

# CORRECTED VERSION

## ECONOMIC, EDUCATION, JOBS AND SKILLS COMMITTEE

### Inquiry into portability of long service leave entitlements

Melbourne — 14 September 2015

#### Members

Mr Nazih Elasmr — Chair

Ms Dee Ryall — Deputy Chair

Mr Peter Crisp

Mrs Christine Fyffe

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#### Witnesses

Mr Stephen Smith, Head of National Workplace Relations Policy, and

Mr Tim Piper, Director – Victoria, Australian Industry Group

**The CHAIR** — I welcome Mr Stephen Smith, Head of National Workplace Relations Policy, and Mr Tim Piper, Director — Victoria, Australian Industry Group. Thank you for coming. I need to go through a couple of things that are important for our hearing. Welcome to this public hearing of the Economic, Education, Jobs and Skills Committee Inquiry into the portability of long service leave entitlements. All evidence taken at this hearing is protected by parliamentary privilege. Any comments you make outside the hearing are not afforded such privilege. Hansard is recording today's proceedings. We will provide a proof version of the *Hansard* transcript so you can correct any typographical errors. I would now like to invite you to make an opening statement. The Committee also has a number of questions for you, so please keep your statement as brief as you can.

**Mr PIPER** — I will just introduce ourselves and get Steve to provide the bulk of our submission. My name is Tim Piper. I am the Victorian Director of the Australian Industry Group. Stephen Smith is here with me, as you mentioned earlier. Thank you for hearing us on this issue. We consider this to be a very significant issue that the state government is reviewing. As such, we have taken some considerable time and effort to put together a submission, which we think is important.

Portable long service leave as an issue is something we have not ever given consideration to in the sense that so many of our members would consider it to be something that is anathema to what they do. We are concerned really about the idea of it being spread across the Victorian economy, and Steve will give you some figures in a little while about the cost implications of that occurring with employers. It is a significant cost to business at a time when business is finding it extremely difficult.

We represent around 15 000 businesses around Victoria and we represent 60 000 to 70 000 businesses within Australia, so we understand what is happening not just within Victoria but nationally, and of course the impact of that internationally as well. What I am hoping is that the Government and you as reviewers take note of the impact that the cost implications have on businesses in Victoria. Whilst these cost implications do not necessarily impact on services today, what we do find in manufacturing businesses in particular—and about 65 per cent of our members are manufacturers, so we represent manufacturing in a significant way—is that companies look to investments here and overseas and are competing with overseas companies both internally and externally. By internally I mean that we have international companies here who are looking to see where their next investments are going to be. We know from talking to many of our managing directors that they have to compete internally with potential investments in Thailand, in Indonesia and even into Eastern Europe. In many circumstances they look at issues such as the cost of employment, and what we are talking about here is an additional cost of employment. In those circumstances companies do not pull out today—or tomorrow, for that matter—but they start to reduce their amount of capital expenditure so that in three, four, five or six years' time it is a much easier decision for them to make to leave Victoria, to leave Australia. That is the sort of implication that we are concerned about with having continuing increases in employment costs on businesses. The fact is that something such as is being considered with portable long service leave would have significant implications on those costs. It seems to me that governments need to appreciate who it is that is actually employing these people, because in many instances it is small businesspeople who cannot afford to be continuing to have portable long service leave imposed on them or to have that sort of imposition on them. In the end they are simply not going to be considering extra employment, and that is what we are all after.

One thing before Steve starts: this Government has been talking about jobs. Its mantra is jobs. Every time I talk to a new minister it is about jobs. This is not going to enhance the possibility of creating new jobs in the manufacturing industry. It is not going to enhance new jobs in any other industry. In fact it is going to have the exact opposite effect. People are going to question whether they want to create new jobs because of all the continuing new costs that are being imposed on employment.

**Mr SMITH** — As would be clear from our submission, we very strongly oppose the extension of portable long service leave entitlements across the Victorian workforce or indeed anywhere beyond where those entitlements already exist in the construction industry. Portable long service leave conflicts with the fundamental purpose of long service leave, which is to reward employees for a period of loyal service with one employer. The focus of portable long service leave is not on rest and recuperation at all but on the accumulation of a lump sum payment. You only have to look at the experience in the building and

construction industry, and you would look long and hard to find any worker who took any long service leave—it is really a mechanism to accumulate a cash payment.

Extending portable long service leave across the Victorian workforce, as Tim has mentioned, would result in Victorian firms becoming less competitive internationally and less competitive against interstate firms. Our economics team has done a great deal of work in analysing the cost for all of the ANZSIC key sectors of a portable long service leave scheme. You can look at the tables in our submission and see that, regardless of whether you pick the manufacturing sector, the social and community services sector or any other sector, the cost is about four times the cost of the long service leave provisions that are there in the general legislation.

The cost of long service leave in Victoria based on the general laws is about \$900 million a year to employers; the cost of portable long service leave, if you take the levy that is currently there in the construction industry scheme of 2.7 per cent, would be more than \$4 billion a year. If you look at sectors like manufacturing, for example, the cost to the manufacturing industry is very, very significant. Currently the manufacturing industry has a long service leave cost of about \$115 million a year. The cost would be \$458 million a year for portable long service leave. For the health and social assistance sector the current cost is \$82 million a year. The cost of portable long service leave would be \$358 million a year—more than four times the cost.

Even the general long service leave laws are a burden on Australian employers. This is a uniquely Australian and New Zealand entitlement. We do not have these entitlements in other countries. Even in the building and construction industry, where if you go back to the 1970s when the existing scheme was introduced, employment in the industry was itinerant—people were terminated typically at the conclusion of a project. As we have highlighted in our submission, the patterns of employment in construction these days are very similar to the patterns of employment in manufacturing and other industries. All of the labour these days is employed by subcontractors, not by the head contractors or the client. The patterns of employment in construction are very similar to the patterns of employment in manufacturing. The whole basis of the existing scheme is no longer there. However, we are not arguing to remove the existing building and construction scheme; we are arguing very strongly not to expand it to other sectors.

As we have said in our submission also, when you look at union arguments about why they believe this scheme should be extended or a new scheme implemented across the workforce, one of the arguments has typically been the alleged casualisation of the Australian workforce, which is a complete nonsense. For the last 17 years the level of casual employment in Australia has been about the same—between 19 and 20 per cent. It peaked eight years ago, in 2007, at 20.9 per cent, and it has gone backwards since that time. In any event, as the Committee would be aware, in 2005 the general Long Service Leave Act was amended to extend long service leave entitlements to casuals. So longer term casuals get those entitlements; shorter term casuals, of course, get a 25 per cent loading in lieu of those entitlements.

The Productivity Commission is currently reviewing long service leave. The unions have put all their arguments to that Commission. We will see what the final report says, but based on the draft report, the Productivity Commission has said that there are not arguments supporting a portable long service leave scheme; the cost would far outweigh the benefit. I note the Chair's comment about keeping my comments brief, so I will not go into all the many, many issues about ...

**The CHAIR** — You have 5 minutes, if you want it.

**Mr SMITH** — I will then just touch on some of the issues with the existing portable construction industry long service leave scheme and the administrator, CoINVEST. As we have set out in significant detail in our submission, there are a raft of problems with the existing scheme that we urge the Committee to become aware of and make recommendations to address. This existing scheme is causing a lot of problems for employers not in the building and construction industry but due to the creeping coverage that has been going on with this scheme for a number of years, either through changes to the coverage rules or, probably even more significantly, interpretations of the coverage that we regard as unreasonable and invalid.

What we have suggested is that the legislation needs to be amended so that the coverage is actually set out in the legislation like in other states rather than allowing CoINVEST to determine the coverage of the scheme through rules. That includes key terms like ‘construction work’, ‘construction industry’ and ‘ordinary pay’ being defined in the Act. Section 10 of the Act is a key section which gives CoINVEST sweeping powers to require a vast amount of information to be provided, and we think that needs to be tightened in the way we have set out in our submission.

We think the existing dispute resolution processes in the scheme are not working, on any reasonable assessment, and a far more effective and efficient dispute resolution process needs to be implemented. We have suggested that VCAT be the body that should be empowered to deal with disputes, including about coverage. CoINVEST should not be taking matters to court before the VCAT processes are exhausted.

At least one Ai Group member has been driven into insolvency as a direct result of CoINVEST litigation. The criminal penalties in the Act that CoINVEST constantly refers to as a way of—coerce is a strong word, but I will use it—coercing employers to provide information should be replaced with civil penalties. The Ombudsman Act should be amended to give the Victorian Ombudsman jurisdiction to oversee the workings of CoINVEST. The Freedom of Information Act should apply, and the Act should be amended to implement strict requirements regarding the protection of information that comes to the attention of not only CoINVEST staff but also the CoINVEST board members.

One way the scheme, we believe, could be significantly improved would be to implement a new funding model like the funding model that is in place in Queensland, New South Wales and the Northern Territory, where there is a project-based funding model. In our submission the comments are there as to the rationale for why the New South Wales scheme was changed years ago to go away from this funding model that is in place in Victoria and move to a project-based funding model.

Finally, we believe the Act should be amended to provide that it does not apply to any employer who is bound by any other long service leave provisions in a statute or industrial instrument. The construction industry long service leave scheme is creating major cost risks and other problems for employers in a large number of industries, including manufacturing, and the scheme does need to be amended, in our view without delay. We are happy to take questions on any of those matters.

**The CHAIR** — Thank you very much for that. I will start with the first question. Your submission identifies a number of concerns about the administration of Victoria’s construction industry long service leave scheme. What impact has the scheme’s administration had on employment and the competitiveness of Victoria’s building and construction industry?

**Mr SMITH** — We believe it has had a negative impact on employment, not in mainstream construction but, when you look at sectors like manufacturing, this is a massive risk. We are waiting on a decision from the Court of Appeal in a case involving NHP, where CoINVEST has argued—through County Court proceedings and now it is before the Supreme Court—that a group of about 100 labour hire workers who have been provided to a manufacturer to work in a great big factory assembling products are construction workers, effectively, under this scheme. If that group of employees is in, then it could not be argued that employees of manufacturers are not in. The problem is that it just keeps—creep, creep, creep. It is a massive risk for employers.

**Ms RYALL** — Some submissions suggest that portable long service leave be statewide for all employees and that, if that cannot be done, in the early stages it go to some specific industries like patient transport, cleaning, community services and building. What would be the impact on those specific businesses and those particular sectors in that circumstance?

**Mr SMITH** — It would operate just like a great big new tax. The current levy with the construction industry scheme is 2.7 per cent, so if you were looking at any model as to what the levy might be for a general scheme, you would have to say, ‘Well, that is the starting point: nearly 3 per cent’, and a 3 per cent levy on any business would have to have a big impact on their costs. So regardless of what sector you look at—if you look at social and community services, a lot of that work has been outsourced to the private

sector. So not only will there be a bigger impact on those private sector businesses but there will be a huge impact on public revenues as well to fund another 3 per cent impost on those services.

**Mr PIPER** — Employers always talk about the add-on costs, and the one that our members talk about all the time is payroll tax. They really dislike the fact that payroll tax is a cost to them on employing somebody. If you employ somebody, then you have 5 per cent that you have to pay in addition. This would be equally as big a concern for them, and they would start to question whether they should put new people on. Payroll tax already makes them do that, so if you are going to add another potentially 2 per cent in additional employment costs—\$4 billion to the Victorian economy—employers are going to question what they are going to do at the next stage because it has long-term implications for them.

**Mrs FYFFE** — Would you just clarify that? If this 2.7 per cent, or whatever it was, was applied to each employee's cost, that is taken into account for the payroll tax so it would push some very small companies into paying payroll tax. Is that what you are saying?

**Mr PIPER** — No, sorry, that was not my implication at all. It is interesting as to whether it might do, though.

**Mrs FYFFE** — It is the cost of employment, is it not?

**Mr PIPER** — It is the cost of employment, so it might push people into the payroll tax band. But of course in Victoria if you get pushed into the payroll tax band, you still only pay above the \$515 000 ...

**Mrs FYFFE** — Which is very easy to reach.

**Mr PIPER** — Yes, it is pretty easy to reach. That is right.

**Mr MELHEM** — Thank you, gentlemen. It is good to see you in a different forum. In my previous life I normally met you in a different discussion. I have a number of questions, but I will kick off with one, which is in relation to cost. I accept what you are saying about the current costs for CoINVEST, for example, which you said is about 2.7 per cent. But what I want to separate out is the total cost versus reality. First of all, long service leave is not a new impost on employers; it is a current entitlement, so we need to take that into account when we do our costs. We cannot just say it is a brand-new 2.7 per cent cost to employers because it is not. If it is a new entitlement, I accept your argument totally.

What I am talking about is, for example, manufacturing. Your submission talks about people between 5 and 10 years, 19.6 per cent; 7 to 10 years, 33 per cent; over 10 years' service, 29 per cent. So if you add all these things—for example, 7 to 10 years is around 62.5 per cent where employers access their long service leave. That is according to your submission. I think it is important to say for the record that it is a current entitlement, so it does cost. It is part of the current costing. If my figures are right and we move to portable long service leave in the manufacturing sector, the cost would be 1.6 per cent. That is a pure entitlement—0.866 a week for 52 weeks a year. If you discount what has already been paid by employers, the additional costs could be around 1 per cent in raw terms.

**Mr SMITH** — No, we do not accept that. If you look at table 2, which I think is the table you are looking at ...

**Mr MELHEM** — Yes, that is what I am looking at.

**Mr SMITH** — The column at the bottom highlights the existing costs of long service leave at \$927 million, based on the existing general long service leave laws, compared to over \$4 million. What you have there is every industry on the main 2-digit ANZSIC codes, the existing cost of long service leave in the second-last column and the cost of long service leave in a portable scheme so you can compare. For manufacturing, existing costs are \$115 million—cost, \$457 million. For the SACS sector, the social assistance sector, the existing cost is \$82 million and the portable cost is \$357 million.

The way those figures have been calculated is to look at the average earnings and to look at the proportion of people with 10 years or more service, so we have that figure. The ABS stats only give you figures from 5 to 10 years; they do not give you figures from 7 to 10 years, so we have taken the group that has 5 to 10 years of service and we have taken three-fifths of that level. That overinflates the cost of the existing non-portable entitlements a bit because you would assume that there would be more people leaving at 5 and 6 than 7, 8 and 9. That is about as precise as we can get it, but it shows that whichever industry you look at, it is about four times the cost.

**Mr MELHEM** — I put it to you that it is a very inflated figure, though. It is very inflated. I mean, if ...

**Mr SMITH** — I do not accept that.

**Mr MELHEM** — It is, and I am not arguing for or against. I understand the impact on jobs; there is no question about that. What I have got a problem with is your figures. You are saying to me that 7 to 9 years is 33 per cent and over 10 years is 29 per cent—that is people actually accessing. My figures tell me that 62 per cent access long service leave. Then the cost on the current system of 0.866 weeks per year, which is \$150 million—is that assuming everyone takes long service leave or are you basically just talking about a portion who do 7 years or more and that is what you are taking to be the average?

**Mr SMITH** — It is the portion who have 7 or more years of service.

**Mr MELHEM** — What is the percentage? Do know the percentage? Are you combining your tables 2 and 3?

**Mr SMITH** — Yes, exactly. All the people who on the ABS stats have 10 or more years of service is one figure. Then that is added to the people who have 5 to 10 years of service, but it takes three-fifths of that on the basis that if they have 7, 8 or 9. That is a fairly precise figure. How much more precise could you possibly get?

**Mr MELHEM** — My figure is 62 per cent already taking long service leave.

**Mr SMITH** — I know, but they are not. That may well be the case, but that figure there, the \$115 million, is a relatively precise figure. How could you possibly get it any more accurate? It is based on average earnings and the people who have 7 or more years of service, compared to the other figure, which is a 2.7 per cent levy based on average earnings across the workforce.

**Mr MELHEM** — That is what I have got a problem with, because I do not accept your figures that the other 38 per cent jumped the number from \$150 million to \$457 million, because you assumed the 2.7 per cent. My number—the cost of long service—is 0.6 per cent. It is a simple formula of 0.866 divided by 52, and that will give you a figure. I accept that CoINVEST might be a bit problematic as far as the cost. I think 2.7 per cent is reasonably high. I accept that. What I have a problem with and what I am basically flagging to you is that the \$457 million, I think, is a bit over the top.

**Mr SMITH** — We do not accept that because there are a dozen footnotes there and all the ABS stats. If there is a more precise way of calculating, then we are happy to be ...

**Mrs FYFFE** — First of all, unlike my colleagues I had no experience in this field at all before coming to this Inquiry so I am looking at portable long service leave with very fresh eyes and so I am asking some very simplistic questions. I am concerned when you say that the rules are changing and have been done by CoINVEST, and I will ask through the Chair for our research team to come back with a report on the changes since this was implemented compared to what applies today because I would like to have a clear feeling for that.

The thing I wanted to ask you about relates to my electorate, which has probably one of the largest number of tradies of any area in Victoria and consequently there are lots of subcontractors. One of the biggest issues we have is the number of kids who cannot get apprenticeships with local companies. There are two aspects. One is, of course, not wanting to meet the payroll tax, but the other is the total cost of each

apprentice. In your opinion and consulting with the companies that you are representing, how is this going to affect, if it was implemented, the number of apprentices employed by your people?

**Mr SMITH** — It would depend on how it is implemented. At the moment, with the construction scheme, the levy is not payable for apprentices. If that occurred, then you would assume the impact is not going to be that great. But there is no guarantee, of course.

**Mrs FYFFE** — So if it is not for apprentices, does it exclude any other group that is in the building and construction industry?

**Mr SMITH** — No, just apprentices. It does not exclude trainees as I understand it, just apprentices.

**Mr CRISP** — I am going to go to regional Victoria, because some of our employment demographic is a little bit different there. I am wondering whether you have given any thought to how this might have specific impacts in regional Victoria?

**Mr SMITH** — The main impact will be the cost impact and the flow-on impacts from that. As we are all aware, a lot of those regional companies are under a lot of pressure. I was up in Bendigo and Ballarat about two weeks ago. We ran a members meeting in both locations, and we had a roomful of people. The discussion was about the Productivity Commission's draft report. They made the point very strongly about the cost pressures that they are under. We opened up a discussion about this proposal with penalty rates in the fast-food industry and retail industry and so on. They were saying, 'Doesn't the Productivity Commission understand the huge cost pressures that we're under?'. It was not an issue about penalty rates in particular they were talking about, but just the huge cost pressures. The idea of a 3 per cent levy on their payroll would just be very damaging to their businesses.

**Mr CRISP** — Thank you.

**Mr PIPER** — Mr Crisp, I have been in regional Victoria a lot in recent times. One of the reasons I have been there is to talk to them about footy Friday, which of course none of them in regional Victoria believes is reasonable, because they think it is ...

**Mr NARDELLA** — Not even the hoteliers that you talk to?

**Mr PIPER** — Not even the hoteliers that you talk to.

**Mr NARDELLA** — No, not even them, but the motel owners?

**Mr PIPER** — Not at all.

**Mr NARDELLA** — Oh. Okay.

**Mr PIPER** — They all just question it, because they think it is a Melbourne-centric holiday, which is what it is. That is just one of the impositions that is placed on them, and they are up in arms about that. That is a cost that will be imposed on them. This would be yet another cost. What I do not understand is why government does not recognise that every time that they think about these additional costs, they put extra dollars on the costs of employment.

If we are going to be putting jobs back into the market, you cannot be continually adding additional costs, because employers every time will question whether they can afford it. Employers want to employ people, because that improves their business—it makes them more productive, and it potentially gives them a greater profit—but if you are going to continually impose additional costs, you are not going to have them doing that, and particularly in regional Victoria.

The impact on the ups and downs in regional Victoria is like that, whereas sometimes in Melbourne we are a little bit more insulated, but in regional Victoria there is an immediate impact. I can tell you that the reaction from employers in regional Victoria to having a cost such as this imposed will be quite significant,

because they will say, ‘What do they want us to do? We can’t have these extra costs imposed and still be employing more people’.

It becomes the psyche too. It is not just the extra 2 per cent that we are talking about; it is their concern. I was talking to regional company last week, and they said there are 10 things that are imposed on them in employment costs beyond what they pay the salary, which adds up to over 30 per cent. I did not get it from them, but it was a regional company who has, by the way, succeeded in recent times because the Government has been supporting local procurement.

I look at Mr Melhem here, because Mr Melhem knows very well how important it is that the Government procures locally. They have actually succeeded in getting some Japanese contracts through, because they were in the rail industry and the rail industry was supporting them. But I know what their reaction will be to this. It is yet another one of those cost impositions on them. As they said to me, there are at least 10, and this would make 11.

**Mr NARDELLA** — Would one of them be company tax?

**Mr PIPER** — Of course it would be.

**Mr NARDELLA** — Thank you. The Ai Group supports BESTaff in its court case against CoINVEST. Is that correct?

**Mr SMITH** — We did not fund that court case but, yes, we supported it in the sense that we saw that CoINVEST had come along and were trying to establish a principle whereby the 2.7 per cent levy was paid on overtime earnings for labour hire companies. BESTaff was targeted. The whole of the labour hire industry were up in arms about the issue, so to that extent we supported it.

**Mr NARDELLA** — The court case found in favour of CoINVEST, did it not?

**Mr SMITH** — This just shows you how unfair litigation can sometimes be. The outcome of the court case was that CoINVEST had to reimburse BESTaff \$30 000 for overpaid contributions, yet the judge awarded the costs CoINVEST’s way, based on what we saw as technicalities. That drove BESTaff into insolvency; no-one won.

**Mr NARDELLA** — So it was not the ATO tax bill which really put the CoINVEST payment in a minuscule amount? BESTaff owed a lot of money to the Australian Tax Office, did they not?

**Mr SMITH** — I have no idea?

**Mr NARDELLA** — Well they did, did they not?

**Mr SMITH** — I have no idea. I was only involved ...

**Mr NARDELLA** — It is public knowledge.

**Mr SMITH** — It is not knowledge to me.

**Mr NARDELLA** — Not for you, but you used them as one of your prime examples within your submission?

**Mr SMITH** — It is a very good example of this creeping interpretation that occurs. For more than a decade CoINVEST had put out information to the labour hire industry saying, ‘Don’t pay your levy on overtime earnings’. BESTaff paid its levy on all of the ordinary time earnings, then was targeted with years and years of back pay on the overtime earnings. BESTaff put up all of CoINVEST’s own literature, saying, ‘Don’t pay it on overtime earnings’, yet based on case law that says in the public sector estoppel principles do not apply, that was held to be something that was not relevant.



Like I said, they ended up effectively winning the court case, but having the costs order made against them, which was just completely unfair.

**Mr NARDELLA** — That is not my interpretation of the court case, but that is fine.

You also say that you want VCAT to make decisions in terms of—as a first point of call—disputes, especially when they are based on a legal interpretation. Why do you want to go to VCAT instead of straight to the Magistrates' Court where you have got judges who can rule on legal matters?

**Mr SMITH** — As we have argued in our submission, there is no effective dispute resolution process. The one in the Act itself is one that deems the parties to have agreed to commercial arbitration. That whole thing is a complete nonsense in our view anyway, because the basis of the Commercial Arbitration Act is that you voluntarily go in and you put your dispute to the arbitrator to determine the outcome. Because you have voluntarily done that, there are very limited appeal rights, so this deems you to have agreed when you may have strongly opposed it. But the costs of that are very significant, and in our experience CoINVEST actively discourages people from using that mechanism. That is the mechanism.

The mechanism that is used by CoINVEST is to demand information on every hour worked by every employee going back often to the period many years ago when the contribution holiday ceased, and then to go serve an invoice on the company for six or perhaps seven-figure sums, and then just chase that debt through either the Magistrates' Court or the County Court or wherever the relevant court is.

**Mr NARDELLA** — Or negotiate it.

**Mr SMITH** — I would not call it negotiate; I would call it coerce, as I have said before.

**Mr NARDELLA** — Okay.

**Ms RYALL** — You mentioned international competition earlier. Obviously you talked about the impact on increased costs versus job creation or employment. In a competitive nature, if Victoria were to go it alone on portable long service leave, how would that affect companies in Victoria in terms of national competition and also expanding on the international competition?

**Mr PIPER** — I would like to make a comment on that. Recently we had a number of CEOs sitting around a table talking to a guest speaker. Comments from at least three international CEOs were that Australia—and we were talking Australia, and I will get to Victoria second, but it is the same relationship—is the most expensive place in the world to employ at the moment, and that goes across the board. The CEOs of those companies, whether they were European based—and they usually are—or American based, but the three I am thinking of now were European based, were saying, 'Why would we currently invest into Australia?'. The same thing goes for Victoria—'Why would we invest into Victoria?'. We know, and it has been shown, that construction costs in Victoria are considerably higher than anywhere else in Australia. Figures suggest it is up to 40 per cent higher to construct in Victoria than it is elsewhere. Getting into a greenfield site, if you want to do it in Victoria, compared with other states means you are already up against it.

To add this in addition to what we currently have would make those international companies—their CEOs, or whoever it might be, question what long service leave is to begin with because that is something they do not have around the world—question why we would be simply imposing it across the board in a small state such as Victoria. They do not look at it as Victoria; they look at it as Australia, and they would be questioning why, in a regional area, we would be forcing that. I think we would be encumbering ourselves. We would be forcing them to question yet again their investment in a state such as ours. They would be asking, 'What else is there?'. The costs of employment are high, so why would you add this as another one?

**Ms RYALL** — And the implications of not investing in Victoria?

**Mr PIPER** — Well the implications are, unfortunately, patently obvious. You would therefore have people who are considering moving out and the greenfield sites, the new investments, would be fewer because they could be going to other countries where they do not have these sorts of impositions.

And it is not as if we do not pay people reasonably well now. We are one of the highest paying countries—if not the highest paying country—in the world. We certainly were when the dollar was higher. That may well improve; our productivity comparisons might improve as a result of it. But the point is, though, that we are competing in an Asian market, and when many of these companies are looking to invest they have many opportunities, not just in Australia. They can be looking to invest in Asian countries with much cheaper employment rates.

**Ms RYALL** — And the impact, therefore, on jobs and job creation in Victoria?

**Mr PIPER** — There would be as a result fewer jobs into Victoria, because they would question the costs of employing people.

**Mr MELHEM** — What sort of a model is the CoINVEST model? I know we talked about VCAT for compliance—I will put it another way. How do we handle employers who are not complying, which is most of the argument? There are two sorts of arguments in relation to CoINVEST. One is, you said CoINVEST imposes broader coverage and overtime to be taken into a calculation. That is one; that has caused the problem from CoINVEST's point of view. On the other hand, unions and employees will say, 'The employer is not up to date'. How would you suggest that we get a compliance in place? Why did you not just go to the Fair Work Commission, for example, as a vehicle to try to—I accept your argument about there being some problems that need to be sorted out. Court is not the answer.

**Mr SMITH** — If you look at the scheme as it operated in Victoria prior to CoINVEST being set up, or the current Act being set up from 1997, disputes did go to the Victorian Industrial Relations Commission. Once the current arrangement came in ...

**Mr MELHEM** — I sat on that once.

**Mr SMITH** — We are open to all of those things. If you look at the coalmining portable long service leave scheme, it was set up from 1948, I think it was.

**Mr NARDELLA** — Forty-seven.

**Mr SMITH** — 1947. Disputes under that piece of legislation go to the Fair Work Commission. What we are saying is there needs to be an effective dispute resolution process. It should not be a litigation process; there needs to be a place—whether it is VCAT or somewhere else—where these disputes can go to be resolved, rather than this process: serve a section 10 notice and demand information on every hour worked by every current and past employee going back more than 10 years. The cost of that to a company, even assembling that, is very significant. Often it takes someone weeks of time to pull together that information. And then serve an invoice on them—and then they do not pay because they say, 'Well, we're not covered', if it is a coverage dispute—and then CoINVEST takes the matter to court. That is not an effective dispute resolution process. If there is a dispute about coverage, it should be the case that you can go somewhere, prior to all that burden being imposed, to have that dispute resolved.

**Mr MELHEM** — Were you guys not on the Board? Has AiG got a seat on the Board?

**Mr SMITH** — We were on the Board many years ago, until it became untenable to continue because of these coverage disputes. So we are not on the Board, and hopefully these changes can be made and the CoINVEST issues are not such that we spend a huge amount of our time trying to defend our members against these claims.

**Mr MELHEM** — If we were to implement portable long service leave, and obviously that will be a decision for the Government—in your view the CoINVEST model is not your preferred model; I hear

that—but if, and I say if, the Government moved that way, what would be your suggestion about a good scheme or model?

**Mr PIPER** — No, I cannot allow that. This is nonsensical.

**Mr MELHEM** — So the answer is no.

**Mr PIPER** — Under some circumstances we can actually accept that changes that are being sought in labour relations are reasonable. You can understand why it is being done. This is simply nonsensical. It is an imposition that is not needed, that is only going to reduce the number of jobs in Victoria—maybe it will not reduce the jobs initially, but it will certainly make them question putting new people on. It will certainly make people question their ability to continue to employ people. It is a nonsensical thing for government to do. It really has no basis to occur. If government was going to countenance it, we would be pushing very hard back against it.

**Mrs FYFFE** — In your submission you referred to the New South Wales and Queensland systems. To your knowledge, do they have the same creep issues that you referred to as being in Victoria?

**Mr SMITH** — No, they do not. Part of that is the funding model. Because the levy is paid at the development application stage, the natural pressure is to keep the scheme within the construction industry. Because it is project funded, there is no incentive for the administrator to want it to creep because you are going to be including lots of people that the levy has not paid for. Whereas CoINVEST has an incentive to force more employers to pay the levy. If they can force one of our manufacturers to pay the 2.7 per cent levy, that will mean that for seven years that levy is paid on every employee, when there will not be any money paid out from the scheme for seven years for any of those people. There is an incentive, we argue, for CoINVEST to continually seek this expansion. CoINVEST will tell you this afternoon that they are but humble administrators and they just administer the scheme as it is drafted, but in our experience that is not the case, as we have argued strongly.

**Mrs FYFFE** — Just staying with New South Wales and Queensland, how are the boards of their portable long service leave schemes made up? Do they have equal employer and employee representation on them?

**Mr SMITH** — They have representation of unions and employers, but the difference is that they are ministerial appointments, and as we have argued in our submission, we believe that is a model that has worked much better than the model here in Victoria.

**Mrs FYFFE** — That is both states?

**Mr SMITH** — Yes, ministerial appointments.

**Mr CRISP** — I would like to talk about how people take their long service leave and whether, from your experience with the construction industry, people take the leave or take the lump sum? I am trying to sort out whether this is about taking breaks or about a lump sum payment.

**Mr SMITH** — We would argue very strongly it is about a lump sum payment. CoINVEST took another one of our members, Jemena, all the way to the High Court arguing that this scheme does not actually give anyone any long service leave entitlements at all—that it is really just like a tax act that requires the payment of a levy. All the way up to the High Court—in fact, in a unanimous judgement in the High Court—that was held to be the case, that it does not actually provide any leave. CoINVEST will argue that you have got the general long service leave laws that provide the leave and you have got this legislation that provides the levy. The argument goes that the two seamlessly interact, and as we have set out in our submission that just is not the case. People in the construction industry are bound by both schemes, and I think you would find it extremely hard to find any long service leave taken by any construction worker. The whole focus of the scheme is on a cash payment, not on long service leave at all.

**Mr NARDELLA** — But the company can and companies do apply for long service when their employees get it and they get part of the payment back, so people do take long service leave using CoINVEST funds.

**Mr SMITH** — In our experience that applies extremely rarely. Where that might apply is ...

**Mr NARDELLA** — Extremely rarely? What, 1 per cent, 2 per cent, what is extremely rare—0.05 per cent?

**Mr SMITH** — In the construction industry ...

**Mr NARDELLA** — Or you do not know?

**Mr SMITH** — No, I have had a lot of experience with this.

**Mrs FYFFE** — I think you should give him a chance to answer.

**Mr NARDELLA** — I will.

**Mr SMITH** — In the construction industry proper there are not any long service leave provisions that have traditionally been in the relevant awards and so on, so the general long service leave laws apply. But in our experience—and we have a lot of construction industry members—construction companies do not provide the long service leave in the normal way. No-one ever applies for it because this is just seen as the long service leave scheme for construction. Where CoINVEST might have forced a company into the scheme and that company may have provided long service leave in the normal way, CoINVEST argues that you have to pay the levy on every employee and then come cap in hand to CoINVEST and apply for a refund.

**Mr NARDELLA** — Cap in hand? You make an application.

**Mr SMITH** — You make an application, yes.

**Mr NARDELLA** — Yes, it is not cap in hand; you make an application like you do for any funding, don't you?

**Mr SMITH** — But the point we make in our submission is it is a process where you apply to CoINVEST. CoINVEST then assesses the application and decides whether, in its view, it should pay the money back.

**Mr NARDELLA** — It is money that is being reimbursed for long service leave. They need to make sure that the person and the company are applying appropriately. You would not want a system that did not have the appropriate checks and balances, would you?

**Mr SMITH** — One question that would be worthwhile asking CoINVEST is on how many occasions they have paid back long service leave through this mechanism. If it is the case that the general long service leave laws apply and everyone is applying for long service leave and taking leave, you would assume that virtually every week if not every day they would be paying money back; but in our experience it is very rare.

**The CHAIR** — Can I ask a question. In other states with multiple long service schemes in industries such as contract cleaning in New South Wales, Queensland and the ACT, what has been your experience with these schemes and in particular what costs do these schemes impose on employers and what impact have these schemes had on employment and on the competitiveness of sectors?

**Mr SMITH** — We have not been supportive of the setting up of these other schemes—the contract cleaning scheme, the social and community services scheme in the ACT—because in our view, as we have said, they just result in a great big levy being imposed on the industry. In industries like contract cleaning the cost is passed on to the client, so it may be sustainable in some of those industries; but in our view it is

not valid. There is no reason to have a portable long service leave scheme in any industry other than—we are not arguing at this stage for the construction schemes to go or the coalmining scheme to go, but the creep of them is the problem. Whether you are looking at contract cleaning or looking at SACS or any other industry, there is no valid reason for a scheme to operate when you look at those huge cost differentials.

**Mr NARDELLA** — There is if you are a worker who has to change employers all the time and is working in the industry for a very long period of time and never gets long service leave. Would that not be the case? I know that is not your argument and that is not your point, but if somebody is working in the SACS area or in the cleaning area and they change, because companies change—you have got phoenix companies, you have got a whole range of things—is it not worthwhile that that worker gets entitlement to long service leave? But your argument is, no.

**Mr SMITH** — In our submission we deal with that issue of patterns of employment in the SACS industry. It is an industry that has patterns of employment similar to the manufacturing industry in terms of length of service, and the SACS industry has a very old workforce. There is no validity to this idea that people in that industry are constantly changing jobs; it is quite the opposite.

**Mrs FYFFE** — Excuse me, I have got to ask: what is the SACS industry?

**Mr SMITH** — Sorry, social and community services.

**Mrs FYFFE** — Thank you, I thought he was saying ‘sex’ industry.

**Mr MELHEM** — The project levy you talked about, would that be paid by the developer?

**Mr SMITH** — Paid by the developer, yes.

**Mr MELHEM** — And that is purely for construction projects, so not by the contractor or employer.

**Mr SMITH** — No, but the benefit of that model is that it is paid once at the development stage. You do not need the compliance officers that CoINVEST has to wander around seeking compliance, because it is paid up-front.

**Mr MELHEM** — I know it is the percentage of the total cost of the project, but how do you match that against the employees who are working on that project? How do you divvy that up and would that not drive up the cost?

**Mr SMITH** — The employees are still registered with the scheme in the normal way, but the funding is paid up-front. As set out in our submission, when you look at those extracts from the parliamentary debate as to why New South Wales went away from the model here, you can see it is far more efficient.

**Mr MELHEM** — But cost-wise I would be interested in any further material you have to do a comparison, for example, between a \$1 billion project in Victoria that costs x as far as long service leave versus a \$1 billion project in New South Wales. Is it 2.7 per cent of the billion or 2.7 per cent of the cost of labour?

**Mr SMITH** — The Queensland scheme has this project levy idea. Tom Fisher did a review of that scheme about five years ago, and he compared all of the costs from one state to another. CoINVEST and the cost of the Victorian model was right up there amongst the most expensive, and the Queensland scheme was amongst the least expensive. It is a much more efficient way to go. CoINVEST in its submission to this Inquiry has said that its own research shows it is more efficient, but, if I am remembering its submission correctly, it says it would not be worth changing the model. In our view it would be worth changing the model, very much so.

**Mr NARDELLA** — Companies have fought coverage extension have they not? But the courts then ruled that whatever extensions were put in place were legitimate under the Act, so how can you say that there was coverage creep when under the Act they were the companies that this legislation was to cover?

**Mr SMITH** — We do not accept that for a number of reasons.

**Mr NARDELLA** — So the courts were wrong?

**Mr SMITH** — No, there is a very important decision of the Supreme Court that is reserved at the moment, as I talked about. That will be a key decision that defines the coverage of this scheme. You would think that CoINVEST would have awaited the outcome of that decision before it made sweeping changes to its own rules. It has completely redrafted them from April based on its interpretation, before the courts have even handed down their decision. In that BESTaff matter, CoINVEST just changed the definition of ‘ordinary pay’ and its rules to circumvent and overturn the decision of the court. This is the problem. Those things need to be in the Act and not left to CoINVEST to draft its own rules. This idea that it has to get the support of Governor in Council is not working because CoINVEST says, ‘The rules mean this. This is how we interpret it, and because we changed them from that to that, that is, in our view, a narrowing of the rules’, even though, in our view, it has been a huge expansion of the rules.

**Mr PIPER** — Mr Nardella’s point about the courts is correct in the sense that the courts have made this decision, but that does not mean that that should not be changed. It does not mean that your recommendation should not be to change that and to ensure that this creep is not possible—that it does not move into areas of business that were never intended to be covered by the construction agreement—because it has moved into areas that are manufacturing alone and not construction. That is the big concern — that it has not managed to creep. So we would be asking you to make changes to what is there now.

**Mr NARDELLA** — So a universal scheme would fix all that.

**Mr PIPER** — We cannot let you finish with that!

**Ms RYALL** — I just wanted to say thank you for, in your submission, the ABS data, stats, references to research and other documents and so forth because we are able to track that through. I am appreciative of that. Thank you.

**The CHAIR** — On behalf of the Committee I would like to thank you, Mr Smith and Mr Piper, for coming and giving evidence.

**Mr PIPER** — Mr Nardella just said that I allowed him to leave with that last comment. If time permitted, I would not!

**Witnesses withdrew.**