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REVIEW OF THE COAL INDUSTRY LONG SERVICE LEAVE FRAMEWORK

12 July 2021

Australian
Chamber of Commerce
and Industry

Australian Chamber of Commerce and Industry

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1. INTRODUCTION

1. This ACCI submission responds to the Australian Government's Review of Coal Mining Industry Long Service Leave (LSL) Framework, announced by the Attorney-General and Minister for Industrial Relations, and the Assistant Minister on 1 June 2021.[1] We thank the Minister and Assistant Minister for the Terms of Reference, and for establishing this review.

ACCI's Engagement with the Coal Industry

2. ACCI members represent some businesses directly operating coal mining operations (holding licences to extract black coal) many of which are likely to also be members of mining industry bodies, or otherwise represented.

3. However there is particularly strong representation and engagement by ACCI and our members with those ancillary, supporting, contracting and supply chain entities that periodically contribute to the industry or undertake work at mine sites, but which are not at any point (to go to one of our core contentions and major issues in this inquiry) undertaking the business of black coal mining, or holding a licence to mine black coal.

4. This is addressed in Section 2, as is the need to properly delineate what is and is not the coal industry for the purpose of determining eligibility and contributions into Coal LSL.

ACCI Priorities and Focus

5. ACCI does not seek to address / address in detail considerations such as:

   a. The organisational culture of Coal LSL as an agency.[2]

   b. Risk management practices in the work of Coal LSL and dispute resolution.[3]

   c. Fraud or breaches in good governance.[4]

   d. Internal audit of the operations of Coal LSL.[5]

   e. Investment management.[6]

6. Put crudely, ACCI's primary concern is not what happens to the money after it goes into Coal LSL. We are primarily focussed on requirements to pay into the fund, their scope and how they are administered (Sections 2 and 3). We do make some consequential recommendations regarding the future composition of the directors of Coal LSL (Section 4).

[1] https://www.ag.gov.au/industrial-relations/publications/coal-lsl-review
[2] Term of Reference 1(a)(iii)
[3] Term of Reference 1(a)(ii)
[4] Term of Reference 1(a)(v)
[5] Term of Reference 1(a)(vi)
[6] Term of Reference 1(a)(vii)

7. Section 5 posits some more fundamental questions raised by this inquiry and wider developments impacting, or foreseeably likely to impact, on the actual black coal industry (not the distorted definition of the industry presently used to determine Coal LSL coverage, which needs to be corrected for balance and practicality). Whilst some of these considerations may not fit neatly within the terms of reference, we request they be engaged with, noted in the final report and drawn to the attention of the Minister and Assistant Minister.

Employer coordination and support

8. Various representatives of employers beyond direct, actual coal mining employers have worked closely together on the legislation, operation and coverage of Coal LSL, particularly since the 2009 and 2011 amendment processes under the Rudd/Gillard Government and more recently following the announcement of this review.

9. ACCI and its member organisations have also had the opportunity to address this matter with colleagues from the Australian Industry Group who have a long and continuous interest in Coal LSL. We have been briefed on the priorities Ai Group intends to raise in this review, and recommendations.

10. As would be clear from the consultations that KPMG convened on 22 June 2021, ACCI shares the concerns and priorities identified by Ai Group, along with those of our members such as ABI/Business NSW, AMMA, the MBA and NECA.

11. ACCI supports both Ai Group and our members' analyses and recommendations, with a particular emphasis on those directed to the coverage of Coal LSL and those employers and employees that should properly be excluded from making contributions. (See Section 2).

2. WHO SHOULD PAY IN, FOR WHICH WORK?

12. What should the scope of the coal industry be for determining liability under the Coal LSL scheme, who should pay in, in which circumstances, for which employees? Which employers and employees should instead be subject to the otherwise prevailing community standard approach to LSL under state legislation which is based on long service with a single employer?

13. ACCI's position and experience is that portable LSL is inherently flawed and unjustifiable and that it should be wound back in favour of community standard LSL based on service with a single employer wherever possible. Extending LSL portability to additional enterprises seems entirely without merit or regard to contemporary and foreseeable labour market and competitive trends and circumstances.

14. Inherent problems, risks and policy and governance hazards arise from the incentives and interests triggered by any attempt to make contributory entitlements / financial provision for employer obligations portable or to remove their administration from employers (along with the potential to earn interest on monies provisioned for LSL under accounting standards) in favour of 'independent' administration.

15. The concerns and risks inherent in portability schemes multiply and are exacerbated where:

    a. There are problems, ambiguities, impracticalities, damaging anomalies or even injustices arising from ambiguity in scope and coverage on which enterprises and on which work triggers requirements for contributions into a portable scheme, or from inappropriately framed scope and legislative error due to rushed implementation.

        i. These are not simply problems for potential employer contributors to a scheme. Ambiguity, variability and double dipping between Coal LSL and community standard LSL for those who work <u>at</u> coal mines (<u>not in them or for those who own and operate them</u>) also harm employees, for example by exacerbating risks of underpayment and error.

        ii. We understand that variability or changeability in requirements to pay into Coal LSL between different periods of work, or for work at different sites on different contracts also serve to delay payments to employees.

    b. There are potential moral hazards for Coal LSL and its governance through a perception that some interests have or may have an interest in more extensive coverage, or to resolving the ambiguity created by poor drafting and rushed legislating in favour of an expansion or encroachment of mandatory LSL Coal obligations beyond any legitimate or originally intended scope of black coal industry employment.

        i. This point is advanced without reference to any particular director or staff member, current or former, and without reference to any particular decision of the Coal LSL Board.

ii. This is a general hazard and risk inherent in the current structure. An incentive, or perceived incentive, exists for black coal industry employers (the owners and operators, licensed to operate a coal mine classified under ANZSIC code 0600) to favour broadening the contribution base / scope of the scheme as a means to potentially extend the payment pool and reduce or freeze their contributions over time. Where coverage is extended, the employer needs to start paying levies for the relevant employees straight away even though those employees will not receive any long service benefit until they have had 8 years qualifying service.

1. Such hazards and risk incentives are inherent in workers compensation, liability pools following litigation, and all compulsory licencing or insurance pooling models subject to compulsory contributions.

2. Every core and clearly mandatory contributor always has an incentive, or the perception of an incentive to rope in additional contributors to moderate their costs.

iii. This concern may well be exacerbated in one likely scenario for the black coal industry. If Australia's domestic reliance on black coal decreases, and exports decrease consistent with global pressures to reduce emissions, it is likely that the number of currently contributing employers will shrink as would their aggregate contributions. Pending further consideration ACCI's view would then be that the scheme needs to be closed, subject to reverting to community standard LSL and a properly considered pay down / legacy arrangement.

iv. However there is clearly a risk of incentives for actual, direct black coal industry employers that are unambiguously bound to contribute to the scheme to seek to broaden the contribution base in such circumstances. Again this is a logically derived risk identified without regard to or any criticism of, or association with, any actions of any coal industry business or any board member.

16. We thank Ai Group, ABI and others for setting out the history of coverage of the scheme and what seems frankly a rushed and botched approach to addressing unintended consequences at the point of transition to modern awards and the National Employment Standards (NES) under the former Rudd/Gillard Government.

17. This appears simply the latest in a series of problems that have come to light over time as a function of the haste and overambition with which changes were made to the former Workplace Relations Act 1996 to become the Fair Work Act 2009.

18. This is also indicative of the adverse consequences for employers and employees arising from the unwillingness of successive Australian Senates to constructively consider amendments to industrial legislation to address anomalies and errors that inescapably arise following the ambition and scope of change pursued by the former government.

19. ACCI shares concerns regarding rushed and partial consultation at the point at which Coal LSL amendments were developed in 2009 and at which they were legislated. In fact the failure to properly follow and trigger the Committee on Industrial Legislation (COIL) process appears to represent a failure of the then Australian Government to comply with Australia's International Labour Organisation (ILO) treaty obligations under ILO Convention 144 (*Tripartite Consultation (International Labour Standards) Convention, 1976*). ACCI agrees with Ai Group that this represented an appalling lack of appropriate process, the practical damage of which is still being suffered by those inappropriately and unforeseeably drawn into the Coal LSL scheme.

20. The problems highlighted in this submission and others are precisely what happens when industrial relations legislation is pursued without applying the well accepted consultation procedures we have developed in Australia.

21. This review is an opportunity to identify to government options to remediate the practical consequences of the procedural and consultative failures of the previous government.

22. In essence the key concerns appear to encompass:

    a. The definitions of eligible employee and of the black coal mining industry in the various pieces of Coal LSL legislation, concerns which were exacerbated / multiplied by the coverage of the modernised Black Coal Mining Industry Award in 2010 (noting in fairness to the Fair Work Commission that the award scope was never set with regard to its application to determine obligations to Coal LSL for non-coal industry employment).

    b. Ambiguity created by broad reference to employees employed in the industry, where coal is mined, and in connection to the industry. In addition to the damaging imprecision and definitional failures of these concepts, what seems to be missing is:

        i. Employment by an employer holding a black coal mining license, owning or operating a black coal mine. If this requirement were added, ambiguities would be minimised and there would be no scope for Coal LSL to demand contributions from employers beyond any realistic community conception of the black coal industry, and which does not risk the moral hazards and self-interest driven risks outlined above.

        ii. A clear exclusion all of those working temporarily or episodically on black coal mine sites but not employed by black coal businesses. We thank colleagues for the example of the genuinely embedded maintenance employee versus those who temporarily participate in for example repair upgrade or shut down work at a black coal mine site, and who then leave the black coal workplace with no set direction or plan to return.

        iii. This seems to capture precisely the concern and impracticality of the legislative status quo. The starting point for a proper delineation of coverage of Coal LSL should be broadly only demanding contributions from those or on behalf of those that could reasonably and sensibly be understood to be operating on a sustained basis in the black coal industry, directly employed by businesses that own or operate coal mines holding a license to mine black coal.

iv. (The preceding is submitted without prejudice to the application of Coal LSL obligations on labour hirers).

Solutions

23. We have been briefed on the various proposed solutions to the coverage problems to be advanced by Ai Group. These are constructive, sound and reasonable proposals to address clear problems, and would start to resolve the ambiguities, damage and risks created by current law and practice. ACCI joins Ai Group in commending their adoption by the reviewer's as recommendations to Government.

ANZSIC Coding

24. This review is also not operating at large or subject to open contest as to what and who does or does not constitute any particular industry in Australia, in this case employment in the Black Coal Industry.

25. We have a powerful, world leading delineation tool to classify every workplace and businesses in Australia into one industry or another, to a substantial level of rigour and consistency through the ABS ANZSIC coding framework (Australian and New Zealand Standard Classification Index).

26. ANZSIC classifies business units by industry down to a significant level of detail. According to the ABS:

> *2.9 The conceptual framework adopted for the development of ANZSIC 2006 uses supply-side based industry definitions and groupings. Using this approach, units engaged in similar productive activities are grouped together. Units in an industry will therefore exhibit similar production functions (a term used to describe the transformation of intermediate inputs, through the application of labour and capital, to produce outputs).*

27. At its core ANZSIC is about grouping like with like, and delineating comparable workplaces and businesses from those that are different, and should be assessed as different.

    a. ANZSIC Code 0600, delineates Coal Mining from all other classifications of businesses and workplaces.

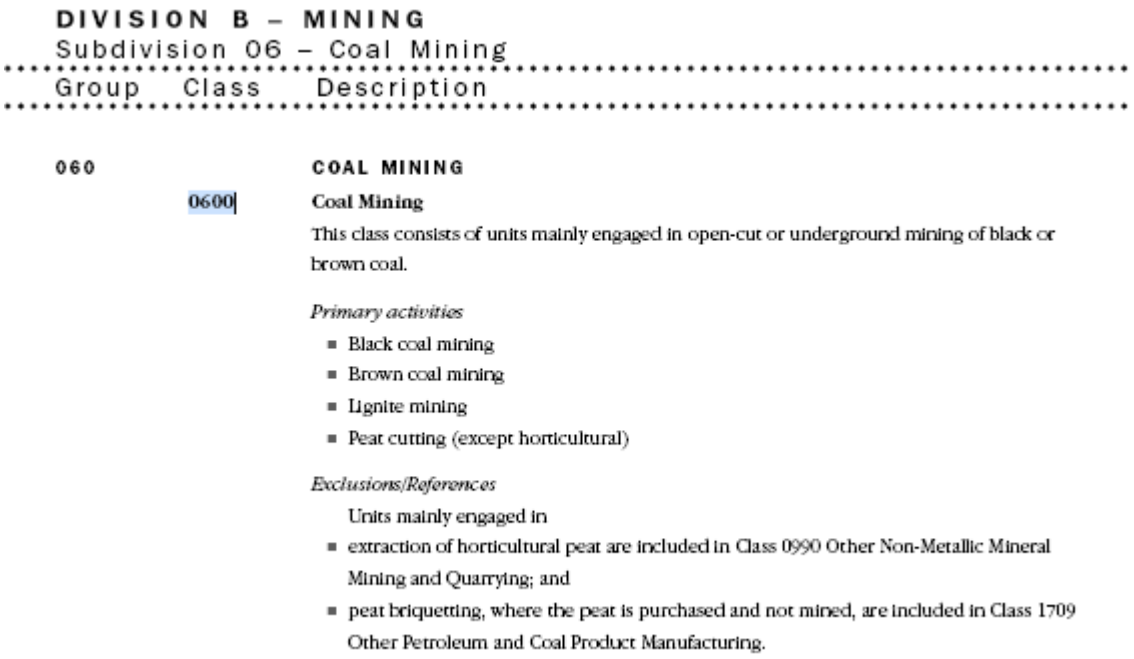
    b. Coal Mining is delineated from other mining operations, such as metalliferous mining, Non-metallic mineral mining, quarrying, exploration, and from oil and gas.

    c. Coal Mining is clearly delineated from mining services (see below) And from various non coal mining activities that we understand are being inappropriately drawn into the coverage and contribution obligations of Coal LSL.

    d. The key omission from ANZSIC Code 0600 seems to be not delineating black coal mining from brown (lignite), however:

        i. We suspect the ABS captures a further level of delineation below the 4 digit level.

ii. An effective proxy to distinguish black from brown coal mining would be excluding Victorian based enterprises.



DIVISION B – MINING
Subdivision 06 – Coal Mining

Group	Class	Description
060		**COAL MINING**
	0600	**Coal Mining**

This class consists of units mainly engaged in open-cut or underground mining of black or brown coal.

Primary activities

- Black coal mining
- Brown coal mining
- Lignite mining
- Peat cutting (except horticultural)

Exclusions/References

Units mainly engaged in

- extraction of horticultural peat are included in Class 0990 Other Non-Metallic Mineral Mining and Quarrying; and
- peat briquetting, where the peat is purchased and not mined, are included in Class 1709 Other Petroleum and Coal Product Manufacturing.

28. What is more significant and relevant is the unambiguous distinction in ANZSIC between 0600 Coal Mining and, for example, businesses primarily engaged in:

a. Mining and Construction Machinery Manufacturing (ANZSIC Code 2462).

b. Repairing mining and construction equipment (ANZSIC Code 9429 Other Machinery and Equipment Repair and Maintenance).

c. Units engaged in trade services such as the installation of electrical wiring or fittings in buildings or other construction projects, or plumbing services (ANZSIC Code 3232 Building Installation Services, 3233 Air Conditioning and Heating Services).

d. Mining machinery or equipment wholesaling, included within Other Specialised Industrial Machinery and Equipment Wholesaling, (ANZSIC Code 3419).

29. The ambiguity and contestability which is so concerning to the business community which periodically or episodically, temporarily or on contract basis provides ancillary services to black coal mining businesses, but at no point understands it becomes part of the black coal industry, is addressed and comprehensively clarified in the ANZSIC framework.

30. To be classified under ANZSIC code 0600 a business unit must be mainly engaged in mining black or brown coal, which is far clearer and more practical and applicable than either the definition (and alternative definitions) of eligible employee under s 4 of the Coal Mining Industry (Long Service Leave) Administration Act 1992 or cl 4 of the Black Coal Mining Award.

31. The ANZSIC Code Book also contains three interesting practical clarifications that are instructive on matters raised by in this review / practical problems regarding Coal LSL:

32. **Manufacturing, sale and installation**: ANZSIC says in regard to these activities:

> *5.33 It is common for some business units engaged in manufacturing, construction, and wholesale or retail activities to install the products they sell to other businesses or households e.g. a business selling hot water systems to members of the public may arrange the installation of the system in the purchaser's dwelling.*
>
> *5.34 Where the installation is performed by the business unit selling the product, the installation activity is treated as a secondary activity of that unit. This is because the value added of the installation activity is normally less than that of the principal activity undertaken. Where installation activities are carried out as a secondary activity, by units mainly engaged in another activity, the units are classified according to their main activity.*
>
> *5.35 The installation activities performed by these units are incidental to the primary activity of the unit (i.e. an elevator manufacturer may also install the lift in a building). Consistent with the classification principle of predominance, these units are classified according to their main activity (i.e. in the case of the elevator manufacturer to the appropriate Manufacturing class).*
>
> *5.36 However, there are many units that specialise in providing installation activities only. In these cases, 'installation activities' are the predominant activity for the units and are coded accordingly. The classification contains a number of classes where such installation activities are the primary activities of the class.*

33. At no point does this indicate the manufacturing sale and installation as services or contributions to a black coal mining enterprise or undertaking is classified under 0600, becomes itself classified under 0600.

34. We highlight the ABS example of installing an elevator or lift. This installation activity is incidental to the manufacture of the lift. At no point does its installation in for example an office building see the elevator company transfer over to the property sector or for example the business services sector or banking and finance sector that may constitute the overwhelming clientele and tenancy of the building into which the elevator is being installed.

35. The analogy is very clear. A business in the business of manufacturing plant or equipment, that also installs and maintains such equipment does not cease to be in that business purely because they may do so on a coal mining site on occasion.

36. The elevator example points to another potential issue for some businesses, which is competing obligations to different portability funds for LSL which in this case might be in both construction and black coal. This means a business may have three different sources of contribution obligations, and perhaps even the prospect of a triple dip – one obligation to Coal LSL, one to a comparable portable scheme in construction and another for any remaining obligations under general community standard LSL. This would be a complete nightmare.

37. **Repair and Maintenance**: ANZSIC addresses another area of anomalies arising from the current application of the Coal LSL scheme:

> *5.25 In ANZSIC 2006, units mainly engaged in repair and maintenance activities involving similar production functions to those used for the creation of the original products, are classified to the industry where units creating the new product are classified.*
>
> *5.26 In these cases, the degree to which the factors of production (capital and labour) are interchangeable between the creation and the repair and maintenance activities is very high. These repair and maintenance activities are included in the appropriate classes.*
>
> *5.28 Where units are mainly engaged in repair and maintenance activities involving different production functions to those used for the creation of the original products, they are classified to the relevant classes in the Other Services Division. Subdivision 94 Repair and Maintenance has been created within that division for repair and maintenance activities of this type.*
>
> *5.29 Examples include:*
>
> *- automotive repair and maintenance (Classes 9411, 9412 and 9419);*
>
> *- domestic appliance repair and maintenance (Class 9421);*
>
> *- electronic and precision equipment repair and maintenance (Class 9422);*
>
> *- other machinery and equipment repair and maintenance (Class 9429); and*
>
> *- clothing, footwear and personal accessories repair (Class 9491).*
>
> *5.30 While all units mainly engaged in repair and maintenance activities involving distinctly different production functions are classified to this subdivision, some repair and maintenance activities are predominantly undertaken by units which either create the new products, or trade them. Creation of a separate class for these repair and maintenance activities anywhere in the ANZSIC would likely result in low coverage ratios.*
>
> *Units undertaking these activities as their predominant activity are classified to Class 9499 Other Repair and Maintenance n.e.c.*
>
> *5.31 Where repair activities are carried out as a secondary activity by units which are mainly engaged in some other activity, the units are classified to the class to which their main activity is primary.*

38. We can see nowhere in this framework a circumstance in which repair or maintenance work for an industry or on premises of a business clearly within another industry becomes classified under that industry.

39. The maintenance of repair activities falling within Subdivision 94, repair and maintenance do not become activities under 0600 Coal Mining.

40. **Labour Hire**: There is also a discussion in the ABS ANZSIC publication on the delineation of ANZSIC 2006 Class 7212 Labour Supply Services, which is defined as:

> *including units mainly engaged in supplying their own employees to other businesses on a fee or contract basis i.e. where assignments are mainly on a temporary or short-term basis and performed under the supervision of staff of the client unit.*
>
> *5.20 These units have large numbers of staff on their books and may specialise in the provision of staff in particular industries e.g. trades, nursing, office work etc.*
>
> *5.21 In order to be classified to this ANZSIC class, a unit must satisfy the following conditions:*
>
> *- the service provided to the client business must be one of labour supply;*
>
> *- personnel supplied to the client remain employees of the unit providing the labour supply service;*
>
> *- assignments are performed under the supervision of staff of the client business; and*
>
> *- the labour supply unit is paid a fee by the client business for supply of the labour.*
>
> *5.22 As noted above, where a unit provides the entire workforce, including the supervisory staff, to the client business, it is classified according to the nature of the activity being undertaken for the client business. The length of time covered by the contract is not a determining factor in these cases.*

41. The current ambiguities created by competing approaches to connection to the industry, or to duties appear avoided or resolved by ANZSIC, as is confusion between award scope and statutory scope.

42. ACCI:

a. Encourages the reviewers to step back and compare the clarity that ANZSIC offers compared to the current melange of competing award and statutory definitions of scope and obligation which are causing so much ambiguity and concern, and creating unacceptable hazards and governance risks.

b. Suggests there may alternatively be scope for example to expressly identify the ANZSIC framework in legislation as able to assist in the resolution of ambiguities or disputed coverage, or as persuasive and illustrative of the coverage that should and should not apply to Coal LSL.

c. More broadly, invites the reviewers to consider the utility of the ANZSIC framework to resolving the ambiguities, anomalies and injustices which gave rise to this review. Encourages consideration of scope for any legislative role that ANZSIC may play in defining or clarifying the scope of Coal LSL contributions / contributors.

d. Notes the possible relevance and utility of ANZSIC to the making of any regulation excluding persons from the definition of eligible employee and the Coal Industry Long Service Leave Administration Act, as proposed by Ai Group.

e. More generally urges consideration of ANZSIC as an illustration of:

   i. A reasonable person or community understanding of what does and does not constitute the black coal industry in Australia.

   ii. The problems that can be avoided by an unambiguous and comparatively simple delineation of the black coal industry from other industries.

Calling Out a Future Scope Issue – Decommissioning

43. Finally for this section, if some foreseeable scenarios come to pass and Australia has fewer active coal mines in a smaller or shrinking industry, a future consideration may be the extent to which decommissioning, and environmental restoration post coal mining is / should covered by the scheme, and subject to Coal LSL.

44. Subject to further consideration and engagement with employer colleagues, both the actual coal industry business that would be closing down or reducing some of their operations, and those who may be contracted to do the decommissioning work…:

a. Decommissioning is precisely the type of not directly extractive activity which is ancillary or supporting to the coal industry proper which does not belong within the scope of coverage of Coal LSL, and that should not be exposed to double dipping.

b. If a mine ceases producing coal and moves from production into decommissioning or remediation, then any employer directing work be undertaken on what would become a former mind site should no longer be engaged in the black coal mining industry and no longer have any obligation to pay into Coal LSL.

c. Decommissioning and clean-up is also clearly temporary, project-based work of a fixed or limited duration which is unlikely to see employees serve the minimum period for LSL which should not trigger inclusion in the scheme obligations.

d. Foreshadowing a point in Section 4, any decline in the industry or move towards long term or widespread decommissioning (if Australia is less able to export coal, and moves away from its use in domestic power generation or more widely) will detract from an insured or contributing base of coal industry employers on LSL, nor would there be sufficient numbers of employees on whose behalf the contributions are being made to keep the scheme sustainable.

e. The answer cannot legitimately lie in broadening the contribution base beyond the actual black coal industry, that would be illegitimate damaging and broaden already significant concerns for enterprises and jobs in particular in coal industry regions.

f. Australia cannot afford to fear or shy away from necessary conversations, in this case questioning the legitimacy or veracity of continuing the Coal LSL scheme, and the case for reverting to the otherwise prevailing community standard LSL under state legislation for black coal industry employees.

3. LIMITING BACKPAY LIABILITIES

45. There is no justification for LSL liabilities, portable or otherwise, to ever extend beyond:

    a. Standard limitations on recovering comparable employment entitlements under employment legislation.

    b. Employers' obligations to maintain employment records under employment legislation, which is 7 years under s 535(1) of the Fair Work Act 2009.

46. If such unbound liabilities are asserted or considered important and relevant, we call for an identification of the rationale and evidence in support, which can then be critically evaluated. There is nothing inherent in LSL which necessitates open ended liabilities, at odds with the vast bulk of Australia's employment laws.

47. To seek to impose liabilities beyond the period for which employment records are kept is fundamentally unsafe for the conduct of business, for compliance with accounting and market disclosure requirements, and for resolution of contested matters of both fact and law.

48. The *Coal Mining Industry (Long Service Leave) Payroll Levy Act 1992 (Cth)* should be amended to provide for a limitation on liabilities to recover unpaid levies consistent with clearly prevailing standards across Australian employment law.

49. To the extent that Coal LSL as an agency may seek to apply an understanding or interpretation at odds with this fundamental and consistent tenet of Australian employment law, that would be demonstrative of the need for corrective amendments to Coal LSL legislation. This is an important integrity matter that needs to be addressed and corrected.

50. Consider a practical example of what we understand Coal LSL's approach may be to the duration and application of historic liability.

    a. A non-coal employer employed an employee for 20 years between 1989 and 2009 in a maintenance capacity that included periods or shifts working on coal mining sites amongst time working on other sites run by enterprises operating clearly in other industries (farms, metalliferous mining, food processing etc).

    b. The employee was correctly paid in full for both long service leave taken, and for the accrued but untaken component at the end of their 20 years service, in accordance with state LSL legislation.

    c. This saw the employee paid 17.3 weeks LSL.

51. According to the logic of the apparent Coal LSL interpretation, that employee could now come forward and claim to have been working in the coal industry throughout, and seek an additional pay out from the scheme for LSL for 100% of their service.

52. Coal LSL would then seek:

    a. 20 years of 'unmade' contributions from the employer for that employee and potentially for every such employee employed back as far as the enterprise was operating (or as could legally be argued under legislation).

    b. Comparable contributions for any and all current and former employees who have worked on coal mines at any point.

    c. Penalties against the business for not having correctly contributed in the first place despite having unambiguously met its general long service leave obligations in full.

    d. All these actions and demands would be completely without regard to the monies already paid to the employee, who would be at liberty to clearly double dip, and to tell all his or her former workmates to have a go at securing the same double payment.

    e. The employer could have at every point invested time and money to correctly comply with its employment obligations , on time and in full and then find not only that it had breached obligations to a scheme it had likely never heard of or considered, But that it was exposed to potential double payment for the same service and are both community standard LSL and Coal LSL.

53. That is no one's conception of a fair go. It is inherently inconsistent with the fundamentals of Australian employment law, and the end result for almost all enterprises would be insolvency and job losses.

54. It is potentially worse than that to the extent that the impacts on the contracting or ancillary business leads to any reduction in services to the black coal industry, or imposes additional costs or delays that endanger jobs.

55. Some contractors and maintenance organisations may rationally take the view that they are not interested on a cost benefit basis in providing any services which see their employees undertake work on black coal mining premises due to the additional cost and complication. The consequences of this is additional costs and delays for the black coal industry itself.

56. Both the double dipping and the unbounded retrospective liabilities need to be fixed as priorities and recommended as such to government through this review.

4. GOVERNANCE AND ENGAGEMENT

57. ACCI does not seek to widely address governance considerations. An exception is ensuring proper representation of employers required to pay into Coal LSL in the scheme's governance. It's a rough and inexact analogy, but 'no taxation without representation' broadly illustrates the point.

58. Consistent with Term of Reference 1(b) we have examined s 13 of the *Coal Mining Industry (Long Service Leave) Administration Act 1992*:

> **13 Appointment of Directors**
>
> (1) The Directors are to be appointed by the Minister and hold office on a part-time basis.
>
> (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.
>
> (3) One Director is to be appointed to represent companies engaged in black coal mining in Western Australia.
>
> (4) Two Directors are to be appointed to represent the Mining and Energy Division of the Construction, Forestry, Mining and Energy Union.
>
> (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.
>
> (7) If the Mining and Energy Division of the Construction, Forestry, Mining and Energy Union changes its name or merges with another Division of that Union, the reference in subsection (4) to the first-mentioned Division is taken to be a reference to that Division under its new name or to the other Division, as the case requires.

59. This needs to be updated, particularly if the scope of the scheme / contributors is not narrowed to the actual scope of the actual black coal industry as we urge (restricted to enterprises able to be classified under ABS ANZCIC Code 0600, and to employment by companies owning or operating coal mines and holding a coal mining license).

60. It cannot be assumed that all employers paying into the scheme, or who may be required to pay into the scheme, are represented by the existing director composition under the Administration Act. With absolutely no reference to any current board member or appointing minister, we do not see sufficient representation of the ambitious or expansionary scope of payers that could potentially be drawn into the scheme in the current Coal LSL Board, or of those at risk of being drawn in to Coal LSL by a distorted approach to the scope of the industry arising from the legislative haste and error of the former government.

61. We stand to be corrected, however there seems an inescapable cleavage of interests between:

    a. Actual black coal industry businesses, holding licenses to mine black coal and having a natural interest in broadening the contributions base to save money / moderate their contributions.

    b. Other employers who have never seen themselves as part of the black coal industry, who the person on the street would not associate with the industry, who have never been employed under black coal awards, that do not hold a license to extract black coal, and that are not classified under ANZSIC Code 0600 as black coal employers.

62. Section 13 of the Administration Act should be amended to provide for the appointment of two (2) additional directors to represent contributors or potential contributors not solely on the current geographical basis but also on a sub-sectoral basis, and in particular focusing on those not currently represented. The two additional directors might be appointed with regard to their connection with:

    a. Contractors and suppliers into coal mines from outside the black coal mining industry.

    b. Labour hire providers into the coal industry.

63. The employer members of the National Workplace Relations Consultative Council (NWRCC[7]) could be directed to make recommendations to the Minister for such additional employer appointments to the Coal LSL Board.

64. ACCI and its members would have no objection to a consequential expansion in union representation if employer numbers expanded from 3 to 5, or from 3 to 4.

Stakeholder Engagement

65. Term of Reference 1(c) is as follows:

[7] Constituted under: https://www.legislation.gov.au/Details/C2004C00091

Any other proposals that would ensure the efficient and transparent administration of the Fund and the corporation more generally, including highlighting existing successful practices and identifying opportunities to engage better with stakeholders.

a. All employing businesses paying into the scheme, or under pressure to pay into Coal LSL, need to be treated as stakeholders / clients, even where objecting to demands for contributions / in some disagreement with Coal LSL.

b. We advance this consideration with absolutely no negative reflection on the staff or operations of the agency, merely to emphasise the importance of the agency demonstrating complete disinterest on whether a particular employer or activity is covered by the scheme, and the highest possible standards of customer service and public sector standards for all clients, including small to medium sized enterprises that have no history in or identification with the black coal industry.

5. MORE FUNDAMENTAL QUESTIONS

66. Significant questions are raised by this inquiry beyond those set out in the Terms of Reference. We raise the below matters for further review and consideration, and request that they be both identified and addressed in the final report, and be drawn to the Ministers' attention.

Current and Future Justification for Coal LSL

67. ACCI questions the following underlined claim from the Coal LSL website:

> *Our purpose is to connect employers and employees with long service leave entitlements for the good of Australia's black coal mining industry.*
>
> *This drive stems from our proud history of ensuring that long service leave entitlements are portable as employees transition between roles within an industry that can offer challenging working environments.*
>
> *This is as relevant today as it was when our journey began 70 years ago. As Australian black coal mining transitions in a global economy, we remain constant. Our commitment is to ensure the security of the long service leave entitlements of eligible employees of the Australian black coal mining industry, for the good of the industry.*

68. Such a claim needs to be critically evaluated based on contemporary evidence and foreseeable circumstances, such as a declining black coal industry. Questions arising include:

> ***Why is there a bespoke scheme for LSL in the Coal Industry in the 21st Century?***
>
> ***Why should coal mining employees get more LSL / access to LSL after fewer years' service than other employees?***
>
> ***Why wouldn't coal industry employees get standard community LSL, under the Long Service Leave Act 1955 (NSW), Industrial Relations Act 2016 (Qld) etc for long service with a single employer?***
>
> ***Is Coal LSL and the portability of LSL in the coal industry actually as relevant as it was in 1949 in the ashes of a massively divisive strike which a Labor government brought in the military to resolve?***

69. Our broad sweep understanding is that:

a. There were a number of unique approaches to industrial relations in the black coal industry after 1949.

b. From the 1980s Australia has sought to 'mainstream' the industry, unwinding bespoke approaches and reintegrating black coal employment into general institutions and legislation, most notably through the abolition of the Coal Industry Tribunal in 1995.

c. A variety of other bespoke arrangements at the state level for the industry such as the New South Wales Coal Compensation Review Tribunal have also abolished.

70. At some point consideration will need to be given to:

a. Repealing the Coal Mining Industry (Long Service Leave) Administration Act 1992 and the Coal Mining Industry (Long Service Leave) Payroll Levy Act 1992, subject to appropriate transitional arrangements, and a clear, transparent and suitably timed unwinding of the scheme.

b. Abolishing Coal LSL, returning the money to employers to meet obligations under state LSL legislation of general application where necessary, subject to appropriate provision for employees.

c. On a transitional basis, maintaining the scheme only for employees entering the industry / having contributions made on their behalf up to a set date (e.g. 1 January 2024), and:

i. Closing the scheme to new employees entering the industry after that date.

ii. Expressly excluding those decommissioning or environmentally restoring former coal mines after extraction ceases.

iii. Incentivising account holders to exit the scheme, with due attention to the interests of both employers and employees.

71. This is far from without precedent.

a. In both the public and private sectors a number of employees (many of whom are still in the workforce) entered industries / took up jobs in the 1980s on the basis of defined benefit superannuation. These arrangements were discontinued in the 1990s, and defined benefits schemes closed to new entrants, in favour of community standard, SGA superannuation after 1992 (or contributory award superannuation prior to that). With the support of suitable preservation, transition, and transparency employees can work beside each other earning different amounts of superannuation, and there appears no reason why such an approach could not also apply to LSL in the black coal industry.

b. LSL has increased at various points, and service up to a particular point accrued at one rate (lower), then from that point onwards at another, higher rate. It is not unknown for those that have been in the workforce longest to have preserved entitlements both higher than new entrants, or on an all up basis, lower than those of those who have been employed later.

Is Coal Mining Actually / Still Unique?

72. The Terms of Reference include the following:

Coal LSL faces a unique operating environment that has evolved considerably over its history. This has included a shift over decades to an industry consisting of employers of all sizes, from multinational companies to small site specific maintenance operations, as well as a more diverse and mobile workforce composition as part of contemporary business operating models.

73. Respectfully, is this the case? Has this threshold assumption been critically examined / confirmed based on contemporary evidence? Is the black coal industry unique?

74. As to "*a shift over decades to an industry consisting of employers of all sizes, from multinational companies to small site specific maintenance operations,…"* justifying portability in LSL:

    a. Industries encompassing big businesses (often multinational enterprises) and small, "employers of all sizes" is not unique, it is increasingly the norm. Specialisation, business services, supply chains, innovation and the growth and diversification of our G20 economy all drive industries towards greater diversity of business size.

    b. There is nothing unique about coal mining in this regard.

        i. The aviation industry encompasses Qantas through to single plane charter operators and flying schools.

        ii. As we saw in debates on the RSRT, trucking encompasses massive companies through to small mum and dad operators operating a single truck.

        iii. The mining industry encompasses massive businesses through to smaller players and partnerships, including small businesses in the METS sector (Mining Equipment, Technology and Services).

        iv. Within the Health Care and Social Assistance sector – and within a more specific area such as disability services - there are massive enterprises through to small NDIS providers, or regional services.

75. As to the further claim that "*a more diverse and mobile workforce composition as part of contemporary business operating models"* somehow justifies perpetuating LSL portability, again:

    a. Every industry is becoming more diverse. Why would this justify a bespoke approach to LSL for this industry that is fundamentally at odds with prevailing community standards? In terms of diversity, why would women, migrants, persons with disability overwhelmingly be subject to community standard LSL (and have to serve the community threshold of 10 years to access it), and coal miners a higher portable entitlement, payable earlier?

    b. Where is the proof? How diverse is the employee profile in black coal extraction compared to the Australian community? Specific questions might include:

        i. What percentage of the 53,000 current Employees in the black coal industry with active accounts in the fund are women? Were born outside Australia? Identify as Indigenous? Have disability? Etc.

ii. How does this compare to a comparable diversity distribution across the Australian community, or indeed employment generally in the regions in which black coal is mined?

76. Workplaces are becoming more diverse right across our community; this in no way justifies portability or industry specific approaches to a generic employment benefit such as LSL.

Why Should LSL Be Portable?

77. ACCI does not support portability of LSL, or of any employment benefits, terms or conditions. We do not consider there is any basis to extend portability beyond some unique sectors of on-site construction (and in fact the historic assumptions in that industry behind portability also need to be re-examined).

78. Employers do not concede in any way that particular patterns of labour mobility make out a case for portability of LSL in any industry, nor that outcomes are improved in any industry by LSL portability, or by the maintenance of independent funds to which compulsory contributions must be made. Employers experience of portable LSL schemes are of:

a. Employment costs in excess of those applicable to industry generally.

b. Additional administration and compliance costs and risks.

c. Risks of being hit with substantial back pay style claims, and compliance penalties.

d. What should be contingent liabilities made absolute from the first hour worked.

e. Being denied interest on monies put aside for LSL that is available to employers observing the generally prevailing community standard approaches to such leave.

79. However the converse is a relevant and legitimate consideration – how could there be any case for portability in an industry in which labour mobility or median job tenure / the distribution of job tenure does not differ significantly from prevailing norms / cross industry experience Alternatively, how could there be any case for portability in an industry in which mobility between jobs was declining (a directly foreseeable scenario in black coal)?

80. These questions need to be met with facts and analysis. ACCI requests that consideration be given to a further review into / or a release of detailed information on the following:

An analysis of detailed distributional data from the ABS on (1) labour mobility and (2) job tenure comparing:

- ***Employees working in workplaces classified under ANZSIC Code 0600 Black Coal Mining, subject to a suitable data cleanse to exclude brown coal (lignite) work (which may be as simple as excluding Victorian workplaces from the sample), with***

- ***Employees generally, employees in the same state, and if possible the same region (e.g. the Hunter or Bowen Basin).***

Longitudinal data on the extent to which employees exit and/or re-enter coal industry work, or exit to non-coal industry work or non-labour market participation, and how this compares between those classified on ANZSIC Code 0600 and work in industry generally.

81. Only with this sort of data can an informed decision be made on whether LSL portability should be maintained in the coal industry, and whether and for how long Coal LSL remains relevant, justified or viable.

82. We have included this request for a report on unreleased or detailed data or in this final section on additional considerations, but in reality it is directly relevant to Term of Reference 1(a)(i) on the contemporary composition of the industry and its workforce.

Does the available data indicate an industry that in any way merits LSL portability, both in 2021 and based on forward projections?

Does the data and foreseeable future scenarios for the industry point to Coal LSL being sustainable going forward or does Government need to consider a transitional plan in which the scheme closes, long LSL portability ends in favour of standard community long service leave, and there is potentially some commensurate change in take home pay for those who directly work for organisations owning and operating coal mines (i.e. the industry proper , not the stretched or distorted definition that is currently being applied in the wake of the legislative errors and haste outlined in the Ai Group submission).

83. The ABS released Job Mobility data for February 2021 on 7 July[8], indicating that whomever did this research should not want for current data if disaggregation to the level required is possible.

A Future Less In Which Less Black Coal Is Mined?

84. As signalled throughout this submission, this review is also an opportunity to look beyond the immediate term and to plan for foreseeable future scenarios for the black coal industry, unavoidably raising difficult questions not directly asked in the Terms of Reference or that they seek to exclude.

85. There are millions advocating throughout the world to reduce the use of black coal, and there are international carbon reduction goals and frameworks for emission reductions.

86. Without debating the merits, technologies, pace of change etc, there is undeniably a very real prospect of a smaller and declining Australian black coal industry within the working lives of many of the 53,000 employees on whose behalf contributions are currently being made onto Coal LSL.

[8] https://www.abs.gov.au/statistics/labour/employment-and-unemployment/job-mobility/feb-2021

87. Another trend impacting on coal employment are campaigns to ensure the industry cannot secure finance, which also play into a scenario of less coal being mined, by fewer employees, working at fewer coal industry workplaces in coming years. It is also a scenario which would contribute to a declining number of current coal mining employees on whose behalf contributions are being made into the scheme.

88. No matter what the replacement technologies may be for power generation or other uses of black coal, and without dismissing new more efficient, lower emission black coal technologies, there is every chance that Australia will see less and less black coal mined, by few operators, at fewer sites, employing fewer people, in coming years.

89. Another scenario is an extended period of operation prior to the scheduled closure of a number of coal mining operations, as we have seen in power generation and car manufacturing.

90. A smaller industry, and even a closing industry scenario needs to be considered in determining future LSL for the coal industry.

91. A clearly foreseeable and consequential scenario is further aggregation into a reduced number of coal mining operations and quite simply fewer employing entities offering coal industry work in the Bowen Basin, Hunter Valley etc. Or perhaps fewer mines accompanied by greater use of labour hire arrangements on a finite, transitional basis as employees exit the industry and cannot be replaced by direct coal employees.

92. This would beg the question as to whether there should be portable LSL in the industry at all. If mobility between employers is likely to decrease (perhaps as the age profile of the industry increases and employees who are re-employable elsewhere and want work secure such work outside coal) does the stated case for portability fall away?

93. Another consideration is whether replacement or transitional coal technologies may change the occupational, skills and technical profile of work in the industry and the implications of such changes for the need for portable LSL. It may be that skills changes in the industry increase the mobility and re-employability of employees who may formerly have fallen under the Coal LSL scheme.

94. Employers would very strongly object to any assumption (direct or tacit) that the answer to a declining contributions base in the actual black coal extraction industry would be to extend the definition of the industry to compel contributions from employers that bear only an incidental relationship to or contact with coal mining, or do so on only a temporary or occasional basis.

95. Employers in general employment, or those providing contracted services to a range of operations, which may include coal but not solely be restricted to coal mining, would very strongly object to being drawn into coal LSL in relation to their employees to bolster a declining contributions base.

96. If actual black coal industry employers cannot sustain a portable LSL scheme it is the scheme which needs to change / be reconsidered not further distortion of the definition of the black coal industry or who should make compulsory contributions.

ABOUT THE AUSTRALIAN CHAMBER

The Australian Chamber of Commerce and Industry (ACCI) is the largest and most representative business advocacy network in Australia. We speak on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses are also able to be members of our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, employing over 4 million Australian workers.

The Australian Chamber strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

OUR MEMBERS

Australian Chamber of Commerce and Industry

CHAMBER

Business SA Chamber of Commerce and Industry South Australia

Canberra Business Chamber

Chamber of Commerce Northern Territory

CCIQ Powering business potential

Chamber of Commerce and Industry WA

NSW Business Chamber

TCCI Invigorating Business

Victorian Chamber of Commerce and Industry

INDUSTRY ASSOCIATION

accord

AMCA

Animal Medicines Australia

afa Great advice for more Australians

ais nsw

Australia Arab Chamber of Commerce & Industry

AADA

Australian Beverages

ADA Australian Dental Association

ADIA Australian Dental Industry Association

AFEI Australian Federation of Employers & Industries

Australian Gift & Homewares Association

AHA

Australian Institute of Credit Management

Australian Made

AMPC

AMMA Australian Resources & Energy Group

AMTA Australian Mobile Telecommunications Association

APMF

ARIA Australian Recording Industry Association

ARITA

Australian Retailers Association

ARTA

ASMI Australian Self Medication Industry

Australian Steel Institute

ATEC Australian Tourism Export Council

ATIC Australian Tourism Industry Council

ATA Australian Trucking Association

AVA Australian Veterinary Association

BIC Bus Industry Confederation moving people

Business Council of Co-operatives and Mutuals

Caravan Industry Association of Australia

Cement Concrete & Aggregates Australia

Chemistry Australia

CAA

CMAA

Consult Australia

COPHE Council Of Private Higher Education

CPA Australia

CLIK Australasia

Customer Owned Banking Association

Direct Selling Australia

Exhibition & Event Association of Australasia

Fitness Australia

Franchisee Federation

HIA

LFRA Large Format Retail Association

Live Performance Australia

Master Builders Australia

master plumbers Expert. Committed. Professional.

MTAA Medical Technology Association of Australia

Medicines Australia

NALSPA

NDS National Disability Services

neca national electrical and communications association

nesa national employment services association

National Fire Industry Association

NRA National Retail Association

NRMA MYNRMA.COM.AU

NSW HCA The voice of the Hire Car Industry

Outdoor Media Association

The Pharmacy Guild of Australia

ppca

Primerus The World's Finest Law Firms

rcsa Leading in the world of work

Restaurant & Catering

S P

The Tax Institute

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VACC You're in good hands