

MELBOURNE REGISTRY

On appeal from the Full Court,  
Federal Court of Australia

JEMENA ASSET MANAGEMENT (3) PTY LTD ACN 086 013 461

First Appellant

JEMENA ASSET MANAGEMENT (4) PTY LTD ACN 009 641 187

Second Appellant

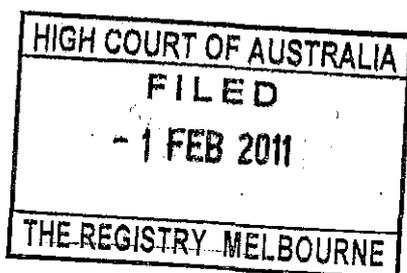
JEMENA ELECTRICITY NETWORKS (VIC) LIMITED ACN 064 651 083

Third Appellant

and

COINVEST LIMITED ACN 078 004 985

Respondent



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APPELLANTS' SUBMISSIONS

Part I:

1. The Appellants certify that these submissions are in a form suitable for publication on the Internet.

Part II:

2. The appeal concerns the interaction of comprehensive regulation of long service leave through federal industrial instruments on the one hand and the Victorian portable long service leave scheme on the other. The issue is the extent to which the compact reached by the industrial parties in respect of long service leave and associated benefits can be interfered with and/or augmented by a State scheme imposing non trivial obligations in respect of such leave or benefits.
3. At all relevant times the Appellants were bound by the *Power and Energy Industry Electrical, Electronic and Engineering Employees Award 1998* (the "1998 Award"), the *AGL Electricity and Agility (Victoria) CEPU/ETU Certified Agreement 2004* and the *AGL Electricity and Agility (Victoria) APESMA/ASU Certified Agreement 2004* (the "2004 Agreements"), (collectively the "Federal Instruments") which the Full Court held were intended to and did exhaustively deal with the long service leave

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The Appellants

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entitlements of their employees in relation to their particular employers: (Appeal Book (“AB”) 440 [8]; AB 449 [45]).

4. The Appellants contend that the *Construction Industry Long Service Leave Act 1997* (Vic) (the “CILSL Act”) and the portable long service leave scheme created by it (the “CILSL Scheme”), alters, impairs or detracts from the long service leave scheme contained in the Federal Instruments and/or that the long service leave scheme contained in the Federal Instruments should be seen as intended to be a complete regulation of the obligations in respect of long service leave, including obligations of the type imposed by the CILSL Act and the CILSL Scheme.

10 5. This involves consideration of the obligations imposed by the CILSL Scheme and the extent to which a relevant inconsistency arises where a State law authorises a State tribunal or body to make an order or implement a scheme which alters, impairs or detracts from a Commonwealth law in the sense described in *P v P* (1994) 181 CLR 583.

20 6. It also involves consideration of whether the circumstance that moneys are paid by an employer to a third party pursuant to the CILSL Scheme, means that the obligation to make such payments is not inconsistent with that created by the Federal Instruments on the basis that it is not an obligation pertaining to the relationship between employee and employer and/or is to be characterised as analogous to a tax in the sense described in *New South Wales v The Commonwealth and Carlton* (1983) 151 CLR 302 (the “Hospital Benefits case”).

### Part III:

7. The Appellants certify that notice in compliance with s. 78B of the *Judiciary Act 1903* (Cth) was given on 7 October 2010.

### Part IV:

*Jemena Asset Management (3) Pty Ltd v Coinvest Limited* [2009] FCA 327

*Jemena Asset Management Pty Ltd v Coinvest Limited* (2009) 180 FCR 576

### Part V:

#### The Parties

30 8. The Appellants are incorporated pursuant to the laws of the State of Victoria. They are successors to part of the electricity distribution business formerly undertaken by the State Electricity Commission of Victoria (the “SECV”). The third appellant, Jemena Electricity Networks (Vic) Ltd, was formerly known as AGL Electricity Limited: (AB 439 at [3]; AB 39 at [22] - [25]; AB163-164 [4] - [7]).

9. The Respondent is the trustee of the Construction Industry Long Service Leave Fund (the “Fund”) established under the trust deed referred to in the CILSL Act: (AB 439 at [4]).

## The Federal Instruments

10. The Appellants are bound by the 1998 Award and by a succession of Certified Agreements (the *AGL Electricity Limited Enterprise Agreement 1999*, the *AGL Electricity and Agility Certified Agreement (Victoria) 2002*, and the 2004 Agreements (collectively the “**Certified Agreements**”)) which among other things oblige the Appellants to comply with the 1998 Award and current policies, customs and practices including the practice in respect of the granting of and payment for long service leave: (AB 439 at [5]; AB 40 [26] – [34]; AB 96.1; AB 165 [13]; AB 42 [34] – [40]; AB 104; AB 110; AB 138 – 139; AB 149-150). Further, in the 2004 Agreements, Attachments D and C respectively make specific provision for long service leave: (AB 144 – 145; AB 154 – 155).
11. The 2004 Agreements also contain dispute resolution procedures: (AB 439 at [6], AB 140 – 141, clause 10; AB 151 – 152, clause 11).
12. The Federal Instruments deal with, and intend to deal with, exhaustively, long service leave entitlements of employees in relation to their particular employers: (AB 449 at [45]).
13. The Federal Instruments deal with the circumstances in which the employers bound by them are obliged to grant and pay for long service leave taken by their employees as well as the means by which any entitlement to take, or be paid, long service leave will accrue. Clause 24 of the 1998 Award prescribes, among other things, the following:
- (a) an entitlement to long service leave at the ordinary rate of pay of 13 weeks on 10 years service with an additional 1.3 weeks leave for each additional year of service: (AB 98, clause 24.2);
  - (b) definitions of ordinary rate of pay (AB 97, clause 24.1.3) and service (AB 97, clause 24.1.4) which includes service with successors or transmittes of the SECV (AB 97, clause 24.1.4), service after retrenchment if the break in employment is less than 12 months (AB 97, clause 24.1.4.7) or service with State or Commonwealth Government organisations or semi-government instrumentalities: (AB 98, clause 24.1.4.8);
  - (c) that leave be applied for and be taken when approved or directed by the employer: (AB 98 - 99, clauses 24.3.1-24.3.4);
  - (d) leave to be taken in minimum periods of 4 weeks unless otherwise agreed with the employer: (AB 99, clause 24.3.4);
  - (e) mechanisms for the extension of leave when taken on half pay: (AB 99, clause 24.3.5);
  - (f) exclusion of public holidays from the period of leave: (AB 99, clause 24.3.6);
  - (g) accrual of recreation leave whilst absent on leave: (AB 99, clause 24.3.7);
  - (h) prohibition on acceptance of paid employment during periods of leave: (AB 99, clause 24.3.8);

- (i) suspension of the leave provisions during periods of industrial action: (AB 99, clause 24.3.9);
- (j) methods for the payment of salary during leave and the rate at which such salary is to be paid: (AB 99, clause 24.4);
- (k) offsetting of debts owing to the employer against payments in lieu of leave: (AB 100, clause 24.4.6);
- (l) payments in lieu of leave in the event of termination of employment covering various contingencies including termination on account of retirement, total and permanent disability or death: (AB 100, clause 24.5);

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(AB 439 – 440 at [7]).

- 14. The 1998 Award deals with all the ordinary aspects of long service leave entitlements which might arise in the industrial relationship between employee and employer: (AB 440 at [8]).

#### **The State Act and the State Scheme**

- 15. The CILSL Act creates a scheme requiring employers to contribute to a fund which is disbursed in a way which provides portable long service leave entitlements for workers in the construction industry: (AB 438 at [1]).

- 16. The purpose of the CILSL Act is stated to be -

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*“... to repeal the Construction Industry Long Service Leave Act 1983 and provide for the scheme established by that Act to be administered in accordance with a trust deed by a company incorporated under the Corporations Law”:* (AB 440 – 441 at [9]).

- 17. In the Second Reading Speech accompanying the CILSL Act, the Minister said:

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*“The purpose of this bill is to repeal the Construction Industry Long Service Leave Act 1983 and to provide for a portable long service leave scheme owned and administered by the construction industry. The Construction Industry Long Service Leave Act 1983 established a compulsory long service leave scheme for the provision of portable long service leave benefits for workers and, on an optional basis, subcontractors in the construction industry.*

...

*This bill changes the legislative structure and the operations of the existing scheme while at the same time preserving the present entitlements of construction industry workers and also the obligations of construction industry employers. This is achieved by converting the scheme into an industry-based and managed scheme, but preserving certain compulsory elements of the current scheme.*

...

*The bill continues to provide construction industry workers with the statutory right to take long service leave and for workers and working subcontractors to be paid out of the fund.” (Emphasis added)*

(AB 441 at [10]).

18. The scheme created by the *Construction Industry Long Service Leave Act 1983* (Vic) (the “1983 Act”) referred to in the CILSL Act and the Second Reading Speech had the following elements:

- (a) the establishment of a construction industry long service leave fund (Pt III);
- (b) a register of employers, working sub contractors and workers (Pt IV);
- 10 (c) the levying of a long service leave charge from employers and working sub contractors (Pt V); and
- (d) significantly, an entitlement to long service leave on ordinary pay as defined (Pt VI and in particular s 40).

(AB 441 at [11]).

19. By operation of the CILSL Act, the Appellants must register with the trustee of the fund or they are effectively prohibited from employing workers (s 8), and they must keep records and make returns regarding the employees (s 9). There is a comprehensive disputes mechanism (leading to binding arbitration) which covers any dispute concerning the CILSL Scheme dealt with by the trust deed between an employer and a person or persons employed or engaged by the employer (s 12): (AB 441 at [13]).

20. Section 6 of the CILSL Act headed “Entitlements” provides:

“(1) *Every worker is entitled to long service leave, and to be paid benefits out of the fund, in respect of continuous service in the construction industry.*

(2) *Every working sub-contractor who has paid long service leave charges is entitled to be paid benefits out of the fund in respect of continuous service in the construction industry.*

(3) *The amount of the entitlement and the method by which that amount is to be calculated are as determined from time to time by the trustee in accordance with the trust deed.”*

(AB 442 at [14])

21. The trust deed is defined to mean the trust deed executed by the Respondent as trustee on 1 April 1997 as amended and in force for the time being (see s 3(1)). The trust deed allows for the making of rules and their amendment, subject to the CILSL Act (the “CILSL Rules”): (AB 258, clauses 5.1 and 5.2). The CILSL Rules were made and amended over time, and deal with many aspects of long service leave. The relevant CILSL Rules are those in existence as at 29 August 2006: (AB 442 at [16]).

22. By virtue of s 3(2) of the CILSL Act, words and expressions used in the rules set out in Schedule 2 to the trust deed and in the CILSL Act have the same meanings in the CILSL Act as they have in the rules as amended and in force for the time being: (AB 442 at [17]).
23. The provisions of the CILSL Act impact upon long service leave entitlements of employees, in that the provisions enhance the entitlement of workers by virtue of the creation and administration of the fund: (AB 449 at [45]).

**Part VI:**

**The Errors Complained of**

- 10 24. The Full Court should have held that there was both a direct and an indirect inconsistency between the scheme created by the 1998 Award and the 2004 Agreements and the CILSL Scheme in place on and from 29 August 2006. The direct inconsistency arose from the non trivial obligations imposed by the CILSL Scheme in respect of long service leave for employees of the Appellants. The indirect inconsistency arose from the exhaustive regulation of the subject matter of long service leave and associated benefits by the Federal Instruments and the intrusion of the CILSL Scheme into this subject matter. In failing to find indirect inconsistency the Full Court mischaracterised both the scope of the Scheme created by the Federal Instruments and the scope of the Scheme created by the CILSL Act.
- 20 25. In the alternative, the Full Court gave no or insufficient weight to the fact that, irrespective of the form that the CILSL Rules took, the CILSL Act authorised a scheme which conferred an entitlement to long service leave on employees of the Appellants. A scheme conferring an entitlement to long service leave on employees whose employment was regulated by the Federal Instruments is necessarily inconsistent with those instruments.

**The Test for Inconsistency**

26. Central to the existence of inconsistency (whether direct or indirect) is the intention of the Commonwealth Parliament<sup>1</sup>.

30 ***Direct Inconsistency***

27. A State law may be inconsistent with a Federal provision because its operation would alter, impair or detract from the operation of a law of the Commonwealth Parliament in more than a trivial manner<sup>2</sup>.
28. If the State law, by granting certain rights, would deny or vary a right, power or

<sup>1</sup> *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at 260 and 280; *Dao v Australian Postal Commission* (1987) 162 CLR 317 at 335; *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76-77 [27]-[28]; *Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632 at 642; *R v El Helou, El Helou v R* [2010] NSWCCA 111 at [24].

<sup>2</sup> *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 354 [41], 428 [310]; *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 at 136; *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630; *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76-77 [27] – [28], 78 [32]; *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 186 [54]; *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330 at 337.

privilege conferred by the Federal law<sup>3</sup> there will be a relevant inconsistency. The mere fact that the subject matters of the two laws are not coincident does not prevent a relevant inconsistency from arising.<sup>4</sup>

29. In determining whether there is an inconsistency it may be necessary to look at the “practical effect” of the State law in relation to the Commonwealth right, so that it is not sufficient to look purely at the legal operation of the Federal and State laws in question<sup>5</sup>.
- 10 30. An example of such an inconsistency is where the State law, if allowed to operate, would impose an obligation greater than that for which the Federal law has provided. There is no requirement that the obligation be on the Appellants to the employee directly or that it create rights in the employee against the Appellants. Inconsistency is to be established by reference to the obligations which the statute imposes upon the employer<sup>6</sup>.
31. It is sufficient if the law authorises a State tribunal or body to make an order or implement a scheme which impairs or detracts from the Federal law. In *P v P* (1994) 181 CLR 583, the majority said:

20 “Subject to that question s. 109 of the Constitution will, in such a case, invalidate any State Law to the extent that it would directly or indirectly (e.g. by conferring authority on a State court, instrumentality or officer) preclude, override or render ineffective the exercise by the federal court of the jurisdiction so conferred” (at 601).

See also McHugh J at 635.5 and *Re Macks; Ex parte Saint*, supra, at 186 [54].

### *Indirect inconsistency*

32. A relevant inconsistency will arise where the Federal law intends to cover the subject matter with which the State law deals<sup>7</sup>.
33. Inconsistency will arise where the State law alters, impairs or detracts from the object or purpose sought to be achieved by the Federal law. The issue is whether there is a case for saying that the intention underlying the Federal law was that it should operate to the exclusion of any State law having that effect<sup>8</sup>.
- 30 34. In cases involving Federal awards and certified agreements, there will be an inconsistency where the effect of the State law, if enforced, would be to destroy or vary

<sup>3</sup> See *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at 290.

<sup>4</sup> *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 398 [196]; *Telstra Corporation v Worthing* (1999) 197 CLR 61 at 78 [31] – [32].

<sup>5</sup> *Stock Motor Ploughs v Forsyth* (1932) 48 CLR 128 per Dixon J; *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322.

<sup>6</sup> *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253 at 257.7, 258.3 259.2 and 271.5; *Telstra Corporation v Worthing* (1999) 197 CLR 61 at 76 [27].

<sup>7</sup> *Majik Markets Pty Ltd v Brake and Service Centre Drummoyne Pty Ltd* (1991) 28 NSWLR 443 per Kirby J; *University of Wollongong v Metwally* (1984) 158 CLR 447 at 455–6 per Gibbs CJ. The underlying issue is the intention of the paramount legislature. *P v P* (1994) 181 CLR 583 at 601.6 – 602.2; *R v El Helou, El Helou v R* [2010] NSWCCA 111 at [24].

<sup>8</sup> *New South Wales v The Commonwealth and Carlton* (1983) 151 CLR 302 (the *Hospital Benefits* case) per Mason J at page 330.2.

the adjustment of industrial relations established by the award or agreement with respect to the matters formerly in dispute<sup>9</sup>.

*Additional Features of the Federal Instruments and the CILSL Scheme*

35. In addition to the matters found by the Full Court the Appellants contend that the scheme created by the Federal Instruments has the following features:
- (a) subject to limited exceptions, they require payment of salary during any period of leave to be made at the ordinary rate of pay in the same manner as if the employee had continued working: (AB 99 – 100, 97, clauses 24.4 and 24.1.3) including:
    - (i) provision for variation of the rate of pay during periods of leave: (AB 99, clause 24.4.1);
    - (ii) payment of ongoing allowances, including the weekend penalty payments for shift workers, during the taking of leave: (AB 100, clause 24.4.2);
    - (iii) prohibition on payment in advance prior to leave becoming due and adjustment of payments made in advance when leave is commenced to take into account variations occurring during the taking of leave: (AB 100-101, clause 24.4.3);
    - (iv) a prohibition on payment in lieu of leave other than in order to adjust the period over which the leave is taken or in the event of termination of employment covering various contingencies including termination on account of retirement, total and permanent disability or death: (AB 99, 100-101, clauses 24.4.5, 24.3.5, 24.5);
  - (b) when the 1998 Award and its predecessors were made and in force, there was Victorian State legislation providing for long service leave for employees working in the building and construction industry based on service in the industry, and obligations on employers of those employees to pay for the funding of that leave by contributing to a fund and provide that leave. At no time have the Appellants registered with the Respondent (or its predecessors) or made regular or any contributions to the Respondent in respect of any of their employees: (AB 48; [41]);
  - (c) when the 2004 Agreements were negotiated one of the matters at issue was entitlements and obligations in respect of long service leave: (AB 44 – 46, [36] – [37]; AB 117.8; AB 129.7; AB 133.5). This claim was resolved by the parties agreeing that the Appellants would continue to provide such leave and make payments in respect of it as required by the 1998 Award as supplemented by the 2004 Agreements: (AB 46 – 48 [38] – [40]; AB 139, clause 5.1; AB 144 – 145, clause 3.d; AB 150, clause 5; AB 154 – 155, clause 3);
  - (d) the scheme created by the Federal Instruments proceeds on the basis that the obligation on an employer to provide long service leave or make payment in lieu arises when such leave is taken or the entitlement to payment in lieu crystallises.

<sup>9</sup> *Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights Union* (1983) 152 CLR 632 at 642.9; *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 499.

Further, the amounts that the employer is required to pay are calculated solely by reference to the long service leave entitlements of the employer's employees. The Appellants accrue amounts to meet these obligations as they arise. The provisioning for long service leave takes into account the possibility that particular employees will not accrue an entitlement to take such leave or be paid in respect of it: (AB 157 – 158, [4] – [8]).

36. In addition to the matters found by the Full Court the Appellants contend that the CILSL Scheme has the following features:

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- (a) the Respondent is the trustee of the fund which was established under a trust deed executed by the Respondent on 1 April 1997 (the “Deed”): (AB 203- 204, [4] – [6]);
  - (b) the Deed requires the Respondent to exercise its powers in accordance with the terms of the CILSL Act: (AB 259, clause 6.2.2);
  - (c) as at 1 April 1997 the CILSL Rules were in the form of Schedule 2 of the Deed (the **Original Rules**): (AB 204, [7]; AB 274 – 324);
  - (d) the Original Rules provided among other things that:

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*“35.1 When a Worker (including a Worker who has been a Working Sub-Contractor) becomes entitled to Long Service Leave Benefit under these Rules, Long Service Leave shall be granted by his Employer as soon as practicable having regard to the needs of his establishment, but subject to these Rules:*

*(a) The taking of the leave may be postponed to such date as is mutually agreed or, in default of agreement, as the Trustee having regard to the problems involved directs, but no such direction shall require Long Service Leave to commence before the expiry of six months after the date of the direction, and*

*(b) In no case shall any entitlement to Long Service Leave be lost or in any way affected by the foregoing provisions of this rule 35.1 or by failure or refusal of the Employer to grant the leave.”*

30 (AB 311, rule 35.1)

- (e) the Respondent has amended the CILSL Rules a number of times since 1 April 1997: (AB 204 – 205, [7] – [11]; AB 388 – 390, [3] – [8]);
- (f) the CILSL Rules as at 29 August 2006 were in the form appearing at AB 325 – AB 384: (AB 389 – 390, [8]) (the **Rules as Amended**);
- (g) the Rules as Amended:
  - (i) define long service leave as a distinct and separate entitlement to long service leave benefit: (AB 331, rule 1.1);

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- (ii) provide for an entitlement to long service leave on ordinary pay: (AB 360-361, rule 27.2);
  - (iii) define what constitutes service for the purpose of calculating the entitlement: (AB 354 – 357, rule 21);
  - (iv) contemplate payments being made in lieu of long service leave where the worker is terminated from the construction industry or dies: (AB 365 – 367, rules 30 and 31);
  - (v) subject to agreement, contemplate the entitlement to long service leave being taken in separate periods: (AB 372, rule 35.1); and
  - (vi) refer to the payments being made when leave is taken: (see in particular AB 372, rule 35.2).
  - (vii) deal with 3 classes of beneficiary:
    - A. “worker” which for current purposes can be equated with employee. The “Long Services Leave Benefit” that a worker receives is 13 weeks long service leave on ordinary pay (AB 360-361, rule 27.2);
    - B. “working sub-contractors”. The “Long Service Leave Benefit” that working sub-contractors receive is, in effect, a refund of the working sub-contractor’s contributions together with interest at a determined rate (AB 362, rule 28.2);
    - C. persons who have served in the industry both as “workers” and “working sub-contractors”. The “Long Service Leave Benefit” these persons receive is a combination of “long service leave” as equal to 1/60<sup>th</sup> of the period of his continuous services in the construction industry as a “worker” and a refund from the fund of their contributions as a “sub-contractor” together with interest at the determined rate (AB 363, rule 29.3(a)).
  - (h) set up the mechanisms for the calculation of the long service leave charge an employer has to pay: (AB 344 – 348, rule 11) and the maintenance of registers of employers: (AB 341, rule 8) and workers: (AB 341 - 342, rule 10).
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  - 30 (i) the amount of the charge to be paid by an employer is determined by the Respondent in accordance with the Deed (CILSL Act, ss 4(2) and 4(3)). Amounts of money received by the Respondent under the CILSL Act are paid into the Fund: (AB 254, clause 1 Definition of “Fund”; AB 256 clause 2.1; AB 340, rule 6.1(a)) and the Respondent may recover any amount of charge owing to it by an employer (CILSL Act, s 5(1)).

## The CILSL Scheme Imposes Obligations in Addition to and Inconsistent with the Scheme Which the Federal Instruments Create and Detract from that Scheme

### *Direct inconsistency*

37. For the Appellants to be required to comply with the CILSL Scheme would amount to the imposition of obligations in addition to and inconsistent with the scheme which the Federal Instruments create and detract from that scheme. This is the case irrespective of whether the CILSL Scheme provides an entitlement to long service leave.
38. The Respondent accepts that if the CILSL Scheme confers an entitlement to long service leave as opposed to an entitlement to payment out of the fund, the scheme would be inconsistent with the relevant provisions of the *Workplace Relations Act 1996*. (Application Book page 66; paragraph 2.1). The Appellants contend that the CILSL Scheme confers such an entitlement to leave. This contention is based upon the terms of the CILSL Act and the stated intention of the Victorian Parliament when that Act was made.
39. In its terms s 6 of the CILSL Act provides for both an entitlement in the employee to long service leave and an entitlement to be paid benefits out of the fund (s 6(1)). The construction adopted by the Full Court sets at nought the entitlement to long service leave which the CILSL Act expressly confers.
40. The construction contended for is consistent with the stated purpose of the CILSL Act namely to provide for the scheme established by the *Construction Industry Long Service Leave Act 1983* to be administered in accordance with a trust deed (CILSL Act s 1) and the second reading speech which accompanied the CILSL Act.
41. As found by the Full Court, the scheme established by the *Construction Industry Long Service Leave Act 1983* conferred an entitlement to long service leave: (AB 441 [11]). On its face, the preservation of the scheme created by the 1983 Act, albeit through a different form of administration, entails maintaining an entitlement in employees to long service leave and payment therefore to be funded by the levying of charges across all employers in the construction industry. That Parliament intended that the CILSL Scheme would confer an entitlement to leave is reflected in the assurance contained in the Second Reading Speech that the “*bill continues to provide construction industry workers with the statutory right to take long service leave...*”: (AB 441, [10]).
42. A construction which promotes the purpose of an enactment is to be preferred to one that does not (*Interpretation of Legislation Act 1984* (Vic), s 35(a), *Acts Interpretation Act 1901* (Cth), s 15AA; *Saraswati v R* (1991) 172 CLR 1 at 21 per McHugh J).
43. Whilst the CILSL Rules do not, in their current form, put in place a time limit for when leave must be taken (cf rule 35.1 prior to December 1997: (AB 311)) this does not mean that there is no entitlement to leave. If not agreed, a dispute about the timing of leave may readily be characterised as a dispute concerning the CILSL Scheme and fall within the dispute resolution mechanism set out in s 12(1)(c) of the CILSL Act. The removal of Rule 35.1 after the CILSL Act came into force should not be seen as changing the clear words of s 6 of the CILSL Act or mean that the Act and the CILSL Scheme are no longer about creating a scheme whereby employees in the construction industry could accrue and take paid long service leave.

44. Further, the CILSL Act empowers the trustee to amend the CILSL Rules so that they provide for an entitlement to long service leave. Indeed the scheme created by the Original Rules unequivocally conferred such an entitlement. The CILSL Act in empowering the trustee to amend the CILSL Rules in this way, indirectly overrides or renders ineffective the scheme contained within the Federal Instruments.

45. Alternatively, if the CILSL Scheme does not confer an entitlement to long service leave, it imposes obligations in addition to and inconsistent with the scheme which the Federal Instruments create and detract from that scheme.

46. The Federal Instruments have from their inception had the following characteristics. They:

(a) require:

(i) leave: (AB 98, clause 24.2);

(ii) payment for leave in the same manner as if the employee had continued working: (AB 99 – 100, 97, clauses 24.4 and 24.1.3);

(b) prohibit:

(i) work during the period of leave in respect of which payment is made: (AB 99, clause 24.3.8);

(ii) payment in lieu of leave other than in limited circumstances namely:

A. conversion into other forms of leave;

B. payment in lieu on termination,

(AB 100, 99, clauses 24.4.5, 24.3.5, 24.5).

47. Under the Federal Instruments an entitlement to long service leave and an entitlement to be paid in respect of same only arises after 10 years service with the employer or with those entities identified as giving rise to continuity of service. The CILSL Scheme substantively alters that entitlement to the extent that it contemplates payment without the taking of leave and alters the nature of the service to be accrued prior to the entitlement arising.

48. In addition, the CILSL Scheme through:

(a) the imposition of the requirement to make contributions pursuant to the CILSL Scheme for all construction employees, including those employees that ultimately do accrue an entitlement to long service leave under the Federal Instruments and take that long service leave: (CILSL Act s 4(1), AB 344, rule 11);

(b) the imposition of the requirement to provide returns pursuant to the CILSL Scheme: (CILSL Act s 9, AB 377-378, rule 41);

(c) a prohibition on employing workers unless registered under the CILSL Scheme: (CILSL Act s 8);

- (d) the confining of any refund obtained in respect of an employee to whom long service leave payments are made pursuant to the Federal Instruments to the amount paid pursuant to the Federal Instruments and not the entirety of the contributions made pursuant to the CILSL Scheme: (AB 376-377, rule 40);
- (e) the inability to recover or obtain a refund of the contributions made in respect of employees that do not accrue sufficient service to attract long service leave pursuant to the Federal Instruments;

imposes non trivial obligations upon the Appellants in respect of long service leave, inconsistent with the scheme created by the Federal Instruments.

10 ***Indirect inconsistency***

- 49. The Full Court found that the Federal Instruments deal, and were intended to deal, with all ordinary aspects of long service leave entitlements that might arise in the industrial relationship between the employee and employer: (AB 449 [45]). This finding is not challenged on appeal.
- 50. The Federal Instruments comprehensively regulate the Appellants obligations in respect of long service leave and the entitlements of employees of the Appellants in respect of such leave. They prescribe, among other things, what payments the Appellants have to make in respect of long service leave, what service is required (both with the Appellants and other employers) to accrue a long service leave entitlement and when and how payments in respect of long service leave or in lieu of long service leave will occur. They require that the Appellants maintain current policies, customs and practices including the practice in respect of the granting of and payment for long service leave.
- 51. This form of regulation was maintained through the 2004 Agreements notwithstanding the fact that those agreements were made in response to a demand directed to long service leave at a time that the CILSL Scheme was in place and not being complied with by the Appellants. The Court should proceed on the basis that the parties would not have agreed to this form of regulation if they intended the CILSL Scheme to have operation to employees whose employment was regulated by the Federal Instruments.
- 52. The field that the Federal Instruments cover is the Appellants' obligations in respect of long service leave accrued in whole or in part through service with the Appellants and the entitlements of employees of the Appellants in respect of such leave: including but not limited to payments made or received in respect of such leave. The CILSL Scheme, in purporting to impose additional obligations upon the Appellants and confer additional benefits upon the employees of the Appellants in respect of such leave is inconsistent with the Federal Instruments.

**Characterisation of the Scheme Created by the Federal Instruments**

- 53. The finding that there was no indirect inconsistency between the scheme created by the Federal Instruments and the CILSL Scheme, turned upon the Full Court's characterisation of the scheme created by the Federal Instruments as pertaining to the relationship between employer and employee and its view that as the CILSL Scheme did not pertain to that relationship, no inconsistency could arise: (AB 449 at [45] and [46]). The Appellants accept that the Scheme created by the Federal Instruments

pertains to the employment relationship. They take issue with the propositions that the CILSL Scheme does not so pertain or that it is necessary for it to pertain to that relationship before a relevant inconsistency can arise.

54. A dispute as to the liability of employers to make a contribution to a fund maintained by a third party for the benefit of employees may, depending upon the circumstances, pertain to the employment relationship. The relationship extends to the obligations and duties owed by one party to the employment relationship to the other, even where the performance of the obligation results in a benefit to third parties<sup>10</sup>.
55. The question of whether a matter pertaining to the employment relationship is one of appropriate characterisation based upon all that relevant circumstances. As a general rule, a payment made, for the benefit of an employee by an employer is normally presumed to pertain to the relationship unless it falls into a category identified as outside the relationship<sup>11</sup>.
56. In the circumstances of this case the Full Court should have held that the CILSL Scheme did pertain to the employment relationship.
57. Alternatively, the question of whether the CILSL Scheme pertains to the relationship of employer and employee is a different question to the question of whether it intrudes into the area regulated by the Federal Instruments. It does not go to, or at the least is not determinative, of whether the CILSL Scheme destroyed or varied the adjustment of industrial relations established by the 1998 Award and the 2004 Agreements or whether it intruded into the field that the parties to the 2004 Agreements should be taken to have exclusively or exhaustively regulated.
58. The fact that the CILSL Scheme requires the Appellants to pay money into a fund administered by the Respondent does not prevent there from coming into being an inconsistency when that Scheme is about funding long service leave benefits, nor does the characterisation of the CILSL Act as "social legislation"<sup>12</sup>.
59. The position is very different from that considered by the High Court in the *Hospital Benefits Case*. In that case the Commonwealth legislation recognised the continued operation of State laws and their capacity to make an impact on the fund (pages 317.7, 318.2, 319.5). As appears at page 319.5 in that case "the central fact, which [was].. of critical importance, [was].. that the levy [was].. simply a charge on the business and therefore a cost which is directly and wholly referable to carrying on that business. As such it [was].. a cost for which the Commonwealth act [made] .. express provision." The Federal Instruments do not contemplate any levy (whether industry based or otherwise) in respect of long service leave.
60. Further, as Mason J pointed out at 328.5, the amount of the levy, when collected, was paid into consolidated revenue. It was in no way an amount earmarked for defraying

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<sup>10</sup> *Metal Trades Employers Association v. Amalgamated Engineering Union* (1935) 54 CLR 387 at 351; *Re Amalgamated Metal Workers Union of Australia and Others; Ex parte The Shell company of Australia Limited and Others* (1992) 174 CLR 345 per Brennan J at 363 -364.

<sup>11</sup> *Australian Maritime Officers Union v Sydney Ferries Corporation* [2009] FCAFC 145 at [21].

<sup>12</sup> see *Colvin v Bradley Brothers Pty Ltd* (1943) 68 CLR 151 at 159.7, *Metal Trades Industry Association v AMWSU* (1983) 152 CLR 632 at 646.4.

the cost of providing free outpatient and ambulance services. The moneys paid pursuant to the CILSL Scheme do not go into consolidated revenue but rather go into a fund from which payments in respect of long service leave are made to employees of the Appellants.

**Part VII:**

61. This Part is attached as an Annexure to these Submissions.

**Part VIII:**

62. The Appeal be allowed with no order as to costs.

63. Set aside the orders made by the Full Court of the Federal Court on 18 December 2009 and, in lieu thereof, order that:

(a) The separate questions be answered as follows :

(i) as to (a), (c), (e) and (g) — Yes;

(ii) as to (b), (d), (f) and (h): ---

to the extent that it applies to the Appellants, the entirety of the CILSL Scheme is inconsistent with the long service leave scheme contained in the 1998 Award when read in isolation or in combination with the Certified Agreements and is accordingly invalid and of no effect.

(b) A declaration that the Respondent does not and did not have any rights under the CILSL Act in respect of the Appellants in respect of any of their employees employed under either the:

(i) 1998 Award;

(ii) 1999 Agreement;

(iii) 2002 Agreement; or

(iv) 2004 Agreement.

(c) An order that the Respondent is restrained from proceeding further to exercise any power under the CILSL Act including requiring the Appellants to register, submit returns, or make contributions in respect of any of its employees employed under either the:

(i) 1998 Award;

(ii) 1999 Agreement;

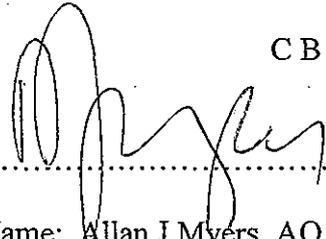
(iii) 2002 Agreement; or

(iv) 2004 Agreement.

**DATED:** 1 February 2011

A J Myers

C B O'Grady

A handwritten signature in black ink, appearing to read 'Allan J Myers', written over a horizontal dotted line.

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## ANNEXURE - PART VII

1 At all material times the *Commonwealth of Australia Constitution Act 1900* (Cth) (Commonwealth Constitution) provided as follows:

**"109 Inconsistency of laws**

10 *When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."*

2 At all material times up to 27 March 2006, the *Workplace Relations Act 1996* (Cth) (WR Act) provided as follows:

**"152 Awards to prevail over State Laws and State Awards**

20 (1) *Subject to this section, if a State law or a State award is inconsistent with, or deals with a matter dealt with in, an award, the latter prevails and the former, to the extent of the inconsistency or in relation to the matter dealt with, is invalid."*

**"170LX When a Certified Agreement is in operation**

(1) *A certified agreement comes into operation when it is certified and, subject to this section, remains in operation at all times afterwards.*

30 (2) *The agreement ceases to be in operation if:*  
*(a) its normal expiry date has passed; and*  
*(b) it is replaced by another certified agreement."*

**"170LZ Effect of a Certified Agreement on Commonwealth Laws or State Laws, Awards or Agreements**

(1) *Subject to this section, a certified agreement prevails over terms and conditions of employment specified in a State law, State Award or state employment agreement, to the extent of any inconsistency.*

40 (2) *Provisions in a certified agreement that deal with the following matters operate subject to the provisions of a State law that deals with the matter:*

- (a) occupational health and safety;*
- (b) workers' compensation;*
- (c) apprenticeships;*
- (d) any other matter prescribed by the regulations."*

50

3 On and after 27 March 2006, the WR Act provided in Division 1 of Part 2 of Schedule 7:

“2 ***Continuing operation of pre-reform certified agreements – under old provisions***

10 (1) *Subject to this Schedule, the following provisions of the pre-reform Act continue to apply in relation to a pre-reform certified agreement, despite the repeals and amendments made by the Workplace Relations Amendment (Work Choices) Act 2005:*

...

(f) *sub-sections 170LX (1) and (4);*

(g) *sections 170LY and 170LZ”.*

4 On and after 27 March 2006, the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) provided in Item 4 of Division 2 of Schedule 4:

20 “4 ***Operation of awards in force before commencement***

(1) *In this item:*

*award means an award within the meaning of subsection 4(1) of the Workplace Relations Act 1996 as in force immediately before the reform commencement.*

*employee has the meaning given by subsection 4AA(1) of the amended Act.*

30 *employer has the meaning given by subsection 4AB(1) of the amended Act.*

(2) *This item applies to an award (the "original award") in force immediately before the reform commencement.*

(3) *The original award is taken to be replaced by an instrument (the "pre-reform award") in the same terms as the original award that, on and from the reform commencement, has effect under the Workplace Relations Act 1996 and binds the following:*

40 (a) *each employer that was bound immediately before the reform commencement by the original award."*

5 On and after 27 March 2006, the WR Act provided relevantly in Part 1 - Preliminary:

“4 ***Definitions***

...

*"award" means a pre-reform award.*

...

*"pre-reform award" means an instrument that has effect after the reform commencement under item 4 of Schedule 4 to the Workplace Relations Amendment (Work Choices) Act 2005."*

*"17 Awards, agreements and Commission orders prevail over State and Territory law etc.*

*(1) An award or a workplace agreement prevails over a law of a State or Territory, a State award or a State employment agreement, to the extent of any inconsistency."*

6 The WR Act was repealed by the *Fair Work (Transitional Provisions And Consequential Amendments) Act 2009* however Schedule 3 of the *Fair Work (Transitional Provisions And Consequential Amendments) Act 2009* provides for the continued existence of awards and pre-reform certified agreements as transitional instruments and for those instruments to continue to be subject to the same instrument interaction rules and State and Territory interaction rules that applied under the WR Act: Schedule 3; Items 5 and 5A.

20 7 At all material times up to 1 March 2005, the *Construction Industry Long Service Leave Act 1997 (Vic) (CILSL Act)* provided relevantly as follows:

#### PART 1—PRELIMINARY

##### 1. Purpose

The purpose of this Act is to repeal the **Construction Industry Long Service Leave Act 1983** and provide for the scheme established by that Act to be administered in accordance with a trust deed by a company incorporated under the Corporations Law.

##### 2. Commencement

(1) This Part comes into operation on the day on which this Act receives the Royal Assent.

(2) Subject to sub-section (3), the remaining provisions of this Act come into operation on a day or days to be proclaimed.

(3) If a provision referred to in sub-section (2) does not come into operation before 1 January 1998, it comes into operation on that day.

##### 3. Definitions

(1) In this Act-

**"commencement day"** means the day on which section 20 comes into operation;

**"director"**, in relation to a corporation, has the same meaning as in section 9 of the Corporations Law;

"existing staff member" means a person who, immediately before the commencement day-

(a) was an officer or employee under the **Public Sector Management Act 1992** assisting the former Board in the administration of the former Act; or

(b) was employed by the former Board;

"former Act" means the **Construction Industry Long Service Leave Act 1983** as in force immediately before its repeal;

"former Board" means the Construction Industry Long Service Leave Board established under Part II of the former Act;

"former fund" means the Construction Industry Long Service Leave Fund established under section 9 of the former Act;

"fund" means the Construction Industry Long Service Leave Fund established under the trust deed;

"person" includes an unincorporated body and a partnership;

"trust deed" means the trust deed executed by CoINVEST Limited A.C.N. 078 004 985 as trustee on 1 April 1997 as amended and in force for the time being;

"trustee" means CoINVEST Limited A.C.N. 078 004 985 or any new trustee appointed under, and in accordance with, the trust deed.

- (2) Words and expressions used in the rules set out in Schedule 2 to the trust deed and in this Act have the same respective meanings in this Act as they have in those rules as amended and in force for the time being.
- (3) Sub-section (2) does not apply to the extent that the context or subject-matter otherwise indicates or requires.

## **PART 2—CONSTRUCTION INDUSTRY LONG SERVICE**

### **LEAVE FUND**

#### **4. *Long service leave charges***

- (1) The trust deed may require-
- (a) an employer to pay to the trustee a long service leave charge in respect of every worker employed by the employer to perform construction work;
- (b) a working sub-contractor (who has made an election referred to in sub-section (4)) to pay to the trustee a long

service leave charge in respect of construction work performed by the working sub-contractor.

- 10
- (2) The date by which a long service leave charge is payable, the period in respect of which it is payable, the amount of charge payable and the method by which that amount is to be calculated are as determined from time to time by the trustee in accordance with the trust deed.
  - (3) The long service leave charge imposed on an employer in respect of a worker must not be more than 3% of the ordinary pay of the worker.
  - (4) The trust deed must permit a working sub-contractor to elect to pay a long service leave charge in respect of construction work performed by the working sub-contractor and to revoke that election at any time.
  - (5) The trust deed may provide for long service leave charges to be payable at different rates in respect of -
    - (a) workers and working sub-contractors;
    - (b) different classes of construction work performed by workers or working sub-contractors.

20

5. *Recovery of charges*

- (1) The trustee may recover any amount of long service leave charge owing to the trustee by an employer or working sub-contractor, together with interest in accordance with sub-section (2), as a debt in any court of competent jurisdiction.
- (2) Interest at the rate for the time being fixed under section 2 of the **Penalty Interest Rates Act 1983** is payable on any amount owing to the trustee calculated from the date on which the amount becomes due until the date on which the amount is paid or otherwise recovered under sub-section (1).

30

6. *Entitlements*

- (1) Every worker is entitled to long service leave, and to be paid benefits out of the fund, in respect of continuous service in the construction industry.
- (2) Every working sub-contractor who has paid long service leave charges is entitled to be paid benefits out of the fund in respect of continuous service in the construction industry.
- (3) The amount of the entitlement and the method by which that amount is to be calculated are as determined from time to time by the trustee in accordance with the trust deed.

7. *Restriction on powers of trustee*

- (1) The trustee must not, without the prior approval of the Governor in Council, exercise any power, authority or discretion given to the trustee by the trust deed the exercise of which would have the effect of enlarging the class of persons capable of being paid benefits out of the fund.
- (2) Without limiting sub-section (1), that sub-section -
- (a) has effect with respect to any addition to, or any amendment, modification, variation, deletion, revocation, substitution or replacement of, the whole or any part of the trust deed by which -
    - (i) the meaning or scope of the expressions "construction work" or "construction industry" is enlarged, whether directly or indirectly; or
    - (ii) an award is prescribed for the purposes of the fund;
  - (b) does not have effect with respect to a decision as to whether or not a particular person is within a class of persons then capable of being paid benefits out of the fund (whether as a result of an amendment of a prescribed award or otherwise) or as to the amount of any benefit to which such a person is entitled.

8. *Registers*

- (1) An employer whose name is not included in the register of employers or the register of working sub-contractors kept by the trustee in accordance with the trust deed must not for more than 5 days in any month -
- (a) employ workers under a contract of employment to perform construction work; or
  - (b) being a principal contractor, engage any other employer or working sub-contractor by contract (not being a contract of employment) to perform construction work.

Penalty: 20 penalty units.

- (2) A working sub-contractor whose name is not included in the register of working sub-contractors kept by the trustee in accordance with the trust deed must not, for more than 5 days in any month, perform construction work as a working subcontractor.

Penalty: 20 penalty units.

- (3) A worker whose name is not included in the register of workers kept by the trustee in accordance with the trust deed must not, for more than 5 days in any month, perform construction work as a worker.

Penalty: 20 penalty units.

9. ***Requirement to keep records and make returns***

- (1) An employer must -
- (a) in accordance with the trust deed, keep records containing information relating to workers employed to perform construction work;
  - (b) retain any such record for at least 7 years after the last entry was made in it;
  - (c) in accordance with the trust deed, send to the trustee from time to time information relating to workers employed to perform construction work.

Penalty: 20 penalty units.

- (2) An employer must not make any false or misleading statement in, or any material omission from, any record that the employer is required by sub-section (1)(a) to keep.

Penalty: 20 penalty units.

- (3) In a proceeding for an offence against sub-section (2) it is a defence to the charge for the accused to prove that the statement or omission resulted from an error made in good faith.

10. ***Trustee may request information***

- (1) The trustee may, by notice in writing given to an employer or a working sub-contractor or any person whom the trustee believes to be an employer or a working sub-contractor, require that person -

- (a) to give any information to the trustee; or
- (b) to produce to the trustee any document under that person's control -

that is relevant to the ascertainment by the trustee of that or any other person's rights or liabilities under the trust deed.

- (2) A notice under sub-section (1) must specify -

- (a) the time or times, not sooner than 28 days after the date of the notice, at which; and
- (b) the form and manner in which -

the information is to be given or the document produced.

- (3) A person to whom a notice is given under sub-section (1) must not -
- (a) refuse or fail to comply with the notice; or
  - (b) in response to the notice give information that is false or misleading in a material particular.

Penalty: 20 penalty units.

- (4) A person is not excused from complying with a notice under sub-section (1) on the ground that compliance might tend to incriminate the person but, if the person in writing given to the trustee before complying with the notice, claims that compliance might tend to incriminate the person, any information given or document produced by the person in compliance with the notice is not admissible in evidence against the person in criminal proceedings, other than proceedings under this Act or other proceedings in respect of the falsity of the information or document.
- (5) In a proceeding for an offence against sub-section (3)(b) it is a defence to the charge for the accused to prove that at the time at which the offence is alleged to have been committed, the accused believed on reasonable grounds -
- (a) in the case of false information—that the information was true; or
  - (b) in the case of misleading information—that the information was not misleading.

## 11. *Enforcement of information request*

- (1) Irrespective of whether a proceeding is commenced for an offence against section 10(3)(a), the trustee may apply to the Magistrates' Court for an order directing a person to whom a notice was given under section 10(1) to comply with the notice within a specified time.
- (2) On an application under sub-section (1) the Magistrates' Court must, if it considers that there are reasonable grounds for believing that the person has refused or failed to comply with the notice, grant the application unless it considers that in the circumstances there are reasonable grounds for not doing so.
- (3) In the application of section 135 of the **Magistrates' Court Act 1989** to an order under this section -
- (a) sub-section (3)(a) of section 135 has effect as if it provided for a fine of not more than 10 penalty units for every day during which the default continues; and

- (b) sub-section (4)(b) of section 135 has effect as if it provided for maximum aggregate sums of 400 penalty units.

12. *Disputes*

- (1) Any of the following disputes (to the extent to which it involves issues that are not the subject of or have not been determined in a proceeding for an offence against this Act) is a dispute for the purposes of this section -
  - (a) a dispute about whether a person is an employer who employs or engages a person or persons to perform construction work between -
    - (i) that person and the trustee; or
    - (ii) that person and a person or persons employed or engaged by that person; or
    - (iii) a person or persons employed or engaged by that person and the trustee;
  - (b) a dispute about whether a person is employed or engaged to perform construction work between -
    - (i) that person and an employer; or
    - (ii) that person and the trustee; or
    - (iii) an employer and the trustee;
  - (c) any other dispute concerning the scheme dealt with by the trust deed between -
    - (i) an employer and a person or persons employed or engaged by the employer; or
    - (ii) any person referred to in sub-paragraph (i) and the trustee; or
    - (iii) a working sub-contractor and the trustee.
- (2) If a dispute is not settled, the parties to the dispute must be taken to have entered into an agreement in writing to refer the dispute to arbitration in accordance with the **Commercial Arbitration Act 1984** before a single arbitrator appointed by the Secretary-General for the time being of the Australian Centre for International Commercial Arbitration.
- (3) Unless the arbitrator otherwise directs, the costs of the arbitration shall be borne equally by the parties to the dispute.

13. *Contracting out prohibited*

Except as is otherwise expressly provided by this Act or the trust deed, any term of an agreement purporting to exclude, limit or modify the operation of this Act or the trust deed is void.

14. *Rule against perpetuities*

Without limiting section 17 of the **Perpetuities and Accumulations Act 1968**, the rule of law known as the rule against perpetuities does not apply to the fund and must be deemed never to have applied to the former fund.

- 8 The CILSL Act was amended by the *Construction Industry Long Service Leave (Amendment) Act 2004* (Vic) with effect from 1 March 2005. The relevant CILSL Act as amended from 1 March 2005 (with the amendments underlined for ease of reference) provided relevantly as follows:

## PART 1—PRELIMINARY

### 1. Purpose

The purpose of this Act is to repeal the **Construction Industry Long Service Leave Act 1983** and provide for the scheme established by that Act to be administered in accordance with a trust deed by a company incorporated under the Corporations Law.

### 2. Commencement

- 10
- (1) This Part comes into operation on the day on which this Act receives the Royal Assent.
  - (2) Subject to sub-section (3), the remaining provisions of this Act come into operation on a day or days to be proclaimed.
  - (3) If a provision referred to in sub-section (2) does not come into operation before 1 January 1998, it comes into operation on that day.

### 3. Definitions

- (1) In this Act—

20 "**commencement day**" means the day on which section 20 comes into operation;

"**director**", in relation to a corporation, has the same meaning as in section 9 of the Corporations Act;

"**existing staff member**" means a person who, immediately before the commencement day—

- (a) was an officer or employee under the **Public Sector Management Act 1992** assisting the former Board in the administration of the former Act; or

30 "**former Act**" means the **Construction Industry Long Service Leave Act 1983** as in force immediately before its repeal;

"**former Board**" means the Construction Industry Long Service Leave Board established under Part II of the former Act;

"**former fund**" means the Construction Industry Long Service Leave Fund established under section 9 of the former Act;

"**fund**" means the Construction Industry Long Service Leave Fund established under the trust deed;

"**person**" includes an unincorporated body and a partnership;

40 "**trust deed**" means the trust deed executed by CoINVEST Limited A.C.N. 078 004 985 as trustee on 1 April 1997 as amended and in force for the time being;

"trustee" means CoINVEST Limited A.C.N. 078 004 985 or any new trustee appointed under, and in accordance with, the trust deed.

- (2) Words and expressions used in the rules set out in Schedule 2 to the trust deed and in this Act have the same respective meanings in this Act as they have in those rules as amended and in force for the time being.
- (3) Sub-section (2) does not apply to the extent that the context or subject-matter otherwise indicates or requires.

## PART 2—CONSTRUCTION INDUSTRY LONG SERVICE LEAVE FUND

### 4. Long service leave charges

(1) An employer must pay to the trustee a long service leave charge in respect of every worker employed by the employer to perform construction work in the construction industry.

(1A) A working sub-contractor (who has made an election referred to in sub-section (4)) must pay to the trustee a long service leave charge in respect of construction work performed by the working sub-contractor in the construction industry.

- (2) The date by which a long service leave charge is payable, the period in respect of which it is payable, the amount of charge payable and the method by which that amount is to be calculated are as determined from time to time by the trustee in accordance with the trust deed.
- (3) The long service leave charge imposed on an employer in respect of a worker must not be more than 3% of the ordinary pay of the worker.
- (4) The trust deed must permit a working sub-contractor to elect to pay a long service leave charge in respect of construction work performed by the working sub-contractor in the construction industry and to revoke that election at any time.
- (5) The trust deed may provide for long service leave charges to be payable at different rates in respect of—
  - (a) workers and working sub-contractors;
  - (b) different classes of construction work performed by workers or working sub-contractors in the construction industry.

### 5. Recovery of charges

(1) The trustee may recover any amount of long service leave charge owing to the trustee by an employer or working sub-contractor, together with interest in accordance with sub-section (2), as a debt in any court of competent jurisdiction.

(1A) The trustee may recover an amount referred to in sub-section (1) from a related body corporate (within the meaning of the Corporations Act) of an employer or working sub-contractor.

(2) Interest at the rate for the time being fixed under section 2 of the **Penalty Interest Rates Act 1983** is payable on any amount owing to the trustee

calculated from the date on which the amount becomes due until the date on which the amount is paid or otherwise recovered under sub-section (1).

## 6. Entitlements

- (1) Every worker is entitled to long service leave, and to be paid benefits out of the fund, in respect of continuous service in the construction industry.
- (2) Every working sub-contractor who has paid long service leave charges is entitled to be paid benefits out of the fund in respect of continuous service in the construction industry.
- (3) The amount of the entitlement and the method by which that amount is to be calculated are as determined from time to time by the trustee in accordance with the trust deed.

## 7. Restriction on powers of trustee

- (1) The trustee must not, without the prior approval of the Governor in Council, exercise any power, authority or discretion given to the trustee by the trust deed the exercise of which would have the effect of enlarging the class of persons capable of being paid benefits out of the fund.
- (2) Without limiting sub-section (1), that sub-section—
  - (a) has effect with respect to any addition to, or any amendment, modification, variation, deletion, revocation, substitution or replacement of, the whole or any part of the trust deed by which—
    - (i) the meaning or scope of the expressions "construction work" or "construction industry" is enlarged, whether directly or indirectly; or
    - (ii) an award is prescribed for the purposes of the fund;
  - (b) does not have effect with respect to a decision as to whether or not a particular person is within a class of persons then capable of being paid benefits out of the fund (whether as a result of an amendment of a prescribed award or otherwise) or as to the amount of any benefit to which such a person is entitled;
  - (c) does not have effect with respect to a decision as to the amount of any benefit capable of being paid out of the fund.

## 8. Registers

- (1) An employer whose name is not included in the register of employers or the register of working sub-contractors kept by the trustee in accordance with the trust deed must not for more than 5 days in any month—
  - (a) employ workers under a contract of employment to perform construction work in the construction industry; or
  - (b) being a principal contractor, engage any other employer or working sub-contractor by contract (not being a contract of employment) to perform construction work in the construction industry.

Penalty: 20 penalty units.

- (2) A working sub-contractor whose name is not included in the register of working sub-contractors kept by the trustee in accordance with the trust deed must not,

for more than 5 days in any month, perform construction work as a working sub-contractor in the construction industry.

Penalty: 20 penalty units.

- (3) A worker whose name is not included in the register of workers kept by the trustee in accordance with the trust deed must not, for more than 5 days in any month, perform construction work as a worker in the construction industry.

Penalty: 20 penalty units.

## 9. Requirement to keep records and make returns

10

- (1) An employer must—

- (a) in accordance with the trust deed, keep records containing information relating to workers employed to perform construction work in the construction industry;
- (b) retain any such record for at least 7 years after the last entry was made in it;
- (c) in accordance with the trust deed, send to the trustee from time to time information relating to workers employed to perform construction work in the construction industry.

Penalty: 20 penalty units.

20

- (2) An employer must not make any false or misleading statement in, or any material omission from, any record that the employer is required by sub-section (1)(a) to keep.

Penalty: 20 penalty units.

- (3) In a proceeding for an offence against sub-section (2) it is a defence to the charge for the accused to prove that the statement or omission resulted from an error made in good faith.

## 10. Trustee may request information

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- (1) The trustee may, by notice in writing given to an employer or a working sub-contractor or any person whom the trustee believes to be an employer or a working sub-contractor, require that person—

- (a) to give any information to the trustee; or
- (b) to produce to the trustee any document under that person's control—  
that is relevant to the ascertainment by the trustee of that or any other person's rights or liabilities under the trust deed.

- (2) A notice under sub-section (1) must specify—

- (a) the time or times, not sooner than 28 days after the date of the notice, at which; and
- (b) the form and manner in which—  
the information is to be given or the document produced.

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- (3) A person to whom a notice is given under sub-section (1) must not—
- (a) refuse or fail to comply with the notice; or

- (b) in response to the notice give information that is false or misleading in a material particular.

Penalty: 20 penalty units.

- (4) A person is not excused from complying with a notice under sub-section (1) on the ground that compliance might tend to incriminate the person but, if the person in writing given to the trustee before complying with the notice, claims that compliance might tend to incriminate the person, any information given or document produced by the person in compliance with the notice is not admissible in evidence against the person in criminal proceedings, other than proceedings under this Act or other proceedings in respect of the falsity of the information or document.
- (5) In a proceeding for an offence against sub-section (3)(b) it is a defence to the charge for the accused to prove that at the time at which the offence is alleged to have been committed, the accused believed on reasonable grounds—
  - (a) in the case of false information—that the information was true; or
  - (b) in the case of misleading information—that the information was not misleading.

#### 11. Enforcement of information request

- (1) Irrespective of whether a proceeding is commenced for an offence against section 10(3)(a), the trustee may apply to the Magistrates' Court for an order directing a person to whom a notice was given under section 10(1) to comply with the notice within a specified time.
- (2) On an application under sub-section (1) the Magistrates' Court must, if it considers that there are reasonable grounds for believing that the person has refused or failed to comply with the notice, grant the application unless it considers that in the circumstances there are reasonable grounds for not doing so.
- (3) In the application of section 135 of the **Magistrates' Court Act 1989** to an order under this section—
  - (a) sub-section (3)(a) of section 135 has effect as if it provided for a fine of not more than 10 penalty units for every day during which the default continues; and
  - (b) sub-section (4)(b) of section 135 has effect as if it provided for maximum aggregate sums of 400 penalty units.

#### 11A. Authorised employee may represent trustee in proceeding

Despite anything to the contrary in any other Act, if the trustee is a party to a proceeding—

(a) for the recovery of long service leave charges under section 5; or

(b) for an offence against section 10(3)(a)—

the trustee may appear in the proceeding by an employee of the trustee authorised by the trustee to do so.

## 12. Disputes

- (1) Any of the following disputes (to the extent to which it involves issues that are not the subject of or have not been determined in a proceeding for an offence against this Act) is a dispute for the purposes of this section—
- (a) a dispute about whether a person is an employer who employs or engages a person or persons to perform construction work in the construction industry between—
    - (i) that person and the trustee; or
    - (ii) that person and a person or persons employed or engaged by that person; or
    - (iii) a person or persons employed or engaged by that person and the trustee;
  - (b) a dispute about whether a person is employed or engaged to perform construction work in the construction industry between -
    - (i) that person and an employer; or
    - (ii) that person and the trustee; or
    - (iii) an employer and the trustee;
  - (c) any other dispute concerning the scheme dealt with by the trust deed between—
    - (i) an employer and a person or persons employed or engaged by the employer; or
    - (ii) any person referred to in sub-paragraph (i) and the trustee; or
    - (iii) a working sub-contractor and the trustee.
- (2) If a dispute is not settled, the parties to the dispute must be taken to have entered into an agreement in writing to refer the dispute to arbitration in accordance with the **Commercial Arbitration Act 1984** before a single arbitrator appointed by the Secretary-General for the time being of the Australian Centre for International Commercial Arbitration.
- (3) Unless the arbitrator otherwise directs, the costs of the arbitration shall be borne equally by the parties to the dispute.

## 13. Contracting out prohibited

Except as is otherwise expressly provided by this Act or the trust deed, any term of an agreement purporting to exclude, limit or modify the operation of this Act or the trust deed is void.

## 14. Rule against perpetuities

Without limiting section 17 of the **Perpetuities and Accumulations Act 1968**, the rule of law known as the rule against perpetuities does not apply to the fund and must be deemed never to have applied to the former fund.

### 14A. Extension of application to certain workers and working sub-contractors

In this Part a reference to a worker or working sub-contractor includes a reference to a person entitled to long service leave and to be paid benefits out of

the fund in accordance with rule 31A or rule 31B in Schedule 2 to the trust deed.

- 9 Minor amendments to the CILSL Act were made by the *Statute Law Amendment (Evidence Consequential Provisions) Act 2009 (Vic)* and the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009 (Vic)* with effect from 1 January 2010 however the amendments did not affect the relevant parts of the CILSL Act as set out in paragraph 10 above.