated jointly by the Master Builders' Association of New South Wales and the Australian Federation of Employers and Industries, and* *(d) 4 shall be persons appointed by the Minister who have a knowledge of, and experience in, the building and construction industry."*
The Victorian Ombudsman needs to be given the jurisdiction to oversee and investigate the actions and decisions of CoINVEST. Employers and employees who are aggrieved by actions or decisions of CoINVEST should have the right to make a compliant to a relevant independent body and the Victorian Ombudsman is the logical body.	The Victorian Ombudsman investigates the decisions and actions of government departments and government agencies. CoINVEST is neither of those things, which is reflected in its limited powers. Its actions in terms of prosecution of failures to comply with the Act or litigation in relation to unpaid charges can be and are tested in court. There is no evidence to suggest that a further layer of review is warranted.	The comments in Ai Group's 7 August 2015 submission are correct (see page 25). The Courts are not an appropriate body to provide oversight of CoINVEST.

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CoINVEST should be made subject to the *Freedom of Information Act 1984* (Vic). CoINVEST is not listed as an agency on the Victorian Government's Freedom of Information website and therefore it is not apparent that CoINVEST is covered by the Act.	CoINVEST is not a government authority or agency. It does not have decision making powers that affect people's rights in the same way that many government authorities or agencies do. Any conclusion that it reaches regarding coverage of an employer is able to be fully tested by a court, should an employer take the view it is not covered and refuses to pay long service leave charges. Documents relating to those issues are discoverable in court. There is no additional need for documents to be disclosable to members of the public via FOI or any other way.	The comments in Ai Group's 7 August 2015 submission are correct (see page 25). CoINVEST is a statutory body. It used its status as such to argue in the *CoINVEST v Bestaff* case that estoppel principles could not be used against it. This was important in the Court proceedings because Bestaff had calculated the levy in accordance with written advice that CoINVEST distributed to employers, including Bestaff, over several years. CoINVEST changed its interpretation and then unfairly pursued backpay against Bestaff when the company had simply followed CoINVEST's advice on the method of calculation. The freedom of information laws should apply to CoINVEST.
The CILSL Act should contain strict requirements and penalties to ensure that CoINVEST, its staff and its Board Members do not pass on information provided by employers and employees under the CILSL Scheme to unions or other external parties, including for unauthorised purposes such as union recruitment, industrial negotiations, etc.	CoINVEST Board members and its staff comply with the provisions of the Privacy principles. Staff are trained and retrained on their obligations under the National Principles. Staff are aware that any release of private information will result in disciplinary action which may include dismissal.	The comments in Ai Group's 7 August 2015 submission are correct (see page 25).

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The current Victorian model results in a much higher cost to the community than the funding model in operation within the NSW, Queensland and Northern Territory construction industry portable long service leave schemes. Compliance is far more costly and difficult under the Victorian model.	There has been no evidence offered that supports this conclusion.	The comments in Ai Group's 7 August 2015 submission are correct (see pages 25 to 27). In Ai Group's experience, the "project levy" funding model in NSW, Queensland and the Northern Territory operates far more efficiently and effectively than the "employer levy" model in the Victorian CILSL Scheme. In 2010, Mr Tom Fisher conducted a review of the Queensland Portable Long Service Leave Scheme for the Queensland Labor Government. On the issue of the funding model, Mr Fisher's report supported the continuation of the "project levy" model": *"Before I go to the specific Terms of Reference there is one fundamental issue that requires comment. The vast majority of stakeholders, including all the current and former Board Members that I spoke to supported the current funding model. That is, a levy on building and construction work rather than a payroll levy such as exists in some other States and Territories. The exception to this situation is the Australian Petroleum Production and Exploration Association Limited (APPEA) who have called for a move to a payroll based levy.* *Interestingly, Chief Executives of other State and Territory schemes have indicated a preference for the Queensland funding model.* *As will be seen throughout this report, the current arrangements work well and the compliance levels are high. I do not accept that a change to the funding arrangements at this time would deliver any substantial benefits and in all likelihood would subject the Scheme to major disruption and administrative costs."*

Ai Group Comment	CoINVEST's Response	Ai Group's response to CoINVEST's Response
The NSW, Queensland and Northern Territory schemes are funded by a project levy which is paid at the time of development consent. Payment at this time ensures that the long service leave contribution can be effectively priced within the project. In NSW, Queensland and the Northern Territory there is no need for the administrator of the portable long service leave scheme to have a team of compliance officers and a multi-million dollar litigation budget.	This comment by Ai Group is inaccurate. CoINVEST does not have a multi-million dollar litigation budget. CoINVEST does not go out of its way to prosecute employers, but rather, seeks to resolve matters amicably rather than initiate costly legal action. In 2014/15, 37 employers were prosecuted for failing to complying with a Section 10 Notice.	The comments in Ai Group's 7 August 2015 submission are correct (see pages 25 and 27).
In Ai Group's experience, the "project levy" funding model in NSW, Queensland and the Northern Territory operates far more efficiently and effectively than the "employer levy" model in the Victorian CILSL Scheme.	In 2007, CoINVEST engaged Access Economics to undertake a study into the impact of a levy scheme in Victoria. It did this as a result of lobbying from sections of the industry. The study found that moving to a project levy would have no economic benefit.	The comments in Ai Group's 7 August 2015 submission are correct (see pages 25 to 27). We note that in CoINVEST's April 2015 submission (page 6), it was stated that Access Economics had determined that the project levy model would be "marginally more efficient". The review was commissioned by CoINVEST and, as such, cannot be considered a totally independent review.
A new funding model for the CILSL Scheme should be implemented based upon the NSW, Queensland and Northern Territory schemes.	See previous comment. Those schemes have different variations of the project levy based funding model and have experienced compliance difficulties because of this model.	The comments in Ai Group's 7 August 2015 submission are correct (see pages 25 to 27). Ai Group has seen no evidence or suggestions (other than CoINVEST's) that the schemes with a project levy model have experienced compliance difficulties. CoINVEST's assertions are inconsistent with the outcomes of the review by Mr Tom Fisher into the Queensland scheme.

Ai Group Comment	CoINVEST's Response	Ai Group's response to CoINVEST's Response
The determination by the High Court of a legal argument about constitutional inconsistency did not address the practical impediments of employers being bound by two conflicting long service leave regimes. This is a problem that needs to be addressed by the Victorian Parliament.	The CoINVEST scheme provides an important benefit for workers who are less likely to be able to access traditional long service leave. In circumstances where workers do access traditional long service leave, the Rules provide that employers are able to be reimbursed for any charges they have paid into the scheme. Ai Group has not provided any evidence to support its position that the co-existence of the CoINVEST scheme with other long service leave regimes causes significant problems for employers.	The problems are obvious from the discussion on pages 27 and 28 of Ai Group's 7 August 2015 submission. Ai Group has had lengthy discussions with many employers who have been adversely affected by being bound by the CILSL Act and long service leave provisions in industrial instruments. Jemina, which was the subject of the High Court case, is just one of many employers.
After paying long service leave to each eligible employee in accordance with the LSL Act 1992, the employer is able to apply to CoINVEST for a reimbursement of the amount paid under Rule 48. Employers who have applied for reimbursement have advised Ai Group that the process is far from straightforward and CoINVEST demonstrates a distinct reluctance to reimburse the funds.	CoINVEST has a legal obligation to reimburse any employer who qualifies to be reimbursed and does so in all circumstances where an employer has provided the appropriate documents to verify the entitlement to be reimbursed.	The comments in Ai Group's 7 August 2015 submission are correct (see pages 27 and 28).
There are many qualifications and exclusions in the Rules relating to an employer's entitlement to reimbursement;	As above.	The comments in Ai Group's 7 August 2015 submission are correct (see pages 27 and 28).
The CILSL Act should be amended to provide that it does not apply to any employer who is bound by other long service leave provisions in a statute or industrial instrument.	This would defeat the purpose of creating a portable long service scheme as other statutes and industrial agreements dealing with long service do not, and cannot, apply so that service is portable.	The interaction between industrial instruments which provide for leave and the CILSL Scheme is highly complex and problematic, as discussed on pages 27 and 28 of Ai Group's 7 August 2015 submission. It is reasonable that employers who are bound by traditional long service leave provisions which recognise service with an employer, such as manufacturers, are not bound by the CILSL Act.

Ai Group Comment	CoINVEST's Response	Ai Group's response to CoINVEST's Response
The CILSL Act provides no entitlement to an employee to take long service leave In practice, this is problematic for those employees who would prefer to take leave rather than having a lump-sum payment.	Agree that this could be problematic for some workers. The matter of taking leave is a matter between an employee and his or her employer. CoINVEST cannot and does not interfere in this process. However, this scheme is designed for workers who regularly change employers. Those workers may consequently be more likely to have periods of time in between jobs, with the result that they may not need to apply for leave to be taken. In any event, to date CoINVEST is not aware of any worker who has been impacted.	CoINVEST concedes that the fact that the CILSL does not provide an entitlement to leave could be problematic for some employees. The scheme operates unfairly to employees who would prefer to take leave rather than having a lump-sum payment, including many employees with caring responsibilities. CoINVEST also concedes that the scheme is designed for workers who regularly change employers. For this reason, the coverage of the scheme needs to be defined more tightly to ensure that it does not apply to manufacturers and other employers outside of the construction industry.
The CILSL Scheme operates as a disincentive to employees from accepting promotions. An employee may have six years of service in the industry, all with one employer, and then be promoted to a position as a Building Trades Supervisor which is not covered by the Scheme.	CoINVEST sought the views of employers during the 2000's as to whether the scheme should be extended to include building supervisors in the scheme. The overwhelming view of the industry was that there should be no change. In the example quoted, an employee that is promoted to Building Trades Supervisor does not lose service accrued with CoINVEST. Therefore, if after 6 years the employee is 'promoted' by his employer, when that employee becomes eligible for long service leave (which would be 1 more year), the employee would be entitled to payment for 6 years from CoINVEST and the employer would pay the balance.	The comments in Ai Group's 7 August 2015 submission are correct (see pages 28 and 29).