

Ai GROUP SUBMISSION

Portable Long Service Leave Design Study Discussion Papers

- **Contract cleaning industry**
- **Security industry**

ACIL Consulting for the Victorian
Department of Economic Development,
Jobs, Transport and Resources

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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

The Australian Industry Group (**Ai Group**) welcomes the opportunity to comment on the Portable Long Service Leave Design Study (**Design Study**) discussion papers for both the security industry and contract cleaning industry in Victoria (collectively the **Discussion Papers**).

Ai Group provided a number of detailed submissions to the Parliament of Victoria's Economic, Education, Jobs and Skills Committee (**Committee**) inquiry into the portability of long service leave entitlements in Victoria (**Committee Inquiry**).

We also provided a submission in April 2017 responding to the security industry issues paper and contract cleaning industry issues paper released by ACIL Allen Consulting (**ACIL**) earlier this year.

We continue to rely upon these submissions, and are opposed to any extension of the portability of long service leave entitlements beyond the building and construction industry in Victoria where these entitlements already exist.

The case for extending portable long service leave entitlements beyond the building and construction industry has not been made out. Uncertainty surrounds the potential costs of portable long service leave schemes in the security industry and contract cleaning industry in Victoria, and the impacts of such costs on employers and employees in these industries.

We reiterate our disappointment that the Victorian Government is proceeding with the Design Study, and the likely introduction of portable long service leave for the security industry and contract cleaning industry in Victoria, despite four of the seven Committee members (a majority) who conducted the Parliamentary inquiry opposing such course of action.

This submission includes Ai Group's responses to the questions raised by ACIL within the following:

- Victorian security industry discussion paper (**Security Discussion Paper**); and
- Victorian contract cleaning discussion paper (**Contract Cleaning Discussion Paper**).

2. General Principles for Scheme Governance

The Discussion Papers seek stakeholder views regarding the general principles for scheme governance of a portable long service leave scheme.

We refer ACIL to our submission to the Committee dated 7 August 2015 (**August 2015 Submission**). Within that submission we identified in detail the problems with the governance and structure of the Victorian Construction Industry Portable Long Service Leave Scheme (**CILSL Scheme**) and its administrator CoINVEST. The below overview is extracted from the August 2015 Submission:

“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 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 CoINVESTs 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 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. At least one Ai Group member company has been driven into insolvency as a direct result of CoINVEST’s aggressive litigation.*
- *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).’’¹*

We note that questions 3.1, 3.2, and 3.3 in both the Security Discussion Paper and Contract Cleaning Discussion Paper consider similar matters with respect to the governance of a portable long service leave scheme for these industries in Victoria. Ai Group addresses these questions using the headings below. We note our responses are relevant for both the security industry and contract cleaning industry.

2.1 Purpose and coverage of the scheme

While we fundamentally oppose to the expansion of portable long service leave in Victoria beyond the building and construction industry, if a scheme or schemes were to be established for the security industry and contract cleaning industry respectively, it is important that the purpose of the scheme be clearly identified as to provide portable long service leave entitlements, and not ancillary services. If a situation arises where there is a surplus of funds within the scheme, then the scheme should be required to reduce the levy rate imposed on employers. We note that funds were withdrawn from the NSW construction industry long service leave scheme by the NSW Government in the 1990s.

With respect to the question seeking input on the possibility of a single governance approach across industries, we strongly oppose any ‘joint administration’ or ‘joint governance’ with the CILSL Scheme and CoINVEST.

2.2 Scheme scope

For many years CoINVEST has pursued unreasonably expansive interpretations of the coverage Rules (**CoINVEST Rules**) for the CILSL Scheme and new rules to redefine “construction industry” and “construction work”. 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 *Construction Industry Long Service Leave Act 1997* (Vic) (**CILSL Act**) requires that CoINVEST obtain the prior approval of the Governor in Council for any rule changes which enlarge the coverage of the CILSL Scheme, CoINVEST typically asserts that particular coverage

¹ Ai Group, Submission to Parliament of Victoria Economic, Education, Jobs and Skills Committee – Inquiry into the Portability of Long Service Leave Entitlements, 7 August 2015, section 6. See attachment to this submission.

changes have not expanded coverage. It bases these assertions on its own unreasonably expansive interpretations of the coverage before it was changed.

For example, we refer ACIL to *Baytech Trades v CoINVEST* [2015] VSCA 342 determined by the Court of Appeal of the Supreme Court of Victoria. Baytech Trades Pty Ltd, the appellant, was represented in the proceedings by Ai Group Workplace Lawyers, Mr Stuart Wood QC and Mr Ben Jellis of Counsel.

The case concerned a group of 100 or so electricians on-hired by Baytech Trades Pty Ltd (a labour hire company) to NHP Electrical Engineering Products Pty Ltd to assemble switchboards in NHP's factory in Melbourne. The County Court of Victoria originally decided that the work was covered by the CILSL Scheme, which created major cost risks for manufacturers and labour hire companies given the 2.7% levy payable under the scheme. The Court of Appeal proceedings were an appeal against the County Court's decision.

In a unanimous judgment of Justices Maxwell, Tate and Dixon, the Court of Appeal decided that electricians who manufacture or assemble products in a factory are not covered by the CILSL Scheme, whether employed by a manufacturer or a labour hire company.

The Court said:

"..although the word "assembly" when read literally would cover the work of an electrician in assembling an appliance as part of a process of manufacture, the context shows that it was not intended to have that meaning here. Rather, it was intended to cover an electrician who assembles (and then installs) an appliance on site, not an electrician who assembles it for supply by the manufacturer to a customer."

Despite the judgment of the Court of Appeal clarifying certain aspects of the coverage of the CILSL Scheme, CoINVEST is currently pursuing an expansion of the scheme through a variation of the CoINVEST Rules to capture the manufacture and assembly of electrical products in factories. It is blatantly trying to overturn the effect of the Court of Appeal's decision through a Rule change.

The above matter is simply one example of the continuing pressure imposed by CoINVEST on employers operating outside of the building and construction industry to pay into the CILSL Scheme. Employers should not be threatened with legal action, and be required to pursue costly litigation to prove that they do not fall within the coverage of a portable long service leave scheme. The scope of any portable long service leave scheme should be clear, free of ambiguity, and not subject to continual change.

Legislating the coverage of any portable long service leave scheme, in detail, is the only mechanism to achieve these objectives and avoid the problems experienced by employers with the construction industry long service leave scheme and its administrator CoINVEST.

2.3 Board composition

Board members of any portable long service leave scheme should be appointed by the relevant Minister for a defined period.

At least a third of the directors should be independent, with no links to the unions or employer organisations represented on the Board.

The Victorian Government should consider the problems that Ai Group has identified with the CoINVEST Board structure. The CoINVEST Board of Directors is comprised of four union officials, four employer representatives and three independents. The three independents are appointed by the other eight directors. This structure has resulted in the following:

- 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 over the actions taken by CoINVEST.

We are of the view that 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 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.

2.4 Independent third party oversight

The Victorian Government should consider independent third party oversight of any new portable long service leave scheme introduced in Victoria. We note that CoINVEST is not subject to oversight by an independent third party. 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 1973* (Vic) (**Ombudsman Act**). The Ombudsman Act exempts "a person in the capacity of trustee under the Trustee Act 1958 (but not including State Trustees)" from oversight and investigation by the Victorian Ombudsman.

The Victorian Ombudsman needs to be given the jurisdiction to oversee and investigate the actions and decisions of portable long service leave scheme administrators. Employers and employees who are aggrieved by actions or decisions of portable long service leave scheme administrators should

have the right to make a complaint to a relevant independent body. The Victorian Ombudsman is the logical body.

Any portable long service leave scheme administrator should be made subject to the *Freedom of Information Act 1984* (Vic). CoINVEST is not listed as an agency on the Victorian Government's Freedom of Information website and therefore it is not apparent that CoINVEST is covered by the Act.

2.5 Dispute resolution

Legislation should set out a fair dispute resolution process between employees, employers and the portable long service leave scheme administrator.

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

The CILSL Act and the CoINVEST Rules include two dispute resolution processes, neither of which operate efficiently nor effectively and neither of which are commonly used.

The first dispute resolution process is found in the CoINVEST Rules. 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 CILSL 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) (**Commercial Arbitration Act**) 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 which are premised on the parties to the dispute agreeing to the arbitration in accordance with the processes under the Commercial Arbitration Act. The deeming provision is particularly unjust for employers covered by the CILSL Act given that appeal rights under the Commercial Arbitration Act 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 of the CILSL Act 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.

We proposed the following changes to the approach to dispute resolution by CoINVEST to the Victorian Government during the Committee Inquiry. These proposals are also relevant to the development, and consideration of, a portable long service leave scheme for the security industry and contract cleaning industry.

- The Victorian Civil and Administration Tribunal (VCAT) should be empowered to deal with disputes arising under the relevant portable long service leave laws, including coverage disputes.
- The portable long service leave scheme administrator 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 relevant portable long service leave law. (Note: a similar time limit of six years applies under section 544 of the *Fair Work Act 2009* (Cth)).
- The relevant portable long service leave law must clarify that the scheme administrator has the ability to waive or reduce back-pay of the levy. In order to resolve disputes, often compromises and flexibility are needed.
- The relevant portable long service leave law should not contain criminal penalties (unlike the CILSL Act).
- Only industrial inspectors employed by the Victorian Government should be empowered to pursue penalties under the relevant portable long service leave law, not the portable long service leave scheme administrator.

- The Victorian Government should implement a litigation policy for the relevant portable long service leave law drawing upon the policies implemented by the Fair Work Ombudsman and Australian Building and Construction Commission.

2.6 Decision making in the scheme

The following matters must be confined to legislation:

- The scope of any portable long service leave scheme (i.e. who is in the scheme). This should not be left to the decision making of the portable long service leave scheme administrator (see above);
- The appointment of Board members (see above);
- The process for resolving disputes (see above);
- Any variation to the scheme levy amount, including the definition of ‘ordinary pay’ upon which any levy would most likely be based; and
- The requirement of the portable long service leave scheme administrator to exercise the upmost transparency and accountability about matters concerning the portable long service leave scheme.

3. Designing the Levy Scheme General

The Discussion Papers make a number of assumptions about the security industry and contract cleaning industries with regard to ‘setting a levy’.

The Discussion Papers suggest that any portable long service leave scheme for the security industry and contract cleaning industry in Victoria will be funded by an employer levy. Such a levy would operate as a tax on employment. It would impose significant costs and risks upon employers not otherwise associated with traditional long service leave. For example, an employer is obliged to make a payment into a portable long service leave scheme with respect to an employee regardless of whether the employee will receive the ultimate benefit of the payment. For example, the Contract Cleaning Discussion Paper suggests that the contract cleaning industry has a 25 per cent attrition rate.² Therefore, it can be assumed that a quarter of contributions made by employers to a portable long service leave scheme for the contract cleaning industry would simply remain in the fund, without any benefit to the employer or employee.

² Contract Cleaning Discussion Paper, page 20.

The CILSL Scheme is funded by the imposition of a 2.7 per cent levy on individual employers. A similar levy imposed on the security industry and contract cleaning industry in Victoria would have significant adverse impacts on employers and employees.

3.1 Security Discussion Paper

Question 4.2

Does the estimate of 3.4 per cent annual wage growth (1.0 per cent real) seem reasonable? Does the estimate of annual income by age seem reasonable?

The security industry is characterised by low wages and high turnover of employees, with a significant proportion of employees leaving the industry (20 per cent) annually.³ It is our experience that the industry, at the lower skill level, is generally ‘award reliant’, with the minimum wage within the *Security Services Industry Award 2010* for a Security Officer Level 1 paid \$755.80 per week (\$39,301.60 annualised) and a Security Officer Level 5 paid \$829.80 per week (43,149.60 annualised).⁴

The public administration and safety sector, under which the security industry is classified for the purpose of ANZSIC codes used by the Australian Bureau of Statistics, recently recorded wage increases in private sector agreements of 2.2 per cent.⁵ Furthermore, the Reserve Bank of Australia has recorded the current rate of income growth over the economy more generally to be modest at below 2 per cent.⁶ It anticipates that as 2017 progresses, wage growth may increase but will remain below 3 per cent, realistically somewhere between 2.5 per cent to 3 per cent.⁷ Given the labour characteristics of the security industry, we consider a 3.4 per cent annual wage growth (as purported by the Security Discussion Paper) to be an over-estimate.

3.2 Contract Cleaning Discussion Paper

Question 4.2

Does the estimate of 3 per cent annual wage growth (0.6 per cent real) seem reasonable? Does the estimate of annual income by age seem reasonable?

Like the security industry, the contract cleaning industry is characterised by low wages and high turnover, with a significant proportion of participants leaving the industry (25 percent) annually.⁸ It is our experience that the industry, at the lower skill level, is generally ‘award reliant’. The *Cleaning*

³ Security Discussion Paper, page 20.

⁴ Security Services Industry Award 2010, clause 14.1.

⁵ Australian Government, Department of Employment, Trends in Enterprise Bargaining, December Quarter 2016. https://docs.employment.gov.au/system/files/doc/other/trends_d16.pdf

⁶ J Bishop and N Cassidy, Insights into low wage growth in Australia, RBA Bulletin, March Quarter 2017.

⁷ J Bishop and N Cassidy, Insights into low wage growth in Australia, RBA Bulletin, March Quarter 2017.

⁸ Contract Cleaning Discussion Paper, page 20.

Services Award 2010 specifies that a Cleaning Service Employee Level 1 must be paid a minimum of \$718.40 per week (\$37,351.60 annualised), and a Level 3 \$783.30 per week (\$40,731.60 annualised).⁹

The average wage growth in the commercial cleaning industry has been subdued over the past five years.¹⁰ In December 2016, the Fair Work Commission approved the *NSW Government Cleaning Contractors Multi Enterprise Agreement 2016* covering 2,300 employees, which included an average annualised wage increase of 1.8 per cent.¹¹ This increase aligns with the Reserve Bank of Australia's report that the current rate of income growth over the economy more generally to be modest at below 2 per cent.¹² It anticipates that as 2017 progresses, wage growth may increase but will remain below 3 per cent, realistically somewhere between 2.5 per cent to 3 per cent.¹³ Given the labour characteristics of the industry, we consider a 3 per cent annual wage growth (as purported by the Contract Cleaning Discussion Paper) to be at the top end of estimated growth (representative of the Australian economy as a whole) and a lesser percentage to be more reasonable.

Businesses within the contract cleaning industry generally operate on tight profit margins, with little room to pass increases in operating costs on to client. Labour costs are representative of about 42 per cent of the contract cleaning industry's revenue.¹⁴ A portable long service leave levy would increase the cost of labour within the contract cleaning industry to significantly higher proportions of industry revenue and would ultimately squeeze the profitability of contract cleaning operators.

4. Conclusion

We continue to be fundamentally opposed to the expansion of portable long service leave in Victoria beyond the building and construction industry. The case for a portable long service leave scheme in the security industry and contract cleaning industry has not been made out. A portable long service leave scheme funded by employer contributions, based on the ordinary wages of workers, is simply a tax on employment and would impose a significant burden on businesses operating in industries with already low profit margins.

⁹ Cleaning Services Award 2010, clause 16.1.

¹⁰ IBISWorld Industry Report N7311, Commercial Cleaning Services in Australia, November 2016, page 20.

¹¹ Australian Government, Department of Employment, Trends in Enterprise Bargaining, December Quarter 2016. https://docs.employment.gov.au/system/files/doc/other/trends_d16.pdf

¹² J Bishop and N Cassidy, Insights into low wage growth in Australia, RBA Bulletin, March Quarter 2017.

¹³ J Bishop and N Cassidy, Insights into low wage growth in Australia, RBA Bulletin, March Quarter 2017.

¹⁴ IBISWorld Industry Report N7311, Commercial Cleaning Services in Australia, November 2016, page 20.



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