C O R R E C T E D V E R S I O N

ECONOMIC, EDUCATION, JOBS AND SKILLS COMMITTEE

Inquiry into portability of long service leave entitlements

Melbourne — 14 September 2015

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Witnesses

Mr John Hartley, Chief Executive Officer, and
Mr Brian Hansen, Manager, Membership Services, CoINVEST.

The CHAIR — On behalf of the Committee I welcome you to the public hearing of the Economic, Education, Jobs and Skills Committee's 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 transcript so you can correct any typographical errors. I now invite you to make an opening statement, and the Committee also has a number of questions. Could you please give us your name for the transcript?

Mr HARTLEY — John Hartley, Chief Executive Officer of CoINVEST. With me is Brian Hansen, Manager, Membership Services, of CoINVEST.

Chair, thank you for the opportunity to present at today's hearing. We have experience in successfully administering a scheme for the Victorian construction industry that is now 39 years old—so our 40th anniversary is next year. Hopefully we can help the Committee with its considerations in this important area. As a trustee company focused on the construction industry, we take a neutral view on whether portable long service leave should be extended to other industries. You will not get too many comments from me on that. The whole idea is for us to offer our experience gained along the way, over those 39 years. Neither of us have been there for 39 years, but we have been there for quite a while.

A brief profile of the fund. We now manage $1 billion. We have paid out over $1 billion in long service leave claims over that period. We hit both marks in the last financial year. The fund has a surplus of $51 million available to meet our long-term liabilities. We measure our liabilities on the basis of future benefits paid to workers who will claim in the future. It is all actuarially calculated. Over 83 per cent of our payments are paid to workers who have worked for two or more employers. Without the fund these workers may not have received a benefit.

On the governance side, the fund is structured the way superannuation funds are heading. When we transferred from being a statutory authority into the private sector and became a trustee company, the government and the lawyers who helped us with that transfer at the time were quite far-sighted. They were able to see that a balanced board with independent directors as well as industry representatives was the way to go. Superannuation funds, particularly industry funds, are only just catching up with that now, and they have to. Our three independent directors have skills and experience in disciplines appropriate for the fund, such as fund management, investment, law or finance. The Board operates under a code of conduct and a board charter. There are detailed selection criteria for directors and a director training policy. The directors understand their responsibilities as directors, and the Board is cohesive and well led. Management reports to the Board always on a risk basis. We also report governance compliance. Pitcher Partners are our internal auditors, and Ernst & Young are our external auditors. Each three years we undertake an independent board performance review, with internal reviews in the intervening years. While we do not come under APRA control, we benchmark against their best practice, with the internal auditors reviewing our practices against APRA and even ASX listing rules where relevant on a three-yearly cycle.

On the operational side our IT and management systems are developed in-house and are far superior to those of interstate colleagues and peers. We meet regularly with our interstate peers and have watched with interest the ACT, New South Wales and Queensland schemes pick up the administration of other industry schemes.

We have a strong relationship with the construction industry and regularly meet with employer associations and unions. It is disappointing that the Australian Industry Group has seen fit to devote much of its submission to criticism of our fund and its operation. Given our dealings with many other employer associations, we have great confidence that the views of the Ai Group are not representative of the industry as a whole.

I thank the Committee for allowing me to respond to the criticisms, which I sent through the week before last, and to point out the misrepresentations and clear lack of substance in those allegations. Now, of

course, we are more than happy to answer questions on points put forward by the Ai Group as well as anything about our operation.

The CHAIR — Thank you, John, for that brief statement. How well does CoINVEST's scheme operate in Victoria, and are there areas where the scheme could be improved?

Mr HARTLEY — We can always improve. If you look at the investment side of the scheme, we have been top quartile for each of the last four years as far as investing against comparable growth funds, balanced growth funds. In fact we have been either first or second in the last three years as far as our investment performance goes. We think our governance is first class, and we get our auditors telling us it is. We get board performance reviews that tell us that we are a highly functioning board.

The industry is a difficult one to work in. We do not take sides in any dispute. We are not an industrial relations organisation. We are not an industry player in any way. We are a simple administrator of the fund in accordance with the rules of the fund. Those laws were derived out of legislation before 1997; they have not changed. Our structure has changed because we are trustee company. We can always improve. We have good compliance in the industry. We bend over backwards to make sure that we do not have to go to court, but often we fail; we have to go.

The CHAIR — If portable long service leave was expanded to other industries in Victoria, what strategies could be implemented to minimise the cost of the scheme and reduce the administrative burden for employers?

Mr HARTLEY — I would recommend that if any other scheme is implemented in Victoria, it be done completely electronically. We have been dealing with paper now for 39 years. I think in my submission I put in a very high level, now, of internet compliance, which is good, but there is still a long way to go and we are working on that. We have an e-commerce strategy, which is underway at the moment, whereby we aim to be entirely paper free and have everybody in the industry comply electronically in three to four years. It is a pretty tough task getting that last bit—we have 15 500 employers and 180 000 workers out there—because we have not got email addresses for all of them. We have not got mobile phone numbers for all of them, so it is a big task that we have set ourselves.

Ms RYALL — You mentioned that the rules have not changed, but I understand that as at 2013 there was an expansion of coverage …

Mr HARTLEY — No.

Ms RYALL — I read a report, I think, on your website that talked about changes that had happened.

Mr HARTLEY — In 2013 we embarked upon the rules rewrite project, and what we did then is we engaged Maddocks, our solicitors, to rewrite the rules in plain English and bring the coverage descriptions back into the rules. We were relying on old awards, 1958 awards and 1983 awards, for the coverage of the scheme, so we wanted to bring all the scoping clauses out of the old awards into the rules as an appendix. That was the coverage side of it. The way the modern awards worked, they were all over the place as far as our coverage was concerned. It would have expanded coverage, it would have reduced coverage in areas unless we had done a lot of work, so our solicitors recommended that we bring it into the rules, plus put the rules in order because they still sounded like legislation and the changes that had been made over the years to some of the provisions meant they were all over the shop in there.

Ms RYALL — Did that mean that some companies that were not aware they had been under the scheme previously were then identified as being under the scheme?

Mr HARTLEY — No. The instructions the Board gave to Maddocks was not one person extra in, as a result of this project, and not one person out from the coverage. The coverage is exactly the same as it was. Some of the wording we clarified and made it a little bit less ambiguous, but we worked with the industry until we were satisfied that we had it right.

In my supplementary submission you will note that the AiG did complain that we had increased coverage. We answered all of their 80-odd questions. The Victorian government, through the then minister, Robert Clark, asked Ashurst to have a look at the rules and see if coverage had increased. They came up with two areas where the rules were slightly different. One we resolved on the spot with Ashurst; we did not proceed with the second one because we could see the ambiguity. They were the only two areas that the Victorian Government came up with in that area; therefore the Chairman wrote to the Minister and the rules were passed in November last year.

Mrs FYFFE — Could I just ask for clarification? In your submission, page 9 of appendix 3, you have got coverage changes since 1997. Are you saying that all of those industries were covered at the very beginning but it was not explained properly?

Mr HARTLEY — No. This was a new set of rules—or not a new set of rules but a rewritten set of rules—that I was talking about then.

Mrs FYFFE — So none of these were part of the original group of industries when the scheme was first set up for the construction industry?

Mr HARTLEY — When the scheme was first set up it was set up as the Building Industry Long Service Leave Board in 1976. In 1983, metal, construction and electrical trades were admitted to the scheme. They wanted to come in. That was done in 1983 by legislation. These are changes that have been requested by the industry since that time, all of them under the new arrangements. In 1997, when we were taken into the private sector, electrical services came to us. In fact the employer association, NECA, came to us and said, 'You are not covering all our workers; we want all the workers covered. We do not want them half in …

Mrs FYFFE — Sorry, what was that association?

Mr HARTLEY — NECA, National Electrical Contractors Association. We thought we had all our workers, our employees, covered, so we went to the government. I think the minister then was Roger Hallam, Minister for Finance.

Mrs FYFFE — So are you saying all of these that are listed here came in by request from them?

Mr HARTLEY — From the industry.

Mrs FYFFE — Sorry, Dee, I just did not quite understand.

Ms RYALL — That is okay. It was good to get that clarification.

Mr MELHEM — There has been a lot of talk about the 2.7 per cent. Can you explain the breakdown of the 2.7 per cent? I know what it is, but for Hansard and the Committee: what does the 2.7 per cent stand for or what is the make-up of the 2.7 per cent?

Mr HARTLEY — As you know, the contribution rate has varied quite considerably over time. It started off in 1976 at 3.5 per cent because the fund picked up liabilities and did not really know its profile. It went steadily down to zero in 1993, and for 10 years the fund rate was zero. We were overfunded. We had good investment returns, but in around about 2000 there was some industrial disputation and the unions put in a claim to increase their benefits. They said, 'Why should the employers get a free ride—why not the workers get better benefits?'.

Mr MELHEM — Sorry to interrupt, that is when they went from 0.866 week per year to 1.3 week per year?

Mr HARTLEY — That is right. It became available after seven years in 2001 and went up by 50 per cent in 2002. The contribution rate came back in in 2003 at 1.5 per cent. Our liabilities took a huge hit during that time. We thought 1.5 per cent would be good in the short term, but it was not because the stock

market crashed when the dot.com bubble burst. Then by 2008 we had recovered to just about 100 per cent funded at about 2 per cent. We had to increase the rate; we increased it to 2 per cent. Then of course we had the GFC, so we had two more years of bad returns, and it has been recovering ever since.

We put the rate up to 2.7 per cent at that time. Of that, somewhere between 2 and 2.2 is the long-term costs of operating the scheme. The extra was to catch up from being 73 per cent funded to get us where we are now at over 100 per cent funded—105 per cent funded—at the end of June. That 2.7 per cent has a bit in there to catch up, but the rest of it—around about 2, 2.1, 2.2—is the long-term actuarially assessed cost of running the fund. And we hope to get back there.

Mr MELHEM — So if you average it over—how many years did you say the fund has been in existence?

Mr HARTLEY — Thirty-nine.

Mr MELHEM — Thirty-nine years. So it would be far less than 2 per cent?

Mr HARTLEY — Sure, yes.

Mr MELHEM — If you average it over that period?

Mr HARTLEY — Far less, yes.

Mr MELHEM — And for an employer today—if an employer is self-funded and not part of CoINVEST—I have got 13 weeks after 10 years of service benefit to my employees. That will equate to 2.7 per cent, was it not, or thereabouts?

Mr HARTLEY — No.

Mr MELHEM — 2.5 per cent, I think.

Mr HARTLEY — Does it?

Mr MELHEM — Yes.

Mr HARTLEY — He does not get investment returns like we do.

Mr MELHEM — No, just a normal cost—1.3 week divided by 52 weeks to give you a percentage of that. If I am going to pay that employee 1.3 week a year and that employee cashes in or takes the leave, it is around 2.5 per cent of the cost—if all employees make it to the entitlement period.

Mr HARTLEY — If all employees make it, that is right. As we know, they do not. The other component of the 2.7 or 2.2 that should be taken into account is that when companies go bust—and the construction industry has a history of this—we pick up the liability. We cannot get the money, but we pick up the liability of those employers. One of the really good benefits of the scheme for the industry is that in our costs that is built in, so it is the whole industry in effect sharing the cost of any workers who do not get their service.

Mr MELHEM — I might come back with some other questions later.

Mrs FYFFE — I am completely new to this issue of portability of long service leave. It has never crossed my desk before, so I have a lot of simple questions—so please forgive me if I am asking you about basics. It has been said that apprentices are not covered by it and that employers do not have to pay for apprentices.

Mr HARTLEY — They do not have to pay, but the apprentices are covered.

Mrs FYFFE — The apprentices are covered?

Mr HARTLEY — In that 2.2 again we pick up the liability for apprentices, so you can be an apprentice. You can leave school at age 16, work for four years in an apprenticeship, work for another three years for your employer, then get 9.1 weeks leave at your current rate of pay.

Mrs FYFFE — So the employer is not making a contribution for the apprentices?

Mr HARTLEY — Not for the first four years.

Mrs FYFFE — Yet you seek from employers details about any apprentices they may have?

Mr HARTLEY — Yes.

Mrs FYFFE — And that is just for your records?

Mr HARTLEY — No, it is so the apprentice can get service

Mrs FYFFE — You have a list of what companies you have expanded to, and that has been answered with it, and you have a list of disputes since 1997—this is your submission page 8. Are they all the disputes that you have been involved in with various employers?

Mr HARTLEY — Yes.

Mrs FYFFE — That is all the disputes that you have had?

Mr HARTLEY — That is right, yes.

Mrs FYFFE — You say that the allegation made by AiG about creeping out into other industries is incorrect and that you do not go out to other industries and basically demand they contribute.

Mr HARTLEY — No, we do not. The AiG are very concerned about the manufacturing industry. If anything, manufacturing has been creeping into construction industry territory or the area we cover. If you look at JDN Monocrane there, that was an arbitration. JDN were supported by Ai Group. They are a company that, if you want to call it, fabricates or manufactures cranes to go in buildings so that stuff can be moved around the building. They also have a division that goes out and does electrical and metal trades servicing not on those cranes, and they compete for work with other electrical contractors in the industry to do that. Their argument was, 'We're a manufacturer; therefore we're not covered', but they are competing with others who are covered, so you get back to the level playing field argument.

Mrs FYFFE — So even if you are not in the construction industry, if you have a business that competes with some people who do work for the construction industry, in your definition they belong to this group.

Mr HARTLEY — They are doing construction work as defined by the act and the rules.

Mrs FYFFE — All right. We have a submission from Visium Networks that was received by the Committee, submission 34. Can you explain to me why they were told they should be within this portable long service leave?

Mr HARTLEY — Brian has been dealing with that one. I will let him explain that.

Mr HANSEN — Visium are actually doing what they call communication works—fibre optic networks. All that fibre optic network is covered under the electrical trades, and part of our definition of 'construction industry' includes fibre optics work, so it is all covered as far as the rules are concerned and the act is concerned. They have been covered since 1983.

Mrs FYFFE — Okay. From what I have heard this morning and what you are telling me now, the tentacles of CoINVEST are spreading into almost every industry that has anything remotely to do with or that is involved in the building and construction industry. That is the message I am getting.

Mr HARTLEY — No.

Mr HANSEN — No.

Mr MELHEM — That is not correct.

Mrs FYFFE — Tell me why not.

Mr HARTLEY — Because we have got a mixed business. It is the same as having any mixed business. If you are a JDN Monocrane, and you have a division that makes several million dollars a year by doing electrical servicing and metal trades maintenance—work that is covered by our scheme—you have come into that industry. In the old days they would have sold the crane or installed it on site, then got contractors to do the servicing. But they said, 'How can we make more money? We'll put up our own division, and we'll hire our own guys to do that servicing'. That work is covered. We do not cover employers; we cover the work that is done.

Mrs FYFFE — Just going back to Visium if I can, because as I said to you, I have got to try to understand all of this. This seems to me to refer to two employees of Visium but not the whole workforce in Visium. Is that correct?

Mr HANSEN — That is right. What I was going to explain there and clarify was that as a worker working for an employer, one may perform work which is covered and one may perform work which is not covered. We do not cover the work which is not covered. We only cover the work which is covered. If an employer has five workers and three are doing construction work and two are not doing construction work, we cover the three who are doing the construction work. We do not cover the two who are not doing the construction work.

Mrs FYFFE — I am getting the impression that we are looking at the expansion of the portability of long service leave, but it seems to me very much that you are doing it yourselves.

Mr HARTLEY — No, I disagree with that. We cover the work that is performed. We do not cover …

Mrs FYFFE — Okay. The other suggestion was that perhaps the negotiations with an employer who is not part of this group are quite strong and intimidating. How do you answer that?

Mr HARTLEY — We have got less power now than we did when we were a public sector organisation.

Mrs FYFFE — Not your power, just how it is handled.

Mr HARTLEY — We have a team of three field officers. We persuade and we talk. If you look at the BESTaff case, we had seven meetings with the Australian Industry Group and BESTaff over about 18 months. We met with labour hire groups because we did not want the dispute. They persisted in denying it. In the end we do not have a choice. We are a trustee. If the work is covered—and the work was covered—and our interpretation was correct in court, then they have to be in because if we think it is covered, we pick up the liability. Also we do not want the rest of the industry paying for …

Mrs FYFFE — So your interpretation is that they are doing that work and it is related. What about in New South Wales and Queensland where they have a different way of collecting the money? I think in New South Wales it is on the total job, and they pay a percentage of that job. Do they do this the same way?

Mr HARTLEY — Yes, pretty much.

Mrs FYFFE — They are expanding into other companies.

Mr HARTLEY — No, they have got a reverse problem, if you want. We do not have a problem because we are not expanding into other companies. We cover the work that is performed. In Queensland and New South Wales their reverse problem is that you have employers putting all their staff in because they do not have to pay. Their biggest issue is taking out the project manager, the supervisor and the office girl. They have the reverse problem. When we were zero contribution rate for 10 years, one of Brian's biggest problems was keeping people out of the scheme who should not have been in it, because everyone wanted to be in a scheme that was not charging. I think out of the 13 000 employers we had at the end of the contribution-free zone or period there were only 4000 that existed in the previous time. There is a huge turnover in the industry.

Mrs FYFFE — Just to help me in clarification, how do you find out about two employees of a company that employs quite a few?

Mr HARTLEY — They come to us.

Mrs FYFFE — The employees came to you?

Mr HARTLEY — They came to us. That is the most common way of getting it. They might have worked for another employer, because that is the type of industry it is, doing exactly the same work. Then they go to work for Visium, and they get their annual statement from us and they see they have no extra service than what they had last year, so they ring us up and they say, 'Hang on, I'm doing the same work for this company. Why aren't I then put in?'.

Mrs FYFFE — So your field officers are not going out and visiting companies and checking who is there?

Mr HARTLEY — They do go out. The majority of the work our field officers do is education at TAFEs like Holmesglen. We try to get to every first and third-year apprentice every year so that we do not have the issue later. The best people to tell us they work in the industry are the apprentices and the workers, so we try it the education way more than any other way.

Ms RYALL — Can I just clarify something? The example that has been given is of a couple of companies that have their own factory. They do their own assembly or manufacturing. They are not on site in the way of doing any construction on site. They come into your scheme. I am just not sure how that works.

Mr HARTLEY — In the example we talked about before, we do not cover the manufacturing operation at all. Let us have a look at the whole labour hire thing, which was changed in 2004 at the request of AiG, the Labour Hire Group and the union, the AMWU. You have got labour hire that gives workers to supplement what is happening in-house. If an electrician is employed by Shell at their plant, that electrician is not covered. However, if they get extra electricians in on a contract basis—a contracting company or a labour hire company—to do the annual shutdown or maintenance, their electrical contracting and all electrical contracting is covered.

Ms RYALL — Given that there are awards and then there is Fair Work that cover their long service leave requirements, is this not in a sense another separate requirement aside from the award, which says long service, and then Fair Work, which says long service?

Mr HARTLEY — In most of the construction industry EBAs and construction industry awards CoINVEST is the default long service leave scheme in Victoria, and there are different ones in the other states and territories. The Fair Work Act gives exemption or gives precedence to state laws on long service leave over federal EBAs. That was changed by the Gillard government, probably as a result of Visionstream, which is on this list. We saw what happened there, where they contracted out under WorkChoices. They were able to specifically contract out of the scheme, and a couple of other employers

did it at that time. With lobbying from the states, that was removed by the Gillard government—the ability to do that. The construction industry long service leave scheme in Victoria is probably of far more benefit to the workers than other long service leave arrangements, like state long service leave laws.

Ms RYALL — So if an industry group, like what you have just described, or in metals or in electrical, comes to you and says, 'We want to be under you', you say yes.

Mr HARTLEY — No.

Mr MELHEM — No.

Ms RYALL — I am asking them.

Mr HARTLEY — He has been involved in it before. No, we say, 'Okay, you have to come hand-in-hand with the employer association, and then the rest of the industry have to accept it', because it could reverberate around the industry. So when metal trades maintenance and labour hire came in, and contracting came in, in 2004, there was about a two-year lead time before they came in. That was negotiations with AiG, the AMWU and the Labour Hire Group. Eventually the Australian Industry Group signed off on it. We just said, 'This is what happens. This is how it will read. You come to the decision'. Then they came to the Board, it was discussed around the board table where all the industries are represented and the Board said, 'Okay, we agree in principle'. Then we went to the Government, and the Government approved it through an Order in Council.

Ms RYALL — So when you said before 'construction work as defined as the Act', what does the Act define as construction work?

Mr HARTLEY — It is not the Act—I am sorry—it is the rules of the scheme, which were formerly the Act.

Mrs FYFFE — And who sets those rules?

Mr HARTLEY — We do, but to change coverage, we need to go to the Government for approval. That was put in as an amendment to the 1997 Act, I think.

Ms RYALL — To Governor in Council, as opposed to the Government.

Mr HARTLEY — That is right; the minister recommends to Governor in Council. But what usually happens is you have got a long process, like on metal trades; the industry works it out together and they say, 'Yep, we want to do this'. Labour hire were very keen to come in, because they did not want to be half in and half out.

Mr MELHEM — Can you just expand on that, because I think that is a very important point, and that is the main beef the AiG had? I think it is worth explaining how that came about, why it was a problem and what was the fix.

Mr HARTLEY — Okay. Labour hire initially came to us and said, 'We don't like our workers half in and half out—too much book work. It is confusing. The men are all casual anyway, so they are working for other labour hire companies as well as working for my labour hire company. We send them off. One day they are doing construction work, the next day they are doing maintenance work, which is not covered, and another day they might be parking cars—I don't know'. They came to us and said, 'We'd like to go in'. We said, 'Hang on a sec'—and this was the employers who came to us —'Have you spoken to the AMWU about this, and, given the impact of it, have you spoken to the Australian Industry Group about it?'. They said, 'No'. The labour hire group is really serviced by the Australian Industry Group.

They went away, and they worked and they debated it. Brian went to meetings all around Victoria with the Australian Industry Group, speaking to groups of employers about what it meant to come into the scheme and what would have to happen. We cautioned the Australian Industry Group and labour hire. We said, 'It

can't be just labour hire, because we cover work. We don't cover employers or groups of employers'. Therefore contractors who do the same work, like EDS, they have to be in too, doing the same work, because they will do a contract like that. The AiG had to sell it to their members, which ultimately they did. Eventually, after a long time—then the government did the consultation after that before it did the Governor in Council. Then finally it was approved when they were sure they had everyone's agreement. We do not change coverage. It comes back to the Board after the Governor in Council, and we table the Governor in Council approval. Then seven out of eight and two out of three have to vote for it to pass the special resolution seven out of the eight industry directors; two out of the three independent directors.

Ms RYALL — When you had the rules put into layman's terms in 2013 …

Mr HARTLEY — I would not call it layman's.

Ms RYALL — Did you go to the Government then and say, 'This is what we're going to do'?

Mr HARTLEY — Yes.

Ms RYALL — 'And can we get approval to do this?'. Then did you go away and do it, then give it back to the Government for review, and then it went to the Governor in Council? Is that how it happened?

Mr HARTLEY — No, because our lawyers told us it did not increase coverage, and the Government then told us, after going to Ashurst solicitors, that it did not increase coverage, so there was nothing …

Ms RYALL — Except for those two little areas …

Mr HARTLEY — We changed those. After all that Ashurst were satisfied that the new rules did not increase coverage; therefore there was nothing for the Governor in Council to do—the Governor in Council has no power. We told the Minister, 'Everyone is happy now, so we are going to pass the rules'.

Mr NARDELLA — Explain to me what happened with BESTaff, because I had the AiG saying, 'Oh yeah, um, really we won the court case, but, you know, so things weren't that good'. I have got the coverage disputes page open. Because that took four years, just explain to me what happened and what ultimately was the result of the court case.

Mr HARTLEY — Okay. Once again, a worker came to us, and he said, 'I haven't got down my work for BESTaff'. He worked for another labour hire company during the week, and he worked on weekends for BESTaff—two days a week, probably about 5 or 6 hours a day; I am not sure. We looked at it, and we said, 'Yeah, that's covered', because this is a guy who has not got fixed hours, and therefore his ordinary hours are based on what he works and whenever he works. It is pretty common in the industry now. So these two days he was working for BESTaff, he should have been getting two days service at the rate of pay he was paid. The metal trades award says all weekend work is at overtime rates. It is not overtime, because you cannot work overtime until you have worked, I think, so it is not …

Mr NARDELLA — But that is the rate. It is either time-and-a-half or double time—whatever.

Mr HARTLEY — Time and a half or double time—whatever it is, yes. We said, 'BESTaff, you have to pay and give this guy service for that time', and they objected. Mr Smith from AiG got involved in it and said, 'It's overtime. You are telling people they do not have to put in for overtime'. I said, 'This is not overtime, and no, they don't have to put in for overtime'. But that is where a worker who has got fixed hours—a 38-hour week, 36-hour week or whatever—works extra hours over his normal day, that is overtime.

Mr NARDELLA — That is overtime.

Mr HARTLEY — We do not give service—we do not demand payment for that.

Mr NARDELLA — Because his hourly rate is the normal—whatever—38 hours a week plus time-and-a-half or double time. I have done that on the weekends. At Neville Smith down at Richmond, I would work on the weekends. I did work for that company. I worked for V.P. Hawthorne, which was my other employer. But the rate is the time-and-a-half or double time that it was at that time.

Mr HARTLEY — Yes, that is his rate of pay, because there are no ordinary hours and he does not have an EBA that he is a signatory to that says, 'Your hours are 38 hours a week or 36 hours a week; there are these days'. The hours he was working were, in the end, after all the calculations were done, his ordinary hours.

Mr NARDELLA — And did the court find that way?

Mr HARTLEY — The court found that way. What it meant was we had to pay them some money because of the averaging provisions that existed at that time. Before the judge handed down her decision we had to agree on a way to calculate it. The rules contained a provision relating to ordinary hours where you averaged them over a year. It is more for people who work casually and have not got fixed hours but work for the same company all the time. There are guys in this industry who work for three or four different companies in a year, so to average their ordinary time out means they would not get any service or would not get any long service leave credits. I remember saying at mediation before the court case—I think I can say this, because the company does not exist anymore …

Mr NARDELLA — You have got parliamentary privilege as well.

Mr HARTLEY — That is true.

Mr MELHEM — You can say whatever you like.

Mr HARTLEY — In mediation there was just the Managing Director of the company and the lawyers. I said, 'If you see our point of view on this and settle, we will walk away and bear our own costs', because their lawyers had said, 'You'll owe us money'. I said, 'Okay, we'll pay it. It's not a big deal. We'll pay the money if that's how it works out to be once we've done our calculations. But let's walk away now so we don't have to go to court'. The Managing Director said to me words to the effect, 'I'd love to settle and I'd love to walk away from this, but I'm not allowed to'. He said that with witnesses in there, including this gentleman. It was about a point. It is difficult sometimes.

As I said before, we have got 39 years of experience. We are fairly good at administering this scheme—we think so anyway—and we do the right thing.

Ms RYALL — What percentage of your members, or employees, who receive long service funds, would take a payout versus those who just take a couple of weeks here or a few weeks there throughout time?

Mr HARTLEY — That is a very difficult question to answer because we do not interfere in the employment relationship between the worker and the employer.

Ms RYALL — But you pay out the money.

Mr HARTLEY — We pay out.

Ms RYALL — So when would you say, 'Okay, well, I'm going to pay out your long service leave', as opposed to, 'I'm only paying out a portion of the long service leave'? I guess what I am getting at is the break versus the lump sum type situation.

Mr HARTLEY — It is true that some take the lump sum, and it is true that a lot take leave. We get letters from them. We do stories in our newsletters about taking leave—photos from Ireland and all over the place—but we do not really know, because we get a claim form signed by the worker …

Ms RYALL — And they can do what they want with it, essentially.

Mr HARTLEY — Yes—and signed by the employer in many cases. Also we will write to the employer telling them, 'This guy's got a payment for leave over this period'.

Mrs FYFFE — So it could be treated like it is a bonus and not actually leave.

Mr HARTLEY — It could be; there is no doubt about that. I am not going to deny that. There is only one state that forces leave being taken, and that is Western Australia. Every other scheme is a payment scheme. In fact in New South Wales if you claim your long service leave, they will not even give you part of it; they give you all of it.

Mrs FYFFE — So you only give part of it?

Mr HARTLEY — We can give them two weeks if they want two weeks, just like anybody else.

Mrs FYFFE — Sorry. I thought you meant that you only give them part of it. If the employee requests two weeks, you give two weeks.

Mr HARTLEY — Two weeks.

Mrs FYFFE — If they request the whole lot, you give the whole lot.

Mr HARTLEY — That is right. In New South Wales if an employee requests two weeks, they get the whole lot no matter what. The reason that was done was that when we were privatised the then government did not want us prosecuting workers for working while they were on leave.

Ms RYALL — Can they go and work while they are on that leave?

Mr HARTLEY — I do not know. We cannot prosecute them and we would not. I guess they can. I was talking to Brian about it before. Occasionally we will get a guy take leave, or take the money in this case, and we find his employer puts in service for him, which we do not. We would put service in for him anyway, but it is not all that often. I am betting that far more than 50 per cent take leave. That is our experience. They talk to our staff about it at the front desk when they bring in their claim forms or when they ring them up to ask about—'I want to go to England'.

Mr HANSEN — People do not just take their leave to go on a holiday overseas.

Ms RYALL — No, not always.

Mr HANSEN — Some people take their long service leave to do repairs to the house or the garden or to do something else.

Ms RYALL — Relax or go to hospital.

Mr MELHEM — The compliance issue, again going back to the AiG, that was one of their complaints. That is something you have to do as an organisation—to make sure your records are right. It is not something you do not like doing. No-one likes doing it. It is a bit like the superannuation industry where an employer has not paid and they need to update their system. Can you take us through that and what mechanisms you have put in place to address it?

Mr HARTLEY — The key thing for us is to make sure the worker gets service for the work he has done in the industry. We used to send out forms, and the employers would pay us what they calculated. We do not do that anymore because we were not getting forms in quickly enough. We get the forms in without any money now. We do the calculations. Therefore they do not make any errors, and we send out a bill. So then we chase up debt. But the key thing for us is to get the forms in, and we have been extremely successful with that. Last year we did 37 Magistrates' Court prosecutions. We used to do 500 or 600 in a

year. It is because our staff are trained to negotiate, to talk and even to settle on the steps of the court under certain circumstances to save the hassle of going through the Magistrates' Court. Thirty-seven a year for late returns is not a whole lot, I would dare to say.

Mr MELHEM — You were talking about maybe VCAT as an alternative or the Fair Work Commission—a non-cost jurisdiction. Is that something you have explored as part of your deliberations?

Mr HARTLEY — We did talk about the different forms in 1997 when we were privatised, and I was involved in that. Both sets of lawyers were against anything except the system we have got. It used to go through, I think, the industrial court in Victoria.

Mr MELHEM — The Industrial Relations Commission, yes.

Mr HARTLEY — And we had had some stuff in the arbitration commission, but these are not industrial relations matters. We are not an industrial relations organisation. This is compliance with legislation and with our rules, but really legislation when it comes to the crunch. The courts we go through are appropriate for what we do. We resist doing it—negotiating with the AiG and their staff for a year and a half and finally getting nowhere. Arbitration is not much fun. There are dispute resolution provisions in our rules where the Board can look at it as well as just me.

Mr MELHEM — Yes, so compliance is not about whether or not you are covered by the scheme. The first hurdle is whether you are covered by the scheme.

Mr HARTLEY — That is right.

Mr MELHEM — That is the first hurdle. It is after that where you say, 'I have 100 employees. I'm a member of CoINVEST. I still work in the industry, but I don't pay for my employees'. That is where the compliance problem arises.

Mr HARTLEY — Yes.

Mr MELHEM — It is not about whether or not I should be in the industry.

Mr HARTLEY — It is time consuming when people say, 'I'm not in the industry'. That can be time consuming and difficult. There are a couple on the list like JDN Monocrane. They said, 'We're a manufacturer'. 'But hang on, you're doing work'. The one that has been referred to, Baytech, is on appeal, or we are waiting for a decision from the Court of Appeal. We obviously won that in the County Court. They are an electrical contracting company, really. We will see what happens there. If that goes against us, it will be the first one. It will be a hassle as to how we deal with it, but we will. We have just got to accept things the way they are. The biggest thing also for employers is having a level playing field, as I said. If someone has got to pay it, then their competitors have got to pay it too.

Mrs FYFFE — In relation to your comments on the interstate schemes, is there anything in those interstate schemes that should be adopted for Victoria?

Mr HARTLEY — We have done a lot of that. We benchmark against them regularly. We did look at the funding. We got Access Economics to do a study, because half the industry wanted it and half did not. It was not employers versus unions either. The Master Builders did not want it and HIA did not want it. In contrast, AiG wanted it, NECA wanted it and the plumbers wanted it.

Mr NARDELLA — Sorry, wanted what?

Mr HARTLEY — Funded by a project levy.

Mrs FYFFE — Like in New South Wales.

Mr NARDELLA — Okay, the New South Wales model.

Mr HARTLEY — Access Economics found there was a marginal benefit if you did it as a greenfield. To switch to it, there was no real benefit. You would not get a benefit for 20 years. I have that report if the Committee wants it. Would I adopt that? No. I do not like their structures. They do not have any independents on their boards. New South Wales has not got a board. They have got a committee and the head of the Department is the Chairman. She is not the head any more—Vicki Telfer. She is the Chair of the Committee, which meets about four times a year, so there is no really strong governance around how they do it. They have compliance issues too. They have six field staff; we have three. Queensland has five and a half field staff. They have had disputes with the mining industry about construction of mines. In the Northern Territory the funding bottom level comes in at $500 000, so everything above $500 000 apart from housing is subject to the levy; so it is really the construction mining industry that is paying for it and the big projects. You can build a house in the Northern Territory for any cost—for $1 million—and not pay the levy, but everyone gets covered on it. It does not match the liabilities. The best way of matching liabilities is through a wages-based system.

Mrs FYFFE — You mentioned board members. It has been suggested that board members should be appointed by the Minister. How are they appointed now?

Mr HARTLEY — There are eight industry directors: four representing workers and four representing employers.

Mrs FYFFE — So, four union members and four employer representatives?

Mr HARTLEY — Representatives, yes. Every two years—half the board retires every two years— we call for nominations from organisations qualified to nominate representatives. We get nominations in; if we get more than one nomination for a position, then we hold an election. On the union side we have never had an election, because they seem to be able to work it out. On the employer side we have had two elections when a member has been challenged.

Mrs FYFFE — Are there prerequisites, such as doing the Australian Institute of Company Directors course or that sort of thing?

Mr HARTLEY — They do not have to have done it by the time they come onto the Board, but they have to do at least the one-day course. We have got several directors who have done it. They do the one-day course and now they have to do an investment course as well.

Mrs FYFFE — Because a billion dollars is a lot of money to be managing.

Mr HARTLEY — It is a lot of money, yes.

Mrs FYFFE — If you have got people with no experience.

Mr HARTLEY — If you are on the audit committee, you have to do a finance course; if you are on the finance and investment committee, you have to do an investment course; and if you are on the Board, you have to do an investment course now. You have got your eight industry directors—and we have just gone through this process this year with our Chairman not seeking a further term. After 16 years on the Board and the last 10 years as Chairman, she is retiring at the end of this month. What happens with the independent directors is an executive search organisation goes out and we give them the criteria—that is, this year we want a finance, corporate, commercial background to get a like for like for our Chairman—so they do the search. They come up with a dozen candidates. We go to an assessment committee. Tim Piper, who was here this morning, is on that assessment committee, so he should know it pretty well. Also Luke Hilakari, who I think was here this morning too, is on the assessment committee representing Trades Hall. We go through the, say, dozen candidates, and we have to have three for each position and we have had two positions this year. They come down and they say, 'Here is our shortlist'. Then they get interviewed by the Board and the eight industry directors select the best candidate. We have got a new director. One director has been reappointed and made chairman this year; the other director, Di Fulton, has an ex-Telstra background, a strong commercial background.

Mrs FYFFE — I was not doubting the integrity of them; I was just interested. Just as a thought and looking at $1 billion, I reckon the average employer would roll over and agree to what you wanted rather than taking you on, because with the size of your organisation and a lot of the businesses, it would just be too big a fight to lose.

Mr HARTLEY — That does not happen though.

Mrs FYFFE — Does it not?

Mr HARTLEY — No. Maybe I have not been clear enough, but we do not approach it in an adversarial way. We never have and we never will.

Mrs FYFFE — But going by the results of the challenges you have had—and you have won every one—they are not going to have much chance of success if they actually challenge your request that they become part of CoINVEST.

Mr HANSEN — They can and they do challenge us. They have. The fact is the court system interprets the rules and makes their decision based on however the rules are to be legally interpreted. There are rights of appeal in Australia through the court system for any organisation or any employer.

Mr NARDELLA — So your rules say that an employee would be working in the construction industry; and if you are working in the construction industry you are covered. Basically that is it, is it not?

Mr HANSEN — That is right.

Mr NARDELLA — If you were making a claim against an employer that was not in the construction industry, would you be asking them to come into your scheme?

Mr HANSEN — No, definitely not. I think it is important to understand that as an organisation we do not enjoy going to court. We do not enjoy litigation. It is a very costly exercise at the end of it, and no-one is a winner. No-one is a winner except the legal system, the lawyers. We realise that we have to work with these employers if they are contributing to our scheme for as long as that employer is in existence and operating in the construction industry. We would much prefer to work in a harmonious working relationship with anybody, rather than an adversarial position with an employer.

Mrs FYFFE — You have listed the ones that went to the Magistrates' Court and that is ongoing. How many have you settled out of court?

Mr HARTLEY — Heaps. Far more than we have been to court.

Mrs FYFFE — And those companies have agreed that they join CoINVEST?

Mr HARTLEY — Yes. There was a company called Dematic last year that was a client of AiG's. We met with the Managing Director. This was a very big company, probably bigger than us, and we spoke to them and explained to them why. They took the explanation and contributed.

Jemena went to the High Court. They took us to the High Court. We did not take them to the High Court; they took us all the way. I think it was 10-zip in the end, but they were initially supported by the Australian Industry Group when they were Alinta or Agility or AGL even. They became Jemena and we went to the High Court and we won. No surprise to us or the Federal Court before that. Then they still would not comply, so I spoke to their CEO and met with the CEO on several occasions. We worked it out in about three weeks, but he had not been involved initially. That is a very big company, far bigger than us again.

Ms RYALL — I just want to clarify and understand if you agree. The intent of the Act and then the scheme subsequent to the enactment of the Act was for project-based construction work.

Mr HARTLEY — Yes.

Ms RYALL — But where things are now it has moved from the intent.

Mr HANSEN — I do not think I would necessarily agree that it was project-based construction work. The whole premise of the scheme established in 1976 was for workers engaged in the construction industry.

Ms RYALL — Because it was project based?

Mr HANSEN — Regardless of whether it was project based or whether it was not project based. Not all of the industry is project based. In the commercial sector, you might be right there. The housing sector, the domestic sector, is not necessarily project based.

Ms RYALL — My understanding, just from reading second-reading speeches and things like that, is the intent was these projects start and finish and so that they do not lose that going to another new project; am I right?

Mr HARTLEY — That is part of it.

Mr HANSEN — That is part of it.

Mr HARTLEY — But also you will have the plumbers covered and you will have electricians.

Ms RYALL — I understand that, but I am just saying the intent of it was that those workers involved were going to cease work at a particular time as a result of that project finishing, and that they therefore could not carry to a new project their long service leave and therefore it was to allow for that.

Mr MELHEM — But that covers the whole construction industry.

Ms RYALL — Hang on. I am asking our witnesses.

Mr MELHEM — I am assisting in answering your question, because I actually came from the industry.

Ms RYALL — I am just saying, based on my reading of the second-reading speeches …

Mr MELHEM — You are right. The whole construction industry is multiple projects. You are covering the workers—a rigger, a carpenter and an electrician who work in the construction industry. Whether it is road construction, building construction, housing construction, gas plant construction, any of that, so let us not split hairs.

Mr HARTLEY — You are right, but it is not exclusive to that.

Ms RYALL — No, but the intent. When I go to second-reading speeches and things like that, the intent was …

Mr HARTLEY — I understand the intent.

Ms RYALL — I just want to understand that that was the intent.

Mr HARTLEY — That was the aim, but you cannot cover plumbers who work on projects. There are going to be some who work for themselves and will get long service leave another way, but you cannot leave them out of the scheme. There are 17 per cent who made claims last year who have only had one employer.

Ms RYALL — I just wanted to clarify because my understanding was that. I just wanted to clarify if you agree that was the intent.

Mr HARTLEY — It was to meet that need, but it was not exclusive to that.

The CHAIR — I will put the last question to you. Some submissions have suggested that CoINVEST could administer portable long service leave schemes that are established for other industries. Is there capacity for your company to administer such schemes, and what practical issues would need to be addressed beforehand?

Mr HARTLEY — I think it is a good capacity because we have got very efficient management systems and IT systems. We have got a very efficient one, plus our e-commerce strategy will help that too. I think any other scheme that came in should be entirely online—entirely over the internet—or entirely electronic. We do electronic uploads of the big companies' spreadsheets now.

What we have found in New South Wales and Queensland—where they have picked up cleaning, and in the ACT, where they have picked up the community services sector, security and cleaning—is really their costs are defrayed, so it becomes cheaper to run the construction industry scheme. We found—when I look at the figures every year before a conference—that New South Wales is costing less to run, because it can push its costs over two schemes. It has not increased its staff—maybe by only one or two. In the ACT they were very small, and they have got four schemes now. They have increased their staff by 4, which means they have got 12 staff. It is the same in Queensland. Queensland did not increase their staff at all, so the costs of operation benefit both schemes. We would not have any real problems implementing another scheme.

Mr NARDELLA — I was in the metal trades industry in 1983 when it came in under the Altona agreement, so I was involved in that sense. This also covers people in the construction industry who do maintenance?

Mr HARTLEY — Yes.

Mr NARDELLA — So it is not just project work. Somebody might go out there and fix up a lift or something, so those blokes would be covered?

Mr HARTLEY — Not the lifts.

Mr MELHEM — Did you not let them in?

Mr HANSEN — It is installation.

Mr HARTLEY — Once again, they could not get agreement with the industry. They wanted to and we had meetings and told them how it works, but installation of this is covered and not maintenance.

Mr NARDELLA — Right. Okay.

Mr HARTLEY — It is the same with glaziers. Every building in Melbourne has got glass. Glaziers are not in, but they are in in every other state and territory. They are not in in Victoria because the employer was happy to come in when it was zero, but as soon as the rate came back, they ran. That is fine, but they are not covered. We do not push. We do not dragoon people into the scheme.

The CHAIR — John and Brian, thank you very much. On behalf of the Committee I thank you for coming and giving evidence.

Witnesses withdrew.