AMMA
AUSTRALIAN
RESOURCES &
ENERGY GROUP

# Independent review of the Coal Mining Industry (Long Service Leave Funding) framework

## Submission to KPMG Coal LSL review team

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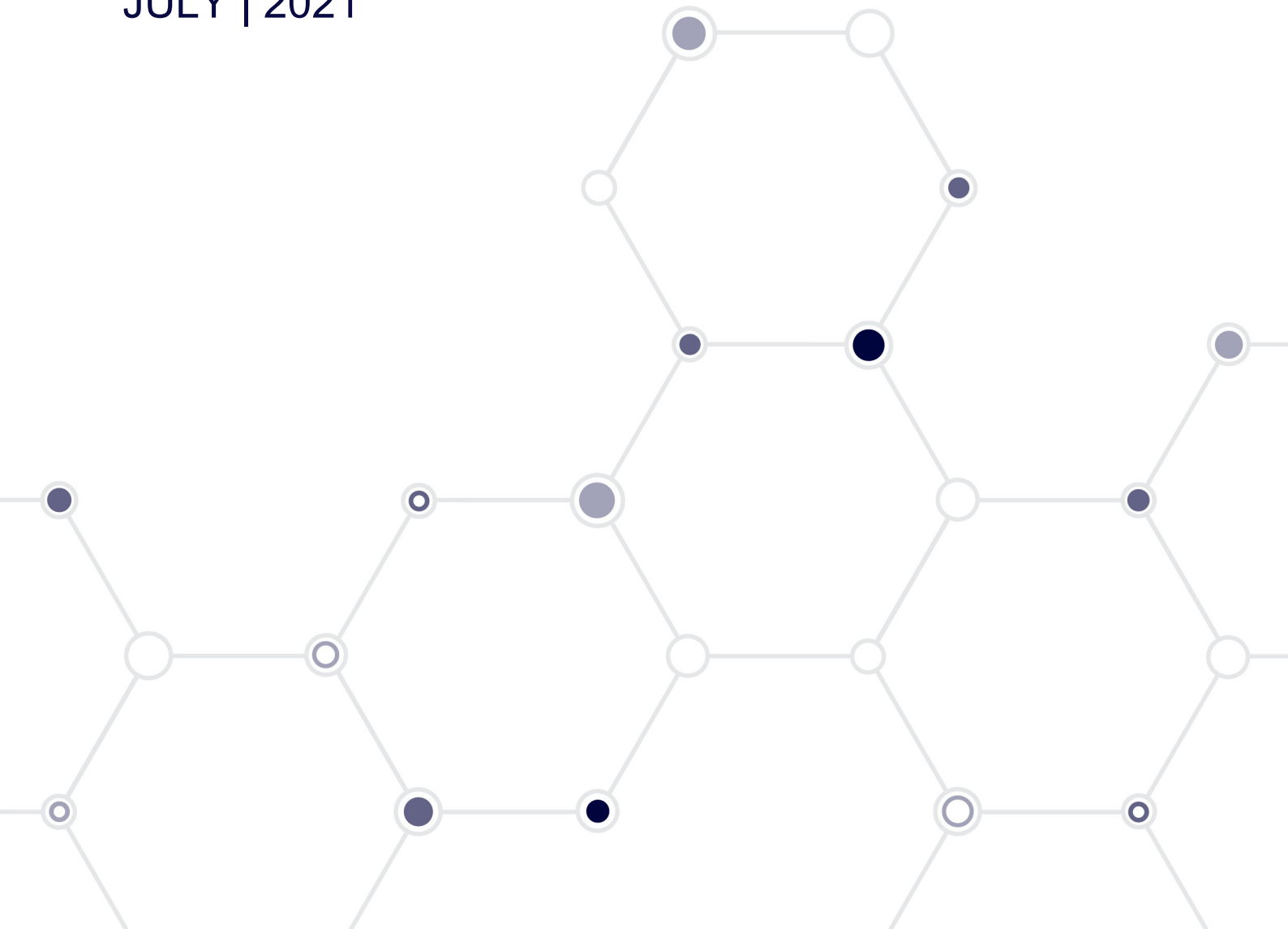

# ABOUT AMMA

AMMA is Australia's resources and energy industry group and has provided a unified voice for employers on workforce and other industry matters for more than 102 years.

AMMA's membership spans the entire resources and energy industry supply chain, including exploration, construction, commercial blasting, mining, hydrocarbons, maritime, smelting and refining, transport and energy, as well as suppliers to these sectors.

AMMA works to ensure Australia's resources and energy industry is an attractive and competitive place to invest and do business, employ people and contribute to our national well-being and living standards.

AMMA members across the resources and energy industry are responsible for a significant level of Australian employment, with an estimated 10% of our national workforce, or 1.1 million Australians, employed directly and indirectly as a result of the resources industry.

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# Introduction

AMMA is pleased to provide this submission to the Australian Government's independent review of the Coal Mining Industry (Long Service Leave Funding) framework (**'Coal LSL Scheme'**), being undertaken by KPMG.

AMMA has a number of members involved in the coal mining industry, including coal mine owner-operators, and contractors and service suppliers across all associated industries. Such industries include on-hire labour, maintenance, engineering and construction, blasting and shotfiring, transport and logistics and more.

All AMMA members have an interest in ensuring the Coal LSL Scheme is a fair and equitable system for employers and employees, and that its administering entity – Coal Mining Industry (Long Service Leave Funding) Corporation (**'Coal LSL'**) – manages the scheme efficiently and transparently whilst providing high quality assistance to participants.

Consultation with AMMA members indicates wide-ranging concerns about the scheme and how Coal LSL administers it, and a large number of required reforms to the framework to bring it into line with the above principles.

This submission is arranged into feedback within each of the categories provided by KPMG, namely Coverage; Compliance and Enforcement; Governance; Administration; and Other Matters.

While AMMA submits feedback across each of these areas, four dominant themes have emerged from member consultations:

1. Significant conflict between specialist contractors and supply sector employers with Coal LSL about eligibility of their employees to be covered by the Coal LSL Scheme;
2. Inequities between how casual employment and permanent employment is treated under the Scheme, including levy payments, qualifying service accrual and ambiguity about the calculation of eligible wages for casual employees paid a loaded / flat hourly rate;
3. Widespread frustrations about the inability and/or unwillingness of Coal LSL to clarify the above and other matters, and to work with employers to resolve disputes; and
4. Widely held view that if Coal LSL was to administer payments of LSL entitlements directly to employees, coal mining industry participants would be freed from an enormous amount of compliance and regulatory burden and have associated costs with the scheme greatly reduced.

KPMG's questions within each category of its review are provided in **bold** prior to AMMA's response, kept as succinct as possible.

As part of this process AMMA has been briefed by the Australian Industry Group ('**Ai Group'**) on key issues with the Coal LSL Scheme for its members and has had the opportunity to review the submissions and recommendations being put to this review by Ai Group.

AMMA recognises Ai Group has had longstanding exposure and continued involvement in Coal LSL matters since before the 2010 Amendments / Award Modernisation process. In addition to any unique AMMA member experiences and feedback provided within this submission, we also endorse the submission and recommendations provided to this review by Ai Group.

# 1. Coverage

**The review provides an opportunity to consider the existing Coal LSL Scheme coverage arrangements, including how employers of eligible employees covered by the scheme are participating, and whether all eligible employees can access their entitlements.**

**What concerns do you or your organisation hold about the current coverage arrangements for long service leave entitlements provided by the existing Coal LSL Scheme?**

*1.1 Contractors / Service Suppliers*

For contractors and service suppliers to the coal mining industry, coverage represents the single biggest issue with the Coal LSL Scheme. The overwhelming experience of these employers is that any provision of an auxiliary service to an operating coal mine is considered by Coal LSL to fall within the coverage of the scheme.

This has seen hundreds, potentially thousands of employers which do not consider themselves to operate primarily in the coal mining industry served with claims notices by Coal LSL due to their provision of a service to a coal mine. Common servicing sectors where employers are in constant dispute with Coal LSL (and unions) about coverage of the Coal LSL Scheme include maintenance, electrical, mechanical, and specialist mining services such as blasting / shotfiring.

Employment in these sectors is typically underpinned by the *Manufacturing and Associated Industries and Occupations Award 2020*, *Electrical, Electronic and Communications Contracting Award 2020,* or *Vehicle Repair, Services and Retail Award 2020.* Long service leave provisions are drawn from State/Territory LSL laws, the National Employment Standards (NES) or Enterprise Agreement terms.

Employers do not apply the Black Coal Mining Award and are not registered with Coal LSL.

Despite this, Coal LSL has seemingly taken the view that any business providing a service with employees located on an operating coal mine falls within the coverage of the scheme and therefore must pay the Coal LSL levy for any past and present eligible employees.

This has led to a very large number of coverage disputes between employers and Coal LSL. Employers in this situation are threatened with litigation and face a potential contingent liability dating back to at least 2010. The sums of these potential back-paid Coal LSL contributions often threaten to bankrupt businesses.

*1.2 The approach prior to 1 January 2010 – clear and understood by all*

The issues regarding coverage of the Coal LSL Scheme come largely from the award modernisation process that took effect from 1 January 2010. This process changed the longstanding principle that coverage of the scheme was derived directly from application of a black coal industrial instrument.

Prior to 1 January 2010 the definition of 'eligible employee' within the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (**'Coal LSL Act'**) included the following two most important criteria (emphasis added):

a) a person employed in the black coal mining industry under a relevant industrial instrument, or the Australian Fair Pay and Conditions Standard, the duties of whose employment are carried out at or about a place where black coal is mined; or

b) a person employed by a company that mines black coal the duties of whose employment (wherever they are carried out) are directly connected with the day-to-day operation of a black coal mine;

The further definition of a 'relevant industrial instrument' included in the Act meant that coverage under the Coal LSL Scheme was almost entirely dependent on an employee's coverage by the *Coal Mining Industry (Production and Engineering) Consolidated Award 1997* or an enterprise agreement that specified coverage under the Coal LSL Scheme.

As a result of the coverage definitions above, the *Coal Mining Industry (Production and Engineering) Consolidated Award 1997* typically covered maintenance, vehicle repair and manufacturing employees directly employed by a coal mining company. However, it did not cover employees of contractors whose primary business was providing those specialist services to clients, which often included coal mines.

Employees of those specialist contractors were covered by awards including the *Metal, Engineering and Associated Industries Award 1998*, the *Vehicle Industry – Repair, Services and Retail Award 2002,* the *National Electrical, Electronic and Communications Contracting Industry Award 1998*, or the *Federal Explosives Manufacturing and Distribution (AWU) Award 2000*.

It was clear and well accepted that employees covered by awards other than the *Coal Mining Industry (Production and Engineering) Consolidated Award 1997* were not eligible employees for the purposes of the Coal LSL Scheme.

This meant, for example, an electrician who was employed directly by a coal mining company and was based on the mine site providing ongoing maintenance would be covered by the Coal LSL Scheme; whilst an electrician working for an electrical contracting company which happened to include some coal miners as regular clients (perhaps alongside civil and construction sector clients) would not be covered by the Coal LSL Scheme.

Another good example comes from a sector experiencing significant challenges with Coal LSL's contemporary approach to coverage – blasting / shotfiring. Under the prior well-understood coverage rules, employees of specialist blasting services providers would never have been considered 'eligible employees' covered by the Coal LSL Scheme because:

a) They were not "employed in the black coal mining industry under a relevant industrial instrument". Rather, they were employed in the blasting industry under the *Federal Explosives Manufacturing and Distribution (AWU) Award 2000;* and

b) They were not persons "employed by a company that mines black coal".

It might so happen to be the case that blasting contractors often deliver their services to a coal mining client, but that did not change the fundamental criteria of which their eligibility under the Coal LSL Scheme was assessed.

Those very same employees may be deploying their services at a quarry, construction site, civil project or other clients the next day, week or month. Whichever client worksite they happen to have been deployed to did not change the nature of their services, skills or employment arrangements.

*1.3 Changes from 1 January 2010 – The source of ambiguity and disputes*

The award modernisation process included two significant changes in relation to coverage of the Coal LSL Scheme.

Firstly, with the recently enacted *Fair Work Act 2009* making it unlawful to include long service leave terms in industrial awards, the 'modern' *Black Coal Mining Industry Award 2010* was absent of any of the clarification regarding Coal LSL Scheme coverage contained in the pre-modern award it was derived from.

This meant coverage of the scheme would be dictated entirely by the Coal LSL Act. In a poor substitution attempt, the Act was amended to clarify that for the purpose of the scheme's coverage

the “black coal mining industry” would have “the same meaning as in the Black Coal Mining Industry Award 2010 as in force on 1 January 2010”.

The second significant change was in relation to the definition of “eligible employee” within the Coal LSL Act. The two most important criteria – (a) and (b) – were amended to the following (emphasis added):

a) an employee who is employed in the black coal mining industry by an employer engaged in the black coal mining industry, whose duties are directly connected with the day to day operation of a black coal mine; or

b) an employee who is employed in the black coal mining industry, whose duties are carried out at or about a place where black coal is mined and are directly connected with the day to day operation of a black coal mine.

The amended criteria created a significant ambiguity about whether coverage of the modernised *Black Coal Mining Industry Award 2010* was necessary for coverage of the Coal LSL Scheme.

Going beyond the simple removal of the historic reference to “a relevant industrial instrument”, the new criteria substituted the established concept of an eligible employee being one “employed by a company that mines black coal” to one simply “employed in the black coal industry”.

It also emphasises the locality of where an employee is engaged to work (“at a place where black coal is mined”) without the clarification that the primary business of their employer should be mining coal.

While it could be argued (and is AMMA’s view) that the intention at the time was simply to move the same historic relationship between the Black Coal Award and the Coal LSL Scheme into the legislation, sloppy drafting has opened the door for the interpretation that any employer engaged in the black coal mining industry may be captured, irrespective of what modern award underpins the employment arrangement of their employees.

This has opened pandora’s box in terms of the ability for Coal LSL and coal mining unions to argue the Scheme’s coverage extends to employees of companies that supply services to the coal mining industry but whose primary business or undertaking is not the extraction of black coal.

There has been a clear lack of common sense applied to interpretating the Coal LSL Act’s new criteria alongside well-established historic principles in relation to coverage of the Coal LSL Scheme as it relates to employees of contractors and service providers whose core business is not mining coal.

AMMA further wishes to note that while it was heavily involved in the modernisation process for other key awards in the mining and oil and gas sectors, such as the *Mining Industry Award 2010* and *Hydrocarbons Industry (Upstream) Award 2010*, the organisation was not provided any opportunity to be involved in or respond to the changes to the award covering the black coal industry.

We are also not aware of any opportunity provided to other key employer bodies involved in the award modernisation process, such as the Australian Chamber of Commerce and Industry (ACCI) or Ai Group, to be involved or respond to these changes.

*1.4 Relevant authorities / case law*

AMMA’s strong view is that the positions taken by Coal LSL, outlined above, in relation to coverage of the Coal LSL Scheme from 1 January 2010, are highly erroneous and not aligned to the intention of the Coal LSL Act.

Further, Coal LSL’s contemporary approach appears to be in conflict with longstanding, well-settled case law on the intended meanings of key expressions in the Act.

In relation to the meaning of "an employer engaged in the black coal mining industry":

1. In *R v Drake-Brockman; Ex parte National Oil Pty Ltd* (1943), the High Court of Australia found the "fact that two industries are carried on at the same place does not abolish the distinction between them".

2. In *R v Hickman and Others, Ex parte Fox and another, Ex parte Clinton and others* (1945), the High Court determined that lorry drivers who carried coal were "employed as lorry drivers generally, and not as carriers of coal". Despite performing their duties on a coal mine site, the Court ruled "they are employed by persons who carry on the business of carriers" and "do not in any real sense belong to the coal mining industry".

3. In *R v Central Reference Board; Ex parte Thiess (Repairs) Pty Ltd* (1948), the High Court found that an engineering employer (Thiess repairs) "is not engaged in coalmining, but is an engineering company carrying on general work. It is not under the control of the mine owner, or even of the contracting party (Thiess Bros. Pty. Ltd.), which actually conducts the mining operations."

   In this important judgement, the High Court also found (emphasis added):

   > *Many industries supply goods to or provide services for other industries. A motor garage may be almost exclusively engaged in repairing trucks for a transport company, and it may do such work under a contract under which it is entitled to obtain and bound to do all the transport company's work. But it would not follow that the motor garage was in the transport industry….Thus the fact that an enterprise provides a service for a particular industry cannot be held to identify that enterprise with that industry so as to make it a part of the industry.*

In relation to the meaning of "an employee who is employed in the black coal mining industry", the prevailing authority is the 1921 High Court of Australia judgement in *R v Hibble; Ex parte Broken Hill Proprietary Co Ltd.* In this judgement the High Court emphasised that the core business or trade of the employee's employer is the key factor in determining whether or not an employee is "engaged in or in connection with the coal or shale industry".

This was the authority applied by the Australian Industrial Relations Commission (AIRC) in the 2005 Full Bench decision in *Appeal by Dyno Nobel Asia Pacific Limited* (PR956868) (***Dyno Nobel***). In that matter the Full Bench found (emphasis added):

> *"[16] Rule 2D of the CFMEU eligibility rules refers to "employees engaged in or in connection with the coal and shale industries". It is an industry rule and the discrimen of eligibility is the trade or business of Dyno Nobel. Indeed, counsel for the CFMEU acknowledged that Rule 2D is the current manifestation of the very rule considered by the High Court in Hibble. Accordingly, we are bound, as was her Honour, to apply the decision in Hibble to Rule 2D. Thus, the issue in this appeal turns on the proper characterisation of the business of Dyno Nobel, that is, whether the business of Dyno Nobel is "in or in connection with" the coal industry."*

AMMA notes that the provisions of the Coal LSL Act actually provide a narrower criteria in which to consider whether an employee "is employed in the black coal industry". Whilst the authority in *Hibble* considered employees engaged "in connection with" the coal industry, the Coal LSL Act allows only consideration of whether an employee "is employed in" the industry.

In relation to the expression "are directly connected with the daily operation of a black coal mine" in paragraph (b) of the Coal LSL Act's criteria, AMMA submits that this expression cannot be examined independently from the two preceding expressions. Simply – if an employee cannot be found to "be employed in the black coal mining industry" based on all the authorities above, it is irrelevant if their services or work are found to be connected with the daily operation of a coal mine.

*1.5 The intent of the Award Modernisation process*

Further confusion about Coal LSL Scheme's coverage comes from inconsistencies between Coal LSL's contemporary approach and that it took immediately after the Award Modernisation process.

AMMA is aware of multiple past instances where it was communicated to employers that the definition of "black coal mining industry" for the purposes of coverage of the Coal LSL Scheme, expressly excluded various contracting sectors.

One such example is provided as Attachment 1: Australian Government Coal LSL Information Pamphlet. This official Australian Government pamphlet, which bears Coal LSL's logo, proclaims its content *"explains the long service leave entitlements for people working in the black coal mining industry. It takes account of changes starting 1 January 2012".*

Page 7 states the following in relation to definitions (emphasis added):

> **The black coal mining industry doesn't include:**
>
> - The mining of brown coal in conjunction with the operation of a power station
> - The work of employees employed in head offices or corporate administration offices of employers engaged in the black coal mining industry (but does include worwk in town offices associated with the day-to-day operation of a local black coal mine or mines)
> - The operation of a coal export terminal
> - Construction work on or adjacent to a coal mine site
> - Catering and other domestic services
> - Haulage of coal off a mining lease unless such haulage is to a wash plant or char plant in the vicinity of the mine
> - The supply of shotfiring or other explosive services by an employer not otherwise engaged in the black coal mining industry

Despite this official advice from Coal LSL, many AMMA members working across these very sectors (maintenance based around construction trades, transport services, shotfiring / explosives services), and which are otherwise not engaged in the black coal industry, have received multiple notices from Coal LSL, many dating back to 2010, claiming they are covered by the Coal LSL Scheme.

From all the above evidence, AMMA has formed the strong view that it was never the intention of the award modernisation process and associated amendments to the Coal LSL Act to significantly broaden the coverage of the Coal LSL Scheme to include businesses and contracting sectors that were clearly not covered by the Scheme in the many years prior.

It is clear that most disputes have come about due to contractors and service sector employers taking the common-sense view, supported by historical precedent set in the pre-modern award era, that they should not be covered by the Coal LSL Scheme. Conversely, Coal LSL has taken the view that the Scheme's coverage should be as broad as their interpretation of the Coal LSL Act, post its 2010 amendments, allows it to be.

Fixing this significant issue must be a top priority recommended by KPMG through this review.

As aforementioned, AMMA has had the opportunity to review draft submissions provided by Ai Group to this review. For the purposes of clarifying this significant coverage issue, AMMA supports the following proposal of that organisation:

> **Amend the definition of 'black coal mining industry' in the Coal Mining Industry LSL Admin Act, as follows:**
>
> ***black coal mining industry*** ~~has the same meaning as in~~ means the employees covered by the *Black Coal Mining Industry Award 2010* as in force on 1 January 2010 and not any other modern award.

**AMMA Member Case Study – Coal LSL's Approach to Coverage Disputes**

One AMMA member is a contracting employer that provides services to the coal mining industry, often on coal mining sites. The employer's activities and workforce are covered by a pre-modern award which was subsumed under the Manufacturing Award during the award modernisation process.

The employer engages its workforce under Enterprise Agreements that provide for more generous long service leave entitlements than what the Coal LSL Scheme provides. To be brought into the Coal LSL Scheme would cause interaction issues between Enterprise Agreements and the Coal LSL Scheme, and may cause long-standing employees to "lose" more favourable conditions.

For more than 10 years Coal LSL has been pursuing the employer regarding claims that some of its employees are 'eligible employees'. The employer's experience is that the process and approach is unnecessarily lengthy and is not transparent nor consistent. For example:

- Regarding employees that Coal LSL has deemed "eligible employees", in some cases Coal LSL has sought information as to whether the employer has to pay the levy, and in other cases Coal LSL has simply declared that there is an obligation to pay the levy and asked the employer to arrange a meeting with Coal LSL.

- On average the timeline between which Coal LSL first advises they are investigating eligibility, and then communicates an outcome, has been approximately two years.

- The employer has been subject to multiple letters and notices in relation to different time periods for the same employees. For example, in relation to one employee:

    - 2015 - Coal LSL wrote notifying they were investigating eligibility for a period between 2012 to 2015 (Period 1).
    - 2017 – Coal LSL wrote notifying they were investigating eligibility for a period between 2010 to 2011 (Period 2).
    - 2018 – Coal LSL wrote to notify they had formed the view that there was an obligation to pay the levy in relation to Period 1.
    - 2019 – Coal LSL wrote to notify they formed a view that there was an obligation to pay the levy in relation to Period 2.

All issues remain unresolved. Despite the employer having responded to all correspondence from Coal LSL, all the employer's correspondence to Coal LSL remains outstanding. Coal LSL will not provide supporting documentation and will not engage in discussions regarding their view that the employees are eligible.

Given Coal LSL has taken the view that it can pursue levy payments dating back to 2010 (rather than the statute of limitations applying), it is the employer's view there is no time pressure or motivation for Coal LSL to provide certainty to employers and employees and respond in a timely and transparent manner.

*1.6 Coverage of employees on 'Care and Maintenance' assets*

For coal mine owner / operators, the eligibility of employees working on a project in "care and maintenance" mode is another area of ambiguity that must be clarified.

Multiple coal mine operators have reported to AMMA that they have attempted to seek clarity from Coal LSL about the coverage of employees providing care and maintenance services to mines that have either temporarily or permanently ceased production.

As is typical of many technical queries put to Coal LSL, those employers have simply been quoted the legislation and asked to make their own determination of eligibility which may, or may not, align to any future determination made by Coal LSL. For this reason, many employers simply continue to pay the Coal LSL contributions for those employees. This does, however, leave them exposed to a future determination by Coal LSL that those employees are not eligible to receive payments.

The above recommended amendment to the Coal LSL Act (clarifying that only those employees covered by the *Black Coal Mining Industry Award 2010* are eligible for the Coal LSL Scheme) would go a long way to clarifying whether or not employees working on "care and maintenance" sites are covered by the scheme.

However, AMMA notes the following:

a) Coverage of the *Black Coal Mining Industry Award 2010* can in itself be very ambiguous, particularly in circumstances where an employee continues to work directly on a site that has transitioned from a producing coal mine to a care and maintenance operation; and

b) There is a question of fairness for those employees. Consider, for example, an employee who had been eligible for the Coal LSL Scheme for a number of years and has had their employer provide payments into the scheme, only to find themselves suddenly ineligible due to a change in the operating status of the mine at which they are employed.

AMMA recommends KPMG investigate how the Act could clarify that if an employee:

a) had been previously eligible for the Coal LSL Scheme; and

b) is working for the same employer which is registered under the scheme and had been providing payments into the scheme for that employee; and

c) continues to work at the same coal mine in a similar capacity for which they previously been eligible…

…that a change in the production status of that mine should have no bearing on that employee's ongoing eligibility under the Coal LSL Scheme.

This would support a scenario where if a coal mining employer had been paying into the Coal LSL Scheme for an employee for eight years during which a mine was operating, and two years during which the mine was in care and maintenance, that if that employee were to take long service leave, payment of their entitlement would be fully reimbursed by Coal LSL to the employer.

This ongoing eligibility would not apply in circumstances where that employee changed employers to a contractor providing specialist maintenance services and whose primary business is not operating coal mines. For that purpose, the contracting employer (whose award coverage would not be the *Black Coal Mining Industry Award 2010*) would not assume any Coal LSL Scheme liability.

AMMA notes these types of scenarios will become more common over coming years with many of Australia's operating coal mines set to transition out of production. At the same time, a large portion

of the coal mining workforce will become employed in assisting with care and maintenance activities, community transitions and environmental rehabilitation.

*1.7 Interaction with State / Territory LSL*

**Do you have any concerns with respect to the interaction of the existing Coal LSL scheme with State and Territory long service leave laws (for example, where an employee may have entitlements under more than one scheme)?**

AMMA members have reported concerns and confusion about potential overlapping of the Coal LSL Scheme and other LSL entitlements – including state and territory LSL schemes, other industry LSL schemes, and LSL entitlements provided in enterprise agreements.

Demonstrating the absurdity of the current approach to coverage taken by Coal LSL (and other schemes), some AMMA members which contract to multiple sectors have reported being served with claims from Coal LSL, as well as construction industry LSL schemes, in addition to accounting for long service entitlements directly in their enterprise agreements.

Feedback is that this scenario surely provides evidence that there are significant coverage issues to be clarified. To begin this clarification process and address potential 'double dipping' issues, AMMA endorses the recommended amendments provided in Ai Group's submission, including that (to summarise the key principles):

a) eligible employees be given an opportunity to opt-out of the Coal LSL Scheme if they prefer to receive alternative LSL entitlements;

b) employees should not receive Coal LSL entitlements for periods of service where they have received entitlements under other LSL schemes; and

c) the Coal LSL Act be amended to deal with any potential for employees to receive a "double benefit" due to overlapping with long service leave terms of an enterprise agreement.

## 2. Compliance and Enforcement

**It is important that the Coal LSL Scheme is supported by a robust and effective compliance and enforcement framework, that ensures that: employers comply with their obligations under the scheme, that employee entitlements are safeguarded, and that an effective mechanism for dispute resolution exists.**

**Do you or your organisation have any concerns about the current compliance and enforcement mechanism used by the existing Coal LSL scheme? Do you have any suggestions regarding how the enforcement of the scheme could be improved?**

AMMA provides the following general comments in relation to compliance and enforcement, based on member experiences and observations.

The key frustration is that Coal LSL, when seeking to enforce compliance with the Scheme, goes about its duties as if it were a "tax collector" and that employers it deems to have eligible employees covered by the scheme are effectively "tax dodgers" if they had not been providing payments for those employees.

Coupled with the aforementioned ambiguity around coverage, this has soured the relationship between Coal LSL and various employers which may dispute or seek clarity on its determinations.

Interactions with Coal LSL are often highly strained or litigious in nature, with examples including:

- One AMMA member described its interactions with Coal LSL as "dealing with a highly belligerent organisation that has no interest in working with us to clarify and resolve issues".
- Another AMMA member made the pertinent observation that Coal LSL is part of the coal industry and should seek to assist and support industry participants, instead of taking a "big stick" approach to all employers.
- A common experience is that any queries or requests for clarity about how a coverage or payment eligibility decision has been made is met with Coal LSL providing a link to, or quoting, the legislation back to them.
- One AMMA member said it "appears Coal LSL has the attitude that they have their own legislative powers and will not bend or take on-board any differing views or suggestions from the employer community".

AMMA does not mean to disparage many of the good people working at Coal LSL – there are many examples of account managers attempting to be as helpful as possible. It appears that often their hands are tied by a lack of clarity in the legislation, significant administrative deficiencies (detailed in part 4) and an organisational culture that takes the approach of making a legal determination, issuing employers with notice of that determination and adopting a "brick wall" approach to any responding requests for transparency on how that determination was made.

AMMA submits that cultural change should be instigated at Coal LSL to make the organisation more open and willing to work with employers on areas of contention or ambiguity. Further, the following three changes would also go a long way towards addressing employer issues with the compliance and enforcement approach of Coal LSL:

a) The Coal LSL Scheme should be amended to clarify that State and Territory limitation laws – providing a statute of limitation for recovery of debt to six years (or less in the Northern Territory) – applies to Coal LSL liabilities. It is not helpful that Coal LSL has taken the view that near-universally applied six-year limitations do not apply to the scheme it administers. By claiming for back payments from employers, in many cases

dating to 2010, Coal LSL's decision to ignore the principle of fairness that underpins six-year statute of limitations adds considerably to the level of disputation between parties.

b) A new dispute resolution process should be inserted into the Coal LSL Act to allow Coal LSL and employers to more readily resolve disputes about coverage, payment values, reimbursement values and other matters. At present the dispute procedure is too limited, addressing only disagreement about entitlement to long service leave. Such a dispute resolution procedure will greatly assist in reducing the litigious nature of disputes and encourage employers and Coal LSL to resolve disagreements.

c) Coal LSL should be empowered to reach settlements with employers who owe debts of levy. It is clear through the recent reduction of the levy from 2.7% to 2% that the Coal LSL Scheme is very well funded and does not need to pursue the full amount of all possible debts at all costs. Just as the Australian Tax Office has a Code of Settlement providing it with discretion to settle with a party and avoid legal proceedings, so too should Coal LSL be able to apply administrative discretion in this way.

AMMA submits that the above changes to the Compliance and Enforcement practices of Coal LSL would significantly improve the relationship between the corporation and industry participants and contribute to a more effectively administered scheme overall.

# 3. Governance

**A strong governance framework is necessary to safeguard accountability and public confidence in the Coal LSL scheme. Governance refers to how the Coal LSL Scheme is managed, including risk management, the framework for rules, relationships, systems and processes that govern how the scheme operates and how those in control are held to account.**

**Do you have any concerns regarding the current state of governance of the Coal LSL scheme?**

AMMA members do not report significant concerns about the governance of Coal LSL. However, there is a view amongst some employers that the Coal LSL Board of Directors is distinctly lacking a representative of companies that provide services to coal mines and work in sectors that are commonly involved in longstanding coverage disputes with the corporation.

Given coverage disputes represent arguably the biggest issue with Scheme, intricate knowledge of contracting and service supplier business models would benefit the corporation. AMMA submits that at least one Director should come from a diverse contracting business background.

In addition, there is also a distinct absence of any independent directors on the Coal LSL Board, with its membership comprised 50/50 of employer and employee (union) representatives. Most (if not all) boards of government corporations contain at least 2-3 independent directors that provide guidance on best practice governance and financial management. This would also assist with the views of some AMMA members that there is a lack of transparency about what financial advice in particular is being sought and followed by the Coal LSL Board in making investment and management decisions.

AMMA submits that the Board of Directors be expanded to include 2-3 independent directors with specific skills in financial management and administration, and not from an operational coal industry background or union leadership.

AMMA's submissions on Coal LSL governance matters is limited to the above.

# 4. Administration

**Robust and effective administration processes are vital to enable the scheme to achieve its purposes and manage workers' entitlements in an appropriate manner. This includes ensuring the accuracy and compliance of record-keeping concerning eligible employees and employers regarding entitlements and reimbursements.**

**Do you have any concerns regarding the current administration of the scheme?**

AMMA members have significant concerns about the administration of the Coal LSL Scheme.

Most of these concerns appear to be grounded in the Coal LSL Scheme being built around the unique employment conditions in the Black Coal Mining Award, being a 35-hour ordinary working week and base rate of pay with clearly identifiable allowances and overtime penalties.

This system has failed to adapt to the modern coal mining industry workforce in the 21st century, which sees a far greater variance of employment arrangements, including rosters and remuneration, than that in the Black Coal Award. This has led to significant challenges and frustrations with how Coal LSL administers the scheme.

Many of these frustrations, but not all, relate to the treatment of casual employees and employers of casual employees in comparison to permanent employment arrangements.

*4.1 Reporting of casual employee hours for purposes of LSL levy payments*

Labour hire employers within AMMA's membership have reported that Coal LSL has for some time required employers of casual employees to report all hours worked by casual employees, including overtime, for the purposes of calculating LSL levy payments.

This is a highly inequitable position that sees employers of casual employees often pay significantly greater LSL levies than employers of permanent employees, whose levy payments are capped at 35 ordinary hours per week.

The approach becomes especially absurd when considering casual employees can only accrue a maximum of 35 hours per week in LSL qualifying service (see 4.2 below) even in circumstances where employers are being required to pay the levy for many more hours actually worked (for example, 4 x 12-hour shifts = 48 hours in a working week).

There is no basis in the Payroll Levy Collection Act for this different treatment of hours worked by casuals or permanent employees. LSL levy payments for casual employees should only be calculated based on that employee's ordinary hours worked.

Further backing this recommendation (and this also has implications for governance and transparency), there is no explanation for where the additional funds collected – in the above example 13 additional hours' worth – is allocated.

The employees are not entitled to it and employers most certainly would not be reimbursed more than 35 hours' worth of LSL payments provided to any employee, perhaps out of the mistaken belief that they should as the employee had consistently worked in excess of 35 hours on a weekly basis and payments were required to be made to Coal LSL based on those actual hours.

*4.2 Casual employees' accrual of LSL entitlement*

Under the Coal LSL Act the definition of 'working hours' for the purposes of calculating an employee's accrual of LSL qualifying service is treated very differently for casual employees and non-casual employees. In practice the Act's provisions dictate that:

- Permanent employees accrue 35 hours per week of qualifying service;

- Part-time employees accrue the lesser of either total ordinary hours worked (noting this cannot be more than 35 hours) or 35 hours;
- Casual employees accrue the lesser of either total number of hours worked or 35 hours.

As a result, a casual employee who works more than 35 hours in any one week will only have 35 hours counted as LSL qualifying service. However, if that same employee works less than 35 hours in any other week, only the hours worked count as qualifying service.

This leads to the incredibly unfair outcome whereby a casual employee can work 48 hours one week and 24 hours the next (72 hours in the fortnight) but only accrue 59 hours of qualifying service for that fortnight (note: as per the concerns raised above in 4.1, in this example the employer would have been required to pay the LSL levy on the full 72 hours).

Given it is common in the modern coal industry workforce for casual employees to work rosters that vary from week to week, this system will leave potentially thousands of coal workers with less LSL entitlement than they would have been accrued if permanently employed, despite potentially working the same or even more hours.

This will especially be the case for many casual employees who would opt not to take-up their new rights to convert to permanent employment if employed by the same employer for 12 months (and having worked full time hours for the second six months of their employment), as it is expected many would choose not to do so (a much larger portion of the casual workforce value the casual pay loading than the ALP and trade unions wish to accept).

Unless the purpose of the Coal LSL Scheme is to treat casual employees as second-class citizens, the definition of 'working hours' in the Coal LSL Act must be amended to provide consistency between casual and non-casual employees. One common-sense solution would be to calculate qualifying service for all employees based on ordinary working hours worked over a one-month period (i.e. the period in which data is already being supplied to Coal LSL).

*4.3 Unnecessary complexity in defining 'Eligible Wages'*

A further significant issue for employers of casual employees is the different treatment of the definition of 'eligible wages' within the Payroll Levy Collection Act with respect to casual employees and permanents. This has added a layer of unnecessary complexity that is resulting in employers of casual employees likely paying a LSL levy payment of up to 25% greater than they are required to by the legislation.

The Scheme provides for two formulas for calculating the 'eligible wages' for permanent employees, with the greater value to be the eligible wage for the purposes of the LSL levy payment (note: AMMA summary of the provisions below):

a) the employee's base rate of pay, including incentive payments and bonuses (but not overtime, penalty rates or allowances); and

b) 75% the entire base rate of pay including incentive payments, bonuses, overtime, penalty rates and allowances.

In practice, these alternative formulas have the effect that regardless of how a permanent employees' base rate of pay is calculated (base rate before overtime, penalties and allowance; or take-home total pay minus 25%, allowing for overtime, penalties and allowances that may have been paid), the employer will always have to consider the greater of the two values to be the eligible wages for the purposes of the LSL levy.

In contrast, only one formula is provided for employers to calculate the 'eligible wages' of casual employees for the purposes of the LSL levy payment (exact wording from legislation below):

a) If an eligible employee is a casual employee, the employee's ***eligible wages*** are the base rate of pay paid to the employee, including incentive-based payments and bonuses.

This definition does not provide any clarity for the majority of circumstances where casual employee rates of pay involve a "loaded rate" in which all allowances and payments in lieu of other entitlements (e.g. personal leave, redundancy pay, annual leave) are rolled-up into one flat hourly rate of pay.

With the common practice for casual employment arrangements across all sectors being that 25% of the hourly pay rate is the casual loading paid in lieu of those entitlements and allowances, the Coal LSL Scheme does not allow employers of casual employees to simply rely on the "75% of total wages paid" formula for calculating eligible wages for those employees.

This complexity is compounded by the lack of ability or willingness of Coal LSL to assist employers of casual employees to clarify exactly what the "base rate" of pay is for their employees.

Multiple AMMA members who employee casual employees on coal mining operations are convinced their organisations are paying well above their legally required LSL levy payment for casual employees due to the uncertainty of the meaning of the term "base rate" in the definition of 'eligible wages'. Attempts to argue with Coal LSL that the base rate of pay is simply the full rate of pay less 25% are typically disputed, and higher rates of LSL levy payments are made to hedge against any future liability or claims made against them.

This issue could be easily resolved if the approach used in formula (b) for permanent employees was the approach adopted for determining eligible wages of casual employees in the coal mining industry.

It makes little sense that eligible wages for casual employees should only be calculated using formula (a), when the principles applied in formula (b) are much more aligned to the concept of a 25% casual loading.

It should also be noted that employers of permanent employees are not immune to the challenges with the definitions of 'eligible wages'. For example, those with employees on annualised salary arrangements often experience employees working sporadic working weeks – for example six shifts one fortnight; eight the next, for an average of seven each fortnight. With these types of alternating working weeks, the "base rate of pay" quicky becomes difficult to calculate.

Feedback from most employers of permanent employees is also that one simplified definition for calculating 'eligible wages' would be a very welcome reform of the Scheme. Support is for such an approach to calculate wages based on a percentage of ordinary hours worked exclusive of allowances, overtime and penalties.

*4.4 Other concerns with Coal LSL Administration*

Outside of matters related specifically to the treatment of casual employment, AMMA members have also raised a number of other important concerns in relation to Coal LSL's administration of the LSL Scheme:

a) The levy submission form

Employer feedback is this form is very brief, with basic fields relating only to the employee, their hours worked, eligible wages and the levy. From that basic data entry Coal LSL presumes to make a number of assumptions about how to levy that employee's account. This unsophisticated data entry process leads to a number of technical issues.

For example, with every third month having an extra weekly pay period, there seems no conceivable process for Coal LSL to register whether the entry is for a four or five-week pay run.

Further feedback is the basic “one size fits all” forms are increasingly misaligned to the complexity and variances in shifts and rosters in the contemporary industry. Employers are often trying to manipulate the way they report to fit Coal LSL’s outdated administrative system, with significant frustrations ensuing.

b) Issues with claims for reimbursement

Confusion and frustration also exist in regard to how Coal LSL administers claims for employer reimbursement. One common experience is that Coal LSL takes the position where they will only reimburse LSL amounts for an employee equal to levies recently received for that employee.

The time period in which Coal LSL will examine past payments reportedly range from as little as one month to as many as six months. The problem with this approach is that it often exposes an employer who had only recently taken on a new employee before that employee sought to access some of their Coal LSL entitlement.

Without any guarantee that Coal LSL will reimburse an employer for the actual entitlement sought rather than what past employers had historically paid for that employee, the new employer is effectively taking on a potential liability when bringing new employees onto their payroll.

Many employers describe working out what to claim – in terms of what value Coal LSL will determine an acceptable payout for an employee – to be largely ‘trial and error’. With a lack of clarity about what LSL levy has actually been paid for certain employees, employers have no visibility of any potential shortfall between what entitlement they are paying an employee and what they are likely to receive back from Coal LSL.

c) General quality of service

In general, AMMA members have reported very low levels of satisfaction with how Coal LSL seeks to provide support and assistance to both employers and employees.

Requests from employees to understand their qualifying service, eligible wages or other matters are often told to speak with their employer’s payroll team; and attempts from employers to seek clarity or dispute a determination are met with links to the legislation and/or told to seek external legal advice.

One AMMA member reported that they had sent multiple examples to Coal LSL about the way they employ and pay people, seeking insights or advice into how they could better participate in their role in the Scheme. Each time they were simply sent back a copy of the legislation and asked to comply.

Other members are reporting backlogs of record keeping on critical matters such as levies paid of up to 15 months. Employees have no confidence that if they contact Coal LSL seeking a balance update, that the information they receive would be current.

In light of the widespread concerns and shared experiences and frustrations of employers, AMMA recommends the government invests significantly in a new platform, using cutting edge modern technology, for the administration of Coal LSL Scheme.

The government could be ambitious and seek to replicate the type of technology used in integrated information systems such as the MyGov website. Such a platform could allow employers and employees to log-in and assess payments and entitlements in real time, and potentially integrate with employer’s payroll systems to make manual reporting and payments a thing of the past.

# 5. Other Matters

**The review team is interested in any additional views you may wish to share about the operation of the scheme (within the terms of reference). Do you wish to raise any other matters for the independent review to consider?**

*5.1 Superannuation and Payroll Tax*

One of the most fundamental flaws in the Coal LSL Scheme is that employers rarely, if ever, get reimbursed the full cost when employees take their LSL entitlement.

Some of the common reasons for this are covered in prior chapters of this submission. However, even if Coal LSL were to reimburse employers for the exact entitlement being taken by their employees, two key cost drivers remain for employers:

a) Superannuation

All of AMMA's members consulted for this review agree that under the common law and Superannuation Guarantee Act, payment of superannuation on top of LSL entitlement is most likely required by law. It would take a brave (or reckless) employer to take the alternative position and risk racking-up significant contingent liability in unpaid super for past periods of LSL taken by employees.

However, the view taken by Coal LSL appears to be that superannuation payments on top of the LSL entitlement is an issue for employers. In effect, Coal LSL has absolved itself of that liability, and is therefore actively facilitating a situation where employers have a gap of at least (from 1 July 2020) 10% between the actual cost of an employee taking LSL and what the scheme is refunding them.

b) In addition, employers are also required to pay payroll tax on LSL entitlements. In many cases, the payments made by an employer to an employee under the Coal LSL Scheme will relate to that employee's service under other employers. It makes little sense for a portable LSL scheme to impose additional costs on whichever employer happens to have that employee on their payroll at the time they seek to take that portable LSL entitlement.

*5.2 The Coal LSL entitlement should be paid directly to employees*

Both of these issues would be dealt with if payment of Coal LSL entitlements was made directly by Coal LSL to employees at the time they are taking their entitlement.

The Coal LSL Scheme is unique amongst Australian portable LSL schemes in that it requires employers to pay employees their entitlement and apply to the Scheme for reimbursement. Other schemes directly pay employees for their entitlement. As will be evident throughout KPMG's review, this bizarre system is the cause of a significant amount of the challenges with the Coal LSL Scheme, particularly administration and compliance challenges.

Not only would direct payments from Coal LSL to employees deal with the unfair additional cost burden typically placed on employers, this fundamental change in approach would also drastically reduce regulatory burden on the industry and remove all the wasted resources involved in the double handling of payments.

AMMA submits that KPMG recommend entitlements under the Coal LSL Scheme be directly paid by Coal LSL to employees.

# ATTACHMENT 1

## AUSTRALIAN GOVERNMENT COAL LSL INFORMATION PAMPHLET

## 2012

# IT'S YOUR TIME.

INFORMATION FOR EMPLOYEES

This brochure explains the long service leave (LSL) entitlements for people working in the black coal mining industry. It takes account of changes starting 1 January 2012.



This brochure contains information about long service leave, effective 1 January 2012. It takes into account changes that were made to long service leave from this date.

## WHO'S ELIGIBLE FOR LONG SERVICE LEAVE IN THE BLACK COAL MINING INDUSTRY?

All eligible employees (a definition is on page 7) working in the black coal mining industry (a definition is on page 7). This includes people:

- Working full-time, part time or casual
- Working for contractors
- Working for job agencies.

## WHEN ARE YOU ENTITLED TO LONG SERVICE LEAVE?

You're entitled to take LSL after eight years of qualifying service. **Qualifying service** is service as an eligible employee for one or more employers. It does not include certain absences. For service since 1 January 2000, all service as an eligible employee counts towards qualifying service, unless the eligible employee stops being an eligible employee for eight continuous years or more (a break period). In most cases, any service before a break period will stop being counted as qualifying service. For service prior to 1 January 2000 to count towards qualifying service, it must be 'continuous service'.[1]

You accrue LSL credits for each week during which you are an eligible employee. This means if you are a full-time or part-time employee, each week you work in the black coal mining industry as an eligible employee counts towards your qualifying service. If you are a casual employee, you accrue qualifying service in each week you're employed at any time as an eligible employee.

## HOW MUCH LONG SERVICE LEAVE ARE YOU ENTITLED TO?

### Full-time workers

If you have eight years qualifying service (continuous or in total) as a full-time worker you're entitled to 13 weeks LSL.

### Part-time and casual workers

If your service (or part of it) was as a part-timer or casual worker, you're still entitled to LSL after eight years qualifying service. However, the amount of leave you get is based on the LSL credit you have accrued over your eight years of qualifying service (see below).



[1] *Where an employee was not an eligible employee at any time during 2012, special transitional provisions apply in respect of service prior to 1 January 2012.*

**Your LSL credits accrue in house using this formula:**

$$\frac{13}{416} \times \text{working hours}$$

- 13 is the number of weeks of long service leave entitlement
- 416 is the number of weeks in eight years of qualifying service.

### A definition of working hours

- Full-time employee – 35 hours per week.
- Part-time employee – total number of ordinary working hours up to 35.
- Casual worker – hours worked during the week up to 35 hours per week.

### How LSL entitlements accrue for full-time, part-time and casual employees.

- Full-time employee – 13 weeks after eight years qualifying service.
- Part-time employee – LSL accrues at a rate which reflects the number of ordinary hours worked each week as a proportion of 35 hours. If you worked half the hours a full-time worker worked over the same period ie 17.5 hours per week, you'll accrue half the LSL credits ie 6.5 weeks of 35 hours per week.
- Casual employee – LSL accrues at a rate which reflects the number of hours they worked in the week as a proportion of 35 hours, up to a maximum of 35.

### A summary of LSL entitlements of a full-time employee

| QUALIFYING SERVICE | AMOUNT OF LONG SERVICE LEAVE | |
|---|---|---|
| YEARS | WEEKS | HOURS |
| 8 | 13 | 455 |
| 10 | 16.25 | 568.75 |
| 12 | 19.5 | 682.5 |
| 15 | 24.375 | 853.125 |
| 20 | 32.5 | 1137.5 |
| 25 | 40.625 | 1421.875 |
| 30 | 48.75 | 1706.25 |



## WHAT HAPPENS IF YOUR EMPLOYMENT CHANGES?

If you resign or your employer terminates your employment, you may choose to retain your aggregate qualifying service and your accrual of LSL credits and be paid for that accrued LSL at a later date.

If you cease to be an eligible employee and at that time have become entitled to take a period of LSL, you may request your employer to pay you for your leave not taken.

If you cease to be an eligible employee because of ill health or retirement on or after age 60, and have any period of qualifying service, you may request your employer to pay you for your LSL credits.

If your employment ceases because you're made redundant and at that time have at least six years qualifying service, you can request your employer pay you for your accrued LSL credits.

If you die and at the time of death you have qualifying service, your accrued LSL credits can be paid to your estate.

## WHAT ARE YOU PAID WHEN YOU GO ON LSL OR ARE PAID LSL WHEN YOU STOP BEING EMPLOYED?

If you take LSL while employed, you're entitled to be paid at your base rate of pay (including incentive-based payments) that would have been payable during your LSL.

If you're paid your accrued LSL, you're entitled to be paid as if you had taken the LSL immediately before you stopped being employed.

Your employment contract or enterprise agreement may also outline how you're paid LSL as long as the entitlement is at lease as favourable as the Act.

## HOW ARE QUALIFYING SERVICE AND LSL CREDITS RECORDED?

This information is recorded by Coal LSL. You can check these details.

If you think they're wrong or incomplete, you must provide evidence of this to Coal LSL.

Fair Work Australia has power to deal with some disputes between you and your employer about LSL.

## OTHER THINGS THE LSL LAW COVERS

- How you apply for LSL.
- When you get paid for LSL.
- The minimum amount of LSL you can take at one time.

**What is a 'waiver agreement'?**

Some employees can choose to make a 'waiver agreement' with their employer and, instead of accruing LSL, can be paid or salary sacrifice into super the 'LSL Levy' that their employer would have paid for them. This agreement must be approved by Coal LSL.

**What is the LSL Levy?**

It's a percentage of your weekly wages paid by your employer to the Coal LSL. You can find the levy percentage at www.coallsl.com.au



## DEFINITIONS

**Eligible employee is a person:**

- Employed in the black coal mining industry by an employer engaged in the black coal mining industry, whose duties are directly connected with the day-to-day operation of black coal mining; or
- Employed in the black coal mining industry, whose duties are carried out at or about a place where black coal is mined and are directly connected with the day-to-day operation of a black coal mine; or
- Permanently employed with a mine mine rescue service for the purposes of the black coal mining industry.

**The black coal mining industry includes:**

- The extraction or mining of black coal on a coal mining lease by means of underground or surface mining methods
- The processing of black coal at a coal handling or coal processing place on or adjacent to a coal mining lease
- The transportation of black coal on a coal mining lease
- Other work on a coal mining lease directly connected with the extraction, mining and processing of black coal.

**The black coal mining industry doesn't include:**

- The mining of brown coal in conjunction with the operation of a power station
- The work of employees employed in head offices or corporate administration offices of employers engaged in the black coal mining industry (but does include work in town offices associated with the day-to-day operation of a local black coal mine or mines)
- The operation of a coal export terminal
- Construction work on or adjacent to a coal mine site
- Catering and other domestic services
- Haulage of coal off a mining lease unless such haulage is to a wash plant or char plant in the vicinity of the mine
- The supply of shotfiring or other explosive services by an employer not otherwise engaged in the black coal mining industry.



Australian Government
Coal Mining Industry
(Long Service Leave Funding) Corporation

COAL LSL

## MORE INFORMATION

Visit the long service website
**www.coallsl.com.au**

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COAL LSL

# LONG SERVICE LEAVE IN THE BLACK COAL MINING INDUSTRY