MINERALS COUNCIL OF AUSTRALIA

COAL MINING INDUSTRY (LONG SERVICE LEAVE) LEGISLATION AMENDMENT BILL 2025

SUBMISSION TO SENATE EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE

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OVERVIEW AND RECOMMENDATION

This is the submission of the Minerals Council of Australia (**MCA**) to the inquiry of the Senate Education and Employment Legislation Committee (**the Committee**) into the provisions of the Coal Mining Industry (Long Service Leave) Legislation Amendment Bill 2025 (**the Bill**).

The Bill was introduced on 26 November 2025. It contains measures to deal with the impact of historic liabilities for employers who had considered themselves not covered by the Coal Long Service Leave scheme but have been found to be covered following recent court decisions.

The Bill will provide for:

1. Repayment plans for impacted employers; and
2. Partial debt waivers

The Bill is a positive development that will help to address the uncertainty that certain businesses have encountered because of these historic liabilities.

This submission proposes several small but important amendments that would improve the provisions of the Bill in practice, to better achieve its intent and support regulatory certainty.

The MCA recommends that the Bill be passed by the Senate as soon as possible, subject to the following amendments:

1. **Allow deductions from historic liabilities where employees have taken long service leave and been paid under State LSL legislation:** Apply the same principle that the Bill applies where employees have received a payment in lieu of long service leave upon cessation of their employment.
2. **Extensions of time for repayment plans:** Allow the Minister to grant extensions to individual businesses to apply for repayment plans when there are genuine grounds for them not being able to do so within the two-month time limit
3. **Permissible 'assumptions' for historic employee records:** Expand the range of permissible 'assumptions' in calculating historic employee remuneration to cover all elements of remuneration, where the available historic records do not enable precise calculations to be made.

THE NEED FOR THE BILL

The Bill is necessary in order to deal with the impact of two recent decisions by the Federal Court that have clarified the coverage of the *Coal Mining Industry Long Service Leave* legislation of 1992 (**the Act**).[1]

The Bill follows a consultation process with interested parties that was conducted in 2025 to develop such legislation, in which the MCA and others participated.

The implication of the Court decisions is that various contractors to coal producers that did not previously consider themselves to be covered by the Act have been confirmed to be covered.

The decisions also mean that those contractors were deemed by the Court to have always been covered and thus have always been liable to make contributions to the Coal Long Service Leave Corporation (**Coal LSL**) under the Act. The implication of the decision is that they now have significant back pay liabilities.

The MCA strongly welcomes the measures in the Bill to enable businesses in this situation to be able to deal with these debts through repayment plans and receive a discount on the amounts owed. The provisions in the Bill allowing for extensions of time to enter repayment plans are also strongly supported. In some cases, it will take businesses a longer period to calculate their historical liabilities, which will require them to consult their records going back many years, or possibly decades. The flexibility to allow for extensions of time where necessary is thus a key element of the Bill.

The recent Court decisions

The Act applies to employees of the black coal mining industry who fall within the scope of the definitions in the Act:

> (a) an employee who is employed in the black coal mining industry by an employer engaged in the black coal mining industry, whose duties are directly connected with the day to day operation of a black coal mine; or
>
> (b) an employee who is employed in the black coal mining industry, whose duties are carried out at or about a place where black coal is mined and are directly connected with the day to day operation of a black coal mine [2]

In the *Hitachi* decision of December 2024, a Full Bench of the Federal Court ruled in favour of Coal LSL, which had commenced the proceeding to confirm that certain employees of Hitachi involved in coal mining were covered by the Act.[3]

Hitachi, like other contractors, had operated on the belief it was not covered, as its primary business was not coal production and its employees therefore did not fall within paragraph (b) of the above definition. The Court rejected Hitachi's position at both first instance and on appeal.

Because of the operation of the Act, the effect of the Court's ruling was that the Hitachi employees have always been covered by Coal LSL. As such, it was not only liable to pay premiums moving forward but to also have substantial historical liabilities under the Act.

The Act does not allow for historical liabilities to be waived, even though such businesses had paid long service leave to their employees under other legislation.

The *Orica* decision of May 2025 considered similar issues to *Hitachi*, ruling that certain Orica employees who conducted shot firing or related services at black coal mines had also been covered by the Act.[4]

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[1] There are several separate Acts and regulations governing the scheme which are set out at https://coallsl.com.au/about-us/legislation. For convenience, they are referred to in this submission as 'the Act'.

[2] Coal Mining Industry (Long Service Leave) Administration Act 1992 (Cth) s. 4(1).

[3] *Hitachi Construction Machinery (Australia) Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2024] FCAFC 166.

[4] *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2025] FCAFC 65.

The *Orica* ruling potentially means that a wider range of contractors than those impacted by the *Hitachi* decision have also been covered by the Act.

The *Orica* ruling did not adopt as broad a view as that which had been argued by Coal LSL and, as a result, certain other categories of Orica employees were found to not be covered by the Coal LSL scheme. Coal LSL has now obtained special leave to appeal this ruling to the High Court.

The government's position

On 24 June 2025, Minister Amanda Rishworth issued a media release acknowledging the *Orica* decision and its impact on affected employers:

> The Australian Government acknowledges the impact of the decisions in *Hitachi* and *Orica* on some employers in the coal mining industry. To address these impacts, the Government will progress legislation for a repayment plan, which includes a debt waiver component, for employers with historical levy debts. We will consult with industry representatives about this.[5]

The Bill reflects these commitments and concerns raised by the MCA and other employer representatives during the consultation process. As the process was confidential, this submission does not include any details of these discussions.

The mining industry's concerns

Orica is a member of the MCA. Other MCA members include coal producers who have always paid premiums to Coal LSL and whose coverage has never been in doubt.

The MCA's concerns reflect both the concerns of businesses such as Orica, who now have significant back pay liabilities, as well as those of coal producers, whose coverage has never been in doubt, but whose premiums paid to Coal LSL may be impacted by any changes to the Act.

The level of premiums charged by Coal LSL is adjusted from time to time based on actuarial projections of its future liabilities. As such, the level of premiums is always subject to some change. Since 2005, it has fluctuated from as high as 5 per cent of payroll to as low as 2 per cent.

5 The Hon Amanda Rishworth MP, Minister for Employment and Workplace Relations, media release, 'Orica decision clarifies operation of coal long service leave scheme', 24 June 2025.

FEATURES OF THE BILL

Repayment plans

The Bill introduces a new system under which employers with unpaid Coal LSL levy debts can repay those debts over time. These debts are, in effect, a tax debt that is overdue and payable and subject to penalties for non-payment.

Under the Bill, employers with historic liabilities may agree to enter repayment plans, known as 'unpaid levy payment arrangements', on the following terms:

1. The employer will have two months from the commencement of the system to apply to the Coal LSL Corporation for an arrangement and may submit a 'draft arrangement'.[6] Extensions can be granted by Coal LSL in certain circumstances.[7]
2. The application must include details of the historic liability for each employee.[8] The application must also include an auditor's report stating that the amounts are accurate.[9]
3. The Coal LSL corporation then approves the arrangement, and it then takes effect.[10]
4. The Bill prescribes a set timeframe for repayments under arrangements over a five-year period, as set out below.[11] These dates can be varied by up to 6 months in certain circumstances.[12]

Start date	1 year anniversary	2 years	3 years	4 years	5 years
20%	35%	50%	60%	70%	80%

Debt waivers

The Bill provides that 20 per cent of a business's historical debt liability may be waived, subject to the following conditions:

1. The company has entered into a repayment arrangement
2. 80 per cent of the debt has been paid in accordance with the plan, upon which the remaining 20 per cent is waived

Other features of the Bill

The Bill includes other elements to give effect to its key features, which are as follows:

Waiver of enforcement provisions of the Coal LSL legislation

- If Coal LSL approves an arrangement, the provisions of the legislation that provide for additional levies and enforcement action by Coal LSL will not apply.[13]

Discounts on historic debts

- If an employee has already received a payment for long service leave at the cessation of their employment, the relevant amount can be deducted from the historic liability.[14]

[6] Clauses 5-6, Part 2 of Schedule 1.
[7] Clause 6(3)(b), Part 2 of Schedule 1.
[8] Clause 9, Part 2 of Schedule 1.
[9] Clause 12, Part 2 of Schedule 1.
[10] Clause 14, Part 2 of Schedule 1.
[11] Clause 22, Part 2 of Schedule 1.
[12] Clauses 23-24, Part 2 of Schedule 1.
[13] Clause 19(2), Part 2 of Schedule 1.
[14] Clause 10(4), Part 2 of Schedule 1.

- However, the Bill does not also allow for such deductions where an employee has taken long service leave and been paid by the employer for such leave under State LSL legislation.

Recommended amendment: Allow deductions from historic liabilities where employees have taken long service leave and been paid under State LSL legislation

- The Bill allows for deductions where a payment is made in lieu of long service leave as part of a cessation payment, but not where an employee has actually taken long service leave during their employment.
- There is no apparent policy reason for this distinction. In practice, it will require an employer to make a 'double payment' for the long service leave entitlements of employees who have taken such leave.
- The Bill should apply the same approach to payments in lieu of leave and actual leave taken, where the employer has discharged its obligation under the application State legislation.

Minister may grant extensions for payment plans

- The Bill allows for the Minister to extend the time in which a business may give a notice of intention to seek a payment arrangement, which can be no greater than 2 months.[15]

Recommended amendment: Minister should have discretion to grant extensions on a case-by-case basis

- This power is of a general nature – it applies to all businesses and is limited to a maximum of two months.
- It does not provide any discretion to provide extensions for specific businesses where they may not be able to meet the statutory timeframe. Such a situation could arise where a business is party to litigation to determine whether, or to what extent, it is covered by the Coal LSL scheme and that litigation has not yet been concluded. In such circumstances, the business will not know whether it should seek a repayment plan until the court has issued its decision. This is not a hypothetical scenario.
- The MCA recommends that the Minister's power be amended to grant extensions to the extent necessary for individual businesses where there are genuine grounds for the business not being able to apply for a repayment plan within the statutory timeframe.

Calculation of historic debts

Whilst the key features of the Bill are straightforward in their design, employers will still face complexity in calculating the amount of debt owed. In calculating the debt, a number of issues could arise, including:

1. The number of employees covered (both the 'head count' of employees historically covered and the classes of employees covered)
2. The quantum of the liability for each employee, calculated according to their period of service and hours of work
3. Non-continuous service, for example, where employees moved between periods of time working in coal mines (where they are covered) and metalliferous mines (where they are not)

These issues are further complicated in situations in which a business has acquired another business that has had issues regarding its coverage, or non-coverage by the Coal LSL scheme. The acquiring business could also inherit any historic debts of the other business and would be required to conduct the same calculations for that business.

[15] Clause 5(3), Part 2 of Schedule 1.

The Bill provides that employers may make 'reasonable assumptions' in the calculation of debts where there is 'insufficient information' available in the context of a payment arrangement for a historical debt. It also enables the Minister to make Regulations to determine assumptions that may be made in working out that debt.[16]

However, the Bill sets out requirements for an unpaid levy payment arrangement, which must include 'assumptions' about the wages and employees covered by the arrangement. This only allows for such assumptions to be made in relation to the calculation of employees' remuneration in relation to incentive-based payments and bonuses.[17]

Recommended amendment: Expand the range of factors for which 'permissible assumptions' may be made in calculating historic employee remuneration

- In some cases, businesses with historic liabilities may be required to consult employee records going back years to decades in order to calculate remuneration for individual employees. In many cases, it will not be possible to arrive at fully accurate calculations.
- This problem applies not only to incentive-based payments and bonuses but also to the calculation of employees' hours of work, and whether those hours were 'ordinary' hours paid at base rates, or additional hours paid at higher rates.
- Where an employer has acted in good faith and its available records to not allow it to calculate historic remuneration with precision, the Bill should allow for 'persmissible assumptions' to be made in relation to all elements of remuneration.

[16] Clause 39G, Part 2 of Schedule 1.
[17] Clause 11(c), Part 2 of Schedule 1.

FURTHER AMENDMENTS TO COAL LSL LEGISLATION THAT SHOULD BE PURSUED FOLLOWING PASSAGE OF THE BILL

The intent of the Bill is to address the problems faced by businesses such as Orica, who have found themselves with unexpected historic liabilities that are now payable to Coal LSL. The Bill is a welcome development in providing greater commercial certainty to those businesses moving forward.

The Bill is not intended to make any other changes to the Coal LSL scheme beyond those necessary to achieve this objective.

However, it would clearly be desirable for future legislation to address the uncertainty in the definition of coal mining 'employee' currently contained in the Act. It was the uncertainty surrounding this decision that gave rise to the Court proceedings in the first place. In each case, the two employers, acting in good faith, had concluded that they were not covered by the scheme. Coal LSL had a different view, which was ultimately supported by the Court.

Each of the Court decisions, particularly *Orica*, point to the level of complexity inherent in the definition. In *Orica*, Coal LSL's position was upheld by the Court in relation to some categories of Orica's employees, but not others. Coal LSL is now appealing this ruling in the High Court.

It is clearly an unsatisfactory state of affairs for all parties if it is necessary for High Court litigation to determine the actual meaning of a key legislative provision such as the definition of 'employee' in this case.

The definition under the Act has never been updated since it was first enacted. The level of uncertainty and litigation that it has generated shows there is a clear need for it to be updated to provide greater certainty. This would clearly be in the interests of all parties.

The MCA respectfully recommends that the government consider further legislation to clarify the definition in order to avoid such problems in future. The MCA is confident that appropriate amendments could be developed that accommodates the interests of all parties, namely businesses, workers, unions and Coal LSL. The MCA would be pleased to participate constructively in any process that may be appropriate to develop such amendments.