Ai GROUP SUBMISSION

Inquiry into Portability of Long Service Leave Entitlements

Parliament of Victoria
Economic, Education, Jobs and Skills Committee

7 August 2015
About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

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1. Introduction

Ai Group makes this submission to the Parliament of Victoria’s Economic, Education, Jobs and Skills Committee (Committee) Inquiry into Portability of Long Service Leave Entitlements (Inquiry).

The Inquiry focusses on employer schemes that provide portability of long service leave entitlements for Victorian workers as they move between jobs in the same or similar industry.

Ai Group strongly opposes any extension of the portability of long service leave entitlements beyond the building and construction industry in Victoria where these entitlements already exist, and urges the Committee to emphatically reject any extension.

Extending portable long service leave entitlements to other industries would damage Victorian industry. The additional costs would make Victorian firms less competitive against interstate and overseas firms. The analysis in this submission highlights that portable long service leave schemes are four times as costly as traditional long service leave schemes and the imposition of a levy across the Victorian workforce of the same magnitude as the existing levy in the Construction Industry Portable Long Service Leave Scheme (CILSL Scheme) would cost Victorian employers over $4 billion per annum.

The adverse impacts of such a massive cost impact would not be limited to employers. The impact would be felt by Victorian workers through lower employment, downsizing and plant closures.

In addition to the Committee recommending that portable long service leave entitlements not be extended to other industry sectors, Ai Group urges the Committee to recommend that numerous major problems inherent in the existing CILSL Scheme, and its administrator CoINVEST, be addressed without delay. The necessary changes include:

- The coverage of the CILSL Scheme should be defined in the Construction Industry Long Service Leave Act 1997 (Vic) (CILSL Act) rather than allowing CoINVEST to determine the coverage in its Rules;
- The key terms “construction work”, “construction industry” and “ordinary pay” should be defined in the CILSL Act rather than allowing CoINVEST to define these terms in its Rules;
- Section 10 of the CILSL Act should be amended to implement more reasonable information gathering powers for CoINVEST;
- More appropriate and effective dispute resolution and enforcement provisions should be implemented, including:
  - The Victorian Civil and Administration Tribunal (VCAT) should be empowered to deal with disputes arising under the CILSL Act, including coverage disputes;
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- 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;

- A time limit of no more than six years should apply for back-pay claims against employers under the Act;

- The CILSL Act needs to clarify that CoINVEST has the ability to waive or reduce back-pay of the levy in appropriate circumstances;

- The criminal penalties in the Act should be replaced with civil penalties;

- Only industrial inspectors employed by the Victorian Government should be empowered to pursue penalties under the Act, not CoINVEST;

- 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;

- The Ombudsman Act 1973 (Vic) should be amended to give the Victorian Ombudsman jurisdiction to oversee and investigate the actions and decisions of CoINVEST;

- CoINVEST should be brought within the scope of the Freedom of Information Act 1984 (Vic);

- The CILSL Act should be amended to implement 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 for unauthorised purposes such as union recruitment, industrial negotiations, etc;

- A new funding model should be implemented for the CILSL Scheme based upon the “project levy model” in the Queensland, New South Wales and Northern Territory schemes; and

- The CILSL Act should be amended to provide that the Act does not apply to any employer who is bound by other long service leave provisions in a statute or industrial instrument.

The CILSL Scheme is creating major cost risks and other problems for employers in a large number of industries. The Scheme needs to be amended without delay.

2. The fundamental purpose of long service leave

The fundamental purpose of long service leave is to reward an employee with a period of rest after a long period of loyal service with one employer.
Consistent with this fundamental purpose, long service leave was conceived in Victoria in the 1860s to give the many immigrants in the workforce of that time the opportunity to periodically make the long journey back to their home countries.  

The fundamental purpose of long service leave was described by Justice Haylen of the NSW Industrial Relations Commission in TWU of New South Wales v AJ Mills & Sons t-as Mills Transport CDM Logistics [2008] NSWIRComm 245 (emphasis added):

“64 Before dealing with the particular matter before the Court, it is convenient to make some general remarks about the nature of long service leave. The Long Service Leave Act 1955 is described as an Act to make provisions entitling workers to long service leave; to amend the Industrial Arbitration Act 1940 and for purposes connected therewith. On the introduction of the Long Service Leave Bill in Victoria in 1953, the responsible Minister described the purpose of long service leave as being "a period of rest for the employee, so that he might recuperate after a long period of continuous service". It has otherwise been described as having the purpose of providing a rest to employees to re-energise and recuperate after many years of loyal service to an employer. These general descriptions were encapsulated in the statement of Hungerford J in Kaal Australia Pty Ltd v Federated Clerks' Union of Australia [2001] NSWIRComm 6; (2001) 103 IR 344 where his Honour said at [26] when rejecting a proposal for payment in lieu of leave on the basis that it was contrary to the fundamental and inherent purpose of the Long Service Leave Act, namely being a period of paid leave for long service.”

Portable long service leave schemes conflict with the fundamental purpose of long service leave:

- Portable long service leave provides no reward for service with the one employer; and
- The focus of the CILSL Scheme and other portable long service leave schemes is on an employee’s entitlement to a lump-sum payment, not on an entitlement to a period of rest. The CILSL Act provides no entitlement to an employee to take long service leave. In the Jemina v Coinvest Case, 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.

Given that portable long service leave schemes conflict with the fundamental purpose of long service leave, and impose much higher costs upon employers and the community, Ai Group strongly opposes such schemes being extended into any other industry beyond the building and construction industry where the CILSL Scheme currently operates.

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3. The history of portable long service leave in Australia and Victoria

Portable long service leave was first introduced in Australia in the coal mining industry, following a major coal miners’ strike in 1949. A coal mining industry portable long service leave scheme remains in operation today under federal legislation.3

Portable long service leave was first introduced under Victorian legislation through the Building Industry Long Service Leave Act 1975 (Vic) (BILSL Act 1975) – predecessor legislation to the CILSL Act.

The BILSL Act 1975 reflected the settlement of an industrial dispute in the building industry, rather than community recognition of the merits of portable long service leave. The building unions had at the time pursued a national campaign for portable long service leave in the building industry which, because of the intermittent nature of building work, would accumulate for service to the industry, as opposed to the employer.4 The “Government decided that if the parties involved in the dispute could reach agreement, the Government would introduce the necessary legislation which would help resolve the dispute”.5

The second reading speech to the BILSL Act 1975 explained that the purpose of the legislation was to provide long service leave entitlements to workers in the construction industry who, because of the nature of the industry, would find it difficult to accumulate the years of service with a single employer to become entitled to LSL under the Labour and Industry Act 1958.6

The BILSL Act 1975 followed the passing of the New South Wales (NSW) Building and Construction Industry Long Service Payments Act 1974 (NSW) a year earlier. The NSW legislation had a similar purpose to the BILSL Act 1975, as expressed in the second reading speech for the NSW Bill:

“The introduction of a scheme to provide for long service benefits for workers in the building and construction industry has been sought for many years since the introduction of the Long Service Leave Act in 1955. Due to the nature of the industry, which requires mobility of its work force for employment by different employers at different places as building activities wax and wane, many workers in the industry have not been able to achieve continuity of employment with one employer which is necessary qualification under the Long Service Leave Act.”7

6 Mr Wilcox, Second Reading speech: Building Industry Long Service Leave Bill, 17 April 1975.
During the Parliamentary debate over the NSW legislation, the building and construction industry was characterised as:

“In the building industry we are on what is known as hourly hire. The employer can give the worker the sack at an hour’s notice and similarly the employee at an hour’s notice can tell the employer that he wants to terminate his employment. By the very nature of the industry men are engaged to build a cottage and when the cottage is finished they are given the sack. They have to "follow the job" until they find other employment. In serving fifteen years in the building industry an employee could literally work for 300 or 400 employers. Under the old long-service leave provisions, workers in the building industry would never have been eligible for long-service leave.”

Similar to the background to the introduction of the Victorian portable long service leave scheme, the NSW scheme arose from an industrial dispute between building industry unions and building industry employers. The disputation was focussed on during the Parliamentary debate over the Building and Construction Industry Long Service Payments Bill 1986 (NSW) (the successor to the Building and Construction Industry Long Service Payments Act 1974 (NSW)) the Hon. Joe Slater Thompson, a Labor party member of the Legislative Council said:

“I was a member of Parliament at the time of the 1974 Act, which was progressive legislation. I would be the first to agree with the late Fred Bowen that that legislation was a breakthrough, but, again, the Hon. M. F. Willis failed to say that for four or five years prior to the introduction of that legislation there had been massive disruption in the building industry in an endeavour to obtain portable long service leave. There is no doubt that although the 1974 legislation was to be applauded, it was not introduced as an act of generosity, but because there had been so much unrest in the building industry as a result of the anomaly whereby building workers did not remain with the one employer for a sufficient time to become eligible for long service leave entitlements."

This history demonstrates that the following factors heavily influenced the introduction of portable long service leave in the building and construction industry:

- At the time of the schemes’ introduction, work in the building and construction industry was of an intermittent nature. Employees were typically employed for a project then their employment was terminated;

- Because of the intermittent nature of the work it was difficult for employees in the building and construction industry to meet the continuity of service requirements with an employer which would give rise to an entitlement to long service leave. This was described as an anomaly;
The building unions caused widespread disruption in the industry in an endeavour to coerce employers to support a portable long service leave scheme for employees in that industry; and

Because of the widespread disruption in the industry, the unions, employers and Government came to a negotiated outcome to resolve the dispute.11

The above factors reflected the building and construction industry in the 1970s. These days, even in the building and construction industry, these factors no longer exist. Nowadays most workers on construction projects are employed by subcontracting firms, not by head contractors, and workers are typically relocated from project to project by their employer without their employment being terminated. This is obvious from recent ABS statistics which reveal that almost 27 per cent of persons employed in the construction industry have remained employed with the same employer for 10 years or more.12 This compares with less than 10 per cent of persons who have been employed in the industry with the same employer for more than one but less than two years.13

Despite the reality that the factors which justified the introduction of portable long service leave in the building and construction industry no longer exist, the CILSL Scheme is entrenched in the construction industry and Ai Group is not arguing for its abolition at this time but rather that:

- Portable long service leave entitlements must not be expanded into other industries;
- The coverage of the CILSL Scheme needs to be clarified through amendments to the CILSL Act to ensure that the Scheme only applies to employers and employees who are genuinely engaged in the building and construction industry; and
- A number of other important changes need to be made to the CILSL Scheme to address significant problems that are occurring.

4. The Productivity Commission’s views on the portability of long service leave

The Productivity Commission is currently undertaking a review of the workplace relations framework in Australia, including long service leave laws. On 5 August 2015 it published a draft report which makes a number of important observations with respect to the portability of long service leave entitlements.

In its draft report, the Productivity Commission acknowledges the propensity of portable long service leave to dilute the purpose of long service leave and the negative impact that portable

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12 ABS 2013, Labour Mobility, Australia, February 2013, cat. no. 6209.0, ABS, Canberra.
13 ABS 2013, Labour Mobility, Australia, February 2013, cat. no. 6209.0, ABS, Canberra.
long service leave would have on employees and employers. Notably in section 5 of this submission, particularly in Tables 1 and 2, Ai Group compares the cost of portable long service with the cost of traditional long service leave and the major negative impact that a portable long service leave scheme would have on employers, employees and the Victorian economy.

Below is a relevant extract from the Productivity Commission’s draft report (emphasis added):¹⁴

“... It appears that, notwithstanding the goal of providing a time for recuperation, employees under portable schemes do not necessarily take the leave. For example, in a submission to a review of a New South Wales scheme for contract cleaners, for instance, the Australian Industry Group argued that:

... the experience in other States shows that it is rare for employees to actually take leave under these schemes; rather the emphasis has been on the employees accumulating money. ... [The schemes] do not, in practice, have the effect of giving workers a period of rest and recuperation. (Ai Group 2013)

Similarly, according to the NSW Industrial Relations Advisory Council, ‘in many cases, LSL is not regarded as an opportunity for career renewal, but rather as an economic asset’ (2013).

... Further, while the argument that LSL portability may improve dynamic efficiency is sound in principle, it is not clear that the effects are significant.

In many cases, it would appear that portability schemes are more a direct result of bargaining power by parties in select industries, than of significant evidence of the benefits of such schemes for productivity.

There are still likely to be some benefits from making LSL portable, although in considering the merits of introducing a portable scheme, those benefits must be compared with the costs entailed:

(i) While LSL may not be an efficient measure for creating employer loyalty, it must have some effect, which would be diluted with full portability.

(ii) Some employers may be reluctant to hire workers with accumulated entitlements as these would be more likely to request protracted leave close to their commencement date.

(iii) A move to mandate portability at the current level of LSL entitlements would entail a significant increase in LSL costs to business. Under current arrangements, the total costs of LSL for an employer depend on the tenure distribution of its workforce. As many employees leave before the qualifying period, the total claims under the current arrangements are much smaller than would apply under a portable scheme (where employees’ tenure would

be based on their working lives, not their specific tenure with an employer). The greater coverage of employees would be reflected in the levy imposed on employers, with one estimate suggesting that portable LSL costs could be up to 2.5 per cent of wage costs (McKell Institute 2012). In the absence of any counteracting wage reductions, this would have some dampening effect on employment and encourage businesses to use more capital instead of labour.”

After considering the evidence and arguments, the Productivity Commission has not recommended the implementation of portable long service leave entitlements.

5. There is no valid case for extending portable long service leave entitlements into other industries

5.1 The cost burden and its impacts on employers and employees

It is vital that portable long service leave not be extended into industries beyond the building and construction industry. The current CILSL Scheme with its levy of 2.7% of “ordinary pay” imposes a cost burden on employers in the building and construction industry which is about four times the cost burden imposed by the general long service leave laws in Victoria.

Table 1 below reveals that a 2.7 per cent levy calculated on full time ordinary earnings over 12 months\(^\text{15}\) would amount to approximately an additional cost for Victorian employers of over $4 billion per annum. Table 1 has been prepared by Ai Group using ABS data from May 2015. Victorian employers in the manufacturing industry would be subject to a levy totalling at least $457.6 million each year, with employers in the health care and social assistance industry subject to a levy of at least $357.5 million per annum.

Table 2 below compares the cost of traditional LSL, calculated in accordance with the entitlements deriving from the Long Service Leave Act 1992 (LSL Act 1992), with the cost of a portable LSL scheme with a 2.7% levy (taken from Table 1). Table 2 reveals that traditional LSL costs less than a quarter (approximately $926.7 million over 12 months) than the $4 billion annual cost of a portable long service leave scheme.\(^\text{16}\) Traditional LSL costs Victorian employers in the manufacturing industry around $115.8 million per year, which is about a quarter of the $457.6 million per year cost of a portable long service leave scheme. For employers in the health care and social assistance industry, the current long service leave cost is $82.7 million per year which is less than a quarter of the $357.5 million per year cost of portable long service leave.

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\(^{15}\) Ai Group’s analysis only captures the ordinary earnings of full-time employees. It excludes the ordinary earnings of part-time and casual employees.

\(^{16}\) Ai Group’s analysis only captures the ordinary earnings of full-time employees. It excludes the ordinary earnings of part-time and casual employees. Ai Group’s analysis captures those employees with 10 years or more tenure with the same employer and 60 per cent of those employees with more than 5 but less than 10 years tenure with the same employer. The percentage of 60 per cent is used to take into account those employees with seven, eight and nine years’ tenure with the same employer but exclude those with five and six years’ tenure, as the VIC LSL Act entitles employees to LSL if their employment is terminated after seven years or more tenure with the same employer.
# Table 1: Estimated annual cost of a 2.7 per cent long service leave levy on full-time ordinary time earnings in Victoria by industry

<table>
<thead>
<tr>
<th>Industry</th>
<th>Employment numbers* ('000) Full-time employees***</th>
<th>Average Weekly Earnings ($)** Full-time weekly ordinary time earnings****</th>
<th>Total estimated weekly payroll ($m) Full-time ordinary time earnings</th>
<th>Total estimated annual LSL costs @ 2.7% ($m) based on full-time ordinary time earnings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agriculture, Forestry and Fishing</td>
<td>56.6</td>
<td>n/a</td>
<td>n/a</td>
<td>n/a</td>
</tr>
<tr>
<td>Mining</td>
<td>11.0</td>
<td>2,494.5</td>
<td>27.3</td>
<td>38.4</td>
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<tr>
<td>Manufacturing</td>
<td>240.6</td>
<td>1,354.3</td>
<td>325.9</td>
<td>457.6</td>
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<tr>
<td>Electricity, Gas, Water and Waste Services</td>
<td>32.7</td>
<td>1,631.2</td>
<td>53.3</td>
<td>74.8</td>
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<tr>
<td>Construction</td>
<td>203.9</td>
<td>1,475.1</td>
<td>300.8</td>
<td>422.3</td>
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<td>Wholesale Trade</td>
<td>90.1</td>
<td>1,414.0</td>
<td>127.4</td>
<td>178.9</td>
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<td>Retail Trade</td>
<td>160.1</td>
<td>1,063.6</td>
<td>170.3</td>
<td>239.1</td>
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<td>Accommodation and Food Services</td>
<td>80.6</td>
<td>1,037.2</td>
<td>83.6</td>
<td>117.4</td>
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<tr>
<td>Transport, Postal and Warehousing</td>
<td>120.4</td>
<td>1,451.8</td>
<td>174.9</td>
<td>245.5</td>
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<tr>
<td>Information Media and Telecommunications</td>
<td>51.9</td>
<td>1,671.4</td>
<td>86.7</td>
<td>121.7</td>
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<td>Financial and Insurance Services</td>
<td>91.1</td>
<td>1,725.7</td>
<td>157.3</td>
<td>220.8</td>
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<td>Rental, Hiring and Real Estate Services</td>
<td>33.2</td>
<td>1,283.0</td>
<td>42.6</td>
<td>59.9</td>
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<td>Professional, Scientific and Technical Services</td>
<td>192.8</td>
<td>1,795.2</td>
<td>346.1</td>
<td>485.9</td>
</tr>
<tr>
<td>Administrative and Support Services</td>
<td>58.8</td>
<td>1,273.1</td>
<td>74.8</td>
<td>105.0</td>
</tr>
<tr>
<td>Public Administration and Safety</td>
<td>118.1</td>
<td>1,539.4</td>
<td>181.9</td>
<td>255.3</td>
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<td>Education and Training</td>
<td>142.2</td>
<td>1,565.9</td>
<td>222.7</td>
<td>312.7</td>
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<td>Health Care and Social Assistance</td>
<td>181.9</td>
<td>1,399.6</td>
<td>254.6</td>
<td>357.5</td>
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<tr>
<td>Arts and Recreation Services</td>
<td>31.7</td>
<td>1,291.6</td>
<td>41.0</td>
<td>57.6</td>
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<tr>
<td>Other Services</td>
<td>72.8</td>
<td>1,096.2</td>
<td>79.8</td>
<td>112.0</td>
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<td><strong>Total (ANZSIC06 DIVISION LEVEL)</strong></td>
<td>1,970.7</td>
<td>1,477.0</td>
<td>2,910.7</td>
<td>4,086.6</td>
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</tbody>
</table>

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*** Full-time employees are permanent, temporary and casual employees who normally work the agreed or award hours for a full-time employee in their occupation and received pay for any part of the reference period. If agreed or award hours do not apply, employees are regarded as full-time if they ordinarily work 35 hours or more per week.17

**** Weekly ordinary time earnings refers to one week’s earnings of employees for the reference period, attributable to award, standard or agreed hours of work. It is calculated before taxation and any other deductions (e.g. superannuation, board and lodging) have been made. Included in ordinary time earnings are award, workplace and enterprise bargaining payments, and other agreed base rates of pay, over-award and over-agreed payments, penalty payments, shift and other allowances, commissions and retainers, bonuses and similar payments related to the reference period, payments under incentive or piecework, payments under profit sharing schemes normally paid each pay period, payment for leave taken during the reference period, all workers’ compensation payments made through the payroll, and salary payments made to directors. Excluded are amounts salary sacrificed, non-cash components of salary packages, overtime payments, reimbursements to employees for travel, entertainment, meals and other expenditure incurred in conducting the business of their employer, and other payments not related to the reference period.18

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17 ABS 2014, Average Weekly Earnings, Australia, November 2014, cat. no. 6302.0, ABS, Canberra.

18 ABS 2014, Average Weekly Earnings, Australia, November 2014, cat. no. 6302.0, ABS, Canberra.
Table 2: Estimated annual cost of traditional long service leave in Victoria by industry

<table>
<thead>
<tr>
<th>Industry</th>
<th>All employees with 5 to 10 years tenure with the same employer*</th>
<th>Estimate of current annual LSL expense ($m) @ 0.866 weeks for 60% of employees with 5 to 10 years tenure with the same employer. 60% represents employees with 7, 8 and 9 years tenure**</th>
<th>All employees with 10 years or more tenure with the same employer*</th>
<th>Estimate of current annual LSL expense ($m) @ 0.866 weeks per year for employees with 10 years’ or more tenure with the same employer***</th>
<th>Total estimated current annual LSL for employees with 7 years or more tenure with the same employer****</th>
<th>Total estimated annual LSL costs @ 2.7% ($m) Based on full-time ordinary time earnings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agriculture, Forestry and Fishing</td>
<td>12.4%</td>
<td>52.7%</td>
<td>n/a</td>
<td>3.1</td>
<td>58.4</td>
<td>38.4</td>
</tr>
<tr>
<td>Mining</td>
<td>19.2%</td>
<td>12.9%</td>
<td>1.9</td>
<td>5.8</td>
<td>29.8</td>
<td>42.3</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>19.6%</td>
<td>29.3%</td>
<td>82.6</td>
<td>15.8</td>
<td>245.5</td>
<td>347.6</td>
</tr>
<tr>
<td>Electricity, Gas, Water and Waste Services</td>
<td>18.4%</td>
<td>26.8%</td>
<td>12.4</td>
<td>51.2</td>
<td>98.7</td>
<td>38.4</td>
</tr>
<tr>
<td>Construction</td>
<td>18.6%</td>
<td>26.7%</td>
<td>69.6</td>
<td>42.3</td>
<td>178.9</td>
<td>422.3</td>
</tr>
<tr>
<td>Wholesale Trade</td>
<td>20.7%</td>
<td>27.3%</td>
<td>30.1</td>
<td>43.8</td>
<td>178.9</td>
<td>422.3</td>
</tr>
<tr>
<td>Retail Trade</td>
<td>18.9%</td>
<td>16.6%</td>
<td>24.5</td>
<td>41.2</td>
<td>239.1</td>
<td>478.2</td>
</tr>
<tr>
<td>Accommodation and Food Services</td>
<td>13.1%</td>
<td>8.0%</td>
<td>5.8</td>
<td>11.5</td>
<td>117.4</td>
<td>245.5</td>
</tr>
<tr>
<td>Transport, Postal and Warehousing</td>
<td>18.4%</td>
<td>27.2%</td>
<td>41.2</td>
<td>57.9</td>
<td>245.5</td>
<td>422.3</td>
</tr>
<tr>
<td>Information Media and Telecommunications</td>
<td>19.6%</td>
<td>26.8%</td>
<td>20.1</td>
<td>28.9</td>
<td>121.7</td>
<td>245.5</td>
</tr>
<tr>
<td>Financial and Insurance Services</td>
<td>22.8%</td>
<td>24.0%</td>
<td>32.6</td>
<td>51.2</td>
<td>220.8</td>
<td>441.6</td>
</tr>
<tr>
<td>Rental, Hiring and Real Estate Services</td>
<td>17.4%</td>
<td>21.4%</td>
<td>7.9</td>
<td>11.8</td>
<td>59.9</td>
<td>220.8</td>
</tr>
<tr>
<td>Professional, Scientific and Technical Services</td>
<td>21.1%</td>
<td>23.6%</td>
<td>70.8</td>
<td>108.8</td>
<td>485.9</td>
<td>1074.8</td>
</tr>
<tr>
<td>Administrative and Support Services</td>
<td>15.9%</td>
<td>16.2%</td>
<td>10.5</td>
<td>16.7</td>
<td>105.0</td>
<td>210.0</td>
</tr>
<tr>
<td>Public Administration and Safety</td>
<td>22.2%</td>
<td>37.5%</td>
<td>59.0</td>
<td>80</td>
<td>255.3</td>
<td>504.6</td>
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<tr>
<td>Education and Training</td>
<td>19.7%</td>
<td>36.5%</td>
<td>70.5</td>
<td>93.3</td>
<td>312.7</td>
<td>625.4</td>
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<tr>
<td>Health Care and Social Assistance</td>
<td>20.5%</td>
<td>25.1%</td>
<td>55.5</td>
<td>82.7</td>
<td>357.5</td>
<td>715.0</td>
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<tr>
<td>Arts and Recreation Services</td>
<td>17.4%</td>
<td>23.2%</td>
<td>8.3</td>
<td>12</td>
<td>57.6</td>
<td>114.0</td>
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<tr>
<td>Other Services</td>
<td>18.7%</td>
<td>25.0%</td>
<td>17.2</td>
<td>24.9</td>
<td>112.0</td>
<td>224.0</td>
</tr>
<tr>
<td><strong>Total (ANZSIC06 DIVISION LEVEL)</strong></td>
<td>19.0%</td>
<td>25.3%</td>
<td>638.8</td>
<td>926.7</td>
<td>4086.6</td>
<td>8173.2</td>
</tr>
</tbody>
</table>

*Data taken from the Australian Bureau of Statistics 2015, Labour Mobility, Australia, February 2013, cat no. 6209.0, Table 05, ABS, Canberra.
** The estimate in this column is based on the annual cost of payroll for those employees with 5 to 10 years tenure by 0.866, being the rate of accrual of LSL under the VIC LSL Act divided by 60 per cent. Ai Group has used a percentage amount of 60 per cent to take into account those employees with seven, eight and nine years’ tenure with the same employer but exclude those employees with five and six years’ tenure. The estimation was done using the data of the ordinary time earnings weekly payroll for full-time employees found in ABS catalogue 6302.0 as at November 2014 and ABS data in ABS catalogue 6209.0 (Table 05) from February 2013 detailing the number of employees with 5 to 10 years tenure with the same employer.

*** Ai Group’s estimate in this column is based on the annual cost of payroll for those employees with 10 or years tenure by 0.866, being the rate of accrual of LSL under the VIC LSL Act. This estimation was done using the data of the ordinary time earnings weekly payroll for full-time employees found in ABS catalogue 6302.0 as at November 2014 and ABS data in ABS catalogue 6209.0 (Table 05) from February 2013 detailing the number of employees with 10 years or more tenure with the same employer.

**** This column represents the sum of column two and column four.

The general long service leave laws in Victoria already impose a significant cost burden on Australian employers and reduce international competitiveness, without the imposition of the major cost burden which would arise from extending portable long service leave entitlements into other industries. Long service leave is unique to Australia and New Zealand. When long service leave was widely introduced in Australia in the 1950s, Australia’s economy operated behind high tariff barriers. Today, Australia has one of the most open economies in the world and international competitive pressures are intense.

The building and construction industry is not trade exposed like a range of other industries including manufacturing, and companies in the industry have more capacity to pass on higher costs to their clients. In contrast, companies in trade exposed industries like manufacturing would undoubtedly be damaged through the much higher costs of portable long service leave entitlements. Manufacturers are currently doing it very tough with pressures from a range of factors and the industry, which is a large share of the Victorian economy, has endured an extended period of weakness since 2008. This is illustrated in the Chart below which records the Australian Industry Group Performance of Manufacturing Index (PMI®) over the past decade.

![Australian PMI Chart](chart.png)

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Comsec’s most recent State of the States Report states that “softness in the [Victorian] manufacturing sector is restraining momentum of the broader economy”. An additional 2.7 per cent levy on the earnings of Victorian manufacturing workers would damage Victoria’s manufacturing industry and make Victorian firms less competitive against interstate and overseas firms. Firms in other industries would be similarly damaged.

Victorian firms need the Victorian Parliament to pass laws to create a more positive operating environment for businesses, not laws which would, in effect, impose a massive new tax on employment through the imposition of a portable long service leave levy.

The adverse impacts on Victorian firms would be felt by Victorian workers through lower employment, downsizing and plant closures.

5.2 Employee tenure

As discussed in section 2 above, the fundamental purpose of long service leave is to reward an employee with a period of rest after a long period of loyal service with one employer.

Long service leave which accrues in the traditional way and is not portable provides a significant benefit to employees and may provide some benefit to employers. There is an incentive for employees to remain with their existing employer and hence the employer may benefit from lower turnover.

In contrast, portable long service leave does not provide a benefit to employers; it simply imposes a substantial cost burden. Portable long service leave schemes provide no incentive to employees to remain with their current employers. An employer may spend several years providing professional support and development to a worker only to lose them to another employer.

Australian Bureau of Statistics data reveals that 25 per cent of persons have remained with the one employer for at least 10 years and 19 per cent have remained with one employer between five to 10 years (see Table 2). In Victoria, each of those employees with 10 years’ service with the one employer and a proportion of those with between five to 10 years’ service (i.e. the proportion with seven years’ or more service) would qualify for long service leave with their employer.

Recent ABS statistics reveal that almost 30 per cent of persons employed in the manufacturing industry have 10 or more years of tenure with a particular employer (see Table 2). This is the highest percentage of any period of employment across manufacturing, for example, persons with more than one but less than two years of service with the one employer represent only 10 per cent of the all persons employed in the manufacturing industry.20 Nearly 20 per cent have remained with one employer between five to 10 years.

20 ABS 2013, Labour Mobility, Australia, February 2013, cat. no. 6209.0, ABS, Canberra.
Likewise, the same ABS statistical report reveals that the largest proportion of employees employed in the health care and social assistance industry have been employed with the same employer for 10 years or more – about 25 per cent\(^{21}\) (see Table 2). Almost a quarter of people employed in this sector are aged between 45 and 54.

As discussed in section 4 of this submission, around 27 per cent of persons employed in the construction industry have remained employed with the same employer for 10 years or more\(^ {22}\) (see Table 2). This compares with less than 10 per cent of persons who have been employed in the industry with the same employer for more than one but less than two years.\(^ {23}\)

Furthermore, workers are less likely to move between jobs as they age and the median age of workers is increasing in Australia.\(^ {24}\) Almost a quarter of persons employed in the health care and social assistance industry are aged 45 to 54.\(^ {25}\) In the manufacturing industry, almost 30 per cent of persons employed in the industry are aged between 45 and 54.\(^ {26}\) The largest proportion of workers in the manufacturing industry and in the health care and social assistance industry are of ‘mature age’.\(^ {27}\) These employees have strong employee tenure with a single employer.

The above statistics demonstrate that there is no justification to extend portable long service leave entitlements into other industries.

5.3 Forms of employment

Arguments by unions that portability of long service leave is warranted because of the alleged casualization of the workforce are false and misleading.

The proportion of persons who are working on a casual basis has been reasonably stable since 1998 at 19 per cent to 20 per cent of all workers.\(^ {28}\) Indeed, it may have fallen a touch, with an average of 19.3 per cent of workers in casual employment from 2008-2013, versus an average of 20.3 per cent for the period from 1998 to 2007. The proportion of employees with no leave entitlements peaked at 20.9 per cent in 2007, roughly coinciding with the commencement of GFC-related disruptions in the Australian economy. Casual work then fell to 19.0 per cent in 2012.\(^ {29}\)

\(^{21}\) ABS 2013, *Labour Mobility, Australia*, February 2013, cat. no. 6209.0, ABS, Canberra.

\(^{22}\) ABS 2013, *Labour Mobility, Australia*, February 2013, cat. no. 6209.0, ABS, Canberra.

\(^{23}\) ABS 2013, *Labour Mobility, Australia*, February 2013, cat. no. 6209.0, ABS, Canberra.


\(^{27}\) The ABS considers persons aged older than 45 to be a ‘mature age worker’. See for example ABS 2004, *Australian Social Trends*, 2004, cat. no. 4102.0, ABS, Canberra.

\(^{28}\) ABS 2013, *Forms of Employment, Australia*, November 2013, cat. no. 6359.0, ABS, Canberra.

\(^{29}\) ABS 2013, *Forms of Employment, Australia*, November 2013, cat. no. 6359.0, ABS, Canberra.
Nonetheless, ‘long-term casuals’ are entitled to long service leave in the ordinary way. The Long Service Leave (Amendment) Act 2005 introduced section 62A into the LSL Act 1992 to make it clear that casual employees and seasonal employees are entitled to LSL. Specifically subsection 62A(1) provides that the period of service of a casual employee is to be regarded as continuous if the employee has not had an absence from employment with the employer of more than 3 months. Section 62A was inserted into the LSL Act 1992 to address concerns that casual employees who were regularly employed by the same employer missed out on long service leave entitlements.

Those workers employed on a casual basis are entitled to a wage premium of generally 25 per cent to compensate for the inability of some casuals to not accrue leave entitlements like long service. See for example the Metal Industry Casual Employment Decision whereby a Full Bench of the Australian Industrial Relations Commission took into account long service leave when determining the level of the loading payable to casual employees.  

The idea of extending portable long service leave entitlements into other industries has no merit and we urge the Committee to emphatically reject it.

6. The CILSL Scheme

6.1 Overview

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.

- 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

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30 Application by the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union to vary the Metal, Engineering and Associated Industries Award 1998 (29 December 2000, Print T4991).
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 has excessive powers and there is lack of oversight on the exercise of those powers by the Victorian Ombudsman or another appropriate body.

- 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.

- 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).

Ai Group has regular and substantial involvement with the construction industry portable long service leave schemes in New South Wales, Queensland and South Australian and we have not encountered similar problems to those that are constantly encountered in Victoria.

6.2 Coverage

The CILSL Scheme covers employees and their employers performing “construction work” in the “construction industry”. Neither of these key terms are defined in the CILSL Act.

The CILSL Act establishes the Construction Industry Long Service Leave Fund (CILSL Fund) under a trust deed. The trust deed appoints CoINVEST as the trustee of the CILSL Fund and empowers CoINVEST to make and vary Rules so as to administer the CILSL Fund. The effect of this is that the coverage of the CILSL Scheme is defined in CoINVEST’s Rules.

The Rules define “construction work” and “construction industry” for the purpose of determining the coverage of the Scheme and thereby the employers which are required to pay the levy. The Rules define these two terms in a manner which extends far beyond any legitimate definitions. This problem is exacerbated because 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.
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. The vague coverage Rules create huge risks and potential liabilities for employers. CoINVEST regularly takes Court action to pursue large back-pay claims against employers.

In 2004, then Industrial Relations Minister, the Hon Rob Hulls MP, introduced the *Construction Industry Long Service Leave (Amendment) Bill 2004* (90/2004) to amend the CILSL Act to expressly state that the Act only applies to construction work "in the construction industry". The second reading speech and explanatory memorandum made clear that the amendment was aimed at limiting the potential for work groups outside of the construction industry to become covered.

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.

In *Jemena Asset Management Pty Ltd v CoINVEST Limited*, the Full Federal Court criticised the coverage Rules of the Scheme:31

> “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.”

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.

Areas which have been the subject of recent CoINVEST claims against Ai Group member companies include:

- Mechanical service work carried out by manufacturers;
- Electrical service work carried out by manufacturers;
- Electrical assembly work in factories; and
- The provision of labour hire workers to manufacturers

For several years Ai Group has pressed the Victorian Government to amend the coverage Rules through amendments to the CILSL Act. The previous Coalition Government convened a series of roundtable discussions of employer groups to discuss the issues, which was a constructive exercise, but time ran out for legislative changes before the State Election. Ai Group is continuing to press the issues with the current Labor Government.

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31 *Jemena Asset Management Pty Ltd v CoINVEST Limited* [2009] FCAFC 176 at [21].
The outcome of the *Baytech Trades v Coinvest* case will be very important in clarifying the coverage of the CILSL Scheme. This case was heard on 3 June 2015 by three judges of the Court of Appeal of the Supreme Court of Victoria. Ai Group Workplace Lawyers, Mr Stuart Wood QC and Mr Ben Jellis of Counsel represented Baytech in this important case about the breadth of coverage of the CILSL Scheme.

The Court of Appeal case pertained to an appeal against a 17 September 2014 decision of Judge Kennedy of the County Court of Victoria. Judge Kennedy upheld CoINVEST’s claim that electrical manufacturing workers on-hired by labour hire firm Baytech Trades to assemble products in the factory of NHP Electrical Engineering Products were covered by the Scheme. The decision has created substantial cost risks for manufacturers and labour hire firms in Victoria.

In the Supreme Court proceedings, it was argued on behalf of Baytech that the coverage Rules of the CILSL Scheme need to be interpreted in the context of the coverage of the industrial awards which were referred to in the Rules, including the history and understandings reached over the years about the delineation in coverage between the Metal Industry Award and the Electrical Contracting Industry Award. A central argument was that electrical work in factories needs to be considered in the context of the “Metal Trades Work” section of the coverage Rules and, under that section, work in factories is expressly excluded. It was argued that it could not have been the intention to exclude electrical work in factories under one section of the Rules, only to bring such work back in through a broad interpretation of the “Electrical Trades Work” section of the Rules which applies to electrical contractors working on-site.

If the Supreme Court proceedings there were detailed arguments about the kinds of work carried out by manufacturers, labour hire suppliers and electrical contractors, and the implications for coverage under the CILSL Scheme.

The Court of Appeal has reserved its decision. A decision is expected before the end of 2015.

A submission from NHP Electrical Engineering Products is included as Annexure A and a submission from Baytech Trades is included as Annexure B. A further relevant submission from Genpower Australia is included as Annexure C.

The version of the Rules which was the focus of the *Baytech Trades v CoINVEST* case was amended by CoINVEST on 17 April 2015, to implement a completely rewritten set of coverage Rules. CoINVEST did this despite the proceedings before the Court of Appeal and despite strong concerns being expressed by seven industry groups (including Ai Group) that the rewritten Rules substantially extend the coverage of the CILSL Scheme and breach section 7 of the CILSL Act. Section 7 requires that CoINVEST obtain the approval of the Governor in Council for any extension in coverage of the Scheme. Relevant submissions of the seven industry groups of August 2013 and October 2013 are included as Annexure D and Annexure E respectively.

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.
6.3 Need for key terms to be defined in the CILSL Act

For the reasons identified in section 6.2 above, 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.

It is extremely unsatisfactory and inappropriate to allow these central coverage terms to be defined in CoINVEST’s Rules given the huge financial consequences for employers which flow from the definitions of such terms.

Even though section 7 of the CILSL Act requires that CoINVEST obtain the prior approval of the Governor in Council for any Rule changes which enlarge the coverage of the Scheme, CoINVEST typically asserts that particular coverage changes have not expanded coverage. It bases these assertions on its own unreasonably expansive interpretations of the coverage before it was changed.

In addition to the terms “construction work” and “construction industry”, a further 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.

In 2012 CoINVEST pursued a case in the Country Court of Victoria against labour hire provider Bestaff Australasia Pty Ltd (Bestaff), 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 across the labour hire industry the new expansive interpretation of “ordinary pay” that it had devised.

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.

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32 CoINVEST Limited v Bestaff Australasia Pty Ltd [2012] VCC 1474
6.4 Information gathering powers

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.

When CoINVEST identifies an employer which it believes may be covered by the CILSL Scheme but is not paying the 2.7% levy, at an early stage it routinely uses Notices served under Section 10 of the CILSL Act to demand 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.

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 receipt 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 over $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.

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.

- 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.

6.5 Dispute settling and enforcement processes

There are a number of major problems with the current dispute settling and enforcement arrangements for the CILSL Scheme.

The Act and the Rules include two dispute resolution processes, neither of which operate efficiently or effectively and neither of which are commonly used.

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.

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.

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.

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.

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.

CoINVEST’s standard dispute resolution model, as described above, reflects an organisation in the litigation business rather than the long service leave business.

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.
- 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.

- 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).

- 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 criminal penalties in the Act should be replaced with civil penalties. The existing level of 20 penalty units is appropriate.

- Only industrial inspectors employed by the Victorian Government should be empowered to pursue penalties under the Act, not CoINVEST.

- 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.

6.6 The CoINVEST Board of Directors

The CoINVEST Board of Directors comprises four union officials, four employer representatives and three independents. The three independents are appointed by the other eight directors.

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 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; and

- In Ai Group’s experience the unions represented on the Board have a high degree of influence.

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.

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).

As mentioned in section 6.1 above, Ai Group has regular and substantial involvement with the construction industry portable long service leave schemes in New South Wales, Queensland and South Australia and we have not encountered the problems that we constantly experience with the CILSL Scheme and CoINVEST.
6.7 Lack of oversight

CoINVEST is not subject to oversight by an independent third party.

The Ombudsman Act 1973 (Vic) *(Ombudsman Act)* exempts “a person in the capacity of trustee under the Trustee Act 1958 (but not including State Trustees)”\(^{33}\) from oversight and investigation by the Victorian Ombudsman. The CILSL Act names CoINVEST as the trustee of the CILSL Trust which is governed by the Trustee Act 1958. CoINVEST is therefore exempt from the Ombudsman Act.

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.

Also, 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\(^ {34}\) and therefore it is not apparent that CoINVEST is covered by the Act.

6.8 Protection against misuse of information and breaches of privacy

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.

6.9 Funding model

The CILSL Scheme is funded by the imposition of a 2.7% levy on individual employers. This funding model imposes significant costs and risks upon employers. In effect it operates as a tax on employment.

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.

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.

\(^{33}\) *Ombudsman Act 1973* (Vic), schedule 2, item 14.

In New South Wales, the “project levy” model replaced an “employer levy” model in 1986 with the passing of the Building and Construction Industry Long Service Payments Act 1986 (NSW). During the Parliamentary debate over the Bill it was noted that the “employer levy” model “imposed a considerable requirement on the employer with regard to the method of collection” and was “not working because the method of collection is cumbersome and onerous”.

The second reading speech for the Bill justified the change to a “project levy” model on the following basis:

“... Under the existing scheme employers are liable to pay long service charges. This involves the employer supplying monthly returns setting out the hours worked and the wages earned by each worker and attaching a payment of, currently, 2.25 per cent of that amount to the corporation by way of contribution to the fund.

The 1974 Act therefore places an onerous task on employers in the building and construction industry in respect of the provisions of information relation to workers’ entitlements and particularly in respect to subcontract entitlements.

... Two principle changes are affected by this bill. First, the scheme will be financed by a levy on the erection of buildings and other structures, including civil engineering works such as roads and bridges. This levy will be paid by the person who makes the application for local council approval of the erection of the building or structure. Where no such approval is required the person for whom the building or structure is being erected will pay the levy.

The bill places a ceiling on the levy of 0.6 per cent of the cost of erecting the building or structure but the rate to be initially prescribed by regulation will be 0.5 per cent, based on actuarial advice.”

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” (emphasis added):

“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.”

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.

A new funding model for the CILSL Scheme should be implemented based upon the NSW, Queensland and Northern Territory schemes.

6.10 The CILSL Scheme imposes conflicting obligations on employers

The CILSL Act does not exclude the application of any other long service leave law or industrial instrument. This means that an employer is often bound by two different long service leave regimes with conflicting provisions, for example the CILSL Act and the LSL Act 1992.

This was affirmed by the High Court in Jemena Asset Management (3) Pty Ltd v CoINVEST Limited. The High Court held that because the CILSL Act was directed at the payment of a levy and did not provide any leave entitlements, it was not inconsistent with an industrial instrument that obliged an employer to provide long service leave.

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.

An employer bound by the LSL Act 1992 is required to implement long service leave arrangements which involve:

- Accruing long service leave for each employee based on 13 weeks for 15 years of service (i.e. an accrual rate of 0.8667 weeks per year of service) in accordance with the LSL Act 1992;
- Providing for long service leave in the company’s accounts in accordance with accounting standards and legislative requirements;
- Granting and paying long service leave to eligible employees who apply for leave under the LSL Act 1992;
- Paying long service leave on termination to eligible employees who apply for leave under the LSL Act 1992;

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38 Jemena Asset Management (3) Pty Ltd v Coinvest Limited [2011] HCA 33.
• Submitting returns and paying a 2.7% levy to CoINVEST for the CILSL Scheme which is based on an entitlement of 13 weeks for 10 years of service (i.e. an accrual rate of 1.333 weeks per year of service).

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. Also:

• There are many qualifications and exclusions in the Rules relating to an employer’s entitlement to reimbursement;

• Rule 48 refers to employees who qualify for long service leave under the LSL Act 1992, but does not refer to the numerous other relevant long service leave laws and instruments to which thousands of Victorian employers are bound, including the long service leave provisions in the NES and in enterprise agreements; and

• CoINVEST has some discretion regarding the amount of reimbursement.

Despite the ability for employers to seek reimbursement from CoINVEST for long service leave paid under the LSL Act 1992, the administrative process is burdensome and even if CoINVEST ultimately decides to reimburse the funds, there is nonetheless a period of time for which the employer has outlaid funds for both obligations. This can have serious consequences for cash-flow and liquidity for a business.

Long service leave obligations imposed on employers under the CILSL Scheme and the LSL Act 1992 are not compatible. Employers and employees are often confused about their long service leave obligations and entitlements when covered by the CILSL Scheme.

Ai Group anticipates that some parties with vested interests will argue that these complications do not frequently arise because employers covered by the CILSL Scheme typically ignore the LSL Act 1992. Any party that pursues this argument is obviously failing to recognise that compliance with the LSL Act 1992 is not optional and substantial penalties apply for non-compliance.

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.

6.11 The CILSL Scheme operates unfairly for employees in some circumstances

The CILSL Scheme in some cases operates unfairly for employees.

The focus of the CILSL Scheme is on an employee’s entitlement to a lump-sum payment, not on an entitlement to a period of rest. The CILSL Act provides no entitlement to an employee to take long
service leave. In the *Jemina v Coinvest Case*, 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.

In practice, this is problematic for those employees who would prefer to take leave rather than having a lump-sum payment. The interaction between laws and industrial instruments which provide for leave and the CILSL Scheme is highly complex and problematic, as discussed in section 6.10 above. The effect of this is that employees covered by the CILSL Scheme often do not regard themselves as having an entitlement to a period of leave for long service.

A further problem for some employees is that 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. In this example, the employee would lose the benefit of the employer’s contributions of 2.7 per cent of the employee’s ordinary pay over the past six years.

7. **Australia’s long service leave laws are a mess but portable long service leave is not the answer**

Australia’s long service leave laws are a mess. The interaction between the long service leave provisions in the National Employment Standards (NES) in the *Fair Work Act 2009 (FW Act)*, State and Territory laws and enterprise agreements is so complex that employers and employees find it difficult to navigate and determine entitlements. Also, sensible and longstanding long service leave flexibilities which benefited employers and employees were removed when the FW Act came into operation.

The long service leave provisions in the FW Act have the following effects:

- As a stop-gap measure until a national long standard leave standard was developed, section 113 of the FW Act was implemented to preserve the long service leave terms in pre-modern awards as provisions of the NES.

- Except in respect of the limited NES provisions in ss.113 and 113A of the FW Act, long service leave provisions in enterprise agreements cannot override State long service leave laws (s.27(2)(g), s.27(1)(c) and s.29(2)(b)).

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40 Major federal awards in the metal, graphic arts, vehicle, food manufacturing and other industries included long service leave provisions and these provisions are now deemed to be terms of the NES.
Even though enterprise agreements cannot override State long service leave laws it appears that they can readily override the CILSL Act. In the *Jemina v Coinvest Case,* 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. Therefore, if the CILSL Act is not a law about long service leave, it appears that the law can be readily overridden by an enterprise agreement which contains a provision which states that the CILSL Act does not apply to the employees covered by the agreement. Such a provision would be inconsistent with the operation of the CILSL Act and hence the provision in the enterprise agreement would apply to the exclusion of the CILSL Act (s.29(2)(1) of the FW Act). Despite this option being available to employers who wish to protect themselves against CoINVEST claims, few employers have gone down this path to date due to the complexity of the issues.

The stop-gap measure in s.113 of the FW Act was implemented by the former Federal Labor Government based on an expressed intention at the time to work with the State and Territory Governments to develop a national long service leave standard. This has not occurred and there is no sign that the Governments will ever have the political will to agree on such a standard, given significant differences in entitlements in some States and Territories.

The following changes are needed to long service leave laws in Australia:

- Enterprise agreements should be permitted to override relevant State and Territory long service leave laws, but the laws should be taken into account for the purposes of the Better Off Overall Test. This is the system that operated up to 31 December 2009. It has obvious merit for employers and employees.

- The FW Act should be amended to implement a national long service leave standard within the NES. The standard should reflect the previous standard federal award long service leave provisions, i.e. 13 weeks long service leave after 15 years of service.

- In implementing the proposed national standard, employees should retain any long service leave accrued up to the date of implementation but future long service leave should accrue on the basis of 13 weeks for 15 years of service which is the accrual rate that currently applies in most jurisdictions, including under the LSL Act 1992 in Victoria.

- The national long service leave standard should oust the operation of State and Territory long service leave laws for employees covered by the FW Act.

- The national long service leave standard should not contain a general exclusion for employers and employees covered by the existing portable long service leave schemes but rather a narrower exclusion which recognises the few industries where existing portable long service leave schemes operate in each State and Territory (i.e. the building and

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construction industry and the coal mining industry) and defines these industry exclusions in a tight manner.

The extension of portable long service leave schemes to other industries is certainly not the answer to resolving the complexity with Australia’s long service leave laws. There schemes are extremely costly as discussed in section 5 of this submission. They are also extremely complex, cumbersome and problematic as discussed in section 6 above.

8. Conclusion

For the reasons outlined in this submission, Ai Group urges the Committee to recommend that:

- portable long service leave entitlements not be extended to any other industry sectors; and
- the numerous major problems inherent in the existing CILSL Scheme be addressed without delay.

We would be happy to provide any further information that the Committee may require on these matters. We would also be happy to appear before the Committee at the public hearings.
20 July, 2015

Executive Officer
Economic, Education, Jobs & Skills Committee
Parliament House
Spring Street, East Melbourne VIC 3002

By email eejsc@parliament.vic.gov.au

Dear Committee

Re Inquiry into portability of long service leave (LSL) entitlements for Victorian workers

I am writing in respect of the Committee’s inquiry into the portability of LSL entitlements for Victorian workers and in particular to tell the Committee of the problems NHP Electrical Engineering Products Pty Ltd (NHP) has experienced with the existing portable LSL scheme for the construction industry in Victoria (Scheme) and its administrator CoInvest.

NHP specialises in the manufacture of motor control, power distribution and automation systems, including commercial panel boards.

NHP’s manufacturing operations are based at the Laverton North Manufacturing & Distribution Centre. The installation and repair of panel boards is not performed by employees working at the NHP’s Laverton North premises.

The terms and conditions of employment NHP’s employees manufacturing panel boards at Laverton North are set out in the NHP Electrical Engineering Products Pty Ltd Laverton Manufacturing Enterprise Agreement 2012 which incorporates the Manufacturing and Associated Industry Award 2010. The long service leave entitlements with respect to these employees derive from Part IV of the Metal, Engineering and Associated Industries Award 1998, which have been preserved by section 113 of the Fair Work Act 2009.

In 2013 NHP became aware that a number of labour hire companies with which it engages workers to perform manufacturing work at North Laverton were approached by CoInvest for contributions to the Scheme for its employees manufacturing panel boards for NHP at the premises.

CoInvest maintains that the labour hire employers and their employees are contracting to provide electrical services work and therefore are performing construction work in the construction industry in accordance with the Scheme’s rules. NHP strongly disagrees. NHP’s employees at North Laverton, as well as those workers engaged via labour hire companies at the premises, are not contracting to provide electrical services in the manner contemplated in the Scheme’s rules. These employees are performing manufacturing work.
Nonetheless CoInvest commenced proceedings against Baytech Trades Pty, one of the labour hire companies approached, for contributions to the Scheme in the County Court. Following an adverse finding, Baytech appealed the decision to the Supreme Court in which a decision is now reserved.

Actions against NHP are likely, dependent upon the outcome of the above decision.

The *Construction Industry Long Service Leave Act 1997* must be amended to make it clear that the Scheme is only intended to cover employers and employees within the construction industry. The Scheme must not be expanded into other industries like manufacturing.

NHP supports the submission to the Committee made by the Australian Industry Group.

Kind regards

Mark Skerritt

Chief Human Resources Officer
20 July 2015

Executive Officer
Economic, Education, Jobs & Skills Committee
Parliament House
Spring Street, East Melbourne VIC 3002

By email eejsc@parliament.vic.gov.au

Dear Committee

Inquiry into portability of long service leave (LSL) entitlements for Victorian workers

I am writing in respect of the Committee’s inquiry into the portability of LSL entitlements for Victorian workers and in particular to tell the Committee of the problems Baytech Trades Pty Ltd (Baytech) has experienced with the existing portable LSL scheme for the construction industry in Victoria (Scheme) and its administrator CoInvest.

Baytech specialises in trades and industrial recruitment and has provided labour to NHP Electrical Engineering Products Pty Ltd (NHP) since December 2010 to perform the manufacturing of panel boards in accordance with schematic drawings at NHP’s North Laverton premises in Victoria. Baytech’s employees performing this work are not required to enter a construction site, or leave the premises for the purpose of performing this work.

The terms and conditions of the NHP Electrical Engineering Products Pty Ltd Laverton Manufacturing Enterprise Agreement 2012 which incorporates the Manufacturing and Associated Industry Award 2010 are applied to Baytech’s employees manufacturing panel boards for NHP.

In early 2013 CoInvest approached Baytech for contributions to the Construction Industry Long Service Leave Fund (Fund) in respect of those employees manufacturing panel boards for NHP. It was (and continues to be) CoInvest’s view that these employees are performing construction work in the construction industry on the basis that the work is ‘electrical services’ work as defined by the Fund rules. Baytech strongly disagrees with this contention.

In 2014 CoInvest commenced proceedings in the County Court against Baytech for the recovery of ‘contributions’ to the Fund amounting to $57,440.74. Baytech strongly defended the claim, maintaining that the manufacturing work performed by its employees at NHP’s North Laverton premises is not work covered by the Fund rules. Unfortunately Baytech was unsuccessful in its defence of the claim. Baytech has since appealed the County Court decision and is awaiting the outcome of its appeal to the Court of Appeal.
In our view, it is not appropriate that the Fund be interpreted in a manner which expands the scope of the Scheme beyond what was original intended by the Construction Industry Long Service Leave Act 1997 (Act).

Baytech has invested a significant amount of resources in defending CoInvest's claims against it, which we assert have been made very aggressively and without reason. Baytech contributes to the Fund with respect to other employees that are legitimately performing construction work in the construction industry; however those employees the subject of the proceedings against CoInvest do not perform such work – they perform manufacturing work.

The Act must be amended to make it clear that the Scheme is only intended to cover employers and employees performing construction work within the construction industry. The Scheme must not be expanded into other industries like manufacturing.

Baytech supports the submission to the Committee made by the Australian Industry Group.

Kind regards

Robert Blanche  
Director FAICD, MRCSA (Life)
20/7/2015

Executive Officer  
Economic, Education, Jobs & Skills Committee  
Parliament House  
Spring Street, East Melbourne VIC 3002

By email eejsc@parliament.vic.gov.au

Dear Committee

Re: Inquiry into portability of long service leave (LSL) entitlements for Victorian workers

We are writing in respect of the Committee’s inquiry into the portability of LSL entitlements for Victorian workers and in particular to tell the Committee of the problems Genpower Australia Pty Ltd (Genpower) has experienced with the existing portable LSL scheme for the construction industry in Victoria and its administrator ColInvest.

Genpower specialises in the assembly of electrical switchboard. Genpower’s operations are confined to a factory/assembly environment and do not perform installation work or other ‘on-site’ work. Our primary operations are based in South Australia, but we do operate an assembly only facility in Victoria.

Genpower’s employees are engaged in the assembly of electrical switchboards and perform work which is covered by the Manufacturing and Associated Industry Award 2010 (Manufacturing Award), not the Building and Construction General Onsite Award 2010 or the Electrical Contracting and Communications Award 2010.

In 2013 Genpower was approached by ColInvest to make contributions to the construction industry long service leave fund (Fund). Genpower became known to ColInvest after an employee who had previously been employed in the construction industry with a different employer sought to access his entitlements from the scheme. Rather than enabling the employee to access his entitlements under the Fund, ColInvest pursued Genpower for contributions with respect to the employee and other employees.

Genpower had tried to explain to ColInvest that it is not in the construction industry and its employees do not perform construction work, however ColInvest proceeded to commence legal proceedings against Genpower. Genpower did not have the resources to defend the legal proceedings and therefore, reluctantly began paying into the Fund.

We believe that the outcomes following the dispute with ColInvest are unfair. They include:

- Genpower were forced to pay into the Fund, despite assembling products in the factory and not performing any installation or ‘on-site work’;
- Genpower have a dual obligation with respect to long service leave, firstly under the Fair Work Act and now secondly arising out of the contributions we make to the Fund; also
- Genpower’s employee who was previously in the construction industry when working with a former employer was not permitted by CoInvest to access his entitlements from the Fund.
We support the submissions of the Australian Industry Group with respect to the problems of the existing fund and its administration by CoInvest. We also support their submissions opposing the portability of LSL. In our view portable LSL defeats the intent and purpose of LSL, which is to encourage loyalty to the employer.

Kind regards

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13 August 2013

COINVEST’S REVISED RULES OF 2 JULY 2013 AND PROPOSED FURTHER REVISED RULES OF SEPTEMBER 2013

This submission is made jointly by the following organisations:

- Australian Industry Group (Ai Group);
- Australian Constructors Association (ACA);
- Australian Mines and Metals Association (AMMA);
- Civil Contractors Federation (CCF);
- Labour Hire Contractors Group Victoria (LHCGV);
- Recruitment and Consulting Services Association Australia and New Zealand (RCSA);
- Victorian Farmers Federation (VFF).
We are very concerned about changes made to the Rules of the Construction Industry Long Service Leave Fund ("Fund") on 2 July 2013, and further changes to the Rules which CoINVEST intends to make at its September 2013 Board Meeting, in breach of:

- Section 7 of the *Construction Industry Long Service Leave Act 1997* (Vic) ("Act"); and
- The Trust Deed for the Construction Industry Long Service Leave Fund ("Trust Deed").

Section 7 of the Act relevantly states:

**‘7. Restriction on powers of trustee**

(1) The trustee must not, without the prior approval of the Governor in Council, exercise any power, authority or discretion given to the trustee by the trust deed the exercise of which would have the effect of enlarging the class of persons capable of being paid benefits out of the fund.

(2) Without limiting subsection (1), that subsection—

(a) has effect with respect to any addition to, or any amendment, modification, variation, deletion, revocation, substitution or replacement of, the whole or any part of the trust deed by which—

(i) the meaning or scope of the expressions "construction work" or "construction industry" is enlarged, whether directly or indirectly; or

(ii) an award is prescribed for the purposes of the fund;’

(Emphasis added)

As set out above, any change that would have the effect of enlarging the class of persons capable of being paid benefits out of the Fund requires the prior approval of the Victorian Government. The Victorian Government has not granted approval to enlarge the coverage of the portable long service leave scheme ("Scheme"). In fact the Victorian Government recently commissioned an inquiry into the Scheme and is currently considering the inquiry report, including whether any changes should be made to the Act.

The Trust Deed states:

**‘5 RULES**

**5.1 Trustee may make Rules**

The Trustee may from time to time, subject to the Act, this deed and the Rules set out in Schedule 2, make Rules relating to the Fund, including (without limitation):

(a) the determination and payment of entitlements of Beneficiaries under this deed;

(b) the obligations of persons to make contributions to the Fund; and

(c) the general administration of the Fund.
5.2 Trustee may modify Rules

The Trustee may from time to time, subject to the Act, this deed and the Rules set out in Schedule 2, revoke, amend, modify, vary, substitute or replace the whole or any part of the Rules.

5.3 Status of Rules

The Rules must be construed as part of this deed, provided that the provisions of this deed prevail over the Rules to the extent of any inconsistency.'

(Emphasis added)

As identified above, CoINVEST is not empowered to make, revoke, amend, modify, vary, substitute or replace Rules in a manner which conflicts with the Act or the Trust Deed. To the extent that any changes to the Rules conflict with section 7 of the Act (and hence conflict with clause 5.2 in the Trust Deed) such Rules are invalid and inoperative.

In this submission, the following two sets of Rules recently issued by CoINVEST are analysed:

- The Revised Rules (July 2013) issued by CoINVEST on 2 July 2013 (which now appear on its website, labeled as the current rules);
- The Revised Rules (September 2013) circulated to employer groups by CoINVEST on 16 July 2013 and which CoINVEST intends to have approved at its September 2013 Board Meeting.

The submission compares the Revised Rules (July 2013) and Revised Rules (September 2013) with the Rules in place prior to the version issued on 2 July 2013 (Previous Rules). The submission identifies the reasons why the Revised Rules (July 2013) and the Revised Rules (September 2013) breach the Act and the Trust Deed. Both sets of Rules would have significant adverse consequences upon employers in a wide range of industries.

1. Revised Rules (July 2013)

The following section of this submission relates to the Revised Rules (July 2013) issued by CoINVEST on 2 July 2013 and which CoINVEST regards as its current Rules.

1.1 Expanded coverage

We were not given notice of, or consulted about, the coverage changes made in the Revised Rules (July 2013). It is extremely unfair and inappropriate for CoINVEST to amend key definitions in the coverage provisions without consultation with the employers likely to be affected and their representative bodies. The Revised Rules (July 2013) change definitions which have been the subject of a great deal of contention over the past few years.

The Revised Rules (July 2013) include the following area of work in the definition of ‘Allied Construction Industry’:

‘carrying out Industrial or Machinery Equipment Services’ (defined).

The wording differs markedly from the wording in the Previous Rules which referred to:

‘carrying out the installation, removal or relocation of, or maintenance or modification to, industrial or heavy machinery or equipment by:”

Joint Submission of Employer Representatives
CoINVEST advised Ai Group on 2 August 2013 that the above definition was amended in December 2011 to add the following additional exclusion after the wording in paragraph (ii) above:

‘the installation, removal or relocation of, or maintenance or modification to, trams, trains or any other rolling stock (or any part of them) by Workers at their Employer’s place of business.’

There was no consultation with industry prior to the above alleged Rule change or any notification of such change to industry after the change was made. The amendment was not included in the version of the Rules which were displayed on CoINVEST’s website up to 2 July 2013.

The work referred to in the above exclusion has never been covered by the Rules, so expressly stating that it is not covered is unnecessary.

In any event, the alleged December 2011 amendment did not alter the following relevant definitions in the Rules:

‘Industrial or heavy machinery or equipment’ means any plant, equipment or mechanical apparatus or part of a mechanical apparatus used to perform a function or process in the course of manufacturing or processing jobs or materials or providing goods, materials or services to a wholesaler, manufacturer, corporation, retailer or consumer’.

and

‘installation, removal, or relocation of, or maintenance or modification to, industrial or heavy machinery or equipment’ means:

(a) placing, removing, relocating, fixing or fastening industrial or heavy machinery in position for use; or

(b) commissioning of industrial or heavy machinery; or

(c) repairing, upgrading, maintaining or modifying industrial or heavy machinery to ensure its continued satisfactory and safe operation;

and which is Metal Trades Work.’

The above definitions were developed by CoINVEST in 2003 to address an industrial agreement reached between the Labour Hire Contractors Group Victoria (LHCGV) and the Australian Manufacturing Workers’ Union to pursue changes to enable members of the LHCGV to be covered under the Scheme. The clear intention (as confirmed by written advice, correspondence and other documentation prepared and exchanged in 2003 as part of CoINVEST’s consultation process) was to limit the amendments to work performed by contractors under labour hire type arrangements.
The July 2013 amendments have been drafted by CoINVEST on the erroneous assumption that the previous definitions (as reproduced above) operate extremely widely. This clearly was not the intended interpretation when the definitions were drafted by CoINVEST’s lawyers and does not reflect the types of companies currently covered by the Scheme. The reality is that the following types of companies are not currently applying the Scheme nor are they currently paying the 2.7 per cent Levy:

- Manufacturers with service operations;
- Truck service and repair businesses;
- Tractor service and repair businesses;
- Excavator service and repair businesses;
- Forklift service and repair businesses;
- Manufacturers and suppliers of cranes, hoists and other materials handling equipment which have service and repair operations;
- Tram service and repair businesses;
- Locomotive and rolling stock service and repair businesses;
- Bus service and repair businesses.

The July 2013 amendments expressly state that repair, maintenance or modifications to the following types of equipment are included within the coverage of the Scheme:

- Commercially operated motor vehicles with a Gross Vehicle Mass of 4.5 tonnes or more;
- Commercially operated plant and equipment such as tractors, excavators or forklifts; and
- Fixed plant and equipment used in materials handling, logistics and distribution.

The above types of work were not previously covered under the Scheme and therefore the amendments to the Rules in July 2013 to insert these types of work breach s.7 of the Act and the Trust Deed.

The following limited exclusions relating to the above types of work have been inserted into the Rules through the amendments:

- Trams, trains or other rolling stock (or any part of them) by Workers at their Employer’s place of business;
- Machinery or equipment, including vehicles, used for domestic purposes; or
- Aircraft.

The insertion of the above limited exclusions erroneously implies that these types of work would otherwise be covered under the Scheme. The exclusions also have the effect of implying that the following types of work (not covered by the exclusions) are covered by the Scheme:

- Repairs and maintenance on trams, trains and rolling stock – other than at the Employer’s place of business;
- Repairs and maintenance on an extremely wide variety of machinery and equipment – not used for domestic purposes;
• Repairs and maintenance on vehicles – not used for domestic purposes.

The amendments to the coverage of the Scheme made by CoINVEST on 2 July 2013 without any consultation with the industry representative bodies whose members are directly affected 'have the effect of enlarging the class of persons capable of being paid benefits out of the fund'. CoINVEST did not obtain prior approval from the Victorian Government and therefore the amendments breach section 7 of the Act and the Trust Deed.

The changes are invalid and inoperative (as a result of clause 5.3 in the Trust Deed), and need to be immediately withdrawn by CoINVEST.

1.2 Change to the definition of ‘Ordinary Pay’

The Revised Rules (July 2013) incorporate substantial changes to the definition of ‘Ordinary Pay’, and associated definitions, including:

• A new definition of ‘Weekly Number of Hours’ in Rule 1.1. (NB. This term appears in various Rules);
• Amendments to Rule 11.7 (Meaning of Ordinary Pay in Rule 11.2(b));
• Amendments to Rule 11.8 (Meaning of Ordinary Pay).

These definitions are critical because the 2.7% levy is payable on ‘Ordinary Pay’ and the Act states that a Levy of no more than 3% of ‘Ordinary Pay’ can be imposed on employers.

The changes to the definition of ‘Ordinary Pay’ in the Revised Rules (July 2013) are clearly designed to overturn the 31 October 2012 decision of Justice Kennedy of the County Court of Victoria in CoINVEST Limited v Bestaff Australasia Pty Ltd [2012] VCC 1474. This litigation by CoINVEST forced Bestaff into insolvency. It is highly inappropriate that CoINVEST has failed to accept the Court’s decision and has changed its Rules to implement an interpretation of ‘Ordinary Pay’ which the Court rejected (i.e. the inclusion of overtime earnings in some circumstances).

The changes made to the Rules will increase costs for many employers. For example, the new Rule 11.7(e), which requires that the Levy be calculated on the first 38 hours of earnings (including overtime earnings) for Workers whose hours of work are not permanently ‘fixed’, will lead to a substantial increase in the charge for many employers as highlighted by the following example.

**Example:** A group of labour hire employees work a 38 hour week for Client A for two months starting at 7am each day, Monday to Friday, with two hours of overtime regularly worked at the end of the ordinary work day. The employees then work a 38 hour week for Client B for the next two months starting at 7.30am each day. The employee is paid $40 per hour for ordinary time.

The employer of the above workers would have paid the following Levy, per employee, under the Previous Rules:

\[
38 \text{ hours} \times $40 = $1,520 \text{ per week}
\]

\[
$1,520 \times 0.027 = $41.00 \text{ per week, per employee}
\]

The Revised Rules (July 2013) require that the following Levy be paid for the period when the employees work for Client A:

\[
38 \text{ hours} \times $40 = $1,520 \text{ per week}
\]

\[
$1,520 \times 0.027 = $41.00 \text{ per week, per employee}
\]
Monday: \((7.6 \text{ hours} \times \$40) + (2 \text{ hours} \times \$60) = \$424.00\)
Tuesday: \((7.6 \text{ hours} \times \$40) + (2 \text{ hours} \times \$60) = \$424.00\)
Wednesday: \((7.6 \text{ hours} \times \$40) + (2 \text{ hours} \times \$60) = \$424.00\)
Thursday: \((7.6 \text{ hours} \times \$40) + (1.6 \text{ hours} \times \$60) = \$400.00\)

\[\text{Total} = 424.00 + 424.00 + 424.00 + 400.00 = \$1,672.00\]

\[\$1,672.00 \times 0.027 = \$45.15 \text{ per week, per employee}\]

The above example relating to Rule 11.7(e) is equally applicable to Rule 11.7(f) if CoINVEST intends to interpret the provision as applying to all casual employees.

The changes made to the definition of ‘Ordinary Pay’ conflict with the Act and hence breach the Trust Deed. Subclause 4(3) of the Act states:

‘The long service leave charge imposed on an employer in respect of a worker must not be more than 3% of the ordinary pay of the worker.’

The term ‘Ordinary Pay’ is not defined in the Act, but the term has an ordinary and natural meaning which excludes overtime pay. The amended Rule conflicts with the ordinary and natural meaning of the term. It is not open to CoINVEST to define a term in the Act in whatever manner it pleases, through the Rules. If this was open to CoINVEST, the intent of s.4(3) of the Act could be readily circumvented to the detriment of employers.

Depending upon the pattern of work of a Worker, under the Revised Rules (July 2013) an employer may be required to pay a Levy of ‘more than 3% of the ordinary pay of the worker’ (adopting the ordinary and natural meaning of the term ‘Ordinary Pay’) in breach of the Act and hence the Trust Deed.

2. Revised Rules (September 2013)

The following section of this submission relates to the Revised Rules (September 2013) circulated to employer groups by CoINVEST on 16 July 2013 and which CoINVEST intends to have approved at its September 2013 Board Meeting.

2.1 Definition of ‘Construction Industry’

Under s.4(1) of the Act, an employer must pay to CoINVEST a long service leave charge in respect of every worker employed to perform ‘Construction Work’ in the ‘Construction Industry’. Accordingly, these two definitions are critical to the coverage of the scheme.

Under the Previous Rules, ‘Construction Industry’ means the ‘Principal Construction Industry’ (as defined) and the ‘Allied Construction Industry’ (as defined) but does not include:

- The carrying out of any work on ships;
- The maintenance of or repairs to lifts or escalators; or
- The carrying out of maintenance or repairs of a routine or minor nature by Workers for an Employer who is not substantially engaged in the Principal Construction Industry or the Allied Construction Industry.

The differences in the definition of ‘Construction Industry’ in the Revised Rules (September 2013) when compared to the Previous Rules include:
• Coverage of ‘Metal Trades Fabrication’;
• Coverage of ‘Industrial Machinery or Equipment Services’, as discussed in section 1.1 above; and
• A broader definition of ‘Electrical Services’, as follows:
  o Extension of coverage to include instrumentation (paragraph (c)(xv));
  o Extension of coverage to include electrical switchboards (paragraph (c)(xvi));
  o An expanded coverage of security alarm system work (paragraph (d));
  o An expanded coverage of fire alarm system work (paragraph (e));
  o Extension of coverage to include labour hire (paragraph (i)).
• The omission of the existing exemption for the carrying out of maintenance or repairs of a routine or minor nature by Workers for an Employer who is not substantially engaged in the Principal Construction Industry or the Allied Construction Industry.

The above changes significantly expand the coverage of ‘Construction Industry’ in the Revised Rules (September 2013), compared to the definition in the Previous Rules.

2.2 Definition of ‘Construction Work’

Under the Previous Rules, ‘Construction Work’ means ‘Building Trades Work’ (as defined), ‘Electrical Trades Work’ (as defined), ‘Metal Trades Work’ (as defined) and ‘Other Trades Work’ (as defined).

2.2.1 Definition of ‘Building Trades Work’

The Previous Rules define ‘Building Trades Work’ in terms of work for which a rate of pay is fixed by one of the following awards, or parts of awards:

• AWU Construction and Maintenance Award 1989;
• Building Construction Employees and Builders Labourers (Consolidated) Award 1982;
• Division D of the Carpenters and Joiners Award 1967;
• Clause 4.5.1 (Landscaping Services) of the Construction Industry Sector – Minimum Wage Order – Victoria 1997;
• Clauses 21.1.10 and 21.1.11 (re. Parquetry Floor Laying Services and Floor Covering Services on site) of the Furnishing Industry National Award 1999;
• National Building and Construction Industry Award 1990;
• Part 1 of the Scientific and Technical Workers Award 1987;
• Sprinkler Pipe Fitters Award 1975;
• Plumbing Trades (Southern States) Construction Agreement;
• Prefabricated Building (Off-Site) Award 1978.

The Revised Rules (September 2013) include work:

• within the scope of the work set out on pages 65 to 70 of Appendix A of the Revised Rules (September 2013); and
• within one or more of the classifications set out on pages 70 to 81.

It is inappropriate for CoINVEST to propose this extremely complicated and lengthy definition of ‘Building Trades Work’ without circulating information to industry and to the Victorian Government identifying where each of the terms in Appendix A were derived from.

As it stands the Victorian Government could not possibly be legitimately satisfied that the requirements of s.7 of the Act have been met and that coverage of ‘Building Trades Work’ would not be expanded under the Revised Rules (September 2013).

2.2.2 Definition of ‘Electrical Trades Work’

The Previous Rules define ‘Electrical Trades Work’ in terms of work for which a rate of pay is fixed by Parts A and B of the Electrical Contracting Award 1992.

The Revised Rules (September 2013) include work which is within one or more of the classifications set out in Appendix B and work carried out by a foreperson, sub-foreperson or leading hand in the supervision of work within any of those classifications.

The Revised Rules (September 2013) would lead to a very substantial and obvious expansion in coverage of the Scheme, because:

• Parts A and B of the Electrical Contracting Award 1992 only applied to ‘electrical contractors’, not to electricians and other electrical workers employed by manufacturers, automotive repair companies, electrical power companies and many other types of businesses. The reference to ‘electrical contractor’ has been removed from the definition of ‘Electrical Trades Work’ in the Revised Rules (September 2013).

• The definitions in Appendix B of the Revised Rules (September 2013) have been expanded from those in Parts A and B of the Electrical Contracting Award 1992. For example, the formulation used in the Award was typically ‘[title of classification] means [description]’ whereas the formulation used in Appendix B has typically been changed to ‘[title of classification] including, but not limited to [description]’.

• The operation of the extremely wide definition of ‘Electrical Trades Work’ is not limited to the carrying out of ‘Electrical Services’ (as defined). ‘Electrical Trades Work’ carried out in any of the areas covered by the definition of ‘Construction Industry’ would be covered, including ‘Electrical Trades Work’ carried out in respect of ‘Machinery or Equipment Services’ (now defined very widely as discussed in section 1.1 above) and ‘Metal Trades Fabrication’.

CoINVEST’s proposed definition of ‘Electrical Trades Work’ would have a very substantial and negative impact upon numerous industries including manufacturing, automotive, electrical power and many others.

Given CoINVEST’s proposed definition, there is no doubt that the requirements of s.7 of the Act and the Trust Deed would be breached if the Revised Rules (September 2013) are made without the prior approval of the Victorian Government.

2.2.3 Definition of ‘Metal Trades Work’

Subject to some very important exclusions, the Previous Rules define ‘Metal Trades Work’ in terms of work for which a rate of pay is fixed by one of the following awards, or parts:
• Non-destructive testing carried out under Parts I and II of the Metal, Engineering and Associated Industries Award 1998;
• Part I and Appendix A (On-site Construction) of the Metal Industry Award 1984;
• National Metal and Engineering On-site Construction Industry Award 1989;
• Part III of the Metal Trades Award 1952;
• Transmission Line Construction in Victoria Agreement 1981;
• Part II, Clause 8 of the Engine Drivers’ and Fireman’s (General) Award 1968;
• Part II and Appendix A insofar as it relates to on-site construction in the Metal Industry (Engine Drivers’ and Firemens’) Award 1984;
• Mobile Crane Hiring Award 1988.

The following exclusions appear in the definition of ‘Metal Trades Work’ in the Previous Rules:

‘but does not include any work within the meaning of paragraph (a) or (b) where that work involves the manufacture of any structures, fixtures, fittings, chattels or works which are not manufactured specifically for a particular building or a particular work of the kind referred to in paragraph (a) of the definition of Construction Industry. For the avoidance of doubt:

(c) any manufacture of structures, fixtures, fittings, chattels or works in a permanently established factory or workshop is excluded from this definition of Metal Trades Work;

(d) any manufacture of structures, fixtures, fittings, chattels or works in a temporarily established factory or workshop, where those structures, fixtures, fittings or works are manufactured specifically for a particular building or a particular work, is included in this definition of Metal Trades Work; and

(e) any mass manufacturer of structures, fixtures, fittings, chattels or works is excluded from this definition of Metal Trades Work’

The Revised Rules (September 2013) include work:

• within Scope 1, Scope 2, Scope 3, Scope 4 or Scope 5 on pages 86 to 88 of Appendix C of the Revised Rules (September 2013); and
• within one or more of the classifications set out on pages 88 to 92.

The Revised Rules (September 2013) would lead to a very substantial and obvious expansion in coverage of the Scheme, because:

• The exclusions in paragraphs (c), (d) and (e) have been significantly narrowed. For example, the exclusion for the manufacture of ‘structures, fixtures, fittings, chattels or works in a permanently established factory or workshop’ has been narrowed to ‘metal structure, metal fixture, metal fitting, metal chattel or metal work’. This would bring within the coverage of the Scheme numerous manufacturers of products which are not made out of metal (e.g. electronics, plastics, glass) or are only partially made out of metal.
• Scope 1 on page 86 is extremely broad. For example, ‘fabrication’ is not limited to any particular materials or type of fabrication.
• Scope 2 on pages 86 and 87 is extremely broad and includes ‘every operation, process, duty and function carried on or performed in or in connection with or incidental to any of the occupations set out’.

• Scope 4 on page 88 is extremely broad, and would include technical workers in a very wide range of industries.

• Scope 5 on page 88 is extremely broad. For example, the definition of ‘mobile crane hiring industry’ has been creatively drafted by CoINVEST to include ‘service of materials handling equipment, lifting and machinery movement equipment’. This drafting appears to be designed to bolster CoINVEST’s position in a number of current disputes with manufacturing companies in these industries.

• ‘Metal Trades Work’ (defined extremely widely) carried out in any of the areas covered by the definition of ‘Construction Industry’ would be covered by the Scheme. CoINVEST’s proposed definition of ‘Metal Trades Work’ would have a very substantial and negative impact upon numerous industries including manufacturing, automotive, electrical power and many others.

Given CoINVEST’s proposed definition, there is no doubt that the requirements of s.7 of the Act and the Trust Deed would be breached if the Revised Rules (September 2013) are made without the prior approval of the Victorian Government.

2.2.4 Exclusion for routine or minor maintenance etc

The Revised Rules (September 2013) contain an exclusion from the definition of ‘Construction Work’ for:

‘work comprising maintenance or repairs of a routine or minor nature by a worker for an Employer who is not engaged substantially in the Construction Industry’.

The above exclusion from the definition of ‘Construction Work’ is similar to the one which appears in the definition of ‘Construction Industry’ in the Previous Rules. However, by significantly expanding the scope of the definition of ‘Construction Industry’, as discussed in section 2.1 above, and relocating the exclusion from the definition of ‘Construction Industry’ to the definition of ‘Construction Work’, the operation of the exclusion has been significantly narrowed.

For example, ‘instrumentation’ and ‘electrical switchboards’ are included within the definition of ‘Construction Industry’ in the Revised Rules (September 2013) (see section 2.1 above) but are not included under the Previous Rules. Therefore, routine maintenance in the instrumentation and electrical switchboard industries would be excluded under the Previous Rules but are not excluded under the Revised Rules (September 2013).

Accordingly, the amendments would breach s.7 of the Act and the Trust Deed.

2.3 Definition of ‘Apprentice’

The definition of ‘Apprentice’ has been significantly expanded under the Revised Rules (September 2013) to include a wide range of employees carrying out traineeships who were not previously included. This would expand the coverage of the Scheme in breach of s.7 of the Act and the Trust Deed.
2.4 Definition of ‘Ordinary Pay’

As discussed in section 1.2 above, the changes to the definition of ‘Ordinary Pay’ in the Revised Rules (July 2013) would have a negative impact upon employers and would breach the Act and the Trust Deed.

An additional problem exists in the Revised Rules (September 2013). There is a significant difference between the definition of ‘Ordinary Pay’ in the Revised Rules (July 2013) and the definition in the Revised Rules (September 2013). The word ‘normal’ has been omitted from the definition of ‘Ordinary Pay’ in the Revised Rules (September 2013).

The relevant provision in the Revised Rules (September 2013) is:

‘(h) in respect of a Worker whose terms of employment fix:

(i) the weekly number of hours of work (Weekly Number of Hours); and
(ii) the times and days on which those hours must be worked (Hours of Work);

any remuneration paid for work performed by the Worker for the relevant Employer outside the Hours of Work or in excess of the Weekly Number of Hours.’

In contrast, the relevant provision (in Rule 11.8) of the Revised Rules (July 2013) is:

‘(d) in respect of a Worker whose terms of employment fix the Worker’s normal weekly number of hours (Weekly Number of Hours) and the times and days on which those Weekly Number of Hours must be worked (Hours of Work), any remuneration paid in respect of work performed by the Worker for that Employer outside the Hours of Work or for any hours in excess of the Weekly Number of Hours;’

It is common in the construction industry for regular overtime to be worked and included in site rosters. It is essential that such overtime is not included in the definition of ‘Ordinary Pay’ as to do so could result in a very substantial increase in employers’ costs through a requirement to pay the Levy on regular overtime earnings.

For the same reasons outlined in section 1.2 above, the changes to the definition of ‘Ordinary Pay’ in the Revised Rules (September 2013) breach the Act and the Trust Deed.

Conclusion

For the reasons outlined in this submission:

1. The Revised Rules (July 2013) need to be immediately withdrawn by CoINVEST, as they breach the Act and the Trust Deed.

2. The Revised Rules (September 2013) must not be proceeded with by CoINVEST, as they breach the Act and the Trust Deed.
Members of the Australian Constructors Association

1. Abigroup Limited
2. Baulderstone Pty Ltd
3. BGC Contracting Pty Ltd
4. Brookfield Multiplex Limited
5. CH2M Hill Australia Pty Ltd
6. Clough Limited
7. Downer EDI Limited
8. Fulton Hogan Pty Ltd
9. Georgiou Group Pty Ltd
10. John Holland Pty Ltd
11. Laing O’Rourke Australia Construction Pty Limited
12. Leighton Contractors Pty Limited
13. Leighton Holdings Limited
14. Lend Lease Pty Ltd
15. Lend Lease Infrastructure Pty Ltd
16. Macmahon Holdings Limited
17. McConnell Dowell Corporation Limited
18. Thiess Pty Limited
19. UGL Limited
20. Watpac Limited
11 October 2013

RULE CHANGES MADE ON 2 JULY 2013 AND PROPOSED RE-DRAFTED RULES (DRAFT 8 – 5/7/2013)

This submission is made jointly by the following organisations:

- Australian Industry Group (Ai Group);
- Australian Constructors Association (ACA);
- Australian Mines and Metals Association (AMMA);
- Civil Contractors Federation (CCF);
- Labour Hire Contractors Group Victoria (LHCGV);
- Recruitment and Consulting Services Association Australia and New Zealand (RCSA);
- Victorian Farmers Federation (VFF).
We refer to the joint employer submission of 13 August 2013 and various supporting submissions of other employer groups.

We also refer to CoINVEST’s response dated 13 September 2013 which has not allayed our concerns.

CoINVEST’s response has also not altered our view that the changes made by CoINVEST to the Rules of the Construction Industry Long Service Leave Fund (“Fund”) on 2 July 2013 (“Revised Rules (July 2013)”) and further changes which CoINVEST propose to make to the Rules (“Revised Rules (Draft 8 – 5/7/2013)”) breach:

- Section 7 of the Construction Industry Long Service Leave Act 1997 (Vic) (“Act”); and
- The Trust Deed for the Construction Industry Long Service Leave Fund (“Trust Deed”).

The sections which follow respond to CoINVEST’s correspondence of 13 September 2013 and the table attached to that correspondence.

1. **Revised Rules (July 2013)**

1.1 **Expanded coverage**

In its response of 13 September 2013, CoINVEST states that:

“Work carried out on “industrial and heavy machinery” was brought into the scheme in 2004. At that time, a representative of AIG sat on the CoINVEST Board. That amendment clearly expanded the coverage of the scheme and accordingly, the approval of the Governor in Council was sought and obtained.

*It is clear that the previous definition of ‘industrial and heavy machinery’ was very broad.*

The final sentence above is not correct. The definition was not intended to operate broadly as is highlighted by the events surrounding the amendment made to the definition of “Metal Trades Work” on 1 March 2004 and by the documentation circulated by CoINVEST at the time.

Around 2000, the Australian Manufacturing Workers Union (AMWU) and the Labour Hire Contractors Group Victoria (LHCGV) negotiated a pattern agreement entitled the *Metal and Associated Industries Labour Hire Certified Agreement 2000-2003*. Clause 36 of the pattern agreement stated:

“36 CoINVEST

A joint working party will be established to approach and lobby CoINVEST Limited to try to resolve outstanding coverage issues and worker entitlements (i.e. it is the objective of the parties to achieve coverage by CoINVEST of all employees covered by this Agreement). The working party will consist of a representative from each of the union’s party to this Agreement and an equal number of representatives from The Victorian Labour Hire Contractors Group of Victoria.

The working party will endeavour to resolve all outstanding issues by 30th June 2002. However, if these issues are still not resolved by the expiration of the Agreement, the company will apply a 1% wage increase to employees covered...
by this Agreement, effective from the first pay period on or after 31st March 2003.”

It can be seen that the AMWU and the LHCGV decided to lobby CoINVEST to expand the coverage of the scheme to include labour hire contractors, with a significant financial penalty imposed on members of the LHCGV if the lobbying was not successful.

In response to the lobbying of the AMWU and LHCGV, CoINVEST asked its lawyers, Corrs Chambers Westgarth, to prepare draft Rule changes. These were set out in a legal opinion dated 29 April 2003 which CoINVEST circulated to industry and union representatives in 2003 as part of its consultation process. The legal opinion raised significant complications with the notion of defining a labour hire company for the purposes of the Rule changes and recommended an alternative approach of defining expanded coverage through a definition of “installation of, and maintenance to, industrial or heavy machinery and equipment”.

Ai Group was very concerned about the proposed changes and this concern was expressed to CoINVEST through Ai Group’s representative on the CoINVEST Board (Brian Neill) and in separate correspondence in August 2003 from Ai Group’s national office to CoINVEST. In endeavouring to allay Ai Group’s concerns, CoINVEST provided the abovementioned legal opinion of April 2003 and a further legal opinion of December 2003 to Ai Group’s national office. In providing these legal opinions to Ai Group’s National office, CoINVEST waived privilege over the documents, as was appropriate in the circumstances given the need for openness and transparency regarding the intent of the proposed Rule changes.

The legal opinions are relevant in demonstrating the intent of the Rule changes which took effect on 1 March 2004.

The 29 April 2003 legal opinion of Corrs Chambers and Westgarth Lawyers states:

“You have now instructed us that the amendments are to be restricted to:

- Workers employed by a company whose business is predominantly that of hiring out its employees under labour hire agreements;
- To perform work in the "Metal and Engineering Industry";
- Installing or maintaining industrial machinery.

Our draft amendments are set out below.”

The December 2003 legal opinion of Corrs Chambers Westgarth Lawyers states:

“The intention of this clause is to limit the amendments to cover only work performed by contractors under labour hire type arrangements.”

and goes on to state:

“These definitions should be carefully examined in the context of hypothetical questions of coverage to ensure they are adequately tested prior to implementation. We would be pleased to assist you with this exercise.”

We are unaware whether Brian Neill (who left Ai Group in 2004) attended the CoINVEST Board Meeting in January 2004. However, regardless of how Mr Neill voted at the meeting (if indeed he attended) affirmative votes from at least six of the other 10 members of the Board would have led to the Rule change being approved.
The above events demonstrate that the interpretation which CoINVEST is endeavouring to now place on the definitions inserted into the Rules from 1 March 2004 is much wider than what was intended. Any measure of agreement or acceptance in early 2004 was based upon the interpretations communicated by CoINVEST at the time, not CoINVEST’s extremely expansive current interpretations.

The July 2013 amendments have been drafted by CoINVEST on the basis of invalid interpretations of the relevant definitions in the Rules relating to the installation and maintenance of industrial and heavy machinery and equipment. CoINVEST’s interpretations are not supported by the legal opinions of its own lawyers who drafted the definitions, nor do they reflect the types of companies currently covered by the Victorian Construction Industry Portable Long Service Leave Scheme ("Scheme"). The reality is that the following types of companies are not currently applying the Scheme nor are they currently paying the 2.7 per cent Levy:

- Manufacturers with service operations;
- Truck service and repair businesses;
- Tractor service and repair businesses;
- Excavator service and repair businesses;
- Forklift service and repair businesses;
- Manufacturers and suppliers of cranes, hoists and other materials handling equipment which have service and repair operations;
- Tram service and repair businesses;
- Locomotive and rolling stock service and repair businesses;
- Bus service and repair businesses.

The July 2013 amendments expressly state that repair, maintenance or modifications to the following types of equipment are included within the coverage of the Scheme:

- Commercially operated motor vehicles with a Gross Vehicle Mass of 4.5 tonnes or more;
- Commercially operated plant and equipment such as tractors, excavators or forklifts; and
- Fixed plant and equipment used in materials handling, logistics and distribution.

The above types of work were not previously covered under the Scheme and therefore the amendments to the Rules in July 2013 to insert these types of work breach section 7 of the Act and clause 5 of the Trust Deed.

The following limited exclusions relating to the above types of work have been inserted into the Rules through the amendments:

- Trams, trains or other rolling stock (or any part of them) by Workers at their Employer’s place of business;
- Machinery or equipment, including vehicles, used for domestic purposes; or
- Aircraft.
The insertion of the above limited exclusions erroneously implies that these types of work would otherwise be covered under the Scheme. The exclusions also have the effect of implying that the following types of work (not covered by the exclusions) are covered by the Scheme:

- Repairs and maintenance on trams, trains and rolling stock – other than at the Employer’s place of business;
- Repairs and maintenance on an extremely wide variety of machinery and equipment – not used for domestic purposes;
- Repairs and maintenance on vehicles – not used for domestic purposes.

The amendments to the coverage of the Scheme made by CoINVEST on 2 July 2013 without any consultation with the industry representative bodies whose members are directly affected have the effect of enlarging the class of persons capable of being paid benefits out of the fund. CoINVEST did not obtain prior approval from the Victorian Government and therefore the amendments breach section 7 of the Act.

The changes to the coverage Rules are invalid and inoperative (as a result of clause 5 of the Trust Deed), and need to be immediately withdrawn by CoINVEST.

1.2 Change to the definition of “Ordinary Pay”

In its response of 13 September 2013, CoINVEST incorrectly asserts that the County Court of Victoria in CoINVEST Limited v Bestaff Australasia Pty Ltd [2012] VCC 1474 held that casual workers do not have a normal weekly number of hours fixed by the terms of their employment. As is clear from the extract below, the Court differentiated between casual employees who work fluctuating hours, like Bestaff’s employees, and other employees (casual and permanent) whose hours do not fluctuate.

“Instead, attention is directed to whether there is a normal number of hours fixed under the terms of his employment. The concept of “terms of employment” is a broad term and certainly would include applicable industrial awards. However, the core of every employment relationship is the contract of employment, not just any applicable Award.

In my view, then, an appropriate construction of rules 11.7 and 11.8(a) is such that, where the normal weekly number of hours is fixed under a worker’s terms of employment, the amounts so fixed can be readily utilised to determine the “normal weekly number of hours” for the purposes of rule 11.7(d). However, where such hours are not “fixed” as that concept is ordinarily understood, then the averaging process must be undertaken. This latter scenario may readily apply where there are casual employees working fluctuating hours, as in the present case.”

The hours of work of most employees (permanent and regular casuals) are fixed within regular starting and finishing times. This includes many labour hire employees.

The interpretation placed by the Court on the definition of “Ordinary Pay” was not consistent with the interpretation argued by CoINVEST. Judge Kennedy adopted a very different interpretation which led to CoINVEST reimbursing Bestaff many thousands of dollars for overpaid contributions.

In its response of 13 September, CoINVEST describes the change to the definition of “Ordinary Pay” in the Revised Rules (July 2013) as a “compromise position” and states that “A number of industry representatives, including AIG were given the opportunity to comment on the changes.”
The changes target the labour hire industry and were strongly opposed by Ai Group, the RCSA and the LHCGV – the three organisations which represent the labour hire industry in Victoria. The changes will impose a costly burden on the industry.

The changes made to the definition of “Ordinary Pay” conflict with the Act and hence breach clause 5 of the Trust Deed. Subclause 4(3) of the Act states:

‘The long service leave charge imposed on an employer in respect of a worker must not be more than 3% of the ordinary pay of the worker.’

The term “Ordinary Pay” is not defined in the Act but has an ordinary and natural meaning which excludes pay for hours worked by employees (permanent and casual) outside the ordinary hours fixed under their contract of employment. The amended Rule conflicts with the ordinary and natural meaning of the term. It is not open to CoINVEST to define a term in the Act in whatever manner it pleases, through the Rules. If this was open to CoINVEST, the intent of subsection 4(3) of the Act could be readily circumvented to the detriment of employers.

Depending upon the pattern of work of a Worker, under the Revised Rules (July 2013) an employer may be required to pay a Levy of “more than 3% of the ordinary pay of the worker” (adopting the ordinary and natural meaning of the term “Ordinary Pay”) in breach of the Act and hence the Trust Deed.

The changes to the definition of “Ordinary Pay” are invalid and inoperative (as a result of clause 5 of the Trust Deed), and need to be immediately withdrawn by CoINVEST.

2. Revised Rules (Draft 8 – 5/7/2013)

The following section of this submission relates to the Revised Rules (Draft 8 – 5/7/2013) circulated to employer groups by CoINVEST on 16 July 2013.

2.1 Definition of “Construction Industry”

2.1.1 Definition of “Industrial Machinery or Equipment Services”

As discussed in section 1.1 above, CoINVEST’s re-drafted definition of “Industrial Machinery or Equipment Services” is based upon extremely expansive and invalid interpretations of the relevant existing definitions in the Rules relating to the installation and maintenance of industrial and heavy machinery and equipment.

The proposed definition breaches section 7 of the Act and clause 5 of the Trust Deed.

2.1.2 Inclusion of “Instrumentation” in the definition of “Electrical Services”

In its response of 13 September 2013, CoINVEST did not explain why it proposes to expressly include “Instrumentation” in the definition of “Electrical Services”. Manufacturers of instruments are typically not currently contributing to the Scheme.

The proposed definition of “Electrical Services” breaches section 7 of the Act and clause 5 of the Trust Deed.
2.1.2 Inclusion of “Electrical Switchboards” in the definition of “Electrical Services”

In its response of 13 September 2013, CoINVEST did not explain why it proposes to expressly include “Electrical Switchboards” in the definition of “Electrical Services”. Manufacturers of electrical switchboards are typically not currently contributing to the Scheme.

In its response, CoINVEST refers to a decision of its own Board to deem the employees of Sipos Electrical Services Pty Ltd involved in the off-site “production, making or assembling of electrical switchboards” to be covered by the Scheme. Even if this specific employer is legitimately regarded as an “Electrical Contractor” because of the full range of electrical work that it carries out, many manufacturers of switchboards are not electrical contractors and are not legitimately covered by the Scheme despite many arguments by CoINVEST over the years that they are.

The proposed definition of “Electrical Services” breaches section 7 of the Act and clause 5 of the Trust Deed.

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.

2.2 Definition of “Construction Work”

2.2.1 Definition of “Building Trades Work”

Given the huge potential implications of coverage changes, the cost risks for employers in a wide range of industries, and the need to ensure that section 7 of the Act is complied with, it is unreasonable for CoINVEST to propose widespread changes to the coverage Rules without identifying the source of each specific provision in the completely re-drafted proposed new Rules. So far, CoINVEST has refused to provide this information.

A preliminary review of the coverage provisions of some of the main awards identified by CoINVEST in its response of 13 September 2013 highlights that the coverage of “Building Trades Work” under the Revised Rules (Draft 8 – 5/7/2013) is wider than under the awards identified.
Just a few examples are identified below:

- The wording in clause 1.1 of Appendix A (p.65) is consistent with the coverage of the *AWU Construction and Maintenance Award* with the exception that “laying gas mains” has been included in clauses 1.1.1, 1.2 and 1.3.5.

- It is not clear where the following extremely broad and inappropriate inclusion in clause 2.2.2 has been derived from:
  
  “any making or contracting job in wood, stone, brick, concrete (including but not limited to, pre-casting concrete panels, lintels and beams for use in buildings and other works where the pre-casting occurs on-site or away from the site on which those buildings or works are being constructed), iron or steel or combination of those or other materials incidental to building construction”

- It is not clear where the following extremely broad and inappropriate wording in Scope 6 (p.68) has been derived from:
  
  “Preparing, decorating or assembling joinery or building components in timber or other recognised building and/or joinery material in a shop, factory or yard that is off-site.”

- The *National Building and Construction Industry Award* contains several important express exclusions which have inappropriately been omitted from the Revised Rules, (Draft 8 – 5/7/2013) including:
  
  o “The making of implements of agriculture”; and
  
  o “Employees classified in this award who are employed by a mixed enterprise in a maintenance and/or ancillary capacity”.

- The wording in clause 4.2 on pp.67-68 has been derived from the *Plumbing Trades (Southern States) Construction Agreement* but the concept of “work performed in plumbing workshops” has been added. There is no definition of a “plumbing workshop”. Many manufacturers make building products in their factories which are used by plumbers and associated trades. Also, over the years there have been many demarcation issues concerning the work of plumbers, sheet metal workers, air-conditioning workers and other workers. The vague concept of a “plumbing workshop” could expose employers in other industries to claims.

The proposed definition of “Building Trades Work” breaches section 7 of the Act and clause 5 of the Trust Deed.

**2.2.2 Definition of “Electrical Trades Work”**

We note that CoINVEST has agreed to amend the Revised Rules (Draft 8 – 5/7/2013) to:

- Clarify that “Electrical Trades Work” only applies to Employers and Working Subcontractors who contract to provide “Electrical Services” to a third person or who provide labour hire workers who provide “Electrical Services”;

- Replace the words “including, but not limited to” with the word “means” in the definitions for “Alarm Security Tester”, “Alarm Security Technician”, “Electronics Serviceperson”, “Television Antenna Installer / Erector” and “Television / Radio / Electronic Equipment Serviceperson”.

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*Joint Submission of Employer Representatives*
Unfortunately, the revised wording would still lead to a very substantial expansion in coverage of the Scheme as follows:

- As explained in section 2.1.3 above, the Scheme’s coverage would be extended to 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 for the first time.

- In addition to coverage being restricted to “Electrical Contractors”, the Electrical Contracting Industry Award 1992 (and consequently “Electrical Trades Work” under the existing Scheme) only applies to “employees who are members of or are eligible to be members of the Electrical Trades Union” (ETU) – as the eligibility rule of this union existed in 1992. The removal of this restriction, as proposed in the Revised Rules (Draft 8 – 5/7/2013) would significantly expand the coverage of the Scheme.

- Subject to the exclusions in the Electrical Contracting Industry Award 1992 (including the two outlined above), “Electrical Trades Work” only includes work which falls within the definition of “Electrical Services” in clause 5.2.2 of the Award. The award definition is narrower than the definition of “Electrical Services” in the Revised Rules (Draft 8 – 5/7/2013). For example, award clause 5.2.2 does not include “Instrumentation” or “Electrical switchboards”.

- The formal qualification requirements have been removed from various award definitions when they have been included in the Revised Rules (Draft 8 – 5/7/2013) which would expand coverage of the Scheme. For example, under the Award, a “Television / Radio / Electrical Equipment Serviceperson” is required to have a trade qualification (see clause 4.16 in Part B of the award) but this requirement is not included in item 33 on p.85 of the Revised Rules.

The proposed definition of “Electrical Trades Work” breaches section 7 of the Act and clause 5 of the Trust Deed.

2.2.3 Definition of “Metal Trades Work”

We note that CoINVEST has agreed to delete references to “metal” in the exclusions which appear in paragraphs (d), (e) and (f) of the definition of “Metal Trades Work” in the Revised Rules (Draft 8 – 5/7/2013). We also note that CoINVEST has agreed to amend Scope 4 to limit the coverage to non-destructive testing.

Despite the above two changes which CoINVEST has agreed to make, the re-drafted Rules would lead to a very substantial and obvious expansion in coverage of the Scheme, as follows:

- The wording in the Metal Industry Award 1984 – Part I, upon which Scope 1 is based, is “Subject to the exceptions and exemptions prescribed by the award” (clause 3(b) of the Award). The long list of exceptions and exemptions in clause 45 of the Award, which have effect under the current Rules, have been omitted (p.86).
• The Scheme does not currently cover the manufacture of structures, fixtures, fittings, chattels or works in a permanently established factory or workshop (paragraph (c) of the definition of “Metal Trades Work” in the current Rules), yet the list of items in Scope 2 includes numerous types of manufacturing and processing which only occur in permanently established factories and workshops (e.g. “tool, die, gauge and mould making”, “galvanising”, “electroplating”, “processing of metals such as sheradizing and borderizing”, and “manufacture of any article or articles from metal wire”) (pp.86-87).

• The Scheme does not cover “sorting, packing, despatching and transport” yet these functions have been included at clause 2.1.36 of Scope 2 (p.87).

• The Scheme does not cover the manufacture, maintenance or repairs to lifts or escalators (see paragraph (c) of the definition of “Construction Industry” in the current Rules), yet these operations have been included at clause 2.1.24 of Scope 2 (p.87).

• The Scheme does not cover the “generation and distribution of electric energy”, yet this has been included at clause 2.1.34 of Scope 2 (p.87).

• The wording “every operation, process, duty and function carried on or performed in or in connection with or incidental to any of the occupations set out at clauses 2.1.1 to 2.1.37” (p.87) is extremely wide, vague and inappropriate for inclusion in the coverage Rules of the Scheme.

• The scope of the Mobile Crane Hiring Award is limited by the narrow range of classifications in the Award (i.e. Operator of Mobile Crane, Dogger and Rigger). No such limitation has been included in the Revised Rules (Draft 8 – 5/7/2013). Consequently, Scope 4 (p.88) would extend the Scheme’s coverage to numerous operations relating to materials handling equipment.

• Various occupations which have been included on pp.88-92 of the Revised Rules (Draft 8 – 5/7/2013) are only found in permanently established factories (e.g. furnaceperson) and hence are not currently covered by the Scheme.

• The exclusion in paragraph (d) of the definition of “Metal Trades Work” should not be limited to “works of the kind referred to in paragraphs (a) to (c) if the definition of Construction Industry” (p.10).

The proposed definition of “Metal Trades Work” breaches section 7 of the Act and clause 5 of the Trust Deed.

2.3 Definition of “Apprentice”

The definition of “Apprentice” in the Revised Rules (Draft 8 – 5/7/2013) is not appropriate.

The issues dealt with in the definition of “Apprentice” are not definitional issues at all but rather are purported obligations of employers in respect of employees to whom a training arrangement applies, including obligations relating to:

• Cancelling, suspending or varying training contracts;

• Terminating or threatening to terminate the employment of an employee; and
Transmission of business.

As was dealt with in great deal in the recent Fair Work Commission (FWC) Apprentice and Trainee Case ([2013] FWCFB 5411), the rights and obligations of employers and employees under State Training Acts are in many cases varied through the operation of the Fair Work Act 2009 (Cth) and federal award provisions.

The definition is drafted to deem apprentices who do not have all of the entitlements in paragraph (b) to not be an “Apprentice” for the purposes of the Rules and presumably to require that the 2.7% levy be paid for that apprentice.

Further, we are not convinced by CoINVEST’s assertion that its proposed definition of “Apprentice” would not include trainees. The inclusion of trainees would expand the coverage of the Scheme in breach of section 7 of the Act and clause 5 of the Trust Deed.

The definition is unworkable and inappropriate.

2.4 Definition of “Ordinary Pay”

In section 1.2 above, the costly, inappropriate and, in our view, unlawful changes made by CoINVEST to the definition of “Ordinary Pay” in July 2013 are dealt with.

The further change made in the Revised Rules (Draft 8 – 5/7/2013) to remove the critical word “normal” would result in huge cost increases for a large proportion of employers covered by the Scheme.

The relevant provision in the Revised Rules (Draft 8 – 5/7/2013) is:

‘(h) in respect of a Worker whose terms of employment fix:

(i) the weekly number of hours of work (Weekly Number of Hours); and

(ii) the times and days on which those hours must be worked (Hours of Work);

any remuneration paid for work performed by the Worker for the relevant Employer outside the Hours of Work or in excess of the Weekly Number of Hours.’

In contrast, the relevant provision (in Rule 11.8) of the Revised Rules (July 2013) is:

‘(d) in respect of a Worker whose terms of employment fix the Worker’s normal weekly number of hours (Weekly Number of Hours) and the times and days on which those Weekly Number of Hours must be worked (Hours of Work), any remuneration paid in respect of work performed by the Worker for that Employer outside the Hours of Work or for any hours in excess of the Weekly Number of Hours;’

The central issue in the CoINVEST Limited v Bestaff Australasia case was the meaning of the term “normal weekly number of hours”. Judge Kennedy aligned the term “normal weekly number of hours” in the Rules with the concept of “ordinary hours”, as follows:

“73 …..Where hours are instead fixed, the “normal weekly number of hours” is to be calculated under clause 11.7(d) and means the ordinary or standard hours so fixed.”
It is common for project agreements and project rosters to “fix” working hours. These fixed hours often include a substantial amount of overtime, but the “normal weekly number of hours” are fixed at 36 or 38 hours. The removal of the word “normal” in the Rules would have major, very costly implications for employers.

For the same reasons outlined in section 1.2 above, the changes to the definition of ‘Ordinary Pay’ in the Revised Rules (Draft 8 – 5/7/2013) breach the Act and the Trust Deed.

**Conclusion**

For the reasons outlined in this submission:

1. The Revised Rules (July 2013) need to be immediately withdrawn by CoINVEST, as they breach the Act and the Trust Deed.

2. The Revised Rules (Draft 8 – 5/7/2013) must not be proceeded with by CoINVEST, as they breach the Act and the Trust Deed.
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17. McConnell Dowell Corporation Limited
18. Thiess Pty Limited
19. UGL Limited
20. Watpac Limited
Dear Stephen

VICTORIAN CONSTRUCTION INDUSTRY PORTABLE LONG SERVICE LEAVE SCHEME

I write in reply to your email of 13 August 2013 in relation to recent and proposed changes by the CoINVEST Board to the Rules of the Construction Industry Long Service Leave Fund (Rules).

Your correspondence raises a number of concerns with the Victorian Government including that CoINVEST has replaced its existing Rules (2009 Rules) with new Rules (July 2013 Rules) without any industry consultation. In addition, your attached submission asserts that the changes made by the July 2013 Rules and further proposed amendments to the Rules (Proposed Rules) to be tabled at CoINVEST’s September 2013 Board meeting are in breach of the Construction Industry Long Service Leave Act 1997 (Vic) (the Act).

CoINVEST did not consult with the Government prior to or following publication of its July 2013 Rules and has not formally provided the Government with a copy of the Proposed Rules. I have written to John Hartley, CEO, CoINVEST reminding him of CoINVEST’s obligations under section 7(1) of the Act and that CoINVEST must not, without the prior written approval of the Governor in Council (GIC), exercise any power, authority or discretion which would have the effect of enlarging the class of persons capable of being paid benefits out of the Fund.

An initial comparison has been undertaken by the Department of Treasury and Finance of the coverage of the 2009 Rules, July 2013 Rules and Proposed Rules, to consider whether amendments made or proposed to be made to the Rules could give rise to any expansion in coverage of the scheme. In accordance with the requirements of the Act, any changes which would have the effect of enlarging the class of beneficiaries payable under the scheme would not be valid until GIC approval has been obtained. I am currently awaiting a response from CoINVEST.

I hope this information is of assistance to you.

Yours sincerely,

ROBERT CLARK MP
Minister for Industrial Relations

20/8/13