

## EXPLANATORY STATEMENT

Issued by the Coal Mining Industry (Long Service Leave Funding) Corporation

### *Employer Reimbursement Rules 2011*

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

#### **Purpose**

The *Employer Reimbursement Rules 2011* (the Rules) set out rules for how the Board of the Coal Mining Industry (Long Service Leave Funding) Corporation (the Corporation) calculates reimbursement amounts to employers under the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (the Act).

#### **Legislative Provisions**

The Rules are made under new section 45 of the Act, as introduced into the Act by the *Coal Mining Industry (Long Service Leave) Legislation Amendment Act 2011* (the Amendment Act), which provides that the Board of the Corporation must make rules relating to:

- amounts to be reimbursed to employers for payments to eligible employees under Part 5A of the Act;
- amounts to be reimbursed to employers for payments to the legal personal representative of an eligible employee; and
- the creation of notional accounts for eligible employees.

The Rules are a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (the LIA).

Section 4 of the *Acts Interpretation Act 1901* provides that the Rules may be made by the Board after the Amendment Act is enacted and before the amendments made by it come into operation. The Amendment Act received Royal Assent on 29 November 2011 and the Rules will commence at the same time as the relevant amendments in the Amendment Act come into operation (1 January 2012).

#### **Background**

The Act sets out a long service leave funding scheme for the black coal mining industry and establishes the Corporation to administer that scheme. The Act also requires the Corporation to establish and maintain in its books the Coal Mining Industry (Long Service Leave) Fund (the Fund). The long service leave funding scheme has been agreed to between employers and employees in the Australian black coal mining industry.

Under the long service leave funding scheme, employers are required to pay levy imposed by the *Coal Mining Industry (Long Service Leave) Payroll Levy Act 1992* to the Corporation in respect of eligible employees. Such employers are subsequently entitled to be reimbursed an amount by the Corporation after the employer makes a payment of long service leave to the eligible employee.

The Amendment Act implements new arrangements for the long service leave funding scheme. It amends the Act to include new subsection 40(4), which provides that the Corporation may create notional accounts within the Fund to reflect payroll levy paid by employers after 1 January 2012 and new section 44, which provides that the Corporation must pay to an employer the reimbursable amount the Board decides in accordance with the Rules to be made under new section 45.

## **Operation**

The Rules require the Corporation to create notional accounts for eligible employees and set out how the Board is to calculate reimbursement amounts to be paid to employers in respect of claims made by those employers under section 44 of the Act.

The account is referred to as a "notional account" because an employee is not directly entitled to the amount in the account. Rather the amount in the notional account is used in the calculation of reimbursable amounts for employers for payments made to the related employee in respect of long service leave credits which accrue after 1 January 2012.

The Rules provide that the Board is to calculate reimbursable amounts differently depending upon whether the long service leave to which the employer payment relates was accrued in relation to employment as an eligible employee before or after 1 January 2012.

A decision of the Board under section 44 of the Act, that relies on calculations made under the Rules, is reviewable by the Administrative Appeals Tribunal.

The Rules also provide for the Corporation to create notional accounts for eligible employees and to debit, credit and transfer amounts to or from those accounts, for the purpose of being able to calculate a reimbursable amount to be paid to an employer under section 44 of the Act.

The Corporation may treat notional accounts as inactive in certain circumstances, in order that the Corporation need not expend its limited administrative funds unnecessarily.

## **Consultation**

Section 17 of the LIA requires the Board to be satisfied that any consultation it considers to be appropriate and that is reasonably practicable to undertake has been undertaken before making the Rules.

In preparing the Rules, the Corporation has consulted closely with the Industry Working Party (the IWP). The IWP is constituted by representatives of black coal mining employees, employers and employee organisations and has provided advice and guidance to the Government in relation to the long service leave funding scheme in the Act, as well as the changes recently made to the Act by the Amendment Act.

## **Regulatory Impact**

The Office of Best Practice and Regulation (OBPR) has considered the matter and formed the opinion that no regulatory impact analysis is required for the Rules. The OBPR reference number is 13326.

## **Details**

Details of the Rules are provided in Attachment A.

## **Statement of Compatibility**

A Statement of Compatibility with Human Rights for the Rules is at Attachment B

## NOTES ON RULES

### Part 1 – Preliminary

#### **Rule 1            Name of Rules**

Rule 1 provides that the name of the instrument is the *Employer Reimbursement Rules 2011*.

#### **Rule 2            Commencement**

Rule 2 provides that the Rules commence on 1 January 2012.

#### **Rule 3            Definitions**

Rule 3 provides definitions used in the Rules.

The definitions of "industrial authority" and "relevant industrial instrument" reflect the definitions given to those terms in the Act before the commencement of the Amendment Act.

Rule 3 also notes that the Rules contain terms which have the same meaning as in the Act e.g. eligible employee, employee, employer, Fund and LSL credit.

### Part 2 – Notional Accounts

Part 2 of the Rules sets out rules regarding the creation of notional accounts and how and when the Corporation must debit or credit an amount to or from an account. These rules ensure that the Board can properly calculate a reimbursable amount claimed under section 44 of the Act.

#### **Rule 4            Creation of notional accounts**

The Corporation is required by rule 4 to establish in the books of the Fund, notional accounts for the eligible employees it is aware of when the Rules commence on 1 January 2012 and for all eligible employees that the Corporation becomes aware of after the Rules commence.

These rules ensure that the Corporation creates notional accounts for all existing eligible employees as at 1 January 2012 and all newly commenced eligible employees after that date.

#### **Rule 5            Allocation and crediting of receipts to notional accounts**

Rule 5 requires that the Corporation must allocate and credit to a notional account (other than an account which is treated as inactive under rule 16) each month an amount that is the amount of levy paid by an employer under the *Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992* in respect of that employee, less the administrative costs of the Corporation.

These deductions will be used by the Board to meet the day to day costs of operating the Corporation and the exercise of its functions under section 7 of the Act.

#### **Rule 6            Crediting of other amounts to notional accounts**

Rule 6 requires that the Corporation must credit a notional account (other than an account which is treated as inactive under rule 16) with other amounts calculated using a crediting rate or transferred to the account under rule 8.

#### **Rule 7            Debiting of amounts from notional accounts**

The Corporation is restricted by rule 7 to only debiting particular amounts from a notional account, such as those amounts reimbursed to an employer for payments made by the employer to an

employee in respect of their post-2012 entitlements or as might be determined by the Board to be debited from the account in order to satisfy any losses or debts etc arising from the investment activities of the Fund or amounts transferred from the notional account under rule 8.

#### **Rule 8 Transferring amounts from notional accounts**

Rule 8 provides that the Corporation may transfer amounts to or from a notional account or the Fund. This rule is to ensure that the Corporation has sufficient flexibility to operate the notional accounts to respond to errors in relation to the notional accounts or any orders made by a Court in relation to the amounts in a notional account or an account is made inactive under rule 16.

#### **Part 3 – Calculation of reimbursable amounts (Part 5A of the Act)**

This part of the Rules sets out the way in which a reimbursable amount is calculated by the Board. Part 3 provides different rules for calculating reimbursable amounts to employers in respect of long service leave based on employment as an eligible employee either before 1 January 2012 or on and after that date.

The previous method of calculating reimbursement amounts in the Act before it was amended by the Amendment Act ensured that reimbursement amounts to employers did not exceed the amount actually paid to the employee in respect of their LSL credits. This approach is continued in the Rules made under new section 45.

#### **Rule 9 How is the reimbursable amount for an employer calculated?**

Subrule (1) sets out that a reimbursable amount for an employer is the total of amounts payable to the employer for payments made by the employer to an employee in respect of their pre-2012 and post-2012 entitlements.

Subrule (2) requires the Board to determine if a claim for reimbursement contains parts in respect of pre-2012 and/or post-2012 entitlements. If a claim does contain such parts, then subrule (3) requires the Board to deal with each part separately.

These requirements ensure that the Board can calculate a reimbursable amount for an employer that takes into account long service leave accrued as a result of an eligible employees employment before 1 January 2012 (pre-2012 entitlements) and after 1 January 2012 (post-2012 entitlements).

#### **Rule 10 How is the pre-2012 service component calculated?**

Subrule (1) set out the rules for calculating reimbursable amounts in respect of the pre-2012 service component. The method to be used reflects the agreement between employers and employees in the black coal mining industry that for reimbursement for long service leave accrued before 1 January 2012, employers would be reimbursed an amount calculated using the reimbursement methods in the Act before it was amended by the Amendment Act.

Subrule (1) uses a formula to calculate the amount to be reimbursed to an employer in respect of the pre-2012 service component of a reimbursable amount. This formula is equivalent to that used in former section 44 of the Act to determine the "maximum reimbursable amount" in relation to a pre-2012 reimbursement claim. Subrule (1) also includes definitions of eligible service, rate of accrual of long service leave and eligible weekly wage in order to enable the Board to make the required calculation using the formula. These definitions have been slightly modified in the Rules to ensure that only matters occurring before 1 January 2012 are taken into account when calculating the pre-2012 service component.

Of note is that the definition of eligible weekly wage in subrule (1) operates to ensure that employers are only reimbursed an amount calculated using the wage rates that were applicable when the employee was employed by the employer and not wage rates at the time the payment was made. This ensures that the calculation of the pre-2012 service component is not affected

by any general increase in wages during the interim period between an employee's employment and when a payment for long service leave is later made.

Subrule (2) provides that a reference to an employee's long service leave entitlement is a reference to an entitlement arising under any of the three listed employment arrangements. This description of an employee's long service leave entitlement mirrors that previously used in the Act before it was amended and ensures that a reimbursement in respect of a payment under new Part 5A of the Act is not able to be dealt with under this rule 10.

Subrule (3) provides that only legislation in force on or before 31 December 2011 is to be considered when calculating a maximum reimbursable amount. This is to ensure that pre-2012 entitlements are treated and calculated in a way as close as possible to the way they were before the commencement of Amendment Act. For some period after the commencement of the Rules, employers will be making claims for reimbursement for payments made to employees in respect of their long service leave accrued before 1 January 2012.

### **Rule 11            How is the post-2012 service component calculated?**

Rule 11 provides for the calculation of a reimbursable amount for an employer in respect of payments made by the employer under Part 5A to an eligible employee based on the following principles:

- (a) amounts in the Fund generally will be debited first in satisfaction of a reimbursement claim made by an employer in relation to a payment made in respect of the long service leave accrued by an eligible employee prior to 1 January 2012 (rule 10);
- (b) to the extent that a reimbursement claim is in respect of a payment made for long service leave accrued after 1 January 2012, the notional account for the eligible employee will then be debited according to the formula in rule 11.

The formula in rule 11 is designed to reflect these principles and also to ensure that:

- (c) an employer cannot receive reimbursement for any payment in respect of an amount of long service leave over and above the LSL credit attributed by the Corporation to the relevant eligible employee;
- (d) where there would be an amount of LSL credit remaining after the reimbursement is made to the employer, only a "pro rata" reimbursement is paid to the employer; and
- (e) an employer will not be reimbursed more than the amount paid to the eligible employee in respect of that employees accrued LSL credits.

It is appropriate to utilise a "pro-rata" formula as described above to calculate a post-2012 service component because to the extent that an employer does not pay to an employee an amount in satisfaction of *all* the LSL credit accrued by that employee after 1 January 2012, either that or other employers will in due course have liabilities in relation to the employee in respect of the remaining LSL credit.

A pro-rata approach represents a fair and objective way of determining the amount an employer is reimbursed from the notional account, as against all other employers who may also claim a post-2012 service component from that account.

#### **Part 4 –Calculation of reimbursable amounts (legal personal representatives)**

Sections 39C and 39CC of the Act operate to ensure that legal personal representative of a deceased eligible employee is able to be paid the long service leave entitlements of that employee, regardless of whether or not the eligible employee had completed 8 years of qualifying service as is required by the general rule in section 39A of the Act.

Part 4 of the Rules sets out how the Board is to calculate reimbursable amounts for employers in respect of a payment made to a legal personal representative.

##### **Rule 12           How is the reimbursable amount for payment to a legal personal representative calculated?**

Rule 12 operates to ensure that the same method of calculating reimbursable amounts for employers generally under Part 3 is used to calculate the reimbursable amount for an employer in respect of a payment made to a legal personal representative under either of sections 39C or 39CC of the Act.

#### **Part 5 – Miscellaneous**

In order to properly operate and maintain the notional accounts created in accordance with the Rules and for the Board to efficiently calculate the reimbursable amounts to be paid to employers under the Rules, the Corporation must undertake a number of other activities in relation to the accounts. Part 5 provides for the Corporation to perform those activities.

##### **Rule 13           Notice to be given**

Rule 13 ensures that notice is given to the employer of an eligible employee when a notional account is created and when amounts are debited or transferred from the account.

This notice ensures that an employer of an eligible employee is aware of the status of the account should the employer desire at some point to make a claim for a reimbursable amount from the account.

##### **Rule 14           Correction of notional accounts**

Rule 14 ensures that the Corporation can make corrections to the details or balance of a notional account should it determine that an error has been made in relation to that account.

##### **Rule 15           Records to be made**

Rule 14 requires the Corporation to make proper records of any transactions in relation to notional accounts, consistent with good book-keeping practice and to ensure that any audit of the accounts is able to be properly undertaken.

##### **Rule 16           Inactive accounts**

Rule 16 provides that the Corporation might treat a notional account as inactive in instances where the Corporation knows or is satisfied that there is no longer any requirement of the Corporation to reimburse an employer from the account. This includes such circumstances as after an employee dies and final payment is made to the legal personal representative or when after a period of 8 years, the account is unlikely to be drawn upon and the Corporation is satisfied that an employer is not under an obligation to make payment to the person in respect of whom the account was created.

The treatment of a notional account as inactive does not operate to extinguish an entitlement to reimbursement provided to employers under the Act, but rather enables the Corporation to cease providing administrative and accounting services in relation to it and to transfer any unused amounts in the account back into the Fund – see rules 5, 6 and 8.

This will allow the Corporation to more efficiently use its limited administrative funds and to make better use of the overall amounts standing to the credit of the Fund more generally.

Rule 16 contains provisions requiring the Corporation to "reactivate" an inactive account should a claim by an employer later be made in order to ensure that proper calculation of a reimbursable amount in respect of that employer can be made by the Board.

## Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### Employer Reimbursement Rules 2011

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### Overview of the Legislative Instrument

The *Coal Mining Industry (Long Service Leave) Administration Act 1992* (the Act) sets out a long service leave funding scheme for the black coal mining industry and establishes the Coal Mining Industry (Long Service Leave Funding) Corporation (the Corporation) to administer that scheme. The long service leave funding scheme reflects agreement between employers and employees in the Australian black coal mining industry. The Act was recently amended consistently with further agreement between employers and employees regarding the calculation and payment for long service leave for eligible employees after 1 January 2012.

Under the long service leave funding scheme, employers are required to pay levy imposed by the *Coal Mining Industry (Long Service Leave) Payroll Levy Act 1992* (the Payroll Levy Act) to the Corporation in respect of eligible employees. These employers are subsequently entitled to be reimbursed an amount by the Corporation after the employer makes a payment for long service leave to an eligible employee or the legal personal representative of a deceased employee.

The *Employer Reimbursement Rules 2011* (the Rules) are made under section 45 of the Act for the purpose of enabling the Board of the Corporation to decide, under section 44 of the Act, the reimbursable amount an employer is to be paid by the Corporation.

The Rules also require the Corporation to create notional accounts for eligible employees. The account is referred to as a "notional account" because an employee is not directly entitled to the amount in the account. Rather the amount in the notional account is used in the calculation of reimbursable amounts for employers for payments made to the eligible employee or the legal personal representative of a deceased employee in respect of long service leave credits which accrue after 1 January 2012.

Consistent with the Act, the Rules provide that the Board is to calculate reimbursable amounts differently depending upon whether the long service leave to which the employer payment relates was accrued by employment before or after 1 January 2012.

For long service leave accrued after 1 January 2012, the Rules provide that reimbursable amounts are calculated consistently with the new law. For long service leave accrued before 1 January 2012, the Rules provide that reimbursable amounts are calculated using the method in place immediately before the Act was amended.

#### Human rights implications

The Rules engage the following human right:

*Right to work and rights in work*



The Rules deal with financial aspects related to the secure provision of, and payment for, long service leave for employees in the black coal mining industry. The Rules will operate as an integral part of the overall long service leave scheme agreed to by employers and employees.

In ensuring that employers are provided appropriate reimbursement for long service leave payments made to an employee, those employers are therefore returned some proportion of the payroll levy paid by employers.

Accordingly, the Rules in conjunction with the Act, contribute to the smooth operation of the long service leave scheme and in particular, ensure the secure and prudent use of monies paid by employers, by which the long service leave scheme for workers in the black coal mining industry is funded. This process facilitates the provision of long service leave by employers in the black coal mining industry to their employees.

The Rules support the substantive rights arising under the Act, and do not diminish those under any other law directly in relation to individuals employed in the black coal mining industry or otherwise. It is thus the case that the Rules do not operate to limit the human rights of any class of persons or particular individuals.

### **Conclusion**

The Rules are compatible with human rights as they advance the protection of the right to work and rights in work for employees in the black coal mining industry, and do not limit any human rights for those or other persons.