



Coal Mining Industry (Long Service Leave) Legislation Amendment Act 2011

No. 142, 2011

An Act to amend the law relating to long service leave in the black coal mining industry, and for related purposes

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

Contents

1	Short title	1
2	Commencement	2
3	Schedule(s)	2
Schedule 1—Long service leave entitlement		3
Part 1—Main amendments		3
<i>Coal Mining Industry (Long Service Leave Funding) Act 1992</i>		3
Part 2—Amendments relating to funding		34
<i>Coal Mining Industry (Long Service Leave Funding) Act 1992</i>		34
Part 3—Other amendments		38
<i>Coal Mining Industry (Long Service Leave Funding) Act 1992</i>		38
<i>Coal Mining Industry (Long Service Leave) Payroll Levy Act 1992</i>		39
<i>Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992</i>		39
Schedule 2—Constitution of the Board		40
<i>Coal Mining Industry (Long Service Leave Funding) Act 1992</i>		40
Schedule 3—Levy and collection arrangements		43
Part 1—Amendments relating to levy		43
<i>Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992</i>		43
Part 2—Amendments relating to audit and reporting requirements etc.		45
<i>Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992</i>		45
Schedule 4—Amendment of the Coal Mining Industry (Long Service Leave Funding) Amendment Act 2009		51
Schedule 5—Transitional provisions		52
Part 1—Preliminary		52
Part 2—Recognition of long service leave before 1 January 2012		53

Part 3—Keeping records of recognised long service leave	56
Part 4—Miscellaneous	59



Coal Mining Industry (Long Service Leave) Legislation Amendment Act 2011

No. 142, 2011

An Act to amend the law relating to long service leave in the black coal mining industry, and for related purposes

[Assented to 29 November 2011]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Coal Mining Industry (Long Service Leave) Legislation Amendment Act 2011*.

Coal Mining Industry (Long Service Leave) Legislation Amendment Act 2011 No. 142, 2011

1

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	29 November 2011
2. Schedules 1, 2 and 3	1 January 2012.	1 January 2012
3. Schedule 4, item 1	1 January 2010.	1 January 2010
4. Schedule 4, item 2	1 January 2012.	1 January 2012
5. Schedule 5	1 January 2012.	1 January 2012
Note:	This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.	

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Long service leave entitlement

Part 1—Main amendments

Coal Mining Industry (Long Service Leave Funding) Act 1992

1 Subsection 4(1)

Insert:

base rate of pay has the same meaning as in the *Fair Work Act 2009*.

2 Subsection 4(1)

Insert:

civil penalty order has the meaning given by section 49A.

3 Subsection 4(1)

Insert:

civil penalty provision means a provision declared by this Act or the Payroll Levy Collection Act to be a civil penalty provision.

4 Subsection 4(1)

Insert:

covers, in relation to an industrial instrument that is a modern award, enterprise agreement or workplace determination, has the same meaning as in the *Fair Work Act 2009*.

5 Subsection 4(1)

Insert:

eligible wages has the same meaning as in the Payroll Levy Collection Act.

6 Subsection 4(1)

Insert:

employee organisation has the same meaning as in the *Fair Work Act 2009*.

7 Subsection 4(1)

Insert:

enterprise agreement has the same meaning as in the *Fair Work Act 2009*.

8 Subsection 4(1)

Insert:

executive officer of a body corporate means a person, by whatever name called and whether or not a director of the body, who is concerned in, or takes part in, the management of the body.

9 Subsection 4(1)

Insert:

fair work instrument has the same meaning as in the *Fair Work Act 2009*.

10 Subsection 4(1)

Insert:

Federal Court means the Federal Court of Australia.

11 Subsection 4(1)

Insert:

FWA has the same meaning as in the *Fair Work Act 2009*.

12 Subsection 4(1)

Insert:

industrial association has the same meaning as in the *Fair Work Act 2009*.

13 Subsection 4(1)

Insert:

industrial instrument means:

- (a) a fair work instrument; or
- (b) a contract of employment.

14 Subsection 4(1)

Insert:

insolvent has the same meaning as in the *Corporations Act 2001*.

15 Subsection 4(1)

Insert:

LSL credit has the meaning given by subsection 39AB(5).

16 Subsection 4(1)

Insert:

LSL dispute has the meaning given by subsection 39D(1).

17 Subsection 4(1)

Insert:

modern award has the same meaning as in the *Fair Work Act 2009*.

18 Subsection 4(1)

Insert:

ordinary hours of work of an eligible employee means:

- (a) if an industrial instrument that covers the employee specifies, or provides for the determination of, the ordinary hours of work of the employee—those hours; or
 - (b) otherwise—the hours agreed by the employee and his or her employer as the employee's ordinary hours of work;
- regardless of the number of hours actually worked by the employee.

19 Subsection 4(1)

Insert:

public holiday has the same meaning as in the *Fair Work Act 2009*.

20 Subsection 4(1)

Insert:

qualifying service has the meaning given by section 39A.

21 Subsection 4(1)

Insert:

salary sacrifice arrangement has the same meaning as in the Payroll Levy Collection Act.

22 Subsection 4(1)

Insert:

waiver agreement means an agreement made under section 39B and includes such an agreement as varied under section 39BA.

23 Subsection 4(1)

Insert:

workplace determination has the same meaning as in the *Fair Work Act 2009*.

24 After paragraph 7(d)

Insert:

- (da) to maintain records relating to:
 - (i) the employment of eligible employees; and
 - (ii) the qualifying service completed by, and the long service leave entitlements of, eligible employees; and
 - (iii) employers of eligible employees; and
 - (iv) amounts that are, or may become, payable to employers under Part 7; and

25 After Part 5

Insert:

Part 5A—Entitlement to long service leave

Division 1—Entitlement, amount and grant etc.

39A Entitlement to long service leave

General rule

- (1) If an eligible employee completes a period of qualifying service that is, or periods of qualifying service that add up to, at least 8 years, the employee is entitled to long service leave under this Part in respect of that period, or those periods, of qualifying service.

*Meaning of **qualifying service***

- (2) A period of **qualifying service** by an employee is a period during which the employee is an eligible employee of one or more employers, but does not include any of the following:
 - (a) a period of unauthorised absence;
 - (b) a period of unpaid leave or unpaid authorised absence, other than:
 - (i) a period of absence under Division 8 of Part 2-2 of the *Fair Work Act 2009* (which deals with community service leave); or
 - (ii) a period of stand down under Part 3-5 of the *Fair Work Act 2009*, under an enterprise agreement that applies (within the meaning of that Act) to the employee, or under the employee's contract of employment; or
 - (iii) a period during which the employee is absent from work because of a personal illness, or a personal injury, for which the employee is receiving compensation under a law of the Commonwealth, a State or a Territory that is about workers' compensation or under an industrial instrument; or
 - (iv) a period of leave or absence of a kind prescribed by the regulations for the purposes of this paragraph;
 - (c) if the employee ceases to be an eligible employee for a continuous period (a **break period**) of 8 years or more—any period before the break period during which the employee was an eligible employee;

- (d) any period during which a waiver agreement is in effect between the employee and an employer;
 - (e) any other period of a kind prescribed by the regulations for the purposes of this paragraph.
- (3) For the purposes of subsection (2), if a casual employee is an eligible employee at any time during a week, the employee is taken to have been an eligible employee for the whole week.

Effect of break period once entitled to long service leave

- (4) If:
- (a) an employee ceases to be an eligible employee for a continuous period of 8 years or more; and
 - (b) at the time of so ceasing, the employee is entitled to long service leave under subsection (1) in respect of a period, or periods, of qualifying service (the employee's ***previous qualifying service***); and
 - (c) the employee becomes an eligible employee again;
- paragraph (2)(c) does not apply in respect of the employee's previous qualifying service.

39AA Amount of long service leave

- (1) The number of hours of long service leave that an eligible employee is entitled to for a week of qualifying service completed by the employee is worked out using the formula in subsection (2).
- (2) The formula is:

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

where:

working hours means:

- (a) if the employee is a full-time employee at all times during the week—35 hours; or
- (b) if the employee is a part-time employee at any time during the week—the lesser of the following amounts (or either of them if they are equal):

- (i) the total number of ordinary hours of work of the employee as a part-time employee for the week;
- (ii) 35 hours; or
- (c) if the employee is a casual employee at any time during the week and paragraph (b) does not apply—the lesser of the following amounts (or either of them if they are equal):
 - (i) the total number of hours worked by the employee as a casual employee during the week;
 - (ii) 35 hours.

39AB Grant of long service leave

- (1) An eligible employee may apply, in writing, to his or her employer to take a period of long service leave.
- (2) The employee may only apply to take a period of long service leave that:
 - (a) is a single continuous period of at least 14 days (being equivalent to a number of hours of long service leave as agreed with the employer); and
 - (b) does not exceed the employee's LSL credit at the time the leave is to be taken.

Note: An employee is taken not to be on long service leave on public holidays and during certain other periods of absence (see section 39AE).

- (3) As soon as practicable, but no later than 14 days after the application is made, the employer must give the employee a written response:
 - (a) stating whether or not the employer grants the long service leave; and
 - (b) if the employer refuses to grant the long service leave—giving details of the reasons for the refusal.
- (4) The employer may refuse to grant long service leave only on reasonable business grounds.

*Meaning of **LSL credit***

- (5) For the purposes of this section, the long service leave credit (**LSL credit**) of an eligible employee on a day (the **calculation day**) is the number of hours worked out as follows:

- (a) first, add together the number of hours of long service leave that the employee is entitled to under section 39AA for each week of qualifying service completed by the employee before the calculation day;
- (b) then, subtract the number of hours of long service leave (if any) previously granted to the employee under this section.

Note: The number of hours of long service leave that an employee is entitled to in respect of certain qualifying service may be affected by section 39CE.

Civil penalty provisions

- (6) Subsections (3) and (4) are ***civil penalty provisions***.

Note 1: Part 7A provides for pecuniary penalties for contraventions of civil penalty provisions.

Note 2: Division 4 of this Part provides other remedies for contraventions of civil penalty provisions.

39AC Payment for long service leave

- (1) If an eligible employee takes a period of long service leave, the employer must pay the employee for the long service leave no less than an amount that is equal to the base rate of pay (including incentive-based payments and bonuses) that would have been payable to the employee during the period had the employee not taken the leave.
- (2) Subsection (1) is a ***civil penalty provision***.
 - Note 1: Part 7A provides for pecuniary penalties for contraventions of civil penalty provisions.
 - Note 2: Division 4 of this Part provides other remedies for contraventions of civil penalty provisions.
- (3) In this section:
 - (a) a reference to the base rate of pay payable to an employee is a reference to the employee's base rate of pay before any amounts are deducted under a salary sacrifice arrangement; and
 - (b) a reference to an incentive-based payment in relation to an employee is a reference to a payment of that kind that is paid to the employee at least once a month; and

- (c) a reference to a bonus in relation to an employee is a reference to a bonus that is paid to the employee at least once a month.

39AD Manner of payment for long service leave

- (1) If an eligible employee takes a period of long service leave, the employer must pay the employee for the long service leave:
 - (a) at the same time as the employer would have paid the employee during the period if the employee had not taken the leave; or
 - (b) if the employee requests to be paid in advance for the whole period and an industrial instrument that covers the employee expressly allows the employee to be paid in advance for long service leave—in accordance with the employee's request.
- (2) Subsection (1) is a ***civil penalty provision***.

Note 1: Part 7A provides for pecuniary penalties for contraventions of civil penalty provisions.

Note 2: Division 4 of this Part provides other remedies for contraventions of civil penalty provisions.

39AE Public holidays etc. not to count as long service leave

- (1) If the period during which an eligible employee takes long service leave includes a day or part-day that is a public holiday in the place where the employee is based for work purposes:
 - (a) the employee is taken not to be on long service leave on that whole day; and
 - (b) the public holiday is taken not to break the continuity of the period of long service leave.
- (2) If the period during which an eligible employee takes long service leave includes a period of absence from employment under Division 8 of Part 2-2 of the *Fair Work Act 2009* (which deals with community service leave):
 - (a) the employee is taken not to be on long service leave for the period of absence; and
 - (b) the period of absence is taken not to break the continuity of the period of long service leave.

Division 2—Waiver agreements

39B Waiver agreements may be made with certain employees

- (1) An eligible employee of a kind prescribed by the regulations may make an agreement (a ***waiver agreement***) with his or her employer that provides for the employer to do either or both of the following:

- (a) pay additional remuneration to the employee or as directed by the employee;
- (b) make additional contributions, for the employee's benefit, to a superannuation fund nominated by the employee;

in lieu of long service leave that the employee would be entitled to under this Part in respect of qualifying service that the employee would have otherwise completed.

Note 1: A period of qualifying service by an employee does not include any period during which a waiver agreement is in effect between the employee and an employer (see paragraph 39A(2)(d)).

Note 2: An employer is not required to pay payroll levy in respect of eligible wages paid to an employee for any period during which a waiver agreement is in effect between the employee and an employer (see section 39BD).

- (2) The value of the additional remuneration, contributions, or both, must be equal to, or greater than, the amount of payroll levy that would have been payable by the employer in respect of eligible wages paid to the employee had the waiver agreement not been in effect.
- (3) The waiver agreement must:
- (a) be in writing; and
 - (b) include terms dealing with the matters set out in subsection (4); and
 - (c) be signed by both the employee and employer; and
 - (d) specify the date on which the agreement is made; and
 - (e) specify the date on which the agreement takes effect (being a date after the agreement is lodged with the Corporation under subsection (5)).
- (4) For the purposes of paragraph (3)(b), the matters are:
- (a) the frequency of the additional payments, contributions or both; and

- (b) if, because of a change in circumstances, the agreement no longer complies with subsection (2)—how the agreement is to be varied under section 39BA.
- (5) As soon as practicable after the waiver agreement is made, the employer must lodge it with the Corporation.
- (6) A waiver agreement between an employee and an employer ceases to have effect if:
 - (a) the Corporation refuses to approve it (see subsection 39BC(5)); or
 - (b) it is terminated under section 39BB; or
 - (c) the employee ceases to be an eligible employee of a kind mentioned in subsection (1).

39BA Variation of waiver agreements

- (1) If a waiver agreement is in effect between an employee and an employer, the employee and employer may agree to vary the agreement.
- (2) The variation must:
 - (a) be in writing; and
 - (b) be signed by both the employee and employer; and
 - (c) specify the date on which the variation is made; and
 - (d) specify the date on which the variation takes effect (being a date after the variation is lodged with the Corporation under subsection (3)).
- (3) As soon as practicable after the variation is made, the employer must lodge the varied waiver agreement with the Corporation.

39BB Termination of waiver agreements

- (1) If a waiver agreement is in effect between an employee and an employer, the employee and employer may agree to terminate the agreement.
- (2) The employer may only refuse to terminate a waiver agreement if the employer has reasonable grounds to do so.
- (3) The agreement to terminate must:

- (a) be in writing; and
 - (b) be signed by both the employee and employer; and
 - (c) specify the date on which the waiver agreement terminates.
- (4) As soon as practicable after the agreement to terminate is made, the employer must give the Corporation written notice of the termination, including the date on which the waiver agreement terminates.

39BC Approval of waiver agreements and variations by the Corporation

- (1) Within 30 days after a waiver agreement, or a varied waiver agreement, is lodged with the Corporation, the Board must:
 - (a) decide to approve or refuse to approve the agreement or variation; and
 - (b) give the parties to the agreement or varied agreement written notice of the decision.
- (2) If the Board does not make a decision within the 30 day period mentioned in subsection (1), the Board is taken to have approved the waiver agreement or variation (as the case may be).
- (3) The Board may only decide to approve a waiver agreement or variation if the Board is satisfied that:
 - (a) the employee to whom the agreement or variation relates is an eligible employee of a kind mentioned in subsection 39B(1); and
 - (b) there are no reasonable grounds for believing that the agreement or variation has not been genuinely agreed to by the parties; and
 - (c) the terms of the agreement, or varied agreement:
 - (i) do not contravene subsection 39B(2); and
 - (ii) adequately deal with the matters set out in subsection 39B(4).
- (4) If the Board refuses to approve a waiver agreement or a variation, the notice given under paragraph (1)(b) must:
 - (a) set out the reasons for the refusal; and
 - (b) include a statement that, subject to the *Administrative Appeals Tribunal Act 1975*, application may be made to the

Administrative Appeals Tribunal for review of the Board's decision.

Note: Section 52B provides that an application may be made to the Administrative Appeals Tribunal for review of a decision of the Board to refuse to approve a waiver agreement or a variation.

- (5) If the Board refuses to approve a waiver agreement, the agreement ceases to have effect on the day the parties to the agreement are notified of the refusal under paragraph (1)(b).
- (6) If the Board refuses to approve a variation of a waiver agreement, the variation ceases to have effect on the day the parties to the variation are notified of the refusal under paragraph (1)(b).

39BD Effect of waiver agreements on payroll levy

For any period during which a waiver agreement is in effect between an eligible employee and an employer, the employee is taken not to be an eligible employee for the purposes of sections 4 and 6 of the Payroll Levy Act.

Note: This means that an employer of an eligible employee is not required to pay payroll levy in respect of eligible wages paid to the employee while the waiver agreement is in effect. However, returns made by the employer under section 5 of the Payroll Levy Collection Act while the waiver agreement is in effect will still need to include information in relation to the employee.

39BE Employer must comply with waiver agreement

- (1) If a waiver agreement is in effect between an employee and an employer, the employer must pay the additional remuneration or make the additional contributions or both pay the additional remuneration and make the additional contributions (as the case may be) in accordance with the terms of the agreement.
- (2) Subsection (1) is a ***civil penalty provision***.

Note 1: Part 7A provides for pecuniary penalties for contraventions of civil penalty provisions.

Note 2: Division 4 of this Part provides other remedies for contraventions of civil penalty provisions.

Division 3—Payments on cessation of employment as an eligible employee

39C Payment on cessation—general

Payment to employee

(1) If:

- (a) an employee ceases to be an eligible employee (other than by death); and
- (b) at the time of so ceasing, the employee has a period of untaken long service leave under this Part; and
- (c) at any time after so ceasing, the employee requests the employer, in writing, to make a payment under this section;

the employer must, within 30 days after the request is made, pay the employee no less than the amount that would have been payable to the employee under this Part had the employee taken that period of long service leave immediately before ceasing to be an eligible employee, less any amount previously paid to the employee under this section.

Payment to legal personal representative

(2) If:

- (a) the employee dies without making a request under subsection (1) in respect of a period of untaken long service leave; and
- (b) at any time after the employee's death, the employee's legal personal representative requests the employer, in writing, to make a payment under this section;

the employer must, within 30 days after the request is made, pay the employee's legal personal representative no less than the amount that would have been payable to the employee under subsection (1) as if the employee had made a request under that subsection in respect of all the untaken long service leave.

(3) Subsections (1) and (2) are ***civil penalty provisions***.

Note 1: Part 7A provides for pecuniary penalties for contraventions of civil penalty provisions.

Note 2: Division 4 of this Part provides other remedies for contraventions of civil penalty provisions.

39CA Payment on cessation—ill health and retirement

- (1) This section applies if:
- (a) an employee ceases to be an eligible employee:
 - (i) because of ill health; or
 - (ii) because he or she retires from the black coal mining industry on or after reaching the age of 60 years; and
 - (b) at the time of so ceasing, the employee has completed a period, or periods, of qualifying service in respect of which the employee is not entitled to long service leave under this Part; and
 - (c) at any time after so ceasing, the employee requests the employer, in writing, to make a payment under this section.
- (2) The employer must, within 30 days after the request is made, pay the employee no less than the amount that would have been payable to the employee under this Part had the employee:
- (a) been entitled to long service leave for the period, or periods, of qualifying service; and
 - (b) taken that long service leave immediately before ceasing to be an eligible employee;
- less any amount previously paid to the employee under this section.
- (3) Subsection (2) is a *civil penalty provision*.
- Note 1: Part 7A provides for pecuniary penalties for contraventions of civil penalty provisions.
- Note 2: Division 4 of this Part provides other remedies for contraventions of civil penalty provisions.

39CB Payment on cessation—redundancy

- (1) This section applies if:
- (a) an employee ceases to be an eligible employee because he or she is made redundant; and
 - (b) at the time of so ceasing, the employee has completed a period, or periods, of qualifying service (being a period that is, or periods that add up to, at least 6 years) in respect of which the employee is not entitled to long service leave under this Part; and

- (c) at any time after so ceasing, the employee requests the employer, in writing, to make a payment under this section.
 - (2) The employer must, within 30 days after the request is made, pay the employee no less than the amount that would have been payable to the employee under this Part had the employee:
 - (a) been entitled to long service leave for the period, or periods, of qualifying service; and
 - (b) taken that long service leave immediately before ceasing to be an eligible employee;less any amount previously paid to the employee under this section.
 - (3) Subsection (2) is a *civil penalty provision*.
- Note 1: Part 7A provides for pecuniary penalties for contraventions of civil penalty provisions.
- Note 2: Division 4 of this Part provides other remedies for contraventions of civil penalty provisions.

39CC Payment on death

- (1) This section applies if:
 - (a) an eligible employee dies; and
 - (b) at the time of the employee's death, either of the following apply:
 - (i) the employee has a period of untaken long service leave under this Part;
 - (ii) the employee has completed a period, or periods, of qualifying service in respect of which the employee is not entitled to long service leave under this Part; and
 - (c) at any time after the employee's death, the employee's legal personal representative requests the employer, in writing, to make a payment under this section.
- (2) The employer must, within 30 days after the request is made, pay the employee's legal personal representative no less than:
 - (a) if subparagraph (1)(b)(i) applies—the amount that would have been payable to the employee under this Part had the employee taken all the untaken long service leave immediately before the employee died; and

(b) if subparagraph (1)(b)(ii) applies—the amount that would have been payable to the employee under this Part had the employee:

- (i) been entitled to long service leave for the period, or periods, of qualifying service; and
- (ii) taken all that long service leave immediately before the employee died.

(3) Subsection (2) is a *civil penalty provision*.

Note 1: Part 7A provides for pecuniary penalties for contraventions of civil penalty provisions.

Note 2: Division 4 of this Part provides other remedies for contraventions of civil penalty provisions.

39CD Effect of payment in respect of untaken long service leave

If an employee, or the legal personal representative of an employee, is paid an amount under section 39C or 39CC in respect of a period of untaken long service leave, the payment extinguishes the employee's entitlement under this Part to the period of untaken long service leave.

39CE Effect of payment in respect of qualifying service

- (1) This section applies in relation to a period of qualifying service completed by an employee if, on ceasing to be an eligible employee, the employee is paid an amount under section 39CA or 39CB in respect of the period of qualifying service.
- (2) If the employee becomes an eligible employee again, the period of qualifying service continues to be a period of qualifying service for the purposes of subsection 39A(1) unless the employee ceased to be an eligible employee for a continuous period of 8 years or more.
- (3) If the employee becomes entitled to long service leave under this Part in respect of the period of qualifying service, the number of hours of long service leave that the employee is entitled to under section 39AA for the period of qualifying service is taken to be nil.
- (4) Nothing in this section requires more than 1 payment to be made under this Division in respect of the period of qualifying service.

Division 4—Remedies relating to long service leave

Subdivision A—FWA

39D FWA may deal with disputes relating to long service leave

- (1) Despite subsection 595(1) of the *Fair Work Act 2009*, FWA may deal with a dispute (an ***LSL dispute***) about matters in relation to long service leave under this Part.
- (2) For the purposes of FWA dealing with an LSL dispute, the *Fair Work Act 2009* applies as if:
 - (a) the dispute were a dispute in relation to the National Employment Standards; and
 - (b) subsection (1) of this section were a term referred to in section 738 of that Act; and
 - (c) a reference in subsection 739(5) of that Act to “this Act” were a reference to “the *Coal Mining Industry (Long Service Leave) Administration Act 1992*”.

Subdivision B—Court orders

39DA Employees etc. may apply to court in respect of certain contraventions

Employees

- (1) A person who is or was an eligible employee may apply to the Federal Court or the Federal Magistrates Court for an order under section 39DB in relation to a contravention or proposed contravention of a civil penalty provision of this Part if the person:
 - (a) is affected by the contravention; or
 - (b) will be affected by the proposed contravention.

Employee organisations

- (2) An employee organisation may apply to the Federal Court or the Federal Magistrates Court for an order under section 39DB in relation to a contravention or proposed contravention of a civil penalty provision of this Part if:
 - (a) the organisation has a member who:

- (i) is affected by the contravention; or
 - (ii) will be affected by the proposed contravention; or
- (b) the organisation is entitled to represent the industrial interests of a person who:
 - (i) is affected by the contravention; or
 - (ii) will be affected by the proposed contravention.

Industrial associations

- (3) An industrial association may apply to the Federal Court or the Federal Magistrates Court for an order under section 39DB in relation to a contravention or proposed contravention of a civil penalty provision of this Part if:
 - (a) the industrial association:
 - (i) is affected by the contravention; or
 - (ii) will be affected by the proposed contravention; or
 - (b) the industrial association is entitled to represent the industrial interests of a person who:
 - (i) is affected by the contravention; or
 - (ii) will be affected by the proposed contravention.

39DB Orders that can be made by the court

The Federal Court or the Federal Magistrates Court may, on application under section 39DA, make one or more of the following orders in relation to a person who has contravened or proposes to contravene a civil penalty provision of this Part:

- (a) an order awarding compensation for loss that a person has suffered because of the contravention or proposed contravention;
- (b) an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of the contravention or proposed contravention;
- (c) any other order that the court considers necessary to stop, or rectify the effects of, the contravention or proposed contravention.

Division 5—Relationship with other laws and industrial instruments

39E Relationship with the National Employment Standards

Despite section 61 of the *Fair Work Act 2009*, this Part applies in relation to eligible employees and their employers to the exclusion of Division 9 of Part 2-2 of that Act.

39EA Relationship with State and Territory long service leave laws

This Part applies in relation to eligible employees and their employers to the exclusion of a State or Territory law that deals with long service leave.

39EB Relationship with industrial instruments

This Part establishes minimum entitlements and rights in respect of long service leave for an eligible employee and is not intended to override entitlements or rights in respect of long service leave under an industrial instrument that covers the employee.

Division 6—Miscellaneous

39F Entitlements and rights in respect of long service leave subject to alteration, cancellation etc.

- (1) A person has an entitlement to long service leave under this Part on the basis that:
 - (a) the entitlement may be cancelled, revoked, terminated or varied by or under later legislation; and
 - (b) no compensation is payable if the entitlement is cancelled, revoked, terminated or varied.
- (2) A person has a right to receive a payment in respect of long service leave under this Part on the basis that:
 - (a) the right may be cancelled, revoked, terminated or varied by or under later legislation; and
 - (b) no compensation is payable if the right is so cancelled, revoked, terminated or varied.

26 After Part 7

Insert:

Part 7A—Civil penalty orders

Division 1—Obtaining a civil penalty order

49A Civil penalty orders

Application for order

- (1) The Corporation may, on behalf of the Commonwealth, apply to the Federal Court or the Federal Magistrates Court for an order that a person, who is alleged to have contravened a civil penalty provision, pay the Commonwealth a pecuniary penalty.
- (2) The Corporation must make the application within 6 years of the alleged contravention.

Court may order person to pay pecuniary penalty

- (3) If the court is satisfied that the person has contravened the civil penalty provision, the court may order the person to pay to the Commonwealth such pecuniary penalty for the contravention as the court determines to be appropriate.

Note: Subsections (5) and (6) set out the maximum penalty that the court may order the person to pay.

- (4) An order under subsection (3) is a ***civil penalty order***.

Determining pecuniary penalty

- (5) If the civil penalty provision is a provision of this Act, the pecuniary penalty must not be more than:
 - (a) in the case of a body corporate—300 penalty units for each contravention; and
 - (b) in any other case—60 penalty units for each contravention.
- (6) If the civil penalty provision is a provision of the Payroll Levy Collection Act, the pecuniary penalty must not be more than:

- (a) in the case of a body corporate—200 penalty units for each contravention; and
 - (b) in any other case—40 penalty units for each contravention.
- (7) In determining the pecuniary penalty, the court may take into account all relevant matters, including:
 - (a) the nature and extent of the contravention; and
 - (b) the nature and extent of any loss or damage suffered because of the contravention; and
 - (c) the circumstances in which the contravention took place; and
 - (d) whether the person has previously been found by a court to have engaged in any similar conduct; and
 - (e) if the person is a body corporate:
 - (i) the level of the employees, officers or agents of the body corporate involved in the contravention; and
 - (ii) whether the body corporate exercised due diligence to avoid the contravention; and
 - (iii) whether the body corporate had a corporate culture conducive to compliance.

49AA Civil enforcement of penalty

- (1) A pecuniary penalty is a debt payable to the Commonwealth.
- (2) The Commonwealth may enforce a civil penalty order as if it were an order made in civil proceedings against a person to recover a debt due by the person. The debt arising from the order is taken to be a judgement debt.

49AB Conduct contravening more than one civil penalty provision

- (1) If conduct constitutes a contravention of 2 or more civil penalty provisions, proceedings may be instituted under this Division against a person in relation to the contravention of any one or more of those provisions.
- (2) However, the person is not liable to more than one pecuniary penalty under a law of the Commonwealth in relation to the same conduct.

49AC Multiple contraventions

- (1) A court may make a single civil penalty order against a person for multiple contraventions of a civil penalty provision if proceedings for the contraventions are founded on the same facts, or if the contraventions form, or are part of, a series of contraventions of the same or a similar character.

Note: For continuing contraventions of civil penalty provisions, see section 49CA.

- (2) However, the penalty must not exceed the sum of the maximum penalties that could be ordered if a separate penalty were ordered for each of the contraventions.

49AD Proceedings may be heard together

A court may direct that 2 or more proceedings relating to a contravention, or proposed contravention, of a civil penalty provision be heard together.

49AE Civil evidence and procedure rules to apply

A court must apply the rules of evidence and procedure for civil matters when hearing and determining an application relating to a contravention, or proposed contravention, of a civil penalty provision.

49AF Contravening a civil penalty provision is not an offence

A contravention of a civil penalty provision is not an offence.

Division 2—Civil proceedings and criminal proceedings

49B Civil proceedings after criminal proceedings

A court may not make a civil penalty order against a person for a contravention of a civil penalty provision if the person has been convicted of an offence constituted by conduct that is the same, or substantially the same, as the conduct constituting the contravention.

49BA Criminal proceedings during civil proceedings

- (1) Proceedings for a civil penalty order against a person for a contravention of a civil penalty provision are stayed if:
 - (a) criminal proceedings are commenced or have already been commenced against the person for an offence; and
 - (b) the offence is constituted by conduct that is the same, or substantially the same, as the conduct alleged to constitute the contravention.
- (2) The proceedings for the order (the *civil proceedings*) may be resumed if the person is not convicted of the offence. Otherwise, the civil proceedings are dismissed.

49BB Criminal proceedings after civil proceedings

Criminal proceedings may be commenced against a person for conduct that is the same, or substantially the same, as conduct that would constitute a contravention of a civil penalty provision regardless of whether a civil penalty order has been made against the person in relation to the contravention.

49BC Evidence given in civil proceedings not admissible in criminal proceedings

- (1) Evidence of information given, or evidence of production of documents, by an individual is not admissible in criminal proceedings against the individual for an offence if:
 - (a) the individual previously gave the evidence or produced the documents in proceedings for a civil penalty order against the individual for an alleged contravention of a civil penalty provision (whether or not the order was made); and
 - (b) the conduct alleged to constitute the offence is the same, or substantially the same, as the conduct alleged to constitute the contravention.
- (2) However, subsection (1) does not apply to criminal proceedings in relation to the falsity of the evidence given by the individual in the proceedings for the civil penalty order.

Division 3—Miscellaneous

49C Ancillary contravention of civil penalty provisions

- (1) A person must not:
- (a) attempt to contravene a civil penalty provision; or
 - (b) aid, abet, counsel or procure a contravention of a civil penalty provision; or
 - (c) induce (by threats, promises or otherwise) a contravention of a civil penalty provision; or
 - (d) be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of a civil penalty provision; or
 - (e) conspire with others to effect a contravention of a civil penalty provision.

Note: Section 49CC (which provides that a person's state of mind does not need to be proven in relation to a civil penalty provision) does not apply to this subsection.

Civil penalty

- (2) A person who contravenes subsection (1) in relation to a civil penalty provision is taken to have contravened the provision.

49CA Continuing contraventions of civil penalty provisions

- (1) If an act or thing is required under a civil penalty provision to be done:
- (a) within a particular period; or
 - (b) before a particular time;
- then the obligation to do that act or thing continues until the act or thing is done (even if the period has expired or the time has passed).
- (2) A person who contravenes a civil penalty provision that requires an act or thing to be done:
- (a) within a particular period; or
 - (b) before a particular time;
- commits a separate contravention of that provision in respect of each day during which the contravention occurs (including the day the relevant civil penalty order is made or any later day).

49CB Mistake of fact

- (1) A person is not liable to have a civil penalty order made against the person for a contravention of a civil penalty provision if:
 - (a) at or before the time of the conduct constituting the contravention, the person:
 - (i) considered whether or not facts existed; and
 - (ii) was under a mistaken but reasonable belief about those facts; and
 - (b) had those facts existed, the conduct would not have constituted a contravention of the civil penalty provision.
- (2) For the purposes of subsection (1), a person may be regarded as having considered whether or not facts existed if:
 - (a) the person had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion; and
 - (b) the person honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.
- (3) A person who wishes to rely on subsection (1) or (2) in proceedings for a civil penalty order bears an evidential burden in relation to that matter.
- (4) In this section:

evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

49CC State of mind

- (1) In proceedings for a civil penalty order against a person for a contravention of a civil penalty provision (other than subsection 49C(1)), it is not necessary to prove:
 - (a) the person's intention; or
 - (b) the person's knowledge; or
 - (c) the person's recklessness; or
 - (d) the person's negligence; or

- (e) any other state of mind of the person.
- (2) Subsection (1) of this section does not affect the operation of section 49CB (which is about mistake of fact).

49CD Civil penalty provisions contravened by employees, agents or officers

If an element of a civil penalty provision is done by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the element must also be attributed to the body corporate.

49CE Civil penalty provisions contravened by executive officers

- (1) An executive officer of a body corporate contravenes this subsection if:
 - (a) the body corporate contravenes a civil penalty provision; and
 - (b) the officer knew that the contravention would occur; and
 - (c) the officer was in a position to influence the conduct of the body in relation to the contravention; and
 - (d) the officer failed to take all reasonable steps to prevent the contravention.
- (2) Subsection (1) is a *civil penalty provision*.

49CF Establishing whether an executive officer took reasonable steps to prevent the contravention of a civil penalty provision

- (1) For the purposes of section 49CE, in determining whether an executive officer of a body corporate failed to take all reasonable steps to prevent the contravention of a civil penalty provision, a court is to have regard to:
 - (a) what action (if any) the officer took towards ensuring that the body's employees, agents and contractors have a reasonable knowledge and understanding of the requirements to comply with this Act and the Payroll Levy Collection Act, in so far as those requirements affect the employees, agents or contractors concerned; and

(b) what action (if any) the officer took when he or she became aware that the body was contravening this Act or the Payroll Levy Collection Act.

(2) This section does not, by implication, limit the generality of section 49CE.

27 Subsection 50(1)

Omit “The Corporation”, substitute “Subject to subsection (1A), the Corporation”.

28 After subsection 50(1)

Insert:

(1A) The Corporation’s power under section 52A may only be delegated to an officer (within the meaning of the *Commonwealth Authorities and Companies Act 1997*) of the Corporation.

29 After section 52

Insert:

52A Power to require persons to produce information or documents

- (1) This section applies if the Corporation believes on reasonable grounds that a person has information, or a document containing information, of any of the following kinds:
- (a) information relating to the employment of an eligible employee;
 - (b) information relating to an employer of an eligible employee;
 - (c) information that is reasonably necessary to enable the Corporation to perform its functions under section 7.
- (2) The Corporation may, by written notice, require the person to:
- (a) give the information to the Corporation by the time, and in the manner and form, specified in the notice; or
 - (b) produce the document, or a certified copy of the document, to the Corporation by the time, and in the manner, specified in the notice.
- (3) The notice must set out the effect of:
- (a) subsections (6) and (7) of this section; and

- (b) sections 137.1 and 137.2 of the *Criminal Code* (about giving false or misleading information or documents); and
 - (c) section 149.1 of the *Criminal Code* (about obstructing Commonwealth public officials).
- (4) The time specified under paragraph (2)(a) or (b) must be at least 28 days after the day the notice is given to the person.
 - (5) If a person is given a notice under subsection (2), the person must comply with the notice.
 - (6) A person commits an offence of strict liability if the person contravenes subsection (5). The physical elements of the offence are set out in that subsection.

Penalty: 30 penalty units.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

- (7) Subsection (5) is a ***civil penalty provision***.

Note: Part 7A provides for pecuniary penalties for contraventions of civil penalty provisions.

52B Review by the Administrative Appeals Tribunal

- (1) An application may be made to the Administrative Appeals Tribunal for review of any of the following decisions:
 - (a) a decision by the Board to refuse to approve a waiver agreement under section 39BC;
 - (b) a decision by the Board to refuse to approve a variation of a waiver agreement under section 39BC;
 - (c) a decision by the Board under subsection 44(1) or (2).
- (2) An application under subsection (1) may only be made by the employee or employer to whom the decision relates.

52C Conferral of jurisdiction on the Federal Court and the Federal Magistrates Court

- (1) Jurisdiction is conferred on the Federal Court and the Federal Magistrates Court in relation to any civil matter arising under this Act or the Payroll Levy Collection Act.

- (2) The jurisdiction conferred on the Federal Court under subsection (1) is to be exercised in the Fair Work Division of the Federal Court if:
- (a) an application is made to the Federal Court under this Act or the Payroll Levy Collection Act; or
 - (b) a writ of mandamus or prohibition or an injunction is sought in the Federal Court against a person holding office under this Act; or
 - (c) a declaration is sought under section 21 of the *Federal Court of Australia Act 1976* in relation to a matter arising under this Act or the Payroll Levy Collection Act; or
 - (d) an injunction is sought under section 23 of the *Federal Court of Australia Act 1976* in relation to a matter arising under this Act or the Payroll Levy Collection Act; or
 - (e) an appeal is instituted in the Federal Court from a judgement of the Federal Magistrates Court in a matter arising under this Act or the Payroll Levy Collection Act; or
 - (f) proceedings in relation to a matter arising under this Act or the Payroll Levy Collection Act are transferred to the Federal Court from the Federal Magistrates Court; or
 - (g) the Federal Magistrates Court states a case or reserves a question for the consideration of the Federal Court in a matter arising under this Act or the Payroll Levy Collection Act; or
 - (h) the President of FWA refers, under section 608 of the *Fair Work Act 2009*, a question of law arising from an LSL dispute to the Federal Court; or
 - (i) the High Court remits a matter arising under this Act or the Payroll Levy Collection Act to the Federal Court.
- (3) Jurisdiction conferred on the Federal Magistrates Court under subsection (1) is to be exercised in the Fair Work Division of the Federal Magistrates Court if:
- (a) an application is made to the Federal Magistrates Court under this Act or the Payroll Levy Collection Act; or
 - (b) an injunction is sought under section 15 of the *Federal Magistrates Act 1999* in relation to a matter arising under this Act or the Payroll Levy Collection Act; or

- (c) a declaration is sought under section 16 of the *Federal Magistrates Act 1999* in relation to a matter arising under this Act or the Payroll Levy Collection Act; or
- (d) proceedings in relation to a matter arising under this Act or the Payroll Levy Collection Act are transferred to the Federal Magistrates Court from the Federal Court; or
- (e) the High Court remits a matter arising under this Act or the Payroll Levy Collection Act to the Federal Magistrates Court.

52D Powers of courts

The powers conferred on the Federal Court and the Federal Magistrates Court by a provision of this Act are in addition to, and not instead of, any other powers of the court, whether conferred by another provision of this Act or otherwise.

30 Section 54

Before “The Governor-General”, insert “(1)”.

31 At the end of section 54

Add:

- (2) Without limiting subsection (1), the regulations may:
 - (a) require an employer of eligible employees to maintain records relating to the following matters:
 - (i) the employment of those employees;
 - (ii) the qualifying service completed by, and the long service leave entitlement of, those employees; and
 - (b) provide for penalties, not exceeding 50 penalty units, for offences against the regulations.

Part 2—Amendments relating to funding

Coal Mining Industry (Long Service Leave Funding) Act 1992

32 Subsection 4(1)

Insert:

Employer Reimbursement Rules has the meaning given by section 45.

33 Subsection 4(1) (definition of *industrial authority*)

Repeal the definition.

34 Subsection 4(1) (definition of *relevant industrial instrument*)

Repeal the definition.

35 At the end of subsection 11(1)

Add “or payments out of the Fund under section 44”.

36 At the end of section 40

Add:

- (4) The Corporation may create separate notional accounts within the Fund to reflect payroll levy paid by employers before 1 January 2012 and such levy paid on or after 1 January 2012.

37 Subsections 43(1) to (4)

Repeal the subsections, substitute:

- (1) The Board must seek advice from an actuary as to:
 - (a) whether the rate of payroll levy imposed (at the time the advice is given) would be adequate to ensure that the Fund will be sufficient to reimburse employers in accordance with the Employer Reimbursement Rules; and
 - (b) if not, the rate that would be so adequate.

- (2) The Board must seek such advice at least once every 3 years.

38 Subsection 43(5)

Omit “in respect of any matters referred to in this section”.

39 Subsection 43(6)

Omit “to discharge the liability of employers to make payments to eligible employees in respect of long service leave”, substitute “to reimburse employers in accordance with the Employer Reimbursement Rules”.

40 Sections 44 to 46

Repeal the sections, substitute:

44 Reimbursement for payments relating to long service leave

- (1) If an employer makes a payment under Part 5A to a person who is or was an eligible employee, the Corporation must pay the employer out of the Fund the reimbursable amount the Board decides in accordance with the Employer Reimbursement Rules.
- (2) If an employer makes a payment under Part 5A to the legal personal representative of a deceased person who is or was an eligible employee, the Corporation must pay the employer out of the Fund the reimbursable amount the Board decides in accordance with the Employer Reimbursement Rules.

Note: Section 52B provides that an application may be made to the Administrative Appeals Tribunal for review of a decision of the Board under subsection (1) or (2).

45 Employer Reimbursement Rules

- (1) The Board must, by legislative instrument, make rules relating to:
 - (a) the amount that an employer is to be reimbursed for a payment by the employer under Part 5A to a person who is or was an eligible employee; and
 - (b) the amount that an employer is to be reimbursed for a payment by the employer under Part 5A to the legal personal representative of a deceased person who is or was an eligible employee; and

- (c) the creation of a notional account for each person who is or was an eligible employee representing his or her share of payments into the Fund on or after 1 January 2012, whether or not the relevant employer actually receives any of that share.
- (2) Rules relating to amounts mentioned in paragraph (1)(a) or (b) may be different on the basis of:
 - (a) employment as an eligible employee before 1 January 2012; and
 - (b) employment as an eligible employee on or after 1 January 2012.
- (3) The rules are to be known as the *Employer Reimbursement Rules*.

41 Sections 48, 48A and 48B

Repeal the sections, substitute:

48 Payments to employees if employer insolvent etc.

- (1) An eligible employee, or a former eligible employee, may apply, in writing, to the Corporation for a payment in respect of a period of untaken long service leave under Part 5A if the employee's employer is insolvent, is being wound up or has ceased to exist.
- (2) If the Board verifies that the employer is insolvent, is being wound up or has ceased to exist, the Corporation must pay the employee in respect of the employee's untaken long service leave the amount that would have been payable by the employer under Part 5A had the employee taken the period of long service leave immediately before the relevant circumstance.
- (3) The payment is payable to the employee out of the Fund.
- (4) A payment by the Corporation under this section:
 - (a) discharges the liability of the employer to make the payment; and
 - (b) extinguishes the employee's entitlement under Part 5A to the period of untaken long service leave.
- (5) In this section:
employer means:

- (a) in relation to an eligible employee—a current employer of the employee; and
- (b) in relation to a former eligible employee—an employer of the employee immediately before the employee ceased to be an eligible employee.

Part 3—Other amendments

Coal Mining Industry (Long Service Leave Funding) Act 1992

42 Title

Omit “**provide for a new long service leave funding scheme**”,
substitute “**make provision in relation to long service leave**”.

43 Section 1

Omit “*Coal Mining Industry (Long Service Leave Funding) Act 1992*”,
substitute “*Coal Mining Industry (Long Service Leave) Administration
Act 1992*”.

Note: This item amends the short title of the Act. If another amendment of the Act is described by reference to the Act’s previous short title, that other amendment has effect after the commencement of this item as an amendment of the Act under its amended short title (see section 10 of the *Acts Interpretation Act 1901*).

44 Section 3

Omit “provide for a new long service leave funding scheme”, substitute
“make provision in relation to long service leave”.

45 After paragraph 3(a)

Insert:

- (ab) providing minimum entitlements and rights in respect of long service leave for eligible employees; and

46 Paragraph 3(b)

Omit “long service leave payments made to eligible employees”,
substitute “payments made in respect of long service leave”.

47 Section 51

Omit “Subject to section 53, the”, substitute “The”.

48 Section 52

Omit “Subject to section 53, the”, substitute “The”.

49 Section 53

Repeal the section.

***Coal Mining Industry (Long Service Leave) Payroll Levy Act
1992***

50 Subsection 8(2)

Omit “Funding Act”, substitute “Administration Act”.

***Coal Mining Industry (Long Service Leave) Payroll Levy
Collection Act 1992***

51 Section 3

Insert:

Administration Act means the *Coal Mining Industry (Long Service Leave) Administration Act 1992*.

52 Section 3 (definition of *Corporation*)

Omit “Funding Act”, substitute “Administration Act”.

53 Section 3 (definition of *eligible employee*)

Omit “Funding Act”, substitute “Administration Act”.

54 Section 3 (definition of *Fund*)

Omit “Funding Act”, substitute “Administration Act”.

55 Section 3 (definition of *Funding Act*)

Repeal the definition.

Schedule 2—Constitution of the Board

Coal Mining Industry (Long Service Leave Funding) Act 1992

1 Subsection 4(1) (definition of *employee-representative Director*)

Omit “, (5) or (6)”, substitute “or (5)”.

2 Subsection 4(1) (definition of *employer-representative Director*)

After “subsection 13(2)”, insert “, (2A)”.

3 Subsection 13(2)

Repeal the subsection, substitute:

- (2) One Director is to be appointed to represent the companies engaged in black coal mining in New South Wales or Tasmania.
- (2A) One Director is to be appointed to represent the companies engaged in black coal mining in Queensland.

4 Subsection 13(4)

Repeal the subsection, substitute:

- (4) Two Directors are to be appointed to represent the Mining and Energy Division of the Construction, Forestry, Mining and Energy Union.

5 Subsections 13(5) and (6)

Repeal the subsections, substitute:

- (5) One Director is to be appointed to represent the following organisations:
 - (a) the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia;

- (b) the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union;
- (c) the Association of Professional Engineers, Scientists and Managers Australia;
- (d) the Colliery Officials Association of New South Wales;
- (e) the Mine Managers Association of Australia.

6 Subsection 13(7)

Omit “United Mine Workers Division of the Construction, Forestry and Mining Employees Union”, substitute “Mining and Energy Division of the Construction, Forestry, Mining and Energy Union”.

7 Subsection 13(8)

Omit “, (5) or (6)”, substitute “or (5)”.

8 Subsection 13(9)

Omit “(3), (4), (5) or (6)”, substitute “(2A), (3), (4) or (5)”.

9 Subsection 14(4)

Omit “2”, substitute “4”.

10 Paragraph 14(5)(b)

Omit “2”, substitute “4”.

11 Subsection 17(2)

Omit “section 22”, substitute “section 27J of the *Commonwealth Authorities and Companies Act 1997*”.

12 Paragraph 18(a)

Omit “directors” (wherever occurring), substitute “Directors”.

13 Section 23

Omit “2”, substitute “4”.

14 Application of amendments

- (1) The amendments made by items 3 to 5 and 13 of this Schedule apply in relation to the appointment or reappointment of a Director on or after 1 January 2012.

- (2) The amendments made by items 9 and 10 of this Schedule apply in relation to the appointment of the Chairperson or Deputy Chairperson on or after 1 January 2012.

Schedule 3—Levy and collection arrangements

Part 1—Amendments relating to levy

Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992

1 Section 3

Insert:

base rate of pay has the same meaning as in the *Fair Work Act 2009*.

2 Section 3 (definition of *eligible wages*)

Repeal the definition, substitute:

eligible wages has the meaning given by section 3B.

3 Section 3

Insert:

salary sacrifice arrangement means an arrangement under which an employee chooses to:

- (a) forgo a percentage or amount payable to the employee in relation to the performance of work; but
- (b) receive some other form of benefit or remuneration.

4 After section 3A

Insert:

3B Meaning of *eligible wages*

- (1) If an eligible employee is paid a base rate of pay and is not a casual employee, the employee's *eligible wages* are the greater of:
 - (a) the base rate of pay paid to the employee, including incentive-based payments and bonuses; and
 - (b) 75% of the base rate of pay paid to the employee, including:

Schedule 3 Levy and collection arrangements

Part 1 Amendments relating to levy

- (i) incentive-based payments and bonuses; and
 - (ii) overtime or penalty rates; and
 - (iii) allowances (other than those for reimbursement of expenses).
- (2) If an eligible employee is paid an annual salary, the employee's **eligible wages** are the annual salary paid to the employee, including incentive-based payments and bonuses but excluding:
 - (a) overtime or penalty rates; and
 - (b) shift-loadings.
- (3) 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.
- (4) In this section:
 - (a) a reference to the base rate of pay paid to an employee is a reference to the employee's base rate of pay before any amounts are deducted under a salary sacrifice arrangement; and
 - (b) a reference to the annual salary paid to an employee is a reference to the employee's annual salary before any amounts are deducted under a salary sacrifice arrangement; and
 - (c) a reference to an incentive-based payment paid to an employee is a reference to a payment of that kind that is paid to the employee at least once a month; and
 - (d) a reference to a bonus paid to an employee is a reference to a bonus that is paid to the employee at least once a month.

5 Application of item 4

The amendment made by item 4 of this Schedule applies in relation to levy payable in respect of employment on or after 1 January 2012.

Part 2—Amendments relating to audit and reporting requirements etc.

Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992

6 Section 3

Insert:

employer has the same meaning as in the Administration Act.

7 Section 3A

Before “Chapter 2”, insert “(1)”.

8 At the end of section 3A

Add:

- (2) For the purposes of applying Chapter 2 of the *Criminal Code* to an offence in a provision referred to in column 1 of an item in the following table, the physical elements of the offence are set out in the provision referred to in column 2 of the item:

Physical elements for certain offences		
Item	Column 1 Offence	Column 2 Provision setting out physical elements of the offence
1	section 5	subsection 5(1)
2	section 10	subsection 10(1)
3	section 10A	subsection 10A(3)

9 Section 4

Repeal the section, substitute:

4 Due date for payment

Subject to section 6, levy in respect of eligible wages paid to eligible employees for their employment during a month is payable at the end of the period within which a return is required by this Act to be made in respect of that month.

10 Subsections 5(1) and (1A)

Repeal the subsections, substitute:

- (1) A person who employs an eligible employee at any time during a month must, within 28 days after the end of that month, make a return in accordance with subsection (2) in respect of that month.

11 Subsection 5(3)

Repeal the subsection, substitute:

- (3) A person commits an offence of strict liability if the person contravenes subsection (1).

Penalty: 30 penalty units.

Note 1: For offences of strict liability, see section 6.1 of the *Criminal Code*.

Note 2: For the physical elements of this offence, see subsection 3A(2) of this Act.

- (4) Subsection (1) is a *civil penalty provision*.

Note: Part 7A of the Administration Act provides for pecuniary penalties for contraventions of civil penalty provisions.

12 Subsection 9(2)

Omit “Subject to subsection (3), an”, substitute “An”.

13 Subsections 9(3) and (4)

Repeal the subsections, substitute:

- (3) The annual report of the Corporation for a financial year must include particulars of:
 - (a) any amounts paid to, or recovered by, the Corporation or another person under this section during the financial year;
 - and

- (b) any proceedings brought by the Corporation to recover an amount under subsection (2) during the financial year.

Note: Section 9 of the *Commonwealth Authorities and Companies Act 1997* imposes annual reporting requirements.

14 Section 10

Repeal the section, substitute:

10 Requirement to give report to Corporation

- (1) If a person employs an eligible employee at any time during a financial year, the person must, no later than 6 months after the end of the financial year, give to the Corporation a report prepared by an auditor that:
- (a) states whether, in the opinion of the auditor, the person has paid all amounts of levy, or amounts of additional levy under section 7, that the person was required to pay in respect of the financial year; and
 - (b) if, in the opinion of the auditor, the person has not paid all amounts of such levy or additional levy—specifies in what respect and to what extent, in the opinion of the auditor, the person has not paid those amounts; and
 - (c) if, during the financial year, the person was paid an amount under Part 7 of the Administration Act—states whether, in the opinion of the auditor, the amount paid is correct; and
 - (d) includes reasons for the opinions contained in the report.
- (2) A person commits an offence of strict liability if the person contravenes subsection (1).

Penalty: 30 penalty units.

Note 1: For offences of strict liability, see section 6.1 of the *Criminal Code*.

Note 2: For the physical elements of this offence, see subsection 3A(2) of this Act.

- (3) Subsection (1) is a ***civil penalty provision***.

Note: Part 7A of the Administration Act provides for pecuniary penalties for contraventions of civil penalty provisions.

10A Corporation may require auditor to give report

- (1) If a person employs an eligible employee at any time during a particular period, the Board may, by written notice given to the person's auditor, require the auditor to give to the Corporation, by the time specified in the notice, a report prepared by the auditor that:
 - (a) states whether, in the opinion of the auditor, the person has paid all amounts of levy, or amounts of additional levy under section 7, that the person was required to pay in respect of the period; and
 - (b) if, in the opinion of the auditor, the person has not paid all amounts of such levy or additional levy—specifies in what respect and to what extent, in the opinion of the auditor, the person has not paid those amounts; and
 - (c) if, during the period, the person was paid an amount under Part 7 of the Administration Act—states whether, in the opinion of the auditor, the amount paid is correct; and
 - (d) includes reasons for the opinions contained in the report.
- (2) The time specified in the notice must be at least 28 days after the day the notice is given to the auditor.
- (3) If an auditor is given a notice under subsection (1), the auditor must comply with the notice.
- (4) An auditor commits an offence of strict liability if the auditor contravenes subsection (3).

Penalty: 30 penalty units.

Note 1: For offences of strict liability, see section 6.1 of the *Criminal Code*.

Note 2: For the physical elements of this offence, see subsection 3A(2) of this Act.

- (5) Subsection (3) is a ***civil penalty provision***.

Note: Part 7A of the Administration Act provides for pecuniary penalties for contraventions of civil penalty provisions.

10B Payment of auditor fees

- (1) A person is liable to pay to an auditor such fees as the auditor reasonably charges for preparing a report in respect of the person for the purposes of section 10 or 10A.
- (2) If:
 - (a) a person's auditor gives a report in respect of a particular period to the Corporation in response to a notice under subsection 10A(1); and
 - (b) the report states that, in the opinion of the auditor, the person has paid all amounts of levy, or amounts of additional levy under section 7, that the person was required to pay in respect of the period;there is payable to the person out of the Fund an amount equal to the amount paid by the person to the auditor under subsection (1) in respect of the report.

15 Subsection 12(4) (penalty)

Repeal the penalty, substitute:

Penalty: 30 penalty units.

16 Subsection 13(8) (penalty)

Repeal the penalty, substitute:

Penalty: 30 penalty units.

17 Subsection 13(8B)

Repeal the subsection.

18 Subsection 14(3) (penalty)

Repeal the penalty, substitute:

Penalty: 100 penalty units or imprisonment for 2 years, or both.

19 After paragraph 15(e)

Insert:

- (ea) requiring employers to appoint an auditor; and

20 Paragraph 15(f)

Omit “a fine of \$1,000”, substitute “50 penalty units”.

21 Application of item 9

Section 4 of the *Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992*, as substituted by item 9 of this Schedule, applies in relation to levy payable in respect of employment on or after 1 January 2012.

22 Application of items 10 and 11

The amendments made by items 10 and 11 of this Schedule apply in relation to returns made in respect of employment on or after 1 January 2012.

23 Application of item 13

The amendment made by item 13 of this Schedule applies to the financial year that started on 1 July 2011 and to later financial years.

24 Application of section 10 of the Payroll Levy Collection Act

Section 10 of the *Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992*, as inserted by item 14 of this Schedule, applies to the financial year that started on 1 July 2011 and to later financial years.

25 Application of section 10A of the Payroll Levy Collection Act

Section 10A of the *Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992*, as inserted by item 14 of this Schedule, applies to a period that ends on or after 1 January 2012, whether or not the period begins before that date.

26 Application of items 15 to 18

- (1) The amendments made by items 15 to 18 of this Schedule apply in relation to acts and omissions that occur on or after 1 January 2012.
- (2) For the purposes of this item, if an act or omission is alleged to have occurred between 2 dates, one before and one on or after 1 January 2012, the act or omission is taken to have occurred before 1 January 2012.

Schedule 4—Amendment of the Coal Mining Industry (Long Service Leave Funding) Amendment Act 2009

1 Subitem 1(4) of Schedule 2

Insert:

employment as an eligible employee means any period, or periods, of service completed by an eligible employee between 1 January 2000 and 31 December 2011 (both dates inclusive).

2 Schedule 2

Repeal the Schedule.

Schedule 5—Transitional provisions

Part 1—Preliminary

1 Interpretation

- (1) In this Schedule:

Australian workplace agreement means a written agreement, between an employer and a person whose employment was subject to the agreement, that would have been recognised as an “Australian workplace agreement”, “AWA” or “pre-reform AWA” under a law of the Commonwealth at any time before 1 January 2012.

applicable award-derived long service leave terms has the meaning given by subsection 113(3) of the *Fair Work Act 2009*.

award employee means a person who was covered by section 113 of the *Fair Work Act 2009* at any time on or after 1 January 2010, but does not include a non-award employee.

new law means the *Coal Mining Industry (Long Service Leave Funding) Act 1992*, as amended by Schedule 1 to this Act.

non-award employee means a person who was covered by Schedule 2 to the *Coal Mining Industry (Long Service Leave Funding) Amendment Act 2009* (as in force immediately before 1 January 2012) at any time on or after 1 January 2010.

- (2) An expression used in this Schedule that is also used in the new law has the same meaning in this Schedule as it has in the new law.

Part 2—Recognition of long service leave before 1 January 2012

2 Recognition of long service leave—eligible employees

- (1) This item applies if a person is an eligible employee at any time in the calendar year beginning on 1 January 2012.
- (2) The Corporation must calculate:
 - (a) the period, or periods, of service completed by the employee between 1 January 2000 and 31 December 2011 (both dates inclusive) as if the period, or periods, were a period, or periods, of qualifying service completed by the employee after 1 January 2012; and
 - (b) if the period of qualifying service is, or the periods of qualifying service add up to, at least 8 years—the employee's entitlement (in hours) to long service leave under Part 5A of the new law in respect of that qualifying service.

Note: If the eligible employee is an award employee, see also item 4 of this Schedule.

3 Recognition of long service leave—former eligible employees

- (1) This item applies if:
 - (a) a person is not an eligible employee at any time in the calendar year beginning on 1 January 2012; and
 - (b) the person has an entitlement, or may become entitled, to long service leave in respect of their service in the black coal mining industry before 1 January 2012.
- (2) If the person wishes the Corporation to recognise service before 1 January 2012, the person must provide the Corporation with the following information, in writing:
 - (a) the period or periods of the person's employment as an eligible employee between 1 January 2000 and 31 December 2011 (both dates inclusive);
 - (b) the type of employment of the person (for example, whether full-time, part-time or casual);
 - (c) the person's employer for each period of employment.

- (3) The person must provide the information on or before 30 September 2012 (or such later date prescribed by the regulations).
 - (4) If a person provides the Corporation with information, as mentioned in subitem (2), the Corporation must:
 - (a) verify the information; and
 - (b) if the information is correct—calculate:
 - (i) the period, or periods, of service completed by the person between 1 January 2000 and 31 December 2011 (both dates inclusive) as if the period, or periods, were a period, or periods, of qualifying service completed after 1 January 2012; and
 - (ii) if the period of qualifying service is, or the periods of qualifying service add up to, at least 8 years—the person’s entitlement (in hours) to long service leave under Part 5A of the new law in respect of that qualifying service; and
 - (c) if the information is not correct—take steps to resolve:
 - (i) what period, or periods, of service have been completed by the person between 1 January 2000 and 31 December 2011 (both dates inclusive); and
 - (ii) what entitlement the person has (in hours) to long service leave under Part 5A of the new law in respect of that service;
- so that the calculation mentioned in paragraph (b) can be made in relation to the person.

4 Recognition of long service leave before 1 January 2000

To avoid doubt, items 2 and 3 of this Schedule do not affect any entitlement of an award employee to long service leave arising from applicable award-derived long service leave terms (as preserved by section 113 of the *Fair Work Act 2009*) in respect of service in the black coal mining industry before 1 January 2000.

5 Certain service not recognised

When making a calculation required by item 2 or 3 of this Schedule in relation to a person, the Corporation must disregard:

- (a) any period during which the person’s employment was subject to an Australian workplace agreement, if the agreement specifically excluded an entitlement to long

service leave for service in the black coal mining industry;
and

- (b) any period of long service leave taken by the person:
- (i) for service in the black coal mining industry; or
 - (ii) under State law;
- if an application to take the leave was made before 1 January 2012.

Part 3—Keeping records of recognised long service leave

6 Records relating to eligible employees

- (1) This item applies in relation to a person in respect of whom the Corporation has made a calculation under item 2 of this Schedule.
- (2) The Corporation must notify the person, on or before 30 September 2012 (or such later date prescribed by the regulations), in writing, of the records it has relating to:
 - (a) the person's employment as an eligible employee before 1 January 2012; and
 - (b) the person's employer or employers before that date; and
 - (c) the qualifying service completed by, and the long service leave entitlement of, the person, as calculated under item 2 of this Schedule.
- (3) If a person receives notification from the Corporation, as mentioned in subitem (2), and the person considers that the information is incorrect or incomplete, the person may provide the Corporation with the information necessary to ensure that the Corporation's records are correct.
- (4) If subitem (3) applies, the Corporation must:
 - (a) verify the information provided by the person; and
 - (b) decide whether the person's records need to be corrected; and
 - (c) notify the person, in writing, whether the person's records have been corrected, and if they have, of the records the Corporation now has in relation to the person.
- (5) If the Corporation notifies a person under this item, the Corporation must also give a copy of the notification to the person's current employer or employers.

7 Records relating to former eligible employees

- (1) This item applies in relation to a person in respect of whom the Corporation has made a calculation under item 3 of this Schedule.
-

- (2) The Corporation must notify the person, on or before 31 December 2012 (or such later date prescribed by the regulations), in writing, of the records it has relating to:
- (a) the person's employment as an eligible employee before 1 January 2012; and
 - (b) the person's employer or employers before that date; and
 - (c) the qualifying service completed by, and the long service leave entitlement of, the person, as calculated under item 3 of this Schedule.

8 Interaction with the new law

- (1) Subject to item 9 of this Schedule, the new law applies in relation to a person who is covered by Part 2 of this Schedule as if:
- (a) the person's period, or periods, of service, as calculated by the Corporation under that Part and/or arising from applicable award-derived long service leave terms, is a period, or are periods, of qualifying service; and
 - (b) where the period of qualifying service is, or the periods of qualifying service add up to, at least 8 years—any entitlement of the person to long service leave (in hours), as calculated by the Corporation under Part 2 of this Schedule and/or arising from applicable award-derived long service leave terms, is an entitlement to long service leave under Part 5A of the new law in respect of that qualifying service.
- (2) For the purpose of working out the LSL credit of a person who is:
- (a) an eligible employee; or
 - (b) a former eligible employee who becomes an eligible employee again on or after 1 January 2012;
- the number of hours of long service leave that the person is entitled to for each week of qualifying service, as calculated by the Corporation under Part 2 of this Schedule and/or arising from applicable award-derived long service leave terms, is to be added to the number of hours of long service leave mentioned in paragraph 39AB(5)(a) of the new law.

9 Records created after 1 January 2012

Schedule 5 Transitional provisions

Part 3 Keeping records of recognised long service leave

If, after 1 January 2012, a record is created in respect of a person mentioned in subitem 3(1) who has not provided the Corporation with information within the time mentioned in subitem 3(3), subitem 3(4) and item 5 of this Schedule do not apply to calculating:

- (a) the period, or periods, of service completed by the person before 1 January 2012; and
- (b) the person's entitlement (in hours) to long service leave under Part 5A of the new law in respect of that service.

Part 4—Miscellaneous

10 Actuarial advice relating to sufficiency of fund

- (1) In January 2013, (or such later month before 1 January 2015 prescribed by the regulations), the Board must seek advice from an actuary as to:
 - (a) whether the rate of payroll levy imposed (at the time the advice is given) would be adequate to ensure that the Fund will be sufficient to reimburse employers in accordance with the Employer Reimbursement Rules; and
 - (b) if not, the rate that would be so adequate.
- (2) To avoid doubt, advice sought under this item satisfies the requirements of subsections 43(1) and (2) of the new law for the period 1 January 2012 to 31 December 2014.

11 Transitional regulations

- (1) The Governor-General may make regulations prescribing matters:
 - (a) required or permitted by this Schedule to be prescribed; or
 - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Schedule.
- (2) The regulations may prescribe matters of a transitional nature (including matters of an application or saving nature):
 - (a) arising out of the enactment of Part 5A of the new law; or
 - (b) relating to amounts that are, or may become, payable to employers under Part 7 of the new law.
- (3) Despite subsection 12(2) of the *Legislative Instruments Act 2003*, regulations made under this item may be expressed to take effect from a day before the regulations are registered under that Act.
- (4) Subitem (2) does not limit subitem (1).

*[Minister's second reading speech made in—
Senate on 21 September 2011
House of Representatives on 22 November 2011]*

(197/11)

60 *Coal Mining Industry (Long Service Leave) Legislation Amendment Act 2011* No.
142, 2011