



# Enhancing certainty and fairness:

**Independent Review of the Coal Mining  
Industry (Long Service Leave Funding) Scheme**

8 December 2021

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# Foreword

Senator the Hon Michaelia Cash  
Attorney-General and Minister for Industrial Relations  
Parliament House  
Canberra ACT 2600

*cc: Senator the Hon Amanda Stoker*

*Assistant Attorney-General and Minister for Industrial  
Relations*

Dear Minister Cash

## Independent Review of the Coal Mining Industry (Long Service Leave Funding) Scheme

We present this report as an Independent Review of the Coal Mining Industry (Long Service Leave Funding) Scheme consistent with the Terms of Reference dated June 2021 (the Review).

The Coal Mining Industry (Long Service Leave Funding) Corporation (the Corporation) is a corporate Commonwealth entity established under the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth). The Corporation's role is to administer the federal coal mining portable long service leave scheme which was established in 1949 for the benefit of employees working in the black coal mining industry (the Scheme). Since its inception, there have been considerable changes to the Corporation's operating environment coupled with shifts in workforce composition within the industry.

The Review is an important opportunity to consider the Scheme's current operation to ensure it offers a fit-for-purpose framework into the future. To that end, we trust this Review will help resolve issues of the past and assist the ongoing administration of the Scheme into the future.

We express our appreciation to the staff of the Attorney-General's Department for their assistance to the Review, and to the Corporation, for its cooperation during the Review.

We also wish to express our thanks to the external industry stakeholders and members of the public who attended consultation forums, provided written submissions, and actively engaged in the Review. Evident from the consultation process is that the stakeholder landscape consists of many individuals and organisations with deep industry expertise, who are committed to engaging in constructive dialogue for the purpose of improving the operation of the Scheme.

Yours sincerely



Philip Jones-Hope

Partner

**KPMG**

# Contents

Executive Summary	4
Chapter 1: Introduction	19
Chapter 2: Background	24
Chapter 3: Overview of Current Arrangements	27
Chapter 4: Key Features of a Best Practice Future Scheme	47
Chapter 5: Analysis and Assessment	56
Chapter 6: Options to Advance the Recommendations	115
Appendices	127

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February 2022

# Executive Summary

Purpose

Key Findings

Recommendations

Options to Advance the Recommendations



## Purpose

On 1 June 2021, the Attorney-General and Minister for Industrial Relations, together with the Assistant Minister for Industrial Relations, announced an Independent Review of the Coal Mining Industry (Long Service Leave Funding) Scheme dated June 2021. The Review has arisen from increased levels of public scrutiny and a desire to assess whether the legislative framework currently regulating the Scheme remains fit-for-purpose.

## Key Findings

The Scheme is a Federal Government initiative dating back to 1949. Since 1992, the Corporation has administered long service leave (LSL) entitlements on behalf of eligible employees in the black coal mining industry. Both the industry and the Corporation have undergone significant change in the subsequent years.

The Review identified that, for a large majority of employees engaged in permanent positions in the black coal mining industry, the Scheme meets its fundamental objective in connecting each employee with their LSL entitlement. However, the Review also identified that the Scheme has areas for improvement, particularly with respect to:

- employees engaged through newer employment models (including the treatment of casual employees);
- employees employed by an employer who operates at coal mines and other sites; and
- employees who transfer between roles on site, or employers.

The Review has collated key findings across the four central areas of enquiry:

- i) coverage and treatment;
- ii) compliance and enforcement;
- iii) governance; and
- iv) administrative processes.

While some stakeholders have gone as far as calling for an abolition of the Corporation, the Review forms the view that a number of pressing issues can be addressed by legislative reform, coupled with non-legislative options to improve the current performance of the Scheme over the short to medium period. This approach balances the need to address current shortcomings, while allowing time for longer-term deliberations about potential structural reform to occur in parallel with further evolutions in the black coal mining industry and the use of portable LSL schemes in Australia.

## Coverage and Treatment

The definition of 'eligible employees' is a key issue that underpins many other issues currently experienced within the Scheme. Amending the definition to provide certainty, in combination with amendments to ensure equal treatment of all employees (whether casual or permanent), will provide the Scheme with a stronger foundation upon which all other aspects will be able to function more effectively.

### A. Coverage

For many employees working in a permanent capacity on a mine site, the coverage and treatment provisions perform their function in connecting those employees with their accrued entitlements. However, for a growing number of workers employed as casual employees, or being engaged in newer employment models (including contracting and labour hire), transferring between roles on site, or between employers, the Review has found that aspects of coverage and treatment are not fit-for-purpose.

While current eligibility disputes primarily concern a group of unregistered employers and the Corporation, resolving the eligibility issue has broader ramifications for all employers who may be required to contribute to the Scheme, and the employees who derive entitlements from employers participating in the Scheme.

The coverage issues predominantly relate to:

1. the legislative definition of who is an 'eligible employee' within the Scheme;
2. the interplay between the federal portable Scheme, and other schemes in operation in the States and Territories; and
3. certain occupations which are presently excluded from the Scheme.

With respect to portability, it appears that shifting workforce dynamics are also challenging the foundations of portability, in so far as the current legislative design, which in some circumstances, operate to disincentivise the mobility of workers between roles and employers. The Review has found circumstances where the current operation of the Scheme contributes to outcomes where some employees effectively 'miss out' on entitlements and others mistakenly receive entitlements under two or more LSL schemes – although the Review notes that the extent of the issue and the quantum of entitlements involved is difficult to assess.

### B. Treatment

In addition to coverage issues, further issues arise in the context of differential treatment between permanent employees and casual employees, who are each 'eligible employees' within the Scheme. The differential treatment appears as a result of three intricacies within the current Scheme, being:

1. the definition of eligible wages;
2. calculation of 'work hours'; and
3. reporting of hours within monthly returns, within the relevant legislation.

The coverage and treatment issues appear to have arisen through shifts in the composition of the workforce, the changing nature of work coupled with legislative drafting that does not provide the requisite level of certainty for stakeholders. Further details on current legislative frameworks are provided in section 3.11, and further details of the issues arising are set out in chapter 5.

## Compliance and Enforcement

The Corporation has progressively adopted a stronger regulatory posture over the past decade. The compliance strategy adopted uses education, limited compliance tools, and an increasing reliance on litigation to secure compliance with the Scheme.

Ongoing compliance issues experienced within the Scheme largely result from unresolved coverage issues, combined with the limited number of compliance tools available for use. Remedying the existing coverage issues will reduce many of the current issues experienced by the Scheme. Other compliance issues can be addressed through a refinement of the powers currently available to administer the Scheme, and a strengthening in decision-making and dispute resolution processes.

### A. Compliance tools to be refined

The Corporation's legislative framework includes a limited number of powers to administer the Scheme, as outlined in section 3.4. As a result of the limited nature of the current powers available to the Corporation, activity to encourage employer compliance to date has been pursued through either educational activities, requests for information, or the initiation of legal proceedings – with few intermediary tools available.

In addition to strengthening decision-making, review and dispute resolution mechanisms, a refining of the powers available to administer the Scheme would allow matters of non-compliance to be addressed proportionately (without recourse solely to legal proceedings in court), that could act to preserve the Corporation's relationship with employers. A refining of the powers available to administer the Scheme could improve the manner in which the Corporation seeks information (per section 52A of the Administration Act in particular) and confer any additional enforcement powers to an appropriate Commonwealth Regulator.

### B. Review and dispute resolution processes to be strengthened

At present, the Scheme's legislative framework provides only limited review and dispute resolution mechanisms, and as noted in section 3.4, does not provide a robust and transparent framework capable of resolving disputes in a swift and cost-effective manner to the satisfaction of affected stakeholders. The absence of a body (other than a court) that is empowered to make binding decisions with respect to eligibility, coverage and LSL entitlements is undesirable. Stakeholders have commented that the Corporation currently acts as a 'tribunal', without the requisite powers to support such a function.

Strengthening the decision-making, review, and dispute resolution mechanisms, by:

- clarifying the decision-making powers available to the Corporation; and
- including an external review body (other than a court) capable of making binding decisions and reviewing the administrative decisions of the Corporation

would provide a more efficient and cost-effective mechanism for disputes to be conclusively resolved, thereby providing certainty to employees, employers, and the Corporation.

## Governance

The Scheme's governance structures largely support the Corporation to discharge its performance and corporate governance responsibilities, however there are several areas for improvement. These areas of improvement relate to both the current structure of the Scheme, and conduct that can enhance transparency, accountability and public confidence in the Scheme.

Governance within the Scheme is considered through the lens of 'structural governance' (being matters related to legislation), and corporate conduct, which relates to how the Corporation administers the Scheme. The Review makes the following findings with respect to governance matters:

### A. Structural Governance

#### i) A Scheme underpinned by a reimbursement model

The Scheme is currently underpinned by a reimbursement model (detailed in chapter 3) which is complex to administer and provides little by way of transparency in relation to the inputs to, and outputs of, the Scheme. This is not a reflection of the way the Corporation administers the Scheme, but rather a structural matter caused by the design of the legislation.

Presently, it is not possible for an employer to draw a line of sight between the levy payments they contribute for an individual employee, the corresponding reimbursable amount, or how that levy payment is ultimately translated into the payment of accrued entitlements to the respective employee. Equally, the current administration of the Scheme means it is difficult for an employee to have real-time visibility and a direct line of sight as to how their entitlements are being preserved and ultimately paid out.

A simplified payment mechanism, through adoption of an 'Authority Pays' model, could provide greater visibility as to how levy payments are translated into employee entitlements. An 'Authority Pays' model is premised on employees being paid their accrued LSL entitlements directly from the Corporation. This model would contribute to improved transparency and public confidence in the Scheme.

#### ii) How the Corporation makes decisions

The current legislative framework provides limited powers and guidance as to how the Corporation exercises its decision-making powers (outlined in section 3.2). Areas of improvements exist in the way the Corporation makes decisions having regards to:

- procedural fairness;
- consistency in determinations; and
- having a greater regard to a wider range of evidence when making decisions.

#### iii) Board Arrangements

The current Board composition is modelled from an industry representative approach, appointed by the Minister pursuant to the enabling legislation. The Board composition does not presently include any independent directors. Enhancements to Board arrangements are further detailed in section 5.4 to encourage performance and accountability consistent with the expectations of a modern Commonwealth entity.

#### iv) Conflicts of interest

The Review has considered opportunities for, and incidences of, conflicts of interest arising in the operation of the Scheme. Consistent with stakeholder feedback, the Review has identified that any conflicts of interest are likely to arise as a function of the composition of the Board. If not properly managed, conflicts arise as a result of the appointment of industry representatives, who are able to obtain information in the course of their Board duties which could be used in dealings beyond the administration of the Scheme. Stakeholders shared anecdotal evidence that suggested a limited number of conflicts may have arisen historically relating to the potential use of information in broader industrial relations contexts. Any such conflicts could be more visibly managed through reforms to Board arrangements, including further training for Directors and the implementation of further assurance mechanisms (further details can be found at section 4.6.2).

## v) Allegations of Fraud

On the face of the information considered, and contrary to some suggestions proffered in the public domain, within the scope of the Review, the Review has found no evidence of money laundering occurring within the Scheme, the involvement of criminal organisations, or systemic mismanagement of funds by the Corporation.

Notwithstanding this conclusion, the Review does consider that the complexity of the Scheme and its administrative processes have left the Scheme vulnerable to the potential for both unintentional and intentional under-reporting by employers of hours worked by eligible employees. In its 2021 Corporate Plan, the Corporation has included an adoption of enhanced fraud prevention protocols. Further consideration of matters pertaining to alleged fraud within the Scheme, including recent initiatives by the Corporation to examine the incidence of under-reporting of hours, is detailed in section 5.3.

## B. Corporate Conduct

### i) Culture

The organisational culture of the Corporation has been considered as a function of its powers and remit of responsibility. As an administrator of a Scheme designed to support the black coal industry, the Corporation is empowered to connect employees with their accrued entitlements, which necessarily involves monitoring employer compliance and discharging its functions in accordance with law. The Review acknowledges that the Corporation has undergone substantial change in the past decade and has commenced a journey of transformation to enhance the Scheme's performance.

Notably in the past decade the Corporation has adopted a stronger regulatory posture, that has not been readily embraced by all stakeholders, nor supported through the range of compliance tools provided by the enabling legislation. Some stakeholders have suggested the Corporation's organisational culture is problematic, however on assessment of the information provided during stakeholder consultation, the Review prefers the view that any complaints concerning corporate culture are more likely the result of complexity relating to:

- the Scheme's design and administration;
- ambiguity in the coverage arrangements;
- an absence of alternative dispute resolution mechanisms; and
- a limited range of tools available under the legislative framework to administer the Scheme.

### ii) Communications

The Review has considered the Corporation's approach to communications as an indicator of corporate conduct relevant to the governance of the organisation. The Corporation has provided information confirming an increase of content publicly available on its website, as well as conforming with the reporting requirements of a Corporate Commonwealth Entity (CCE).

Notwithstanding, during the stakeholder consultation process the Review was provided with many examples of areas of improvements required in stakeholder communications, particularly concerning:

- inconsistencies in information communicated to stakeholders through publication of guidance materials; and
- with specific reference to a smaller cohort of unregistered employers (where there is typically a dispute as to coverage):
  - the nature and tone of communications; and
  - the timeliness and cadence of communications that relate to compliance activity.

### iii) Risk Management

As a CCE responsible for the management of in excess of \$AUD 2 billion in funds, an assessment of the Corporation's governance structures, including committee structures, risk management policies, and Fund performance outcomes, indicate that the Corporation generally adopts a prudent approach to managing risk. In the context of the Corporation being a party to current legal proceedings, the Review suggests the Corporation's approach to risk management should include consideration of legal liabilities. Through the lens of best practice, the Corporation may also consider the adoption of the ISO31000 standard pertaining to risk management. Further details are set out in section 5.4B.

## Administrative Processes

To improve accessibility and ease of doing business with the Corporation, the Scheme's administrative processes should adopt greater technology-enabled systems as a priority. In-built technology will assist the speed and efficiency in which administrative processes can be completed. Administrative processes should be reviewed to consider the diverse range of employers contributing to the Scheme, and how further flexibility could be provided to assist small business employers demonstrate compliance with administrative requirements.

In summary, the Scheme's administrative processes should:

1. facilitate the collection of levy payments from employers in a manner that does not create additional cost or excessive administrative burdens for employers;
2. ensure payment of LSL entitlements to employees in a timely and efficient manner.

The Review identifies the following five key issues relating to current administrative processes:

### A. Adoption of technology

The Review has found that the Corporation is proactively advancing its adoption of technology through new initiatives, however a majority of current administrative processes remain manual in nature (often through the use of email exchange) and the Corporation currently lags behind comparable Commonwealth entities in terms of its use of technology.

### B. Timeliness of administrative processing

The manual nature of current administrative processes contributes to delays in the processing of the monthly levy returns, which in turn impacts on the timeliness that employees can have visibility of their accrued entitlement. Further details are discussed in section 5.4.

### C. Data security and privacy

The Review heard employers' express concerns regarding the security of data provided to the Corporation, largely as a result of email exchange being used as a common method of data submission. Data security and privacy is a significant risk posed to all modern corporations, the Review considers the Corporation should prioritise managing data security and privacy risk in an expedited manner.

The Review acknowledges the Corporation has recently published updated privacy policies and a privacy statement (August 2021)<sup>1</sup>, and that work is currently underway to further its digital transformation. Digital transformation is known to improve the accessibility and ease of doing business and can assist in the management of records and data in accordance with statutory requirements.

The Corporation has also recently announced the development of a data management framework for the Scheme, which on its face appears to improve the Corporation's current operations with respect to data security and privacy.<sup>2</sup> Further details are discussed in section 5.4.

### D. Validation of data

The current legislative framework includes limited mechanisms by which information provided to the Corporation is, or can be, validated as part of existing administrative processes. Stakeholders raised concerns regarding incorrect reporting or calculation of hours, as well as allegations that the Scheme includes 'registered employers' which do not exist. Stakeholders at the public forum, employees, parliamentarians,

<sup>1</sup> Coal Mining Industry (Long Service Leave Funding) Corporation, Privacy Statement (2021)  
<[https://assets.ctfassets.net/w7mmu5az9koe/1yBNSZPuhXsUewf3E6wZtd/fa3c82274c449b60739232cee931abfc/Coal\\_LSL\\_-\\_Privacy\\_Statement.pdf](https://assets.ctfassets.net/w7mmu5az9koe/1yBNSZPuhXsUewf3E6wZtd/fa3c82274c449b60739232cee931abfc/Coal_LSL_-_Privacy_Statement.pdf)> ('Privacy Statement').

<sup>2</sup> Coal Mining Industry (Long Service Leave Funding) Corporation, Coal LSL Corporate Plan 2021/22 (Report, 2021) 20  
<[https://assets.ctfassets.net/w7mmu5az9koe/7E0hVOQfCIEI2aJEXz6a0u/ee1286e0e189ff4e2b0ce8b413b0c44f/Coal\\_LSL\\_Corporate\\_Plan\\_2021-22.pdf](https://assets.ctfassets.net/w7mmu5az9koe/7E0hVOQfCIEI2aJEXz6a0u/ee1286e0e189ff4e2b0ce8b413b0c44f/Coal_LSL_Corporate_Plan_2021-22.pdf)> ('Corporate Plan 2021/22').

and the Corporation, each point to the inclusion of data validation processes to improve accountability of the Scheme. Further details are discussed in section 5.4.

## E. Audit requirements

Some administrative processes are currently mandated by legislation, and include for example, all employers within the Scheme complying with audit requirements. Non-compliance can amount to a strict liability offence, or a civil penalty.

Stakeholders have shared that the current audit requirement is inflexible, adopts a 'one size fits all approach' which is disproportionately burdensome for small business, and provides little by way of guidance as to the veracity of audits to be undertaken.

Administrative processes, in particular audit requirements, should be reviewed to consider the diverse range of employers contributing to the Scheme. Consideration should be given to adding more flexibility in how small business can comply with the requirements. Further details are discussed in section 5.4.

# Recommendations

The Review proposes 20 recommendations.

## Coverage and Treatment

### Definition of eligible employees



Certainty

#### **Recommendation 1:**

It is recommended that the Commonwealth amend the definition of eligible employee through legislative reform to reduce ongoing uncertainty. The focus of the reform should be to:

- address section 4 of *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth) (the Administration Act) and in particular paragraph (b) of the definition of 'eligible employee' definition) with reference to the term "an employee who is employed in the black coal mining industry"; and
- review the occupations presently excluded from the Scheme for alignment with the intention of a best practice future scheme and contemplate legislative reform to address any anomalies.

### Addressing legacy issues



Certainty

#### **Recommendation 2:**

In addition to clarifying coverage for the future operation of the Scheme (recommendation 1), to address the legacy issues associated with the past application of coverage provisions, it is recommended that the Minister engage with the parties to the Existing Proposals with a view to progressing the proposals, and seeking legal advice concerning the drafting of any amendments. In determining which aspects of the Existing Proposals should progress to legislative amendment, the Minister should have regard to the option models presented in chapter 6 and any impact on broader stakeholders within the Scheme.

### Empowering workers: choice of scheme



Fairness

#### **Recommendation 3:**

It is recommended that to address current issues caused by the interaction between LSL schemes, that the Commonwealth take steps to explore mutual recognition arrangements with the relevant State and Territory LSL schemes to reduce the incidence of employees mistakenly receiving entitlements under two or more LSL schemes, or employees missing out on entitlements (because of not meeting the pre-qualifying service criteria or recognition of service between schemes).

### Equal treatment of casual and permanent employees



Fairness

#### **Recommendation 4:**

It is recommended that the Commonwealth enact legislative amendments to ensure that casual employees are treated no less favourably than permanent employees in the Scheme.

# Compliance and Enforcement

## Strengthening decision-making, review, and dispute resolution processes



### **Recommendation 5:**

It is recommended that the Commonwealth strengthen decision-making, review, and dispute resolution processes to:

- clarify the Corporation's powers to make decisions concerning eligibility for the Scheme and the relevant assessment criteria for the use of those powers;
- provide greater legislative guidance on the operation of the Scheme's internal review mechanisms; and
- create an external mechanism for binding determinations with respect to eligibility, coverage, and LSL entitlements, without recourse to court action.

**Certainty Fairness**

## Resolving liabilities



### **Recommendation 6:**

It is recommended that the legislation provide a power for liabilities to be settled in certain circumstances to promote employer compliance with the Scheme. Any settlements should have no impact on the ability for employees to receive their accrued entitlement.

**Certainty**

## Resolving liabilities



### **Recommendation 7:**

It is recommended that the Commonwealth consider the merits of introducing a limitation period for the assessment and collection of levy liabilities within the Scheme to promote timely administration of the Scheme.

**Certainty**

## Ensuring the Corporation, as a custodian of the Scheme, has fit-for-purpose tools



### **Recommendation 8:**

While the adoption of recommendations 1, 2 and 5 should reduce the number of disputes and improve the administration of the Scheme, it is recommended that the Commonwealth consider refining the powers available to administer the Scheme with a focus on:

- the current operation and use of section 52A of the Administration Act;
- ensuring any non-compliance is addressed proportionately, and to preserve the Corporation's relationship with employers; and
- conferring additional powers, where necessary, to an appropriate Commonwealth Regulator with the skills, resources and established culture to oversee regulatory functions.

**Accountability Fit-for-Purpose**

## Safeguarding of employees' entitlements



### **Recommendation 9:**

It is recommended that legislative reform occur to enable the Corporation to connect employees more easily with their accrued LSL entitlements within the Scheme, particularly in circumstances involving non-compliance by an employer.

**Fairness**

## Governance

### Increasing visibility of entitlements and payments



Transparency



Fit-for-Purpose

#### **Recommendation 10a:**

It is recommended that to improve transparency in the Scheme the Commonwealth consider introducing an Authority Pays mechanism (rather than a reimbursement model), akin to that used in many portable schemes; or

#### **Recommendation 10b:**

It is recommended that the Corporation accelerate implementation of technological solutions (per recommendation 17) to:

- improve employee visibility of entitlements;
- improve employer visibility of levy payments, liabilities and reimbursements; and
- provide more education material on its website as to how funds are managed within the Scheme, to reduce the perception of mismanagement.

### Improving how decisions are made



Transparency



Fairness

#### **Recommendation 11:**

It is recommended that the Corporation improve transparency of decision-making by integrating further procedural fairness elements into the Scheme's decision-making and internal review processes.

### Clarifying expectations and requirements for evidence



Accountability



Transparency



Fairness

#### **Recommendation 12:**

It is recommended that to improve administrative decision-making by the Corporation that the standards for evidence be clarified to clearly set out the type and quantum of evidence required to be produced by employers and employees.

### A modern and representative Board



Fit-for-Purpose

#### **Recommendation 13:**

It is recommended that the total board composition be increased to approximately 7 or 8 members (inclusive of the Chair), being an appropriate number of directors to oversee the Corporation having regard to the ambit of its responsibilities.

Board arrangements should be reconfigured to reflect contemporary best practices for modern corporations by ensuring:

- a minimum board composition of approximately 20% of independent directors;
- introduction of a skills-based board with the combination of skills to be benchmarked by an external organisation every three years;
- rotation of committee chairs;
- Board composition that is reflective of diversity of skills, age, gender, expertise, and interests; and mandatory refresher training on director duties (including conflict of interest, data security, privacy, and contemporary environmental, social and corporate governance (ESG) principles).

Reconfigurations to the Board composition should include:

- at least one independent director (preferably with expertise in data security; technology or corporate governance); and
- addition of one director representative of Modern Industry Stakeholders.

### Mitigating conflicts of interest



#### **Recommendation 14:**

**Accountability Transparency**

Noting the Board composition consists of industry representatives; it is recommended that the Board's risk management practices regarding conflict of interest are made publicly available. These policies should include mitigation strategies to prevent use of information obtained in the course of Board duties being used in broader contexts, external to the operation of the Scheme.

### Safeguarding the Scheme from fraud



#### **Recommendation 15:**

**Accountability Transparency**

It is recommended that to safeguard against fraud (including the under-reporting of hours) that:

- the Corporation's fraud management policies be reviewed to ensure alignment with the Commonwealth's fraud control requirements and be made public to increase transparency of the Corporation's compliance with its obligations;
- visibility of employee's accrued entitlements be provided through an online platform to allow discrepancies to be identified quickly by employees and employers, consistent with recommendation 17; and
- simplified reporting requirements be implemented for employee's hours in a uniform manner across casual and permanent employees, consistent with recommendation 4.

### Conduct consistent with a custodian of the Scheme



**Accountability**

#### **Recommendation 16:**

It is recommended that the Corporation review its approach to compliance and enforcement activities and stakeholder communications to position the Corporation as the trusted custodian of the Scheme by advancing initiatives designed to support stakeholders navigate, and comply with, the Scheme.

## Administrative Processes

### Accelerated adoption of technology

#### **Recommendation 17:**



Fairness



Fit-for-Purpose

It is recommended that the Corporation's digital transformation and technology enablement should be accelerated to bring the Corporation in line with contemporary best practice for modern corporations as soon as is practicable. The aim should be to provide greater automation of administrative processes, providing employees and employers with a clear line of sight between levy payments and employee entitlements. This includes:

- continued development of technology platforms, such as the Levy Loader, to provide real time access to employee entitlements, employer levy payments and reimbursements; and
- implementation of measures to increase alignment between the Corporation's and employers' systems, through stakeholder consultation to identify common practice between employers in the industry.

### Protection of data and privacy

#### **Recommendation 18:**



Accountability



Fit-for-Purpose

It is recommended that the Corporation should implement and publish data security and privacy practices consistent with best practice standards provided by the Office of the Australian Information Commissioner (OAIC).

### Validation of data

#### **Recommendation 19:**



Fairness



Accountability

It is recommended that validation processes be incorporated into the Scheme's operations, including:

- identification of validation process undertaken in like organisations;
- identification and evaluation of areas within the Scheme which could most benefit from enhanced validation;
- use of existing mechanisms such as ABNs (and TFNs if permitted) which may be leveraged to provide greater accountability and validation within the Scheme; and
- greater data sharing with other Commonwealth agencies, to the extent permitted by law, to increase integrity in the Scheme and reduce the likelihood of underreporting of hours by employers.

### Reducing audit impost on small business employers

#### **Recommendation 20:**



Certainty



Fairness

It is recommended that the Scheme support employer compliance by offering greater certainty of audit requirements for employers, by:

- clarifying the existing requirements through the provision of guidance material; and
- providing greater flexibility for small business employers in how they demonstrate compliance with the audit requirement.

# Options to advance the Recommendations

The Review identifies three key option models available to advance the recommendations. The details of the options, including comparative assessments are set out in chapter 6.

Option 1: Interim reform	Option 2: Targeted reform	Option 3: Structural reform
<p>Option 1 recognises value in implementing minimalist reform through non-legislative change that can improve the current effectiveness of the Scheme. This option contemplates that some improvements are possible without legislative reform, and capable of being advanced by the Corporation while any potential legislative reform is being progressed.</p>	<p>Option 2 involves both legislative and non-legislative change to address current issues within the Scheme, however it is not intended to extend to broader structural reform. This option allows for short to medium term changes to occur that are targeted at implementing specific solutions to the issues identified by the Review. This option leaves broader structural change, including the adoption of an Authority Pays model, to a time in the future, where further change may be considered.</p>	<p>Option 3 involves significant legislative reform to address current issues identified with the Scheme and contemplates a suite of future structural changes to the Scheme including:</p> <ol style="list-style-type: none"> <li>1. re-modelling the Scheme to a direct Authority Pays model rather than a reimbursement model,</li> <li>2. considering initiatives to harmonise LSL schemes across Commonwealth, and State and Territory State jurisdictions,</li> <li>3. evaluating the potential for mutual recognition with State-based schemes, and</li> <li>4. potentially transitioning the Scheme from Commonwealth administration towards industry management.</li> </ol>
<p><b>Minimal Change Required</b></p>		<p><b>Significant Change Required</b></p>

Figure 1: Breadth of options available

# Chapter 1: Introduction

- 1.1 Scope
- 1.2 Methodology
- 1.3 Structure



## 1.1 Scope

The Terms of Reference are contained at Appendix B, and in summary requires the Review to examine:

- a. the operation of the legislative framework and any potential amendments to address its relevance, clarity, usability, and enforceability;<sup>3</sup>
- b. governance and operational models capable of enabling Coal LSL to effectively manage its responsibilities, risks and accountabilities in the interests of eligible employees and their employers;<sup>4</sup> and
- c. any proposals to ensure the efficient and transparent administration of the fund and the Corporation.

The Terms of Reference excluded the following matters from consideration:

- a. the Corporation's Investment Plan and asset allocation guidelines, and the role of the Board in preparing those documents;<sup>5</sup>
- b. the Corporation's legal status as a Commonwealth corporation established by the Administration Act, rather than a private sector entity;<sup>6</sup>
- c. any proposal that would result in a reduction in the LSL entitlement of eligible employees, as defined by the Administration Act;<sup>7</sup> and
- d. potential legislative changes related to industrial relations or other policy issues in the coal mining industry beyond LSL.<sup>8</sup>

For clarity, the Review was not asked to provide legal advice and this report does not constitute legal advice. Throughout various parts of this report, reference is made to certain issues, options, and Existing Proposals, where the Commonwealth may wish to seek legal advice to advance the recommendations.

As part of contributions from stakeholders during the consultation process, several submissions were received regarding topics beyond the Review's Terms of Reference. While out of scope, a summary of the topics is provided in Appendix A in acknowledgement of the effort and value contributed by stakeholders. The Commonwealth may wish to consider these later in the broader context of industry reform.

## 1.2 Methodology

The Review has been conducted in accordance with the Terms of Reference as set out at Appendix B. Key points of examination within the Terms of Reference have been categorised into four broad themes:

1. coverage and treatment;
2. compliance and enforcement;
3. governance; and
4. administrative processes.

The four themes explored by the Review were used to guide stakeholder discussions, ensuring feedback was received on all matters relevant to the Terms of Reference.

A stakeholder consultation process was undertaken early in the Review, (detailed at section 1.2.3). The Review would like to thank all stakeholders, organisations, and individuals who contributed to the Review by either attending a forum or providing their views in writing.

To provide context for a fair and balanced Review, the Review notes that the consultation process did not focus attention on the body of stakeholders who are satisfied with the current operation of the Scheme. Data

<sup>3</sup> Industrial Relations Division, Attorney-General's Department, 'Coal LSL Review – terms of reference' (June 2021) 2 [1a] <<https://www.ag.gov.au/sites/default/files/2021-06/terms-of-reference-coal-LSL-review.pdf>> ('Terms of Reference').

<sup>4</sup> Terms of Reference (n 3) 2 [1b].

<sup>5</sup> Ibid 2 [3a].

<sup>6</sup> Ibid 2 [3b].

<sup>7</sup> Ibid 2 [3c].

<sup>8</sup> Ibid 2 [3d].

received from the Corporation's client satisfaction survey,<sup>9</sup> and the Mining and Energy Division of the Construction, Forestry, Mining and Energy Union (CFMEU) (Mining and Energy Division) suggests there are many employers and employees who are content with the Scheme's current operations. The methodology adopted by the Review was designed to engage in critical dialogue with stakeholders to better understand, seek out, and unpack issues associated with the Scheme. The observations and recommendations offered by the Review reflect that approach.

For comparative analysis, the Review sets out key features of a best practice future state for the Scheme in chapter 4. These features are used as a benchmark to assess issues identified by stakeholders, to develop the recommendations and options proposed by the Review.

Additionally, the Review has formulated several high-level principles-based recommendations that seek to address broader holistic issues, with a view to ultimately improving stakeholder and public confidence in the Scheme.

The options presented in chapter 6 seek to provide three broad models to advance the recommendations to achieve the best practice future state for the Scheme.

While the Review has considered a range of views expressed by stakeholders, some of which are referenced in this report, conclusions drawn, and recommendations expressed by the Review reflect the independent views of KPMG Australia.

### 1.2.1 Approach to attribution

The Review's approach to attribution was to treat stakeholder submissions as confidential, to facilitate frank and open dialogue. Accordingly, when referencing stakeholder feedback in this report, all comments are attributed to the broader stakeholder group. The exception to this approach is where stakeholders have elected to publish their submissions to the Review in the public domain, in that circumstance the Review refers to the submission by name.

### 1.2.2 Terminology

Through discussions with stakeholders, it became apparent that the use of some language can be a source of confusion. For example, the term 'Opt-in Proposal' is used interchangeably with the term 'Joint Parties Agreement' and should be countered with 'Opt-out provisions' which is a term some stakeholders use to describe the waiver agreement provisions under the Administration Act. The waiver provisions and discussions concerning waivers also need to be clarified as distinct from discussion concerning debt waivers. The Review adopts the language of the applicable legislation to avoid any confusion. A full glossary of terms is available at Appendix D.

### 1.2.3 Stakeholder consultation overview

The Review consulted with a broad range of stakeholders to understand the operation of the Scheme and any associated concerns.

Noting that the Scheme currently comprises of approximately 1000 registered employers and 53,000 employees accruing entitlements,<sup>10</sup> the Review did not attempt to conduct consultations spanning the full extent of the stakeholders involved with the Scheme. Rather, consultations were undertaken with stakeholder groups that were representative of the current black coal mining industry, and other stakeholders who have an interest in the Scheme. The stakeholder groups that were consulted as part of this review included:

1. producers;

<sup>9</sup> Coal Mining Industry (Long Service Leave Funding) Corporation, Coal LSL Annual Report 2020/21 (Report, October 2020) 24-25 [[https://assets.ctfassets.net/w7mmu5az9koe/3efZl7tILlW99MNUd11eg/25a4a2d763e6a1d32b80ac28553ab344/Coal\\_LSL\\_Annual\\_Report\\_2020-21.pdf](https://assets.ctfassets.net/w7mmu5az9koe/3efZl7tILlW99MNUd11eg/25a4a2d763e6a1d32b80ac28553ab344/Coal_LSL_Annual_Report_2020-21.pdf)] (Annual Report 2020/21).

<sup>10</sup> Annual Report 2020/21 (n 9) 13.

2. employer groups and peak bodies;
3. members of the public who attended a public forum conducted in Newcastle, NSW;
4. employers (including unregistered employers);
5. unions;
6. Modern Industry Stakeholders (see section 3.6);
7. Employees;
8. the Coal LSL Executive;
9. the Coal LSL Board;
10. Commonwealth entities; and
11. parliamentarians.

Noting that the Review took place during the COVID-19 pandemic, stakeholder consultations were undertaken through a mix of virtual and face to face forums, and by written submissions. A summary is included below in Figure 2.

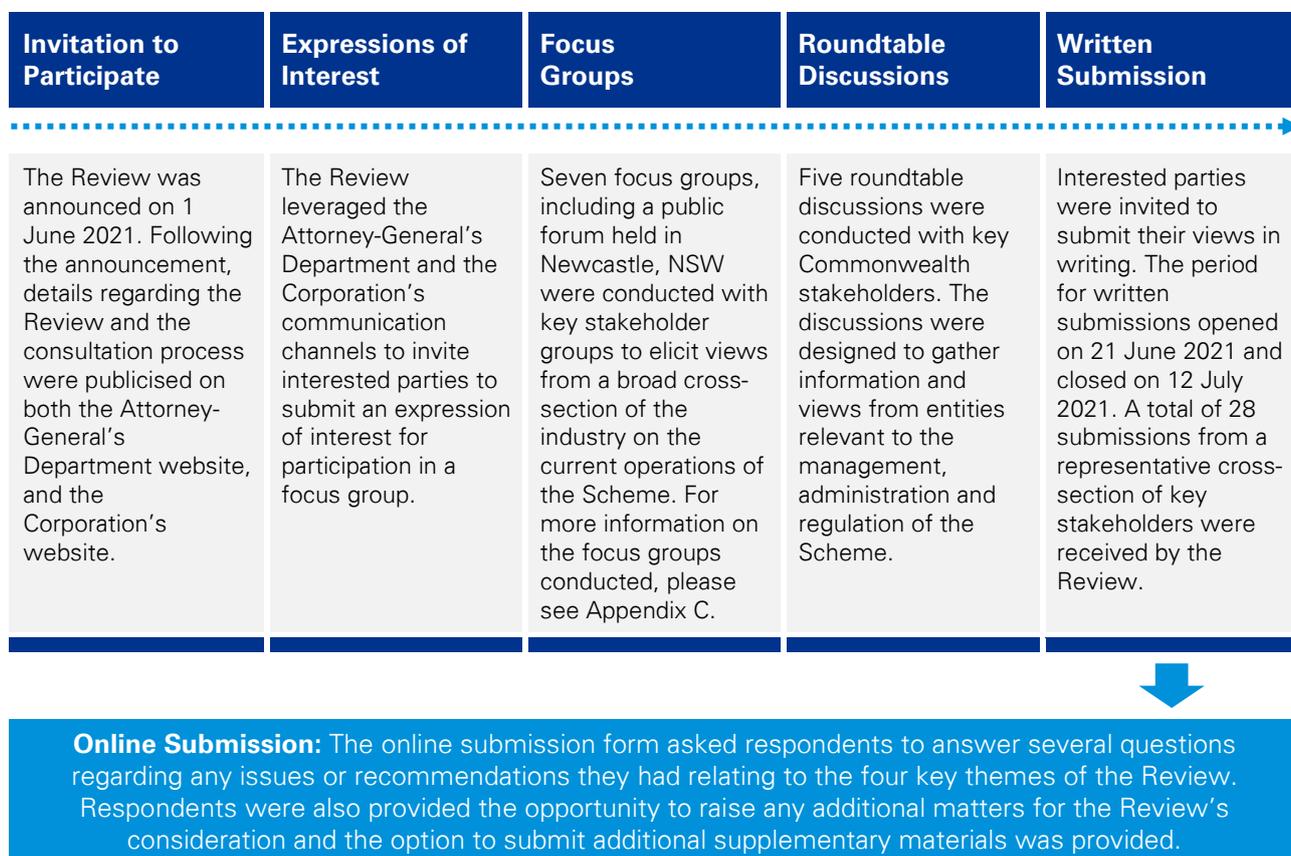


Figure 2: Stakeholder consultation approach

## 1.3 Structure

This report is structured in six chapters, commencing with an overview of the current operations of the Scheme, then identifying a best practice future scheme, before analysing issues identified by the Review to inform the recommendations and options models presented.

### Chapter 1: Introduction

Overview of scope and methodology for the Review.

### Chapter 2: Background

A brief history of the Scheme and portable long service leave entitlements in Australia.

### Chapter 3: Current Arrangements

Details the current legislative and operational frameworks of the Scheme, including a brief introduction of the context for each of the Review's four themes.

### Chapter 4: Best Practice Future Scheme

Provides a series of six principles that can be used as benchmarks to underpin a future portable coal mining industry LSL scheme.

### Chapter 5: Analysis and Assessment

A detailed examination of the issues identified by the Review, stakeholder feedback and recommendations to align the Scheme with a best practice future ideal.

### Chapter 6: Options

Identifies three option models for Commonwealth consideration.

# Chapter 2: Background

## 2.1 History of the Scheme



## 2.1 History of the Scheme

### 2.1.1 Establishment of a federal portable black coal mining LSL scheme

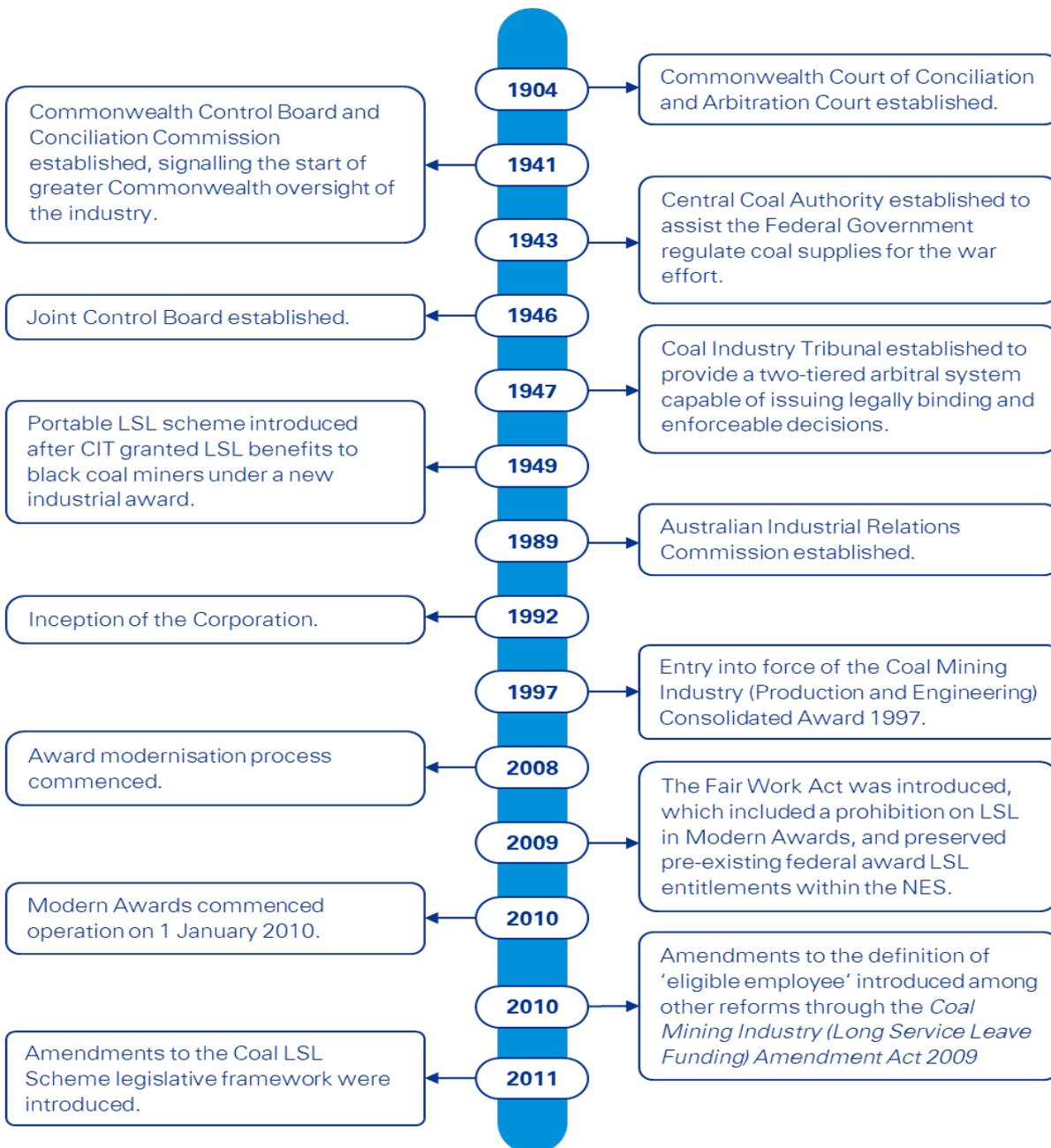


Figure 3: Historical timeline

The Australian black coal mining industry has a long history, with the Scheme recently celebrating its 70th anniversary. LSL in the coal mining industry began in 1949 with the establishment of the portable Scheme. The introduction of the Scheme was reflective of a wider move by the Australian Government to assume greater control of, and responsibility over, the coal mining industry, and the supply surety of coal in the post-war era.

In the years immediately pre-dating the establishment of the Scheme, the Commonwealth had established the Joint Control Board in 1946, and the Coal Industry Tribunal (CIT) in 1947 to resolve the disputes that plagued the industry at the time, that were significantly reducing productivity of the market.

The CIT was a two-tiered arbitral system established under the *Coal Industry Act 1946* (Cth) with powers to make legally binding and enforceable decisions. The tribunal was responsible for resolving all industrial relations disputes in the industry until its functions were taken over by the Australian Industrial Relations Commission (AIRC).

The early 1990s was also the point at which the portable scheme established in 1949 was transitioned to the Coal Long Service Leave Fund, which brought a change in the way long service liabilities were paid. Prior to the 1992 amendments, LSL entitlements had been collected by the Commonwealth as an excise per ton of coal produced, which was then provided back to the States as grants. States then used the grants to fund employees' LSL entitlements. The 1992 legislative amendments introduced a shift by way of the introduction of a levy and the Coal LSL Fund. This meant, in practice, that employers pay a levy to the Corporation, and then pay out LSL entitlements to employees, before being able to seek a reimbursement from the Corporation. This legislative framework continues to form the basis that the Scheme operates within today and is discussed further in chapter 3, section 2.

The FW Act made changes to how LSL was dealt with under the federal industrial relations framework. Under these changes, LSL was no longer permitted to be included in modern awards. Terms in pre-reform awards that dealt with LSL were preserved as part of the *National Employment Standards* (NES).

The 2010 reforms to workplace relations in Australia also led to a series of important legislative amendments to the legislative framework governing the Scheme. These changes involved inserting a legislative definition of eligibility into the Scheme's governing legislation. These reforms have given rise to issues not previously encountered by the Scheme. It is these issues that remain unresolved to date and form the basis of many concerns brought to the attention of this Review.

## 2.1.2 LSL entitlements

Entitlement to LSL under the Scheme is accrued by employees who complete a period of 'qualifying service'.<sup>11</sup> The Scheme is self-contained and applies to the exclusion of any LSL entitlements preserved by the NES, or any State or Territory LSL law that might otherwise apply.<sup>12</sup> The Scheme does not, however, override LSL entitlements or rights provided by industrial instruments.<sup>13</sup>

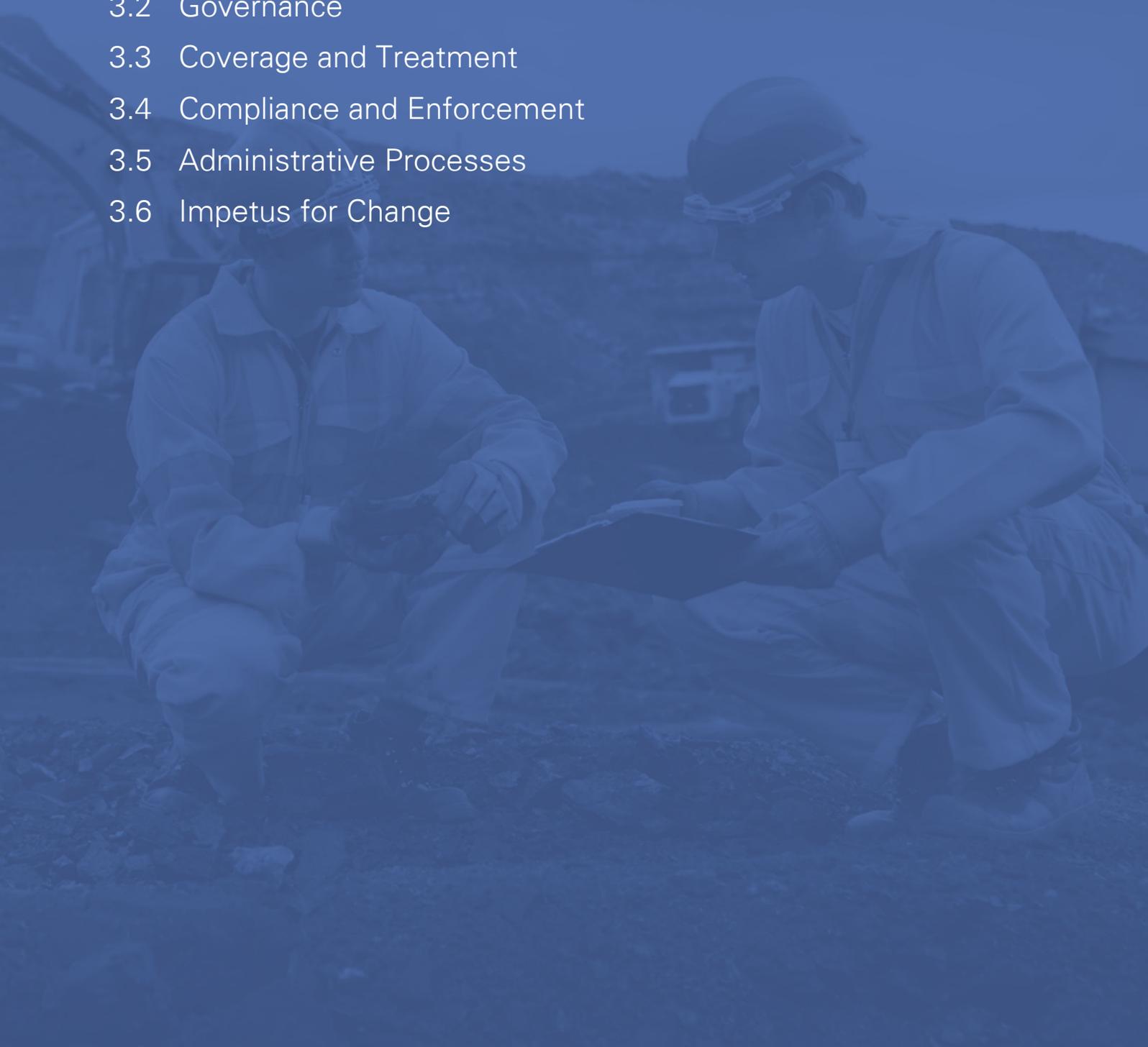
<sup>11</sup> *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth) ('Administration Act') s 39A.

<sup>12</sup> Admin Act (s11), s39E.

<sup>13</sup> *Ibid* s39EB.

# Chapter 3: Overview of Current Arrangements

- 3.1 Legislative Overview
- 3.2 Governance
- 3.3 Coverage and Treatment
- 3.4 Compliance and Enforcement
- 3.5 Administrative Processes
- 3.6 Impetus for Change



## 3.1 Legislative Overview

<b>Enabling Legislation for the Corporation and the Scheme</b>	<i>Coal Mining Industry (Long Service Leave) Administration Act 1992</i> (Cth) (Administration Act)
	<i>Coal Mining Industry (Long Service Leave) Administration Regulations 2018</i> (Cth) (Administration Regulations)
	<i>Coal Mining Industry (Long Service Leave) Payroll Levy Act 1992</i> (Cth) (Payroll Levy Act)
	<i>Coal Mining Industry (Long Service Leave) Payroll Levy Regulations 2018</i> (Cth) (Payroll Regulations)
	<i>Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992</i> (Cth) (Collection Act)
	<i>Coal Mining Industry (Long Service Leave) Legislation Amendment Act 2011</i> (Cth) (Amendment Act)
	<i>Coal Mining Industry (Long Service Leave Funding) Amendment Bill 2009</i> <i>Employer Reimbursement Rules 2017</i> (Reimbursement Rules)

Figure 4: Overview of enabling legislation

The Corporation and Scheme is established and governed by the following applicable legislation and enabling instruments:

<b>Other applicable Commonwealth laws and instruments</b>	<i>Public Governance, Performance and Accountability Act 2013</i> (Cth) (PGPA Act)
	<i>Public Governance, Performance and Accountability Rule 2014</i> (Cth) (PGPA Rule)
	<i>Fair Work Act 2009</i> (Cth) (FW Act)
	<i>Regulatory Powers (Standard Provisions) Act 2014</i> (Cth) (RP Act)
	<i>Regulatory Powers (Standard Provisions) Regulation 2015</i> (Cth) (RP Regulations)
	<i>Black Coal Mining Industry Award 2010</i> (BCMI Award)

Figure 5: Overview of key applicable Commonwealth laws and instruments relevant to the Review

## 3.2 Governance

### 3.2.1 The Corporation and its functions

The Corporation is established by section 6 of the Administration Act. Section 7 of the Administration Act provides that the functions of the Corporation are:

- (a) to establish and maintain the Fund; and
- (b) to make payments into and out of the Fund, and invest the Fund, in accordance with this Act and the Payroll Levy Collection Act; and
- (c) to advise the Minister as to the rates of payroll levy that should be imposed on employers; and
- (d) to monitor payments of the payroll levy and keep the Minister informed of any failure by an employer to pay the payroll levy; and
- (da) to maintain records relating to:
  - (i) the employment of eligible employees; and
  - (ii) the qualifying service completed by, and the long service leave entitlements of, eligible employees; and
  - (iii) employers of eligible employees; and
  - (iv) amounts that are, or may become, payable to employers under Part 7; and
- (e) to advise the Minister generally on the operation of this Act, the Payroll Levy Act and the Payroll Levy Collection Act; and
- (f) such other functions as are conferred on the Corporation by the Payroll Levy Collection Act.

In addition, section 11 of the Collection Act provides the following functions:

- (1) The Corporation has the following functions on behalf of the Commonwealth under this Act:
  - (a) to receive returns made, or financial statements or certificates given, under this Act; and
  - (b) to receive payments of levy made under this Act; and
  - (c) to receive payments of additional levy made under section 7; and
  - (d) to sue for and recover amounts of levy and amounts of additional levy that have not been paid.
- (2) The Corporation may, on behalf of the Commonwealth, enter into an agreement with a person authorising that person to perform on behalf of the Commonwealth any one or more of the functions referred to in subsection (1).
- (3) The Commissioner of Taxation has power to enter into an agreement with the Corporation under subsection (2) for the performance by the Commissioner of Taxation of a function referred to in subsection (1) and, if such an agreement is entered into, the Corporation is liable to pay to the Commissioner of Taxation such charges for the performance of that function as are agreed between the Corporation and the Commissioner of Taxation.

The Corporation is a CCE that operates within the Attorney-General's portfolio. The PGPA Act applies to the Corporation, save for some exemptions that relate to investments by CCEs.<sup>14</sup> Relevantly, the PGPA Act provides the framework for the operation of CCEs, including reporting and the use and management of public resources.

As a CCE, the Corporation is a body corporate.<sup>15</sup> The Corporation is classified as a Public Financial Corporation (PFC) which includes Commonwealth entities that trade in financial assets and liabilities, and operate commercially in the financial markets.<sup>16</sup> This sector classification enables the collection of financial information

<sup>14</sup> See *Public Governance, Performance and Accountability Act 2013* (Cth) s 59 ('PGPA Act').

<sup>15</sup> Administration Act (n 11) s6 (2)(a).

<sup>16</sup> Australian Government, Department of Finance, 'Flipchart of PGPA Act Commonwealth entities and companies (187)' (6 May 2021) [https://www.finance.gov.au/sites/default/files/2021-05/Flipchart%206%20May%202021\\_0.pdf](https://www.finance.gov.au/sites/default/files/2021-05/Flipchart%206%20May%202021_0.pdf) ('PGPA Flipchart')

on the performance of Commonwealth entities and companies in the Commonwealth public sector, as defined and required by Australian equivalents of international standards - known as Government Finance Statistics. The Corporation is one of only five such entities across the Commonwealth.<sup>17</sup> Other comparable corporate Commonwealth entities include the Australian Reinsurance Pool Corporation, the National Housing Finance and Investment Corporation, the Reserve Bank of Australia, and the Export Finance and Insurance Corporation.

The Corporation does not engage staff under the *Public Service Act 1999* (Cth).

## Governance arrangements

Part 2 of the Administration Act provides for the establishment, functions, and powers of the Corporation. Part 3 of the Administration Act constitutes a Board that is to manage the affairs of the Corporation and administer the Fund. Section 11 of the Administration Act provides that the Board must prepare guidelines for the management of the affairs of the Corporation and submit them to the Minister for approval.<sup>18</sup>

Currently, the Administration Act mandates that the Board consists of six Directors.<sup>19</sup> The Board is accountable to the responsible Minister who appoints the Directors to hold office on a part-time basis.<sup>20</sup> Remuneration for Directors is determined by the Remuneration Tribunal with allowances paid as prescribed,<sup>21</sup> and remuneration and allowances of Directors are to be paid out of the Fund.<sup>22</sup>

The Board of the Corporation is also the key governance mechanism, although it is not the only mechanism. It is the accountable authority under the PGPA Act and is accountable for the performance of the Corporation in respect of its use of public resources, its achievement of the Corporation's purpose, and the financial sustainability of the entity. The Board has other duties under the PGPA Act, including in relation to establishing and maintaining systems related to risk and control.

## Current Board composition

Section 13 of the Administration Act determines the composition of the Board, which includes the appointment of:

### **Section 13 Appointment of Directors**

- (2) *One Director to represent the companies engaged in black coal mining in New South Wales or Tasmania.*
- (2A) *One Director to represent the companies engaged in black coal mining in Queensland.*
- (3) *One Director to represent companies engaged in black coal mining in Western Australia.*
- (4) *Two Directors to represent the Mining and Energy Division of the Construction Forestry, Mining and Energy Union.*
- (5) *One Director 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.*

<sup>17</sup> PGPA Flipchart (n 16).

<sup>18</sup> Administration Act (n 11) s11.

<sup>19</sup> Ibid s12(1).

<sup>20</sup> Ibid s13(1).

<sup>21</sup> Ibid s24.

<sup>22</sup> Ibid s52.

The legislation presently provides that if the Mining and Energy Division of the CFMEU 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.

## Committee structure and risk management

The Corporation's Board provides corporate governance, including through its subcommittees: the Audit, Risk Management and Compliance Committee (ARCC); Investment Committee (IC); Technical Compliance Committee (TCC); and Remuneration Committee (RC).<sup>23</sup> The performance of the Board, subcommittees and independent advisers is regularly reviewed.<sup>24</sup> The ARCC receives reports on performance and risk management of business areas and Corporation activities, and the suitability and operation of governance, risk, and compliance frameworks.<sup>25</sup>

Relevantly the ARCC main functions include oversight of:<sup>26</sup>

- financial reporting;
- performance reporting;
- system of risk management;
- system of internal controls;
- accounting policies;
- business policies and practices;
- compliance with applicable laws and regulations; and
- governance issues for the Corporation.

The Corporation's standard governance activities include the following risk practices:

- development and implementation of annual risk strategies and risk profiles, including level of risk appetite for the Corporation;
- regular review on reporting on risk registers;
- maintenance of operational risk matrix; and
- risk based reviews of client records to ensure data accuracy.<sup>27</sup>

In its most recent Corporate Plan for 2021-22, the Corporation outlined its stated risk management approach as follows:<sup>28</sup>

“[The Corporation] manages risk proportionately to educate the black coal mining industry on compliance obligations and minimise its regulatory burden.”

The Corporation highlighted that it currently has a low to moderate risk appetite for the following areas:<sup>29</sup>

- management of Fund and returns;

<sup>23</sup> Coal Mining Industry (Long Service Leave Funding) Corporation, Coal LSL Annual Report 2019/20 (Report, October 2020) 18 <[https://assets.ctfassets.net/w7mmu5az9koe/4laQ2Zt3YRFLpFYEjhgMkf/4904f407b5d5cc50d8fe2a3c7b14871e/COAL\\_LSL\\_ANNUAL\\_REPORT\\_2019-20.pdf](https://assets.ctfassets.net/w7mmu5az9koe/4laQ2Zt3YRFLpFYEjhgMkf/4904f407b5d5cc50d8fe2a3c7b14871e/COAL_LSL_ANNUAL_REPORT_2019-20.pdf)> ('Annual Report 2019/20').

<sup>24</sup> Annual Report 2019/20 (n 23) 18.

<sup>25</sup> Ibid 16.

<sup>26</sup> Ibid 18.

<sup>27</sup> Ibid 19.

<sup>28</sup> Coal Mining Industry (Long Service Leave Funding) Corporation, Coal LSL Corporate Plan 2020/21 (Report, 2020) 18 [https://assets.ctfassets.net/w7mmu5az9koe/7IES1D7DC0IJ2k4dhwPVRX/575ae5e42e5f4df22f5de43faf9d9bac/Coal\\_LSL\\_Corporate\\_Plan\\_2020-21.pdf](https://assets.ctfassets.net/w7mmu5az9koe/7IES1D7DC0IJ2k4dhwPVRX/575ae5e42e5f4df22f5de43faf9d9bac/Coal_LSL_Corporate_Plan_2020-21.pdf) ('Corporate Plan 2020/21').

<sup>29</sup> Annual Report 2019/20 (n23) 17.

- employer compliance;
- reputation as the regulatory body;
- service delivery to stakeholders;
- operational accuracy; and
- people and culture.

The following areas were identified as priorities for the next financial year:

- intelligence-led, risk-based decision-making within the regulatory framework;
- ongoing alignment between strategic and operational risk considerations; and
- feedback mechanisms for enhanced risk awareness.

In addressing the cyber security risk faced by modern corporations, the Corporation noted that it “*will continue to implement essential strategies to mitigate cyber security risks and build the foundations for an end-to-end information security management systems.*”<sup>30</sup>

### 3.2.2 Operation of the Scheme and funding

The Scheme, through legislative design, is underpinned by a reimbursement model. The reimbursement model appears to be shaped from the state grant scheme that operated prior to 1992 as the precursor to the federal portable Scheme.

The funding of the Scheme is designed to facilitate a portable scheme where the Corporation holds funds (paid through levy amounts from employers), until such time as eligible employees meet the pre-qualifying service criteria and take their accrued leave, before reimbursing the employer. This means that employees are paid their LSL entitlements from their respective employer at the time leave is taken,<sup>31</sup> noting that the employer may effectively be ‘paying out’ leave from periods of eligible service undertaken with former registered employers. The current employer then applies to the Corporation after the pre-approved LSL hours have been paid to the employee to have the reimbursable amount returned to them.<sup>32</sup>

Levy payments into the Scheme by employers, and the subsequent reimbursements to employers and payments to employees, are governed by the combined operation of three key pieces of legislation:

- the Administration Act;
- the Collection Act; and
- the Payroll Levy Act.

In summary, the Administration Act defines an ‘eligible employee’,<sup>33</sup> creates an entitlement to LSL<sup>34</sup> and establishes the Fund.<sup>35</sup> The Payroll Levy Act then operates to impose a levy<sup>36</sup> and provides for a prescribed percentage of the eligible wages paid to be subject to the levy<sup>37</sup> and paid by the liable person (the employer).<sup>38</sup> The Collection Act defines the meaning of ‘eligible wages’,<sup>39</sup> provides the mechanics for collection of eligible wages, imposes a monthly due date for payment,<sup>40</sup> and mandates that an employer must make a return in

<sup>30</sup> Corporate Plan 2021/22, (n 2) page 20. Further detail on the Corporation’s technology systems can be found at section 5.5.1.

<sup>31</sup> Administration Act (n 11) ss 39AB, 39AC, 39AD.

<sup>32</sup> Ibid s 44.

<sup>33</sup> Ibid s 4.

<sup>34</sup> Ibid Part 5A, ss 39A – 39AE.

<sup>35</sup> Ibid s 40.

<sup>36</sup> *Coal Mining Industry (Long Service Leave) Payroll Levy Act 1992* (Cth) s 4 (‘Payroll Levy Act’).

<sup>37</sup> Payroll Levy Act (n 36) s 5.

<sup>38</sup> Ibid, Section 6.

<sup>39</sup> *Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992* (Cth) s 3B (‘Collection Act’).

<sup>40</sup> Collection Act (n 39) s 4.

respect of that month.<sup>41</sup> Importantly, it is the Collection Act that provides that the Corporation is to receive payments of the levy, and any additional levies.<sup>42</sup>

In effect, levy payments are collected from employers of eligible employees via monthly returns.<sup>43</sup> Levies must be paid by employers for all eligible employees who have earned 'eligible wages' for the relevant monthly period. The levy is currently charged at 2% of eligible wages (calculated as defined in the Collection Act). This levy is paid in addition to an employee's salary and does not reduce the amount payable to an employee at any time.

Through the provision of monthly returns by employers, the Corporation maintains a notional account for each employee covered by the Scheme, and whose employer has paid a relevant levy amount into the Fund.<sup>44</sup> Section 44 of the Administration Act states that where employers have paid out a grant of LSL to eligible employees, the Corporation is obligated to pay the employer the 'reimbursable amount'. The 'reimbursable amount' is decided by the Board in accordance with the Employer Reimbursement Rules.<sup>45</sup>

The Fund's relationship with the Commonwealth's Consolidated Revenue Fund (CRF) creates an area of complexity. The legislation requires all monies received by the Corporation to be paid into the Fund, as permitted by section 40 of the Administration Act.<sup>46</sup> Levy payments are transferred to the Commonwealth via consolidated revenue and are then transferred back to the Fund from the CRF on a monthly basis under a special (standing) appropriation.<sup>47</sup> Monies may only be paid out of the Fund for payments authorised by the Administration Act or the Levy Collection Act.<sup>48</sup> Operationally, this means that the Corporation collects the payroll levies on behalf of the Commonwealth. The funds are held in a levy collection account (a cheque account bearing interest) before being transferred to the CRF on a monthly basis.

Levy payments appropriated to the Fund are 'pooled' or collective in nature. As a pooled fund, there are no individual financial accounts in which funds are held on behalf of individual employees, although the Corporation does maintain records of hours accrued by each eligible employee. The funds are held in accordance with the Corporation's approved strategic asset allocation.

Appropriated funds from CRF are managed within the Fund, in order to meet future LSL payments for all eligible employees. The Fund is assessed by an actuary at least every three years to ascertain the adequacy of funding. Levy rates may be changed from time to time, to support the adequacy of funding.

The funding of the Corporation's operations is met out of the Fund from levies collected from employers and investment returns. The Corporation receives no additional funding from the Commonwealth for its operation.

Figure 6 provides a visual overview of the current funding arrangements.

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<sup>41</sup> Ibid s 5.

<sup>42</sup> Ibid s 11.

<sup>43</sup> Collection Act (n 39) s 5.

<sup>44</sup> *Employer Reimbursement Rules 2017* (Cth) ss [5]-[7].

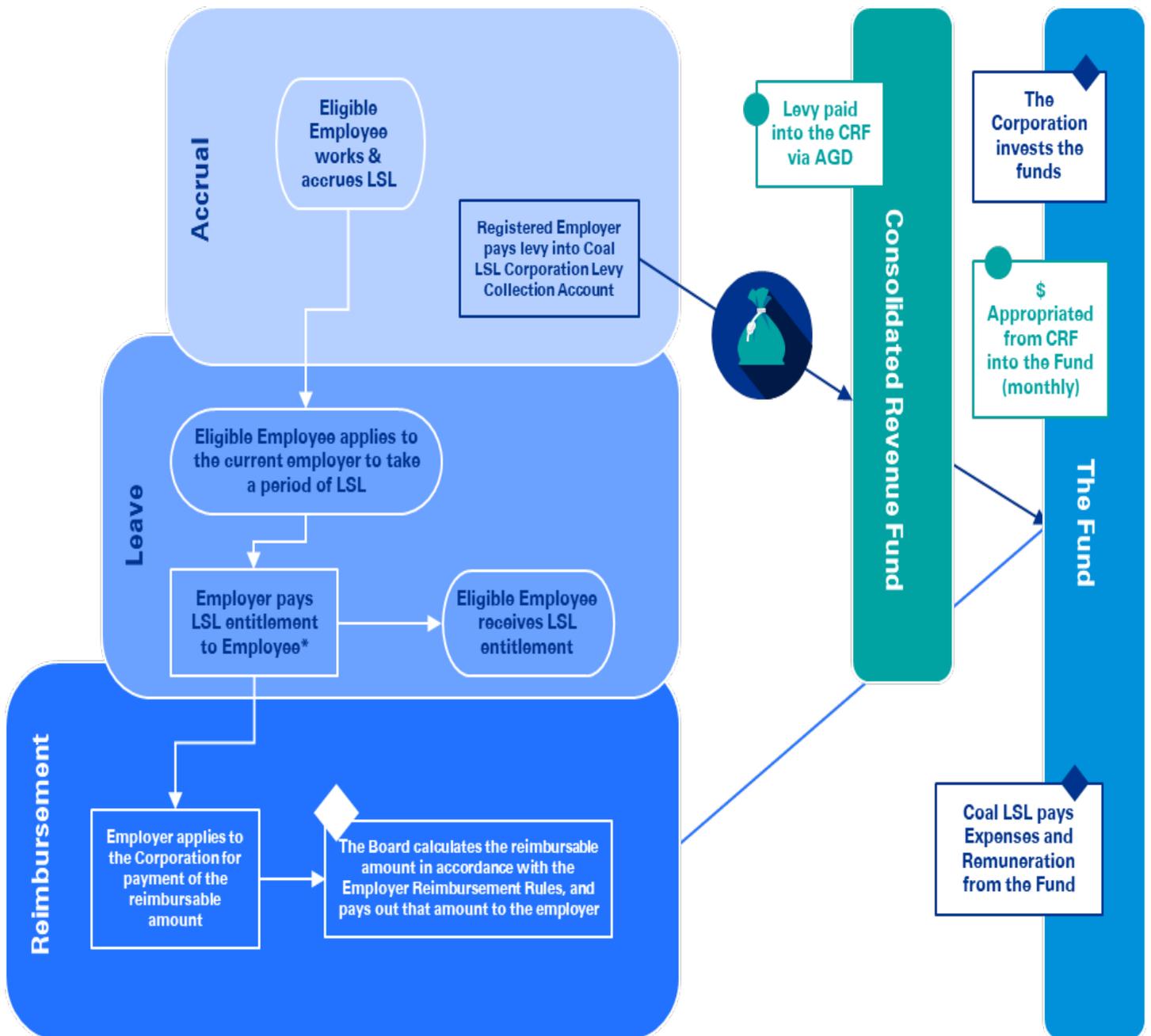
<sup>45</sup> Administration Act (n 11), s44.

<sup>46</sup> Ibid s 40.

<sup>47</sup> Ibid s 36.

<sup>48</sup> Ibid s 41.

### Operation of the Scheme and funding



\*subject to the Employer conforming with the Corporation’s administrative approval process

Figure 6: Operation of the Scheme and funding

### 3.2.3 Operational environment

#### Key operations<sup>49</sup>

The number of people accessing the Scheme

**11,096**



leave applications approved

representing a **14%** year-on-year increase from FY20

The FY 2020/21 saw significant increases for the Corporation with respect to:

The Fund's investment portfolio (with approx.)

**\$2.1bn**



currently under management

with a **17.1%** return on investment

**183**

new employers registering for the Scheme



a **5%** increase in the number of employees in the Fund...

...and employer levy submissions increased on **FY2021** by

**23%**

#### In 2020-2021

**1,075**

total employers registered within the Scheme

**53,437**

active employees within the Scheme

**22,067**

Levy forms processed

**787**

Missing service reviews applications processed

#### Workforce profile<sup>50</sup>

**167**

ongoing staff



**3**

Non-ongoing staff

#### Client engagement<sup>51</sup>

In 2020-21, the Corporation:

received

**30,877**

phone enquiries

received

**5,517**

online enquiries

received

**28,291**

Email enquiries

attended

**2,788**

meetings with employers and stakeholders

#### Current technology initiatives underway



Levy loader portal

Organisational-wide client relationship management systems

#### Legal matters

As of **11 October 2021**, the Corporation was a party to three legal proceedings before the Federal Court concerning eligibility and coverage of the Scheme:



Coal LSL  
v  
Hitachi<sup>52</sup>



Orica  
v  
Coal LSL<sup>53</sup>



Coal LSL  
v  
DAC Mining Services<sup>54</sup>

<sup>49</sup> Annual Report 2020/21 (n 9) 2.

<sup>50</sup> Annual Report 2020/21 (n 9) 63.

<sup>51</sup> Annual Report 2020/21 (n 9) 2.

<sup>52</sup> Federal Court of Australia, NSD 843/2021.

<sup>53</sup> Federal Court of Australia, NSD156/2021.

<sup>54</sup> Federal Court of Australia, NSD242/2021.

## 3.3 Coverage and treatment

When discussing 'coverage', the Review refers to the inclusion or exclusion of employees within the scope of the Scheme. When referring to 'treatment', discussion is related to the conditions which attach to an employee's entitlements under the Scheme, for example, the differing treatment of casual and permanent employees under the current legislative framework.

The legislative provisions related to coverage and treatment are set out below and are the most common cause of dispute between stakeholders within the industry, and between the Corporation and (unregistered) employers.

### 3.3.1 Coverage

#### Definition of 'eligible employee'

Coverage of the Scheme is determined by the definition of the 'eligible employee' as contained within the Administration Act, and with reference to the BCMI Award:

#### **Section 4 Interpretation**

**Black coal mining industry** has the same meaning as in the Black Coal Mining Industry Award as in force on 1 January 2010.

**Eligible employee** means:

- (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; or
- (c) an employee permanently employed with a mine rescue service for the purposes of the black coal mining industry; or
- (d) a prescribed person who is employed in the coal mining industry; but does not include a person declared by

**BCMI Award - Clause 4.2** For the purposes of this award, black coal mining industry has the meaning applied by the courts and industrial tribunals, including the Coal Industry Tribunal. Subject to the foregoing, the black coal mining industry includes:

- (a) the extraction or mining of black coal on a coal mining lease by means of underground or surface mining methods
- (b) the processing of black coal at a coal handling or coal processing plant on or adjacent to a coal mining lease;
- (c) the transportation of black coal on a coal mining lease; and
- (d) other work on a coal mining lease directly connected with the extraction and processing of black coal.

The coverage contained within subsections (a), (c), and (d) of the definition of 'eligible employee' in section 4 of the Administration Act remain largely uncontested, however the scope of the coverage definition within subsection (b) is the subject of widespread dispute and legal discourse. Many parties who engaged with the Review's stakeholder consultation process outline relevant case law and precedent about the interpretation of that provision. The contrasting interpretations have given rise to disputes between the Corporation and employers who are currently not registered for the Scheme and who do not consider their employees are covered by the definition of 'eligible employee', as well as employers who have a changing workforce profile that gives rise to disparate coverage arrangements across their workforce.

The differing positions in relation to the scope of section 4(b) is the basis upon which many employers remain unregistered with the Scheme and is a central focus of the Corporation's compliance activities.

While the Corporation has released guidance notes on coverage, uncertainty regarding coverage remains an ongoing issue which is discussed further in section 5.

## Exclusions

The existing linkage of the definition of 'eligible employee' to the BCMI Award preserves the exclusions which are outlined in the Award. These exclusions include:

### **4.3 Black Coal Mining Industry Award**

*The black coal mining industry does not include:*

- (a) the mining of brown coal in conjunction with the operation of a power station;*
- (b) the work of employees employed in head offices or corporation administration offices (but excluding work in town offices associated with the day-to-day operation of a local mine or mines) of employers engaged in the black coal mining industry;*
- (c) the operation of a coal export terminal;*
- (d) construction work on or adjacent to a coal mine site;*
- (e) catering and other domestic services;*
- (f) haulage of coal off a coal mining lease (unless such haulage is to a wash plant or char plant in the vicinity of the mine); or*
- (g) the supply of shottfiring or other explosives services by an employer not otherwise engaged in the black coal mining industry.*

These exclusions operate to prevent some employees from having their LSL hours accrued to the Scheme. This creates anomalies within the application of the current legislative framework, as outlined further in chapter 5.

## Interaction with state-based LSL schemes

Several portable LSL schemes operate across Australia. Typically, the schemes are established and governed by state legislation and administered by authorities which collect a levy from employers as a provision for LSL entitlements for employees.

The Corporation administers the only federal portable LSL scheme operating in Australia, although the Australian Parliament has considered the operation of portable schemes in a wider range of professions.<sup>55</sup> Due to the existence of both state and federal LSL schemes, there exists the real possibility that over an employee's working life, an employee may be covered by both a state and the federal scheme.

Part 5A, Division 5 of the Administration Act governs the interaction of the Scheme with other relevant LSL laws. Relevantly, section 39EA provides that the Scheme applies in relation to eligible employees and their employers to the exclusion of a State or Territory law that deals with LSL.

Section 39EB establishes minimum entitlements and rights in respect of LSL for an eligible employee and is not intended to override entitlements or rights provided under an industrial instrument that covers the employee.

The current interaction of the Scheme with state-based schemes is complex and has given rise to several undesirable scenarios for employees and employers, which can be distilled into the following two issues:

1. employees mistakenly receiving entitlements under two or more LSL schemes, or 'double dipping' as it is referred to amongst stakeholders, and

<sup>55</sup> Senate Standing Committee on Education and Employment, Parliament of Australia, The feasibility of, and options for, creating a national long service standard, and the portability of long service and other entitlements (Report, February 2016) 3.3, 3.4 ('Feasibility Report') <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Education\\_and\\_Employment/LSL\\_Portability/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/LSL_Portability/Report)>.

2. non-recognition of service between schemes, or ‘missing out’ as it is commonly referred.<sup>56</sup>

Both issues are discussed further in chapter 5.

### 3.3.2 Treatment

Within the legislative framework, casual and permanent employees are treated differently. Differences in their treatment arise in the following three contexts:

1. hours accrued by employees calculated per ‘working hour’;
2. levy paid by employers on ‘eligible wages’; and
3. hours reported to the Corporation through monthly returns.

Similar to the definition of ‘eligible employees’, the legislative interpretation of ‘eligible wages’ and ‘working hours’ has been contested across the industry with the application of the differing interpretations having significant consequences for the amount of levy paid by employers, hours accrued by employees, payments made to employees, and amounts reimbursed to employers. This issue is explored further in chapter 5.

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<sup>56</sup> Mining and Energy Division, ‘Submission to the Coal Long Service Leave Review’ (July 2021) [Microsoft Word - Coal LSL ME submission\\_120721\\_Final.docx \(cfmeu.org.au\)](#) 17 (‘Joint Submission of the Mining and Energy Division of the CFMMEU and the AMWU’).

## 3.4 Compliance and enforcement

### 3.4.1 Overview of the current compliance and enforcement framework

#### Powers and tools

Section 8 of the Administration Act provides the Corporation with its powers. Relevantly, section 8(1) provides:

*The Corporation has power to do all things that are necessary or convenient to be done for, or in connection with, the performance of its functions...*

Through its functions, the Corporation is required to monitor payments of the levy and keep the Minister informed of any failure by an employer to pay the payroll levy.<sup>57</sup> The Collection Act mandates an 'additional levy' be imposed on an employer as a penalty for failing to pay the levy by the due date.<sup>58</sup>

Under the Administration Act and the Collection Act, the Corporation is empowered with a limited number of tools:

- a. The Corporation is authorised to bring proceedings to the Federal Court and Federal Circuit Court on behalf of the Commonwealth to enforce the civil penalty provisions (see Appendix F).<sup>59</sup>
- b. The Corporation is empowered to sue for and recover levies or additional levies as debts due to the Commonwealth.<sup>60</sup>
- c. Section 52A of the Administration Act provides the Corporation with the power to require persons to produce information or documents by written notice. The information the Corporation is empowered to request includes:
  - i. information relating to the employment of an eligible employee,
  - ii. information relating to the employer of an eligible employee, and
  - iii. information that is reasonably necessary to enable the Corporation to perform its functions under the Administration Act and Collection Act.

Additional powers to access premises and books,<sup>61</sup> and obtain information and evidence,<sup>62</sup> are available to the Commissioner of Taxation should an agreement under section 11 of the Collection Act be in place. Section 11 provides that:

#### **Section 11 Functions of Corporation under this Act**

- (1) *The Corporation has the following functions on behalf of the Commonwealth under this Act*
  - (a) *to receive returns made, or financial statements or certificates given, under this Act, and*
  - (b) *to receive payments of levy made under this Act; and*
  - (c) *to receive payments of additional levy made under section 7; and*
  - (d) *to sue for and recover amounts of levy and amounts of additional levy that have not been paid.*
- (2) *The corporation may, on behalf of the Commonwealth, enter into an agreement with a person authorising that person to perform on behalf of the Commonwealth any one or more of the functions referred to in subsection (1).*
- (3) *The Commissioner of Taxation has the power to enter into an agreement with the Corporation under subsection (2) for the performance by the Commissioner of Taxation of a function referred to in*

<sup>57</sup> Administration Act (n 11) s 7(d).

<sup>58</sup> Collection Act (n 39) s 7.

<sup>59</sup> Enforcement of strict liability offences falls within the jurisdiction of the Commonwealth Department of Public Prosecutions.

<sup>60</sup> Collection Act (n 39) s 9.

<sup>61</sup> *Ibid* s 12.

<sup>62</sup> *Ibid* s 13.

*subsection (1) and, if such an agreement is entered into, the Corporation is liable to pay to the Commissioner of Taxation such charges for the performance of that function as are agreed between the Corporation and the Commissioner of Taxation.*

There is no agreement currently in effect pursuant to section 11(2) of the Collection Act.

Due to the limited nature of these powers, the Corporation has relied on an approach focussed on education and awareness raising among stakeholders to improve compliance outcomes under the Scheme. Where the Corporation has viewed that education and awareness efforts have not produced sufficient compliance, the Corporation has relied upon the limited powers provided to it, particularly Section 52A Notices (detailed in chapter 5), to administer the Scheme, with varying degrees of success.

## Review and dispute resolution processes

Both review and dispute resolution processes currently operate within the Scheme.

 <b>Employers</b>	 <b>Employees</b>
<p>Employers and employer representative groups may:</p> <ul style="list-style-type: none"> <li>bring disputes regarding LSL to the FWC;</li> <li>appeal administrative decisions made by the Corporation in relation to the scheme (e.g. eligibility determinations and reimbursable amounts) through the Corporation's internal review process; and</li> <li>seek merits review of the Corporation's decisions regarding waiver agreements, remission of additional levies, and reimbursable amounts through the Administrative Appeals Tribunal (AAT).</li> </ul>	<p>Employees and employee representatives may:</p> <ul style="list-style-type: none"> <li>bring disputes regarding LSL to the FWC;</li> <li>appeal administrative decisions made by the Corporation in relation to the Scheme (e.g. missing service reviews and eligibility determinations) through the Corporation's internal review process;</li> <li>seek merits review of the Corporation's decisions regarding waiver agreements through the AAT; and</li> <li>apply to court in respect of certain (civil penalty) contraventions of the Administration Act.</li> </ul>

Figure 7: Review and dispute resolution mechanisms

The distinction between these two dispute resolution processes is explored further below:

### Review processes

The Corporation has express administrative decision-making powers in relation to:

- waiver agreements;<sup>63</sup>
- remission of additional levies;<sup>64</sup> and
- assessment of reimbursable amounts.<sup>65</sup>

As above, the Corporation is also empowered to do all things necessary for the performance of its functions. While subject to legal interpretation, this broad power likely enables the Corporation to undertake broader decision-making than that listed above, however historically these types of powers have been read narrowly by the courts. For example, the Corporation has an appeal process for Missing Service Reviews (MSR). A

<sup>63</sup> Administration Act (n 11) s 39BC.

<sup>64</sup> Collection Act (n 39) s7 and 8.

<sup>65</sup> Administration Act (n 11) ss 44 and 49.

necessary aspect of conducting an MSR is determining whether employees identified in the MSR are eligible to be covered by the Scheme.

There are three review mechanisms presently available within the Scheme:

1. Board Review: An initial eligibility assessment can be conducted by the Board of the Corporation. The Board considers both direct and indirect evidence.<sup>66</sup> The Corporation's Service Review Handbook notes that appeals from both employees and employers may be made regarding this initial assessment, and that additional evidence must be provided by employees or employers to trigger the appeals process.<sup>67</sup>
2. Independent Review Panel (IRP): The IRP is available to an employee in circumstances where they are not satisfied with the determination of the Board regarding an eligibility assessment.<sup>68</sup> The IRP consists of legal and subject matter experts from key employee and employer representative groups.
3. The AAT: The current legislative framework permits merits review to the AAT for a limited number of determinations of the Board, including:
  - refusal of waiver agreements;<sup>69</sup>
  - calculation of reimbursable amounts;<sup>70</sup> and
  - remission of additional levies.<sup>71</sup>

### External dispute resolution

Part 5A, Division 4 of the Administration Act provides for remedies relating to LSL.

Section 39D permits the Fair Work Commission (FWC) to deal with a dispute about matters related to LSL under Part 5A of the Administration Act. The powers of the FWC to deal with a dispute under section 39D are limited to conciliation and mediation powers only. The Corporation's enabling legislation provides no mechanism for arbitration or the making of binding determinations, and issues of coverage and section 52A Notices may not be covered within the ambit of Part 5A of the Act.

The Administration Act also provides a mechanism by which employees, employee organisations, and industrial associations may take disputes regarding the civil penalty provisions (Appendix F) to the Federal Court or the Federal Circuit Court.<sup>72</sup> The Federal Court or the Federal Circuit Court are each empowered to make orders awarding compensation, the granting of an injunction, or any other order the court considers necessary when matters under section 39DA are brought before it.<sup>73</sup>

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<sup>66</sup> For details of what the Corporation considers each of these categories of evidence to include See Australian Government Coal Mining Industry (Long Service Leave Funding) Corporation, 'Coal LSL Service Review Handbook' (March 2019) 5 [https://assets.ctfassets.net/w7mmu5az9koe/1W4BnvlhE5H20TLeJWiV1d/21834156a1eb679348e87ac0d8eafcc5/Service\\_Review\\_Handbook\\_November\\_2019\\_WEB.pdf](https://assets.ctfassets.net/w7mmu5az9koe/1W4BnvlhE5H20TLeJWiV1d/21834156a1eb679348e87ac0d8eafcc5/Service_Review_Handbook_November_2019_WEB.pdf) ('Service Review Handbook').

<sup>67</sup> Service Review Handbook (n 66) 6-7.

<sup>68</sup> Ibid.

<sup>69</sup> Administration Act (n 11) s 39BC.

<sup>70</sup> Ibid s 44.

<sup>71</sup> Collection Act (n 39) s 8.

<sup>72</sup> Administration Act (n 11) s 39DA.

<sup>73</sup> Ibid s 39DB.

### 3.4.2 Approach to compliance

In recent years, the Corporation has embarked on a transformation to enhance client services and operational effectiveness.<sup>74</sup> This journey has seen, amongst other things, a significant increase in the compliance activities undertaken by the Corporation with more than 500 additional employers registered with the Scheme since 2017.<sup>75</sup>

The timeline outlined below highlights key developments that have characterised the Scheme’s compliance landscape in the past six years.

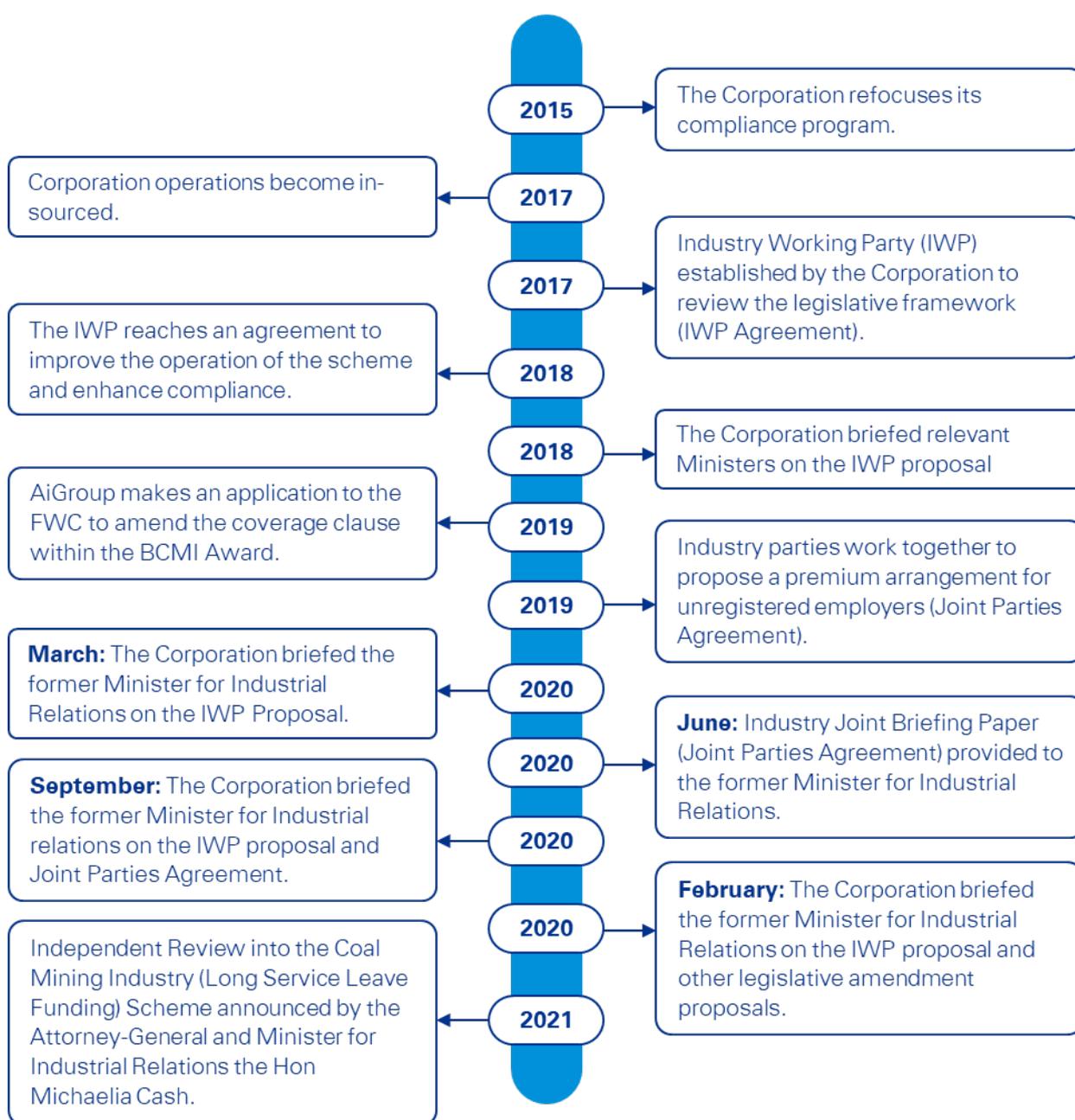


Figure 8: Approach to compliance

<sup>74</sup> Annual Report 2019/20 (n 23) 4.

<sup>75</sup> Evidence to Senate Education and Employment Legislation Committee, Parliament of Australia, Canberra, [2 June 2021] 30.

The contested coverage provisions outlined in section 3.3, have tested relations between the Corporation and employers who dispute their coverage. Observations drawn from stakeholder consultation highlight there is little common ground between the Corporation and employers who are unregistered for the Scheme, with both parties engaging from irreconcilable positions derived from differing interpretations of the current legislative framework.

The Corporation has attempted to address the stalemate by increasing compliance activity through education and awareness programs targeted at unregistered employers. This education and awareness program starts with the identification of an employer who, in the Corporation's view, is covered by the Scheme and is currently unregistered, often as a result of employees lodging a Missing Service Review with the Corporation. In those circumstances, the Corporation will commence communications with the employer to attempt to register the employer into the Scheme. Where employers dispute their registration status, the Corporation's limited compliance and enforcement activities commence, in an escalating manner, which may include employers being served with notices to produce or notice of proceedings being commenced in the Federal Courts.

The Corporation typically engages with stakeholders through general communications via its website and published materials (including Guidance material). Where compliance issues are identified, communication is customised and delivered to individual employees and employers. Further details of stakeholder feedback concerning communications regarding compliance is contained in section 5.4B.2.

## 3.5 Administrative Processes

Administrative processes relate to the systems and information required to underpin the efficient operation of the Scheme.

Key features of the current administrative processes include:

- the reporting of hours by employers to the Corporation;
- levy payments made by employers into the Fund;
- processing of leave applications;
- the process of employer's requesting reimbursement from the Corporation; and
- employer auditing requirements.

Currently, administrative processes underpinning the Scheme are largely manual in nature and require, for example, employers to email reporting data to the Corporation for consideration and record-keeping.

The Corporation has informed the Review it is currently implementing technology-based initiatives aimed at improving the administrative process along a two-year timeline. Technology initiatives include an online self-service portal, online levy submissions, increased digitisation of process,<sup>76</sup> and greater prioritisation of data security, privacy, and IT by the Board.<sup>77</sup>

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<sup>76</sup> Annual Report 2020/21 (n 9) 13, 24.

<sup>77</sup> Ibid 14.

## 3.6 Increasing Pressures: An impetus for change

The black coal mining industry is undergoing change as a result of the evolving models of work and workforce composition, and correspondingly the Scheme and the Corporation are increasingly being asked to pivot to respond to shifting stakeholder expectations.

### 3.6.1 Changes to workforce composition

The black coal mining industry has not been isolated from broader workforce changes occurring within Australia, including the rise of casual employment and alternate employment models. Shifts in models of employment have resulted in the introduction of new stakeholders. The Review refers to this growing sub-sector of stakeholders as 'Modern Industry Stakeholders'. Modern Industry Stakeholders include:

- labour hire companies;
- contractors;
- employers of casual workers;
- employers in related sectors providing services to the black coal mining industry (service providers); and
- small businesses.

Consequently, the black coal mining industry in 2021 is comprised of a larger and more diverse group of stakeholders than was envisaged when the Scheme was introduced.

### 3.6.2 Organisational transformation

In response to the changing workforce composition within the black coal mining industry, and the corresponding compliance issues that have arisen, the Corporation indicated it has invested resources to enhance its ability to act as a 'trusted regulator', with the corresponding necessary governance, assurance, and data management functions currently under development.<sup>78</sup>

### 3.6.3 Greater levels of public awareness and scrutiny

The Corporation was first called to appear before Senate Estimates (Education and Employment Legislation Committee) on 23 October 2019. Since that time, the Corporation has appeared on five further occasions.<sup>79</sup>

The Senate Estimates activity is indicative of wider public awareness of the Scheme that has occurred in recent years. Parliamentarians have advocated for greater public scrutiny to ensure that the Corporation is diligently meeting its obligations and upholding the highest levels of public sector accountability. The advocacy has resulted in a higher level of media reporting and public interest in the Scheme,<sup>80</sup> which has contributed to the increasing pressure to ensure the Scheme is fit-for-purpose and meeting community expectations.

<sup>78</sup> Annual Report 2020/21 (n 9) 7.

<sup>79</sup> Evidence to Senate Education and Employment Legislation Committee, Parliament of Australia, Canberra, [24 March 2021]; Evidence to Senate Education and Employment Legislation Committee, Parliament of Australia, Canberra, [23 October 2019]; Evidence to Senate Education and Employment Legislation Committee, Parliament of Australia, Canberra, [4 March 2020]; Evidence to Senate Education and Employment Legislation Committee, Parliament of Australia, Canberra, [27 October 2020]; Evidence to Senate Education and Employment Legislation Committee, Parliament of Australia, Canberra, [2 June 2021].

<sup>80</sup> See e.g.: David Marin-Guzman, 'Billion-dollar coal fund probed over industry fraud claims', Australian Financial Review (online, 2 June 2021) <<https://www.afr.com/work-and-careers/workplace/billion-dollar-coal-fund-probed-over-industry-fraud-claims-20210602-p57xa9>>; Alex Tigani, 'One Nation senator Malcolm Roberts fires back at his critics after senate address for casual coal miners', Muswellbrook Chronicle (online, 1 November 2019) <<https://www.muswellbrookchronicle.com.au/story/6469512/malcolm-roberts-fires-back-at-his-critics-after-senate-address-for-casual-coal-miners/>>; Ian Kirkwood, 'One Nation and Labor question Coal LSL over 'missing' long service and audit of thousands of mine worker accounts', Newcastle Herald (online, 30 October 2020) <<https://www.newcastleherald.com.au/story/6991031/coal-long-service-leave-fund-says-hundreds-of-industry-workers-missing-out-on-entitlements/>>; Ian Kirkwood, 'Government long service leave agency grilled at Senate estimates over treatment of 'casual' mineworkers | VIDEO', The Singleton Argus (online, 24 October 2019) <<https://www.singletonargus.com.au/story/6456660/one-nation-slams-abuse-of-casual-coal-miners/>>.

### 3.6.4 Proposals for change

Several proposals for amendments to the Scheme have been developed and presented to Government. These proposals were developed by stakeholders across the industry aimed at reforming the Scheme into a workable system for the contemporary workforce. Further detail regarding these proposals and their relevance to options and recommendations presented by the Review can be found in chapter 6.

# Chapter 4: Key Features of a Best Practice Future Scheme

- 4.1 Key Principles
- 4.2 Certainty
- 4.3 Fairness
- 4.4 Portability
- 4.5 Transparency
- 4.6 Accountability
- 4.7 Fit-for-purpose



## 4.1 Key Principles

A best practice scheme must be capable of discharging its functions and statutory obligations, in a manner that meets evolving stakeholder and public expectations.

Figure 9 provides a summary of the six key features that underpin a best practice scheme. Further details are provided below.



Figure 9: Key principles for a best practice scheme

## 4.2 Certainty



“Going forward with the Scheme, clarity, simplicity, and certainty is in the best interests of all.”

**Employer representative**

The operation of the Scheme must provide certainty to employers and employees, who each entrust the Corporation to act as the custodian of employee entitlements. A certain scheme is one that provides all stakeholders a solid foundation upon which they can understand and interact with the Corporation and the Scheme.

Certainty in this context relates to:

- clarity as to who the law applies to and where the limits of the ‘industry’ lie;
- predictability of the Corporation’s actions so businesses can establish and maintain systems and procedures to support compliance with the requirements;
- finality in decisions made by, or about, the Scheme; and
- clarity as to the specific requirements imposed by the legislation, and the Corporation’s administration of the legislative requirements.

Inserting a greater degree of certainty into the operation of the Scheme is central to increasing stakeholder confidence in the Scheme. Certainty is required to assist employers, and employees and their representatives, reach a position of clarity as to the boundaries of the Scheme enabling the Corporation to make repeatable and defensible decisions.

Certainty will assist to resolve issues related to coverage and eligibility issues, dispute resolution, and requirements imposed on stakeholders in areas such as audits, as well as the level of evidence needed to demonstrate compliance with the Scheme.

## 4.3 Fairness



“Fairness speaks to just outcomes.”

**Employer representative**

Fairness in a best practice future scheme should emulate the principles of equity and equality, accessibility, natural justice, empowerment, and proportionality.

Fairness in relation to government entities is inextricably linked to the notion of procedural fairness. Officers within Government are expected to “demonstrate and uphold the highest ethical standards of conduct and integrity, including acting with care and diligence and making decisions that are honest, fair, impartial, and timely, and consider all relevant information.”<sup>81</sup>

Perceived unfairness within the Scheme has led to many stakeholders expressing their frustrations publicly. A combination of changes in workforce composition and a legislative regime designed at a previous point in history has contributed to unfair outcomes, or at least the perception of unfair outcome, experienced by some stakeholders within the Scheme. Integrating fairness as a pillar for the Scheme will assist in resolving issues related to treatment of workers, enhance employee choices and visibility over the safekeeping of their entitlements, and provide a greater degree of natural justice in administrative decision-making.

<sup>81</sup> Institute of Public Administration Australia, ‘Regulatory Professional Capability Guidance’, Professional Standards Capability Program (2015) 4 <https://www.ipaa.org.au/wp-content/uploads/2019/06/Regulatory-Professional-Capability-Guidance-2015.pdf> (‘Regulatory Guidance’).

## 4.4 Portability



“Arguments for extending portability of the LSL scheme are largely based on the right to equal access to the full range of employment benefits.”<sup>82</sup>

Portable LSL schemes are designed to recognise that employees in some industries are unlikely to remain with a single employer for the duration of their career, as a direct consequence of the nature of such industries being predominantly project-based. Portable schemes are designed to protect employees’ entitlements as they move within an industry, accommodating movement and mobility of workers between employers, and increasingly between roles within an industry.

In 2016, the Senate Education and Employment References Committee undertook a study on the “Feasibility of, and options for, creating a national long service standard, and the portability of long service and other entitlements.”<sup>83</sup> The Committee ultimately recommended that all levels of government in Australia review the current LSL system to consider developing a nationally consistent scheme.<sup>84</sup> While the Committee acknowledged that there was a number of key stakeholders who opposed a national system for fear of increased costs for employers, it also noted that the complexity of the schemes should in all cases attempt to be resolved through standardisation of current arrangements across all jurisdictions.<sup>85</sup>

As a federal scheme, the Scheme is unique amongst all other portable schemes in Australia which are governed at the State or Territory level. These comparable portable schemes share many common features which provide useful guidance on contemporary best practice. These key features include:

- the relevant authority being established as a body corporate;
- equal representation on the governing Boards from employee and employer groups, with additional independent representatives;
- mandatory actuarial investigations to determine whether current levy rates are sufficient to maintain the Fund; and
- payment of LSL entitlements to employees directly through the managing Authority (an Authority Pays arrangement), often via an online claims system.

A best practice portable scheme should strive to ensure that all employees are able to access their accrued LSL entitlements, without undue complexity.

<sup>82</sup> Feasibility report (n 55) 33.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid Recommendation 1.

<sup>85</sup> Ibid 12 [2.41].

## 4.5 Transparency



“As a principle, public officials, civil servants, the managers and directors of companies and organisations, and board trustees have a duty to act visibly, predictably and understandably to promote participation and accountability to allow third parties to easily perceive what actions are being performed.”<sup>86</sup>

Transparency is pivotal for a modern corporation to ensure it maintains the trust and confidence of its stakeholders by administering a service that is capable of being understood by its clients and key stakeholders.

Openness and transparency are regarded as key pillars to build accountability and trust in any modern entity.<sup>87</sup> Best practice arrangements for the Scheme requires visibility of relevant operations and data, ease of access to information, and an ability to comprehend the information provided in a manner which permits a stakeholder to effectively engage with the Scheme.

In this context, transparency should be regarded as looking at “not only facts and figures, but how a body is governed, makes decisions, how well it performs, and how to access or complain about its activities.”<sup>88</sup>

Key areas of transparency that are indicative of a best practice scheme include transparency of:

- interactions between the CEO and the Board;
- documented, lawful and evidence-based decision-making;<sup>89</sup>
- discharge of functions and roles of the Corporation;
- systems and accessibility of information;<sup>90</sup>
- governance and performance metrics;<sup>91</sup> and
- data use and protection.<sup>92</sup>

<sup>86</sup> Transparency International, ‘Corruptionary A-Z Transparency’, Transparency International (Web Page, 2021) <<https://www.transparency.org/en/corruptionary/transparency>>.

<sup>87</sup> Angel Gurría, ‘Openness and Transparency – Pillars for Democracy, Trust and Progress’, *Organisation for Economic Cooperation and Development* (Web Page) (‘OECD Openness and Transparency’) <<https://www.oecd.org/about/secretary-general/opennessandtransparency-pillarsfordemocracytrustandprogress.htm>>.

<sup>88</sup> Institute for Government – Public Chairs’ Forum, “Transparency in Arms-Length Bodies: A Guide to Best Practice”, pcf-transparency-doc-v6 (instituteforgovernment.org.uk) (‘Transparency in Arms Length Bodies’).

<sup>89</sup> Regulatory Guidance (n 81) 9.

<sup>90</sup> OECD Openness and Transparency (n 87).

<sup>91</sup> Transparency in Arms Length Bodies (n 88) 1.

<sup>92</sup> Ibid 11.

## 4.6 Accountability



“Accountability is centrally important to any consideration of culture, governance, and remuneration. Clear accountability is vital to effective governance. It ensures that issues are resolved and resolved effectively. It fosters a culture where risks are managed soundly. It lies at the heart at the operation of any variable remuneration and incentive system.”<sup>93</sup>

Accountability is a key feature of a best practice scheme to build and maintain a trusted relationship with stakeholders of the Scheme. Accountability is underpinned by trust, integrity, responsibility, and a mature corporate culture. It is intertwined with transparency and works together to provide a scheme that endears public confidence.

A best practice future Scheme incorporates accountability through its governance structure and the composition of its Board. These are explored separately below.

### 4.6.1 Governance structure

Public scrutiny of government services is high, and accordingly a modern corporation should recognise the benefits of strong governance arrangements in order to build trust in its processes, and to ensure that all requirements for accountability, consistency, transparency, equity, and disclosure are met.<sup>94</sup>

As a CCE, the Corporation acts at arms-length from the Commonwealth and as such must establish its own accountability mechanisms and measurements. These accountability mechanisms must be publicly available to allow stakeholders and the wider community to hold the Corporation to account. Additionally, accountability in governance requires entities to self-review and adjust operations or standards where they are found to be incompatible with their objectives. The Institute of Public Administration Australia (IPAA) provides guidance on best practice for regulators. This guidance outlines the following regulatory cycle, which is relevant to the Corporation should the Scheme require further regulation in the future.

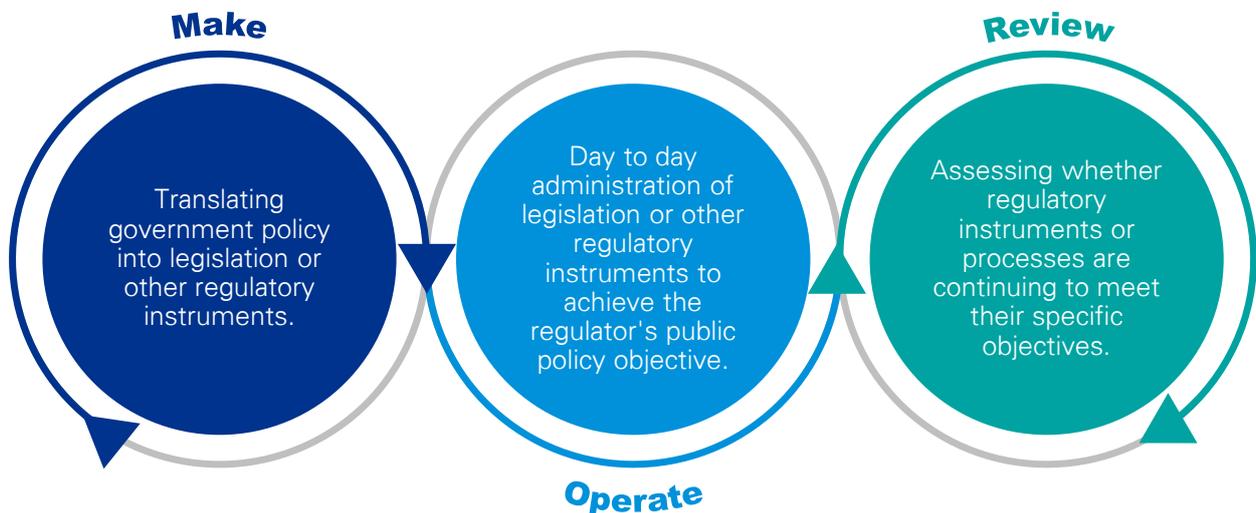


Figure 10: Regulatory Cycle<sup>95</sup>

<sup>93</sup> Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Final Report, February 2019) vol 1, 407.

<sup>94</sup> Regulatory Guidance (n 81) 5.

<sup>95</sup> Ibid 4.

## 4.6.2 Board Composition

Indicative features of a best practice modern board include:

- at least 20% independent Directors;<sup>96</sup>
- only allowing independent directors to Chair the Board;<sup>97</sup>
- having diversity of experience on committees to ensure that the longest serving Directors are not all concentrated on the same committee;<sup>98</sup>
- bench marking the boards skills through an external organisation every three years;<sup>99</sup>
- a director with extensive cyber security and technology skills;<sup>100</sup>
- diversity of gender, age, skills, expertise and interests;<sup>101</sup>
- transparency of remuneration, which is linked to performance;<sup>102</sup> and
- contemporary training for all directors, particularly in relation to fraud cyber security; and environmental management.<sup>103</sup>

It is best practice for modern boards to be composed of a diversity of skills, and actively report on the skill-matrix of its Directors. An example of a best practice skills matrix is demonstrated by the Australian Institute of Company Directors.<sup>104</sup>

<sup>96</sup> Australian Institute of Company Directors, 'Director Tools: Governance Relations – Number of Directors – Board Size' < [05446-3-1-1-8-mem-director-tools-gr-number-of-directors\\_a4-web.ashx \(companydirectors.com.au\)](#)> 2.

<sup>97</sup> Ibid.

<sup>98</sup> Australian Institute of Company Directors, 'Director Tools: Board Composition – Checklist for Assessing Board Composition' < [05446-1-8-mem-director-tools-bc-checklist-for-assessing-bc\\_a4-web.ashx \(companydirectors.com.au\)](#)>page 2.

<sup>99</sup> Australian Institute of Company Directors, 'Director Tools: Board Composition – Checklist for Assessing Board Composition' < [05446-1-8-mem-director-tools-bc-checklist-for-assessing-bc\\_a4-web.ashx \(companydirectors.com.au\)](#)>page 2.

<sup>100</sup> Stuart Ridley, 'The CDO and the Board,' *Australian Institute of Company Directors* (online, 1 September 2021) < [The CDO and the board \(companydirectors.com.au\)](#)>.

<sup>101</sup> Australian Institute of Company Directors, *Principle 3: Board Composition* (Web Page, 30 January 2019) < [Principle 3: Board composition \(companydirectors.com.au\)](#)>.

<sup>102</sup> Australian Institute of Company Directors, 'Director Tools: Board Composition – Directors' Fees' < [05446-1-13-mem-director-t-bc-director\\_fee\\_a4-web.ashx \(companydirectors.com.au\)](#)>.

<sup>103</sup> See e.g. Administration Act (n11) s 10.

<sup>104</sup> Australian Institute of Company Directors, 'Board Composition and Skills Matrix' (February 2021) <[0779011egaicboardskillsmatrixa42ppwebf0ec66cd66367e4d1d8e723b961cb818805c96b38f4406fb59760856d5a184.ashx \(companydirectors.com.au\)](#)>. Guidance on preparing a board skills matrix can be found at: [05446-9-mem-director-tools-bc-preparing\\_board\\_skills\\_matrix\\_web.ashx \(companydirectors.com.au\)](#).

## 4.7 Fit-for-purpose



**“[Modern corporations should be aware that] consistency need not be the same as uniformity, and there are circumstances where [policy] that is responsive and adaptive to different circumstances is more effective than a ‘one size fits all’ approach.”<sup>105</sup>**

A best practice scheme must be fit-for-purpose for its:

- objects and purpose having regard to the interests of its clients and the diversity of stakeholder groups who interact with the Scheme;
- diverse stakeholder groups; and
- the modern workforce.

The key object of the current Scheme is to provide minimum entitlements and rights in respect of LSL [to] eligible employees.<sup>106</sup> This purpose involves high levels of engagement with relevant employers and eligible employees. Noting the shifts in workforce composition over recent years, this means that the Scheme’s operations must be able to flex according to the different needs and capabilities of these newer stakeholders.

More specifically, the Scheme’s operations and systems should be reflective of current best practice regarding digital transformation, cyber security, privacy, and data protection. As a CCE, the Scheme is held to high levels of public accountability throughout all aspects of its operations, including its technology systems and administrative processes. Stakeholders expect these to include streamlined, easy to use, and accessible technology systems which prioritise data protection and privacy. A best practice future scheme should include such systems which are compliant with all relevant governmental policies and guidelines applicable to CCEs.<sup>107</sup>

<sup>105</sup> Regulatory Guidance (n 81) 4.

<sup>106</sup> Administration Act (n 11) 3(ab).

<sup>107</sup> See, e.g., Australian Government, Office of the Australia Information Commissioner, ‘Privacy for government agencies’, *Office of the Australian Information Commissioner* (Web Page) <<https://www.oaic.gov.au/privacy/privacy-for-government-agencies/>> and *Legal Services Directions 2017* (Cth).

# Chapter 5: Analysis and Assessment

- 5.1 Summary
- 5.2 Coverage and Treatment
- 5.3 Compliance and Enforcement
- 5.4 Governance
- 5.5 Administrative Processes



## 5.1 Summary

This chapter provides a detailed overview of issues identified by the Review, and recommendations to address those issues. Many of the issues identified were also raised by stakeholders throughout the consultation process and details of stakeholder views are included for reference. Views between stakeholders varied on some matters, and this chapter provides an overview of areas of consensus, and areas where views between stakeholder groups diverged.

The heatmap in Figure 11 provides a visual representation of the frequency in which issues were raised by stakeholders. Issues in the red zone were raised more frequently than those issues appearing in the green zone. Each issue in Figure 11 is allocated an alphabetical reference. The alphabetical reference accords to each issue as discussed in this chapter.

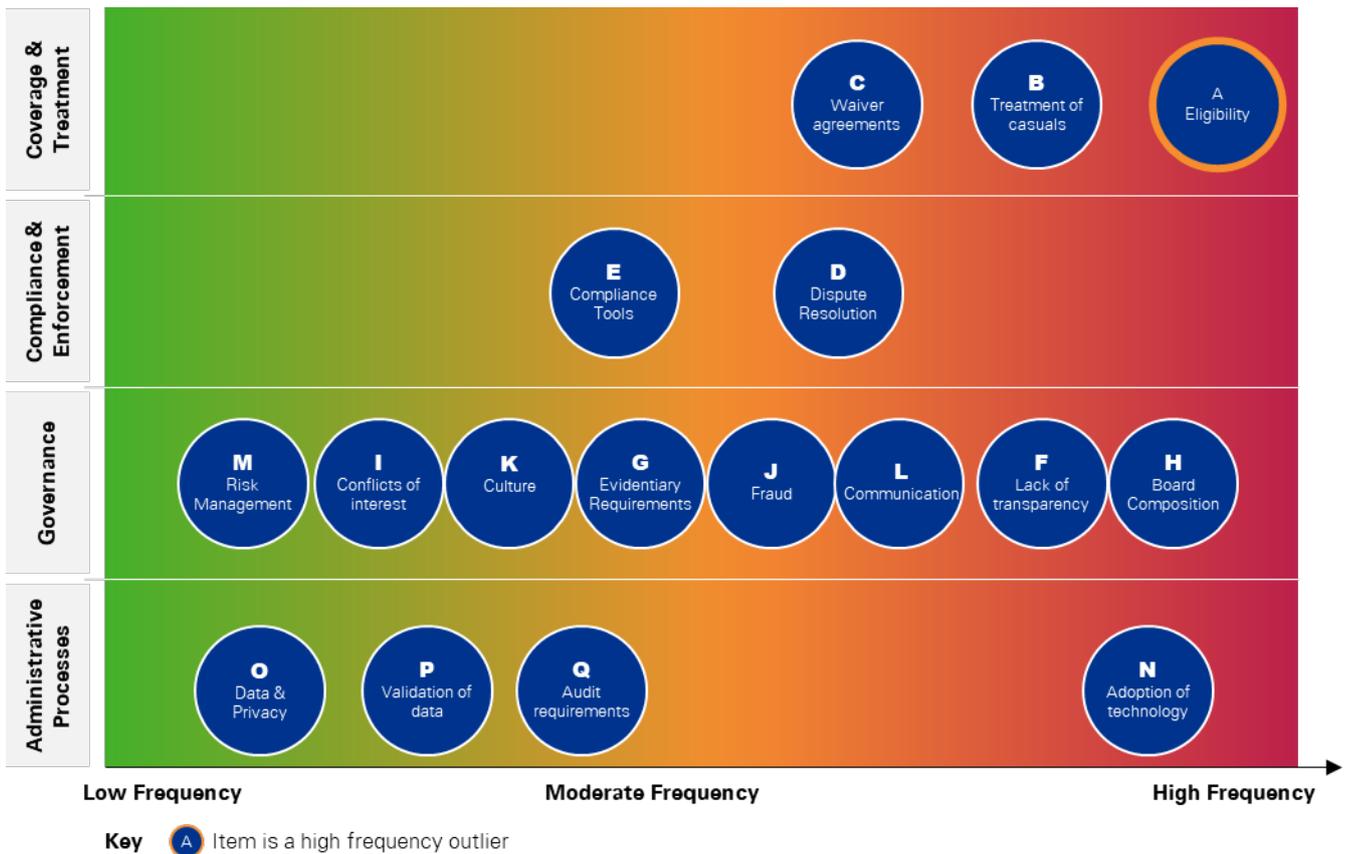


Figure 11: Heatmap of issues

## 5.2 Coverage and Treatment

### Key points and section summary

#### Summary

For many employees working in a permanent capacity on a mine site, the coverage and treatment provisions perform their function in connecting those employees with their accrued entitlements. However, for a growing number of workers performing casual work, or being engaged in newer employment models, transferring between roles on site, or between employers, the Review has found that aspects of coverage and treatment are not fit-for-purpose.

While current eligibility disputes primarily concern a group of unregistered employers and the Corporation, resolving the eligibility issue has broader ramifications for all employers who may be required to contribute to the Scheme, and the employees who derive entitlements from employers participating in the Scheme.

The coverage issues predominantly relate to:

1. the legislative definition of who is an 'eligible employee' within the Scheme;
2. the interplay between the federal portable Scheme, and other schemes in operation in the States and Territories; and
3. occupations which are excluded from the Scheme.

The treatment issues primarily relate to the differing treatment of casual employees and permanent employees within the Scheme.

#### Finding

The definition of 'eligible employees' is a key issue that underpins many other issues currently experienced within the Scheme. Amending the definition to provide certainty, in combination with amendments to ensure equal treatment of all employees (whether casual or permanent), will provide the Scheme with a stronger foundation upon which all other aspects will be able to function more effectively.

#### Recommendations

This section makes four recommendations (1 – 4).

## 5.2.1 Issue A: Eligibility

### Section 1: Coverage and Treatment

#### Issue A: Eligibility

#### Issue B: Treatment of Casuals

#### Issue C: Waiver Agreement

As the entry point of the Scheme, eligibility is the central and most pressing issue currently experienced in the Scheme's operations. Many of the other issues identified by the Review are a consequence of the current ambiguity and uncertainty that arises from the drafting and operation of the eligibility requirements. There was consensus between all stakeholders that eligibility, and addressing the issues surrounding it, was a high priority. There is, however, a divergence of views, as to how to best address this central issue.

The coverage of employees is predominantly disputed on three grounds:

1. the scope of the definition of 'eligible employee';
2. the interplay with other portable schemes (in operation in the States and Territories); and
3. the applicability of exclusions.

Each ground is considered in turn.

### Definition of 'eligible employee'

#### Background

#### *The current definition for an eligible employee*

Section 4 of the Administration Act provides the interpretation of 'eligible employee':

#### **Section 4 Interpretation**

**Black coal mining industry** has the same meaning as in the Black Coal Mining Industry Award as in force on 1 January 2010.

**Eligible employee** means:

- (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; or
- (c) an employee permanently employed with a mine rescue service for the purposes of the black coal mining industry; or
- (d) a prescribed person who is employed in the coal mining industry; but does not include a person declared by the regulations not to be an eligible employee for the purposes of this Act.

Through stakeholder consultation the Review has heard that the drafting and operation of the definition of 'eligible employee' in section 4, and in particular the drafting of paragraph (b), is the primary source of contention for the operation of the Scheme. There is consensus between stakeholders that eligibility was not a contentious issue prior to 2010 and that insufficient consultation was undertaken with stakeholders with respect to legislative reform conducted in the period 2009-2011. The definition of 'eligible employee' was amended as part of the award modernisation process, and the current eligibility issue has arisen because of the associated legislative reforms.

#### *The former framework for accessing employee eligibility*

Prior to the 2011 legislative amendments, eligibility was determined with respect to two criteria based on the relevant coal mining industry award or enterprise agreement:

- a. a person employed in the black coal mining industry under a relevant industrial instrument, or the Australian Fair Pay and Conditions Standard, the duties of whose employment are carried out at or about a place where black coal is mined; or
- b. a person employed by a company that mines black coal the duties of whose employment (wherever they are carried out) are directly connected with the day-to-day operation of a black coal mine.

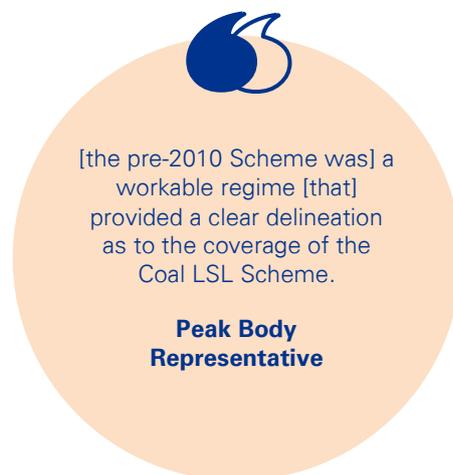
From 1 January 2010, LSL provisions were prohibited from inclusion within modern awards.<sup>108</sup> Instead, modern awards were to be introduced under the FW Act with existing award-based entitlements preserved as a statutory entitlement under the new NES, pending the intended development of a national LSL scheme.<sup>109</sup>

The change in status of previously award based LSL entitlements led to amendments to the then *Coal Mining Industry (Long Service Leave Funding) Act 1992*, with effect from 1 January 2010. The amendments made three key changes to the Scheme's legislative framework:

1. the definition of eligible employee was amended,
2. the definition of 'black coal mining industry' was aligned with the meaning contained within the BCMI Award, and
3. employers became entitled to reimbursement directly from the Fund.

Entitlement to LSL under the Scheme is now determined under the Administration Act. The Scheme is self-contained and applies to the exclusion of any LSL entitlements preserved by the NES, and of any State or Territory LSL law that might otherwise apply.

During the Review, several stakeholders submitted that the 2010 legislative amendments (which were subsequently reflected in the Administration Act as a result of changes made in 2012) were not intended to alter the coverage of the scheme from its pre-2010 status. Stakeholders stated that the amendments were aimed at addressing the section 155 prohibition on LSL in the FW Act, by preserving the 'status quo' of existing coverage of the scheme. The explanatory memorandum to the *Coal Mining Industry (Long Service Leave) Legislation Amendment Bill 2011* outlines that the reforms were intended to "ensure [LSL] entitlements applied universally in the black coal mining industry" and extended coverage to casual employees.<sup>110</sup>



<sup>108</sup> *Fair Work Act 2009* (Cth) s 155 ('FW Act').

<sup>109</sup> Explanatory Memorandum, *Coal Mining Industry (Long Service Leave Funding) Amendment Bill 2009* (Cth) 1.

<sup>111</sup> Payroll Levy Act (n 36) 4.



The overwhelming experience of contractors/service suppliers is that any provision of an auxiliary service to an operating coal mine is considered by [the Corporation] to fall within the coverage of the scheme.

**Modern Industry Stakeholder**

*The current issue*

The current coverage disputes experienced within the Scheme pivot on the interpretation of the ‘eligible employee’ definition in the Administration Act. While current eligibility disputes primarily concern a group of unregistered employers and the Corporation, resolving the eligibility issue has broader ramifications for all employers who contribute to the Fund, and the employees who ultimately derive entitlements from employers participating in the Scheme.

In summary, the disputes have arisen from a view held by some employers that the Corporation has adopted an overly expansive view that a growing number of businesses providing services with employees located on a coal mine site fall within the coverage of the Scheme, and therefore must pay the levy for any past and present eligible employees.

**‘Eligible employee’ definition - paragraph (b): understanding the expression “an employee who is employed in the black coal mining industry”**

The nature of the dispute between the Corporation and unregistered employers (including Modern Industry Stakeholders and their representatives) centres primarily around the operation of the paragraph (b) definition within the Administration Act.

Many employers, who the Review refers to as Modern Industry Stakeholders, do not self-identify as being engaged within the black coal mining industry. Those Modern Industry Stakeholders often provide services across several industries and have rejected attempts by the Corporation to register them for participation in the Scheme. A representative for Modern Industry Stakeholders has relevantly highlighted that “the interests of employers already covered by the Scheme are very different to those who risk being covered by the Scheme if the coverage is expanded”.

Modern Industry Stakeholders, and their representatives, hold the view that the Corporation has adopted an incorrect interpretation of the paragraph (b) definition.

In counter arguments, some stakeholders have suggested that the employers who contest coverage do so on the basis of having undertaken a risk assessment and electing to avoid coverage by quarantining its workforce from coverage within the Scheme to reduce operating costs, thereby achieving a commercial advantage.

The interpretation of the paragraph (b) definition is important, as it translates into significant backpay liabilities that arise should a determination be made that these employers employ, or have employed, ‘eligible employees’. The quantum of the issue has been described as “at best business critical and at worst existential” for a range of unregistered employers.

**Analysis**

There is consensus that the amended legislative criteria for what constitutes an ‘eligible employee’ has created significant uncertainty. The source of the uncertainty appears to be the removal of the former reference to a “relevant industrial instrument” and a shift from an eligible employee being one “employed by a company that mines black coal” to simply “employed in the black coal mining industry”. The amended



[The Corporation] has taken an expansive view of the meaning of ‘eligible employee’, expanding the reach of the Coal LSL Scheme to employers and their employees who have no industrial history of being regulated by coal mining industry teams.

**Modern Industry Stakeholder**

reference to the ‘black coal mining industry’ is problematic, in so far, as that term is open to differing interpretations, and has attracted considerable judicial consideration. Despite attempts by the Corporation to provide clarity through the issuing of Guidance Notes on the meaning of ‘eligible employees’, a number of stakeholders have commented that changes have occurred in guidance material over the period 2013 to present and that the Corporation’s guidance has not assisted in addressing the uncertainty. A fit for purpose definition of ‘eligible employee’ will need to be sufficiently clear, certain and simple to as to allow uniform application across the diverse range of stakeholders affected by the Scheme.

Any attempt to rectify the uncertainty with respect to eligibility must address both legacy issues, that is, finding a solution to historic liabilities arising for current and former employees within the Scheme, in addition to providing certainty for future employee entitlements. It is foreseeable that as technology advances, the location that work is performed may extend far beyond a mine site, and place further stress on the current drafting of the eligibility definition. To that end, it is likely that two solutions are required, one to address past and current issues, and a second solution to future-proof the Scheme ensure the same issue does not arise into the future.

## Exclusions

As a result of the interaction between the definition of ‘eligible employee’ and clause 4.3 of the BCMI Award, there remains a few employee classifications which are excluded from the Scheme. The key exclusions contained within clause 4.3 of the BCMI Award relate to head offices, construction work, and shotfirers.



Corporate Employees	Construction Work	Shotfirers
<p>The operation of the Award and the Administration Act exclude employees employed in Head Offices from coverage in the Scheme.</p> <p>In a modern mining context, it is not uncommon for employees to perform both a mix of technical and corporate roles throughout the course of their career. This variation in role amounts to a change in treatment under the Scheme.</p>	<p>The interaction of clause 4.3(d) of the BCMI Award with the Administration Act, results in the exclusion of construction work on or adjacent to a coal mining site</p> <p>Coverage of construction work is particularly contested within the industry. This issue is exacerbated by the fact that many businesses involved in construction are covered by industry specific State schemes.</p>	<p>While shotfirers have a general exemption under the BCMI Award, if they are employed by a coal mining company, they then become covered by the Scheme and captured by section 4(a) of the Administration Act.</p> <p>In practice, the exclusion results in a difference of treatment between shotfirers employed by a coal producer, and a shotfirer working on a mine site who is employed by a chemical company.</p>

Exclusions mean an employee may have periods of service for LSL interrupted by transferring between roles. The exclusions also create a scenario (especially for shotfirers) where it is possible that two employees, performing the same or similar work, will be treated differently by the Scheme, as a result of being employed by different employers.

Examples have been provided that suggest the present exclusions provided by the BCMI Award create anomalies within the operation of the Scheme, namely:

- a disincentive for workers to pursue career diversity and move into corporate roles (unless the minimum qualifying service period has been attained); and
- an inconsistency between workers who are performing shotfiring roles, albeit through different employers, and receiving different entitlements as a result.

Examples are contained below.



**Exclusions**

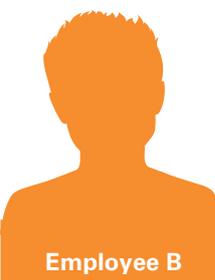
**CASE  
STUDY 1**



**Employee A**

**Corporate Service:** Employee A worked for a large producer from 2009 until present 2021, culminating in at least 12-years' service. During this time Employee A moved between a number of on-site and corporate office-based roles. As a result of the movement between roles that are included within the Scheme and roles excluded from the Scheme, Employee A claims they are unable to access a large proportion (over half) of the LSL entitlements they believe they are owed – despite the fact that they had been employed by the same major coal producer for the entirety of that period.

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**Employee B**

**Corporate Service:** Employee B informed the Review that they worked for three different employers for a cumulative total of 10.5 years. Five of those years were on a coal mine site, and five and a half in a corporate role. As a result, Employee B accrued approximately five years of qualifying service, however the final five years performed in the corporate role for the same employer is not recognised for the purposes of the Scheme. Major coal producer for the entirety of that period.

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**Employee C**

**Technical Roles:** Employee C provided evidence they were a geologist working in the coal mining industry, and explained they work both on-site and off-site with very little difference in tasks completed in those separate locations. Employee C has complained that they only had LSL hours accrued for their time worked on-site.

---



**Employee D**

*“I work for an explosive company in a coal mine full-time as a **shotfirer** and the company claims it is a chemical company and does not pay into [the Scheme]. I have a prior 16 years in the industry and have just been employed by this company so can't get [LSL] through them.”*

KPMG

63

Enhancing Certainty and Fairness

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## Definition of eligible employees



Certainty

### Recommendation 1:

It is recommended that the Commonwealth amend the definition of eligible employee through legislative reform to reduce ongoing uncertainty. The focus of the reform should be to:

- address section 4 of *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth) (the Administration Act) and in particular paragraph (b) of the definition of 'eligible employee' definition) with reference to the term "*an employee who is employed in the black coal mining industry*"; and
- review the occupations presently excluded from the Scheme for alignment with the intention of a best practice future scheme and contemplate legislative reform to address any anomalies.

## Addressing legacy issues



Certainty

### Recommendation 2:

In addition to clarifying coverage for the future operation of the Scheme (recommendation 1), to address the legacy issues associated with the past application of coverage provisions, it is recommended that the Minister engage with the parties to the Existing Proposals with a view to progressing the proposals, and seeking legal advice concerning the drafting of any amendments. In determining which aspects of the Existing Proposals should progress to legislative amendment, the Minister should have regard to the Option models presented in chapter 6 and any impact on broader stakeholders within the Scheme.

## Implementation consideration: Timing

The Review suggests that the implementation of recommendations 1 and 2 be progressed simultaneously to reduce inconsistencies in outcomes for unregistered employers. There is a risk of inconsistencies arising where an unregistered employer may negotiate to be included within an agreement addressing legacy issues but resulting legislative reform could possibly exclude them from future coverage in the Scheme. Simultaneous progression of recommendations 1 and 2 and comprehensive stakeholder consultation will help to mitigate this risk.

## Implementation consideration: Interaction with BCMI Award

Recommendation 1 requires consideration of the intersection between the Administration Act and the BCMI Award, as the occupations presently excluded are contained within the BCMI Award. The Commonwealth may consider the feasibility of legislative reform to the Administration Act to decouple the link to the BCMI Award to permit current anomalies to be addressed in a contained manner within the Scheme's enabling legislation.

## Implementation consideration: Operational status of mine sites

In addition to the uncertainty surrounding the correct interpretation of section 4(b) of the Administration Act, a peak industry body has raised further concerns about an employee's continued eligibility for the Scheme in circumstances where the operational status of a mine shifts out of production, either on a temporary or permanent basis. Stakeholder submissions suggested that multiple coal mine operators continue to pay the levy for employees who were previously employed at a coal mine in production, that has since shifted to care and maintenance mode. Uncertainty exists as to whether those employees continue to be an eligible employee within the Scheme.

This amendment would future proof the legislation, especially in circumstances where it is predicted that a number of coal mines will transition out of production in the near future.

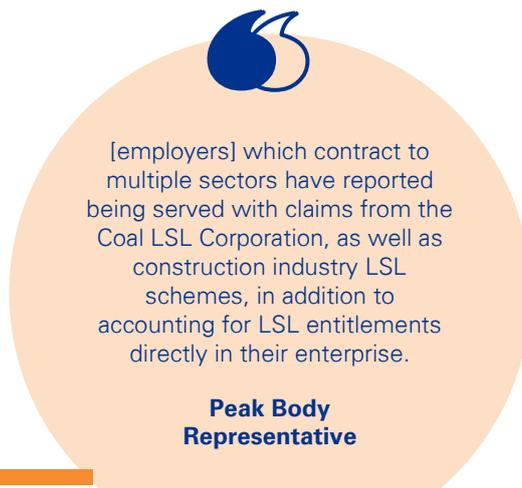
## Interaction with other schemes

The Scheme is a federal initiative developed specifically for the black coal mining industry. Other state schemes which may intersect with the Scheme include, in particular, the New South Wales, Queensland and Western Australian state long service leave schemes (given the presence of coal mining operations in those jurisdictions).

The interaction with other schemes may result in two undesirable scenarios:

1. an employee may mistakenly receive LSL entitlements under more than one scheme (a scenario described as ‘double dipping’; or
2. an employee may be ineligible to receive LSL entitlements, or unable to meet the pre-qualifying criteria, under any scheme at a certain point in time (effectively ‘missing out’ of entitlements).

The potential for this ‘double dipping’ and ‘missing out’ is an issue that was raised consistently throughout the Review’s consultation process by a mix of peak bodies and employee representatives, although it is difficult to determine the frequency in which either scenario occurs. On this issue, a peak industry body submitted that the concurrent operation of schemes produces undesirable outcomes:



[employers] which contract to multiple sectors have reported being served with claims from the Coal LSL Corporation, as well as construction industry LSL schemes, in addition to accounting for LSL entitlements directly in their enterprise.

**Peak Body Representative**



### “Double dipping”

### CASE STUDY 2

Company A is a small business that provides electrical services. It is covered by *the Electrical, Electronic and Communications Contracting Award 2020* for its field based electrical work. When conducting an internal audit, Company A identified that some of its employees were regularly working on black coal mining sites.

The Corporation’s interpretation of section 4(b) of the Administration Act, means that the Corporation determined that Company A was liable for the Coal LSL levy, despite its employees also having entitlements under another scheme.

Company A had already contributed to, and reported service under, the QLD building and construction scheme. As a result of the concurrent operation of the schemes, the employer was required to pay two LSL levies, and an employee mistakenly gained multiple accruals.

The current legislative frameworks governing the interaction between the Scheme and State-based schemes can also give rise to circumstances where an employee will not have their service recognised under any scheme. This may occur where an employee has had their period of qualifying service interrupted, for example, moving between sites or to the corporate head office, or less commonly, as a result of ambiguity of coverage where the employee is not considered to be an eligible employee under any relevant scheme.

Employees who participated in the Review highlighted non-accrual of service as an important issue that must be rectified, although the data received from stakeholder consultation process was not sufficient to draw a conclusion as to the quantum of employees negatively impacted by the concurrent operation of schemes.

Case Study 3 demonstrates that this concern is also shared by employers.



### Employees missing out – equipment providers

## CASE STUDY 3

Company B is an equipment provider who provides services to black coal mine sites and other industries. Cohorts of Company B's workforce are covered under the Scheme, and other parts of the workforce covered under State-based LSL schemes. At different points in their careers, employees of Company B may gain accruals under both schemes, which may result in disadvantage because they must accumulate 8 years of service in the black coal mining industry to access LSL under the Scheme. Company B is concerned its employees may 'miss out' of entitlements as a result of them providing services across multiple industries.

Many proposed solutions were offered by stakeholders, including:

1. eligible employees having the option to nominate their preferred scheme, and to opt-out of the Scheme for specific periods of service if they prefer to receive entitlements under a different scheme;
2. implementation of a credit system that permits exchange credits for moving between schemes;
3. the Corporation accepting that coverage under a State-based scheme is sufficient to mean that an employer is not liable under the Scheme;
4. amending the legislation to exclude employees from receiving Coal LSL entitlements for periods of service where entitlements have been received under a different scheme;
5. expanding the Scheme to replace State-based schemes; and
6. create a mechanism for mutual recognition to create linkages between the schemes.

### Empowering workers: choice of scheme



Fairness

#### **Recommendation 3:**

It is recommended that to address current issues caused by the interaction between LSL schemes, that the Commonwealth take steps to explore mutual recognition arrangements with the relevant State and Territory LSL schemes to reduce the incidence of employees mistakenly receiving entitlements under two or more LSL schemes, or employees missing out on entitlements (because of not meeting the pre-qualifying service criteria or recognition of service between schemes).

### Implementation consideration: Mutual recognition arrangements

Prior to implementation of recommendation 3, it would be prudent to attempt to quantify the frequency and size of the issues caused by employees 'double-dipping' or 'missing out'.

Recommendation 3 requires significant consultation with various State and Territory Governments. Assuming an agreement could be reached between the Commonwealth, and State and Territories, legislative reform would likely need to occur to implement a mutual recognition arrangement. Implementation would likely take a significant period of time.

## 5.2.2 Issue B: Treatment of casuals and permanents

### Section 1: Coverage and Treatment

Issue A: Eligibility

Issue B: Treatment of Casuals

Issue C: Waiver Agreement

For the purposes of this report, ‘treatment’ refers to what rights and entitlements an ‘eligible employee’ has within the Scheme. Treatment includes accrual of entitlements and ability to access accrued entitlements.

The differing treatment between casual employees and permanent employees within the Scheme was raised consistently by stakeholders for the Review’s consideration. This issue has attracted attention by the media and parliamentarians, concerned about its impact on fairness for workers. The differing treatment is a result of three intricacies of the current Scheme:

1. the definition of eligible wages;
2. calculation of ‘work hours’; and
3. reporting of hours by employers through monthly returns.

### Working hours

‘Working hours’ are the measurement by which an employee’s entitlement to LSL is accrued and calculated. Section 39AA of the Administration Act sets out the calculations for an employee’s accruals in reference to their ‘working hours’.

#### **Section 39AA Amount of long service leave**

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

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

where:

**working hours** means:

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

An employee's 'working hours' are calculated differently depending on their employment status as outlined in Figure 12:

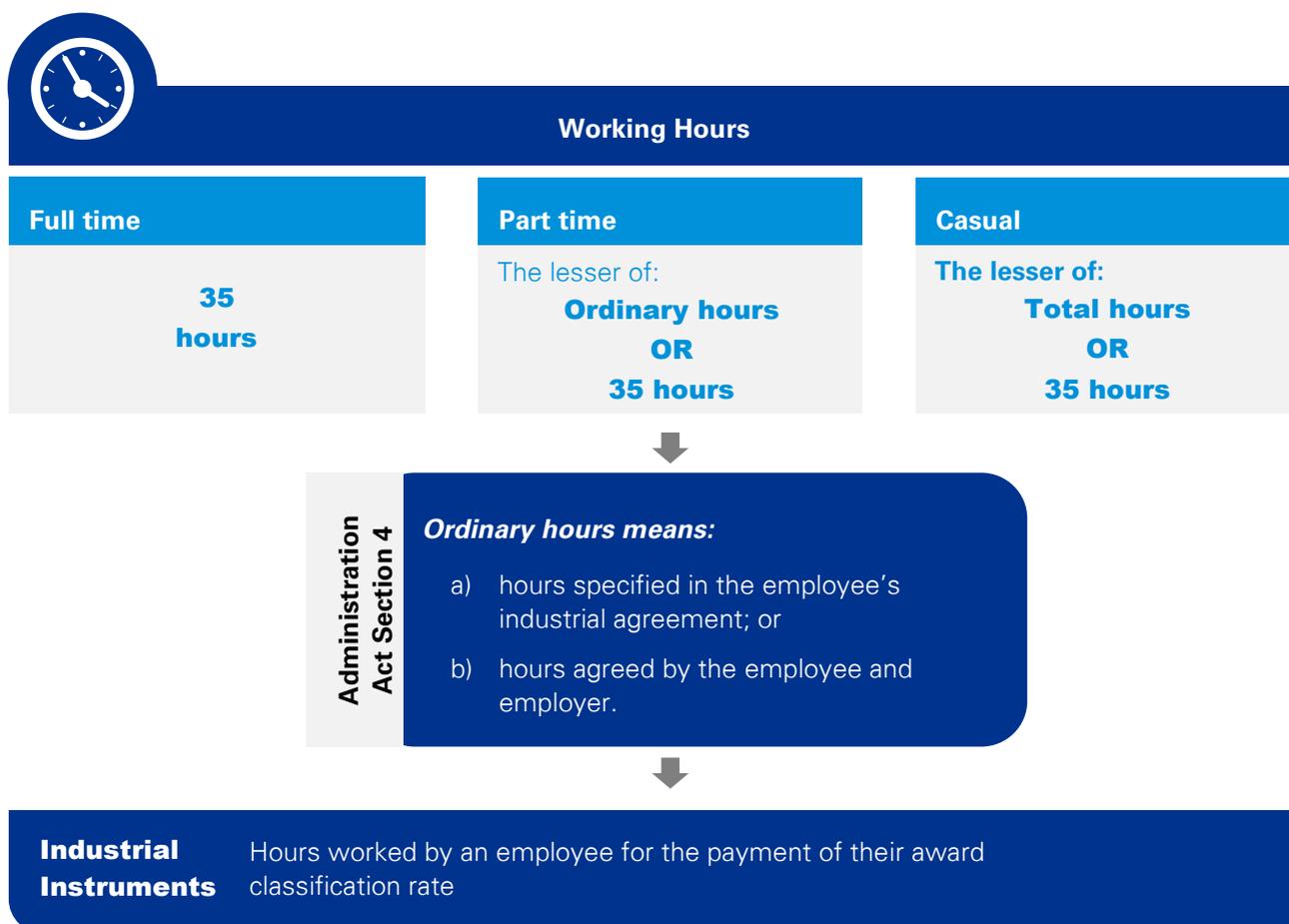


Figure 12: Working hours calculation overview

This calculation results in a circumstance whereby full-time employees are guaranteed to have 35 working-hours (regardless of actual hours worked) whereas casual employees will accrue actual hours worked, capped at 35 hours.

## Eligible wages

'Eligible wages' are the basis upon which the levy is calculated, and an employer's liability arises.<sup>111</sup> The definition of 'eligible wages' is articulated in section 3B of the Collection Act:

### **Section 3B** *Meaning of eligible wages*

- (1) *If an eligible employee is paid a base rate of pay and is not a casual employee, the employee's eligible wages are the greater of:*
- (a) *The base rate of pay paid to the employee, including incentive-based payments and bonuses; and*
  - (b) *75% of the base rate of pay paid to the employee, including:*
    - i. *incentive-based payments and bonuses; and*
    - ii. *overtime or penalty rates; and*
    - iii. *allowances (other than those for reimbursement of expenses).*

<sup>111</sup> Payroll Levy Act (n 36) 4.

- (2) If an eligible employee is paid an annual salary, the employee’s eligible wages are the annual salary paid to the employee, including incentive-based payments and bonuses but excluding:
- (a) overtime or penalty rates; and
  - (b) shift-loadings.
- (3) If an eligible employee is a casual employee, the employee’s eligible wages are the base rate of pay paid to the employee, including incentive-based payments and bonuses.
- (4) In this section:
- (a) a reference to the base rate of pay paid to an employee is a reference to the employee’s base rate of pay before any amounts are deducted under a salary sacrifice arrangement; and
  - (b) a reference to the annual salary paid to an employee is a reference to the employee’s annual salary before any amounts are deducted under a salary sacrifice arrangement; and
  - (c) a reference to an incentive-based payment paid to an employee is a reference to payment of that and that is paid to the employee at least once a month; and a reference to a bonus paid to an employee is a reference to a bonus that is paid to the employee at least once a month.

The definition calculates the wages upon which the levy will be imposed in accordance with three categories:

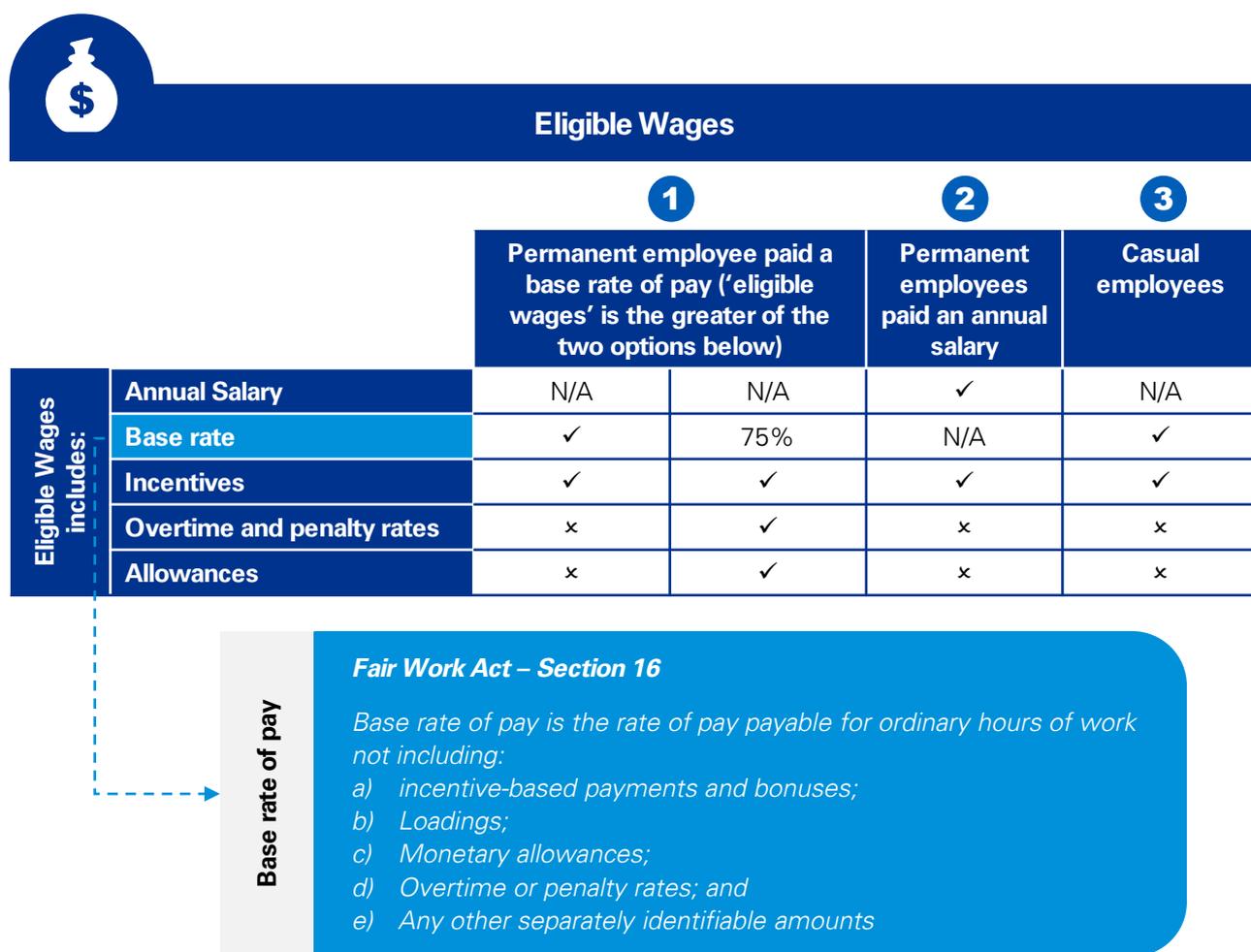


Figure 13: Eligible wages calculation overview

These categories provide permanent employees with two separate calculation methods, with the most beneficial of those calculations to be applied to permanent employees’ ‘eligible wages’ calculation.

Conversely, casual employees are only provided a single calculation method within the current legislative framework.<sup>112</sup>

The Review heard from stakeholders, notably parliamentarians and employees, who expressed concerns that the existing calculation methods produce unfair outcomes. These stakeholders advocated for a Scheme that applies a simple and fair method consistently to all eligible employees within the Scheme. Issues were raised regarding a lack of clarity for the definition of 'base rate' of pay and its application to casual employee loading rates. This issue has resulted in several employers believing they are paying an excess of 25% into the Fund due to the ambiguity regarding casual loading rates.

In submissions provided to the Review, the Corporation has echoed stakeholders calls for greater simplicity in eligible wage calculation to support ease of business and compliance. In submissions, the Corporation advised it recently commissioned an independent study of levies paid by a sample of large employers of eligible casual employees. The independent study reported errors in the levy calculations of all employers who were sampled, indicative of the complexity of the current arrangements.

The Corporation requires all hours worked by casuals to be reported within monthly returns (outlined below).<sup>113</sup>

## Reporting of hours

Section 5 of the Collection Act requires an employer who employs an 'eligible employee' to provide a monthly report to the Corporation within 28 days after the end of the month.<sup>114</sup> The Corporation provides guidance and a template in excel form for employers to use in fulfilling this obligation.

Site-based work completed within the black coal mining industry is often completed on a fortnightly roster. Stakeholders reported the discrepancy between fortnightly rosters, and monthly reporting required by the legislative framework,<sup>115</sup> may result in a casual employee's hours being reported in a disadvantageous manner, per the following submission from a Modern Industry Stakeholder:

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<sup>112</sup> Collection Act (n 39) s 3B(3).

<sup>113</sup> Coal Mining Industry (Long Service Leave Funding) Corporation, 'Guidance Note, Determining "Eligible Wages" for the Purposes of Calculating LSL Levy', *Coal LSL* (Web Page, July 2018) 2  
<https://assets.ctfassets.net/w7mmu5az9koe/36Y3zvOnflqSBbNMVQYzie/4a8c9786e806b92b04bafef68b05444be/guidance-note-on-eligible-wages-for-the-purposes-of-calculating-lsl-levy.pdf>.

<sup>114</sup> Australian Government Coal Mining Industry (Long Service Leave Funding) Corporation, 'Levy Reporting and Payment', *Coal LSL* (Web Page) < <https://www.coallsl.com.au/employer/levies/#levy-advice>>.

<sup>115</sup> Collection Act (n 39) s 5.



In the coal mining industry, it is common for employees to work rosters with ordinary orders that vary from week to week, with more than 35 hours worked in the first week, and less than 35 hours worked in the second week. In such circumstances, casuals can be disadvantaged by having only 35 hours counted in the first week and less than 35 hours counted in the second week, even though they work an average of 35 ordinary hours per week.

**Modern Industry Stakeholder**

This averaging may not reflect the true hours worked by a casual employee per fortnight and is an issue that was raised consistently throughout the Review's consultation phase and during the Corporation's appearances at Senate Estimates.

There was a clear message from all stakeholders, including Parliamentarians who participated in the Review, that there are inequities between the treatment of casual and permanent employees within the Scheme that should be resolved.

### Equal treatment of casual and permanent employees



**Fairness**

#### **Recommendation 4:**

It is recommended that the Commonwealth enact legislative amendments to ensure that casual employees are treated no less favourably than permanent employees in the Scheme.

#### **Implementation consideration:**

Several submissions received by the Review propose remedies to achieve equal treatment between eligible employees within the Scheme. The proposals contain varying levels of detail as to suggested drafting and amendments required to effect the necessary legislative change. The Existing Proposals provide a useful starting point for contemplating technical amendments.

## 5.2.3 Issue C: Waiver agreements

### Section 1: Coverage and Treatment

Issue A: Eligibility

Issue B: Treatment of Casuals

**Issue C: Waiver Agreement**

Section 39B of the Administration Act allows for an eligible employee of a kind prescribed by the Administration Regulations to make an agreement with the employer to receive additional remuneration or contributions to superannuation, in lieu of LSL that the employee would have been entitled to under the Scheme. In effect, the provisions permit a small proportion of eligible employees to opt-out of the Scheme, by having their LSL entitlements paid out as part of earnings.

The stakeholder consultation process revealed a misconception that waiver agreements are broadly available. Contrary to that belief, section 7 of the Administration Regulations operates to limit the number employees who may participate in a waiver agreement.

#### **7 Waiver agreements – prescribed employees**

*For the purposes of subsection 39B(1) of the Act, an eligible employee is of a kind prescribed if the eligible employee:*

- (a) is at least 55 years of age and has no qualifying service for the purposes of section 39A of the Act; or*
- (b) is at least 55 years of age and has at least 8 years of qualifying service for the purposes of section 39A of the Act; or*
- (c) is a manager of a corporation that employs eligible employees in the black coal mining industry; or*
- (d) is a senior professional employee engaged in the management of a corporation that employs eligible employees in the black coal mining industry; or*
- (e) has an annual salary (including allowances) of:*
  - (i) in 2017 – at least \$174, 700; and*
  - (j) in a subsequent year - \$174, 700, as adjusted by the annual rate of the Consumer Price Index for 2017 and then for each completed year (if any) after 2017; or*
- (f) is employed under an undergraduate placement or a work training placement.*

In summary, waiver agreements are currently available to workers approaching retirement, senior corporate managers, and high-income earners.<sup>116</sup> The existing legislative framework does not permit the Corporation to grant waiver agreements to a broader group of employees.

Employees and parliamentarians expressed support for an expansion of the existing waiver agreements provisions to provide employees with greater choice regarding their LSL. This position was opposed by union stakeholders who advocated that expansion would negate the integrity of the Scheme. Union stakeholders also argued that providing an expanded criterion for waiver agreements would create greater vulnerability for employees with the potential loss of their LSL entitlements.<sup>117</sup>

Noting the current ambiguity surrounding coverage within the Scheme, and interaction of other State-based LSL schemes, further consideration is required to assess whether an expansion of waiver provisions is justified, noting the waiver provisions may provide an avenue to rectify a number of issues including:

- the interaction of State LSL schemes and associated issues with employees mistakenly receiving LSL entitlements under two or more schemes; and
- uncertainty regarding coverage provisions, by providing an opt-out mechanism (discussed with respect to Recommendation 3).

Notably, there is presently no option for employers to enter into waiver agreements without employee consent and this safeguard should be preserved in any future arrangement.

<sup>116</sup> *Coal Mining Industry (Long Service Leave) Administration Regulations 2018*, s 7.

<sup>117</sup> Joint Submission of the Mining and Energy Division and AMWU (n 56), page 14.

## 5.3 Compliance and Enforcement

### Key points and section summary

#### Summary

The Corporation has progressively adopted a stronger regulatory posture over the past decade. The compliance strategy uses education, limited compliance tools, and an increasing reliance on litigation to secure compliance with the Scheme. The current approach to encouraging employer compliance with the Scheme has received varying levels of stakeholder support, and while well received by union stakeholders, has been a point of contention and grievance for some modern industry employers and their representatives.

#### Finding

Ongoing compliance issues experienced within the Scheme largely result from unresolved coverage issues, combined with the limited number of tools available to the Corporation to administer the Scheme. Remedying the existing coverage issues will reduce many of the current issues experienced by the Scheme. Other enhancements to the Scheme can be achieved through refining the powers currently available to the Corporation to administer the Scheme, and a strengthening in decision-making, review and dispute resolution processes.

#### Recommendations

This section makes five recommendations (5 – 9).

### 5.3.1 Background

Further to the current state of compliance and enforcement activity summarised in chapter 3, the compliance landscape for the operation of the Scheme has shifted considerably over the past 10 years, and especially since 2015 when the Corporation began refocussing its compliance program.

Despite the Corporation's increased focus on compliance education, there has been no corresponding expansion of the powers provided to the Corporation to undertake compliance or enforcement activities. Because of the coverage issues explained in section 5.1, the Corporation is escalating its approach to compliance to bring unregistered employers into the Scheme. This approach, stands in contrast to the views held by some unregistered employers, and has created a dynamic of conflict, which is increasingly being punctuated by litigation. At the time of writing, there are three proceedings commenced in the Federal Court of Australia concerning eligibility and coverage disputes between the Corporation and employers.

## 5.3.2 Issue D: Dispute resolution process

### Section 2: Compliance and Enforcement

#### Issue D: Dispute resolution processes

#### Issue E: Limited compliance tools

As discussed in chapter 3, both internal and external dispute resolution mechanisms currently exist within the Scheme, however there is currently no external body (other than a court) with the powers to make binding determinations with respect to LSL eligibility, coverage and entitlements.

There was a lack of stakeholder consensus on whether current dispute resolution processes within the Scheme are fit-for-purpose. Unions informed the Review that current Court enforcement powers are adequate, while producers, employers and employer representatives suggested that additional review and dispute resolution processes would assist the administration of the Scheme.

Stakeholder feedback concerning the current dispute resolution centred on five key aspects:

#### i) The need for cost effectiveness and speed

Employer and employee representatives commented that the costs associated with seeking legal advice and defending (or initiating) legal proceedings is costly and burdensome, especially for small businesses. A number of stakeholders indicated that through a risk mitigation exercise, their entity has elected to register with the Scheme, in an effort to avoid compliance repercussions or potential litigation costs, notwithstanding that they adopt the view that their employees are not eligible employees within the meaning of the Scheme.

A small number of stakeholders also commented that the costs associated with complying with the Scheme also acted as a disincentive for companies operating in related sectors who may, as a result of the risk of litigation arising for being unregistered with the Scheme, choose to stop supplying necessary services to the coal mining industry.

#### ii) Strengthening the decision-making and review mechanisms

Commonwealth entities ordinarily have mandated powers with respect to the ability to make decisions, and the relevant considerations for the making of administrative decisions. As discussed in chapter 3, the current legislative framework contains no express powers for the Corporation to make administrative decisions with respect to eligibility – and as a result, has been critiqued by some stakeholders as acting as a tribunal without the requisite legal basis. The Review considers that it is open to the Corporation to make administrative decisions while exercising its functions under section 7 of the Administration Act. However, such a decision should be open to transparent and objective review. Further, increased clarity of the Corporation’s decision-making functions would enhance the operation of the Scheme.

Additionally, many Commonwealth entities have clear public guidelines on internal review processes, including what matters may be considered, by whom, and the evidentiary requirements. The Review acknowledges that the Corporation’s legislative framework is silent on such matters. The provision of greater legislative guidance and clarity in this matter would assist the Corporation to enhance its internal review process to provide greater transparency to all stakeholders involved in the process. Such legislative clarity would also provide a greater level of accountability for the Corporation in ensuring its processes are aligned with legislative requirements. These issues are discussed further in section 5.3.

#### iii) Expanding the current avenues for external dispute resolution

Acknowledging the limitations of the current dispute resolution mechanisms available to the Corporation, employers and employer representatives have called for an expansion of the section 39D dispute resolution provision (the provision that provides the FWC with powers to deal with LSL disputes) as an option to provide a more cost-effective and efficient method for resolving grievances arising between the Corporation and employers, and to a lesser extent, the Corporation and employees.

Stakeholder suggestions included a broadening of the s39D power to have disputes heard by an independent body (other than a court) capable of making binding decisions regarding eligibility, coverage and LSL entitlements. Employer stakeholders also raised the desire to have an independent body available to review the use of the Corporation's powers, specifically with respect to the use of Section 52A Notices (explored further below). Conversely, the Corporation took the view that an external review body would not assist, suggesting that the unique and technical nature of the black coal mining industry, meant the subject matter was unlikely to be suitable for adjudication by an external body. The Review considers that any concerns surrounding subject matter expertise can be addressed in an alternative dispute mechanism using technical/specialist experts or witnesses, as is common practice in a wide range of dispute forums.



Such a [review mechanism] will greatly assist in reducing the litigious nature of disputes and encourage employers and Coal SL to resolve disagreements.

**Employer Representative**

### Strengthening decision-making, review, and dispute resolution processes



#### **Recommendation 5:**

**Certainty Fairness**

It is recommended that the Commonwealth strengthen decision-making, review, and dispute resolution processes to:

- clarify the Corporation's powers to make decisions concerning eligibility for the Scheme and the relevant assessment criteria for use of those powers;
- provide greater legislative guidance on the operation of the Scheme's internal review mechanisms;
- create a mechanism for external binding determinations with respect to eligibility, coverage, and LSL entitlements, without recourse to court action.

#### **Implementation consideration:**

When considering possible alternative dispute resolution mechanisms legal advice should be sought to consider the various legal issues. Potential avenues for strengthened review and dispute resolution include:

- further powers for the Corporation (and corresponding further powers for the Administrative Appeals Tribunal to review the Corporation's administrative decisions); or
- further powers for the Fair Work Commission; or
- the introduction of an arbitration panel that, through the consent of parties, is empowered to make binding determinations.

#### iv) Having the power to make settlements

Throughout the stakeholder consultation process, employers and employer representatives argued for greater flexibility in the legislative arrangements to allow for settlements to be reached concerning liabilities. Most stakeholders agreed that empowering the Corporation to reach settlements with employers would improve the operations of the Scheme, be appropriate for the role of the Corporation and reflect similar powers provided to comparable entities.

Another Modern Industry Stakeholder suggested that a gap exists in the Scheme, in so far as acknowledging that the Corporation has a duty to pursue levies it believes is owing, but no discretionary powers to reach a settlement.

While there was consensus that such powers would be appropriate for the Corporation, registered employers did raise that any such settlements would need to be reached in a manner that was fair and equitable to employers who have been paying into the Fund for a number of years, and ensure they are not disproportionately shouldering the burden of financing the Fund.

As discussed further in chapter 6, the Existing Proposals to address legacy compliance issues and associated debts owed to the Scheme are focused on addressing liabilities accrued in the past. Without further action to address the coverage issues and changing workforce composition, it is highly probable that similar coverage disputes leading to backpay issues will arise in the future. As such, to prevent the issues currently facing the Scheme from enduring, there is merit in the Scheme including powers to reach settlements with employers.



Just as the Australian Taxation Office has a Code of Settlement providing it with discretion to settle with a party and avoid legal proceedings, so too should [the Corporation] be able to apply administrative discretion in this way.

**Modern Industry Stakeholder**

#### Resolving liabilities

##### **Recommendation 6:**

It is recommended that the legislation provide a power for liabilities to be settled in certain circumstances to promote employer compliance with the Scheme. Any settlements should have no impact on the ability for employees to receive their accrued entitlement.



**Certainty**

#### Implementation consideration:

Existing Proposals offered by stakeholders have sought to include powers of settlement through an expansion of section 39D of the Administration Act.

The powers to enter into settlements could potentially be provided to the Corporation, or to another Commonwealth Regulator (such as the Australian Tax Office) with experience negotiating such settlements.

The Review suggests the Commonwealth should seek legal advice as to the ability of the Corporation to waive debts, and any corresponding legal technicalities concerning the ability of the Corporation (as a CCE) to enter into settlements and the granting of an appropriate power.

## v) Limitation periods on levy liabilities

With respect to employers who are alleged to be non-compliant in paying the levy, stakeholders noted that the Corporation currently claims liabilities dating as far back as 2000 and has suggested that any levy liabilities may not be subject to a limitation period.

At law, a limitation period generally refers to a span of time in which legal action must be commenced. Limitation periods act to ensure that claims cannot be brought in perpetuity or commenced after a long passage of time. In Australia, a six-year limitation period is common practice across several different legal practice areas. For example, a limitation period is applied in the FWC. Section 544 of the FW Act imposes a six-year limitation period on the bringing of applications for contravention of civil remedy provisions.<sup>118</sup>

In the context of the Scheme, limitation periods are discussed having regard to the time period in which the Corporation may pursue a levy liability from an employer. The suggestion that levy liabilities may not be subject to a limitation period is ultimately a matter for legal opinion, however the issue was raised during stakeholder consultation as a point of contention.

There is disagreement among stakeholders on whether a limitation period is needed for the Scheme. One Modern Industry Stakeholder noted that it is “ludicrous” to suggest that the Corporation can pursue claims with no time limit. This stakeholder submitted that as the FWC is the dispute resolution body under the Corporation’s governing legislation, the six-year limitation applicable to FWC disputes should therefore apply to the Scheme.

Another stakeholder noted that all other State-based LSL schemes include a six-year limitation for backpay liabilities. Peak body representative and employer stakeholders cited a range of case law as authority for the proposition that liabilities can only go back as far as six years.

In contrary opinion, representatives from producers did not support the introduction of a six-year limitation period, noting that most producers having been registered with the Scheme for periods exceeding six years. Concern was expressed that a six-year limitation period would create a situation where employers who did not want to pay in the Scheme could simply wait out the period and have their liabilities waived. However, producers did also express concerns for small businesses being faced with large liabilities after suddenly finding themselves covered by the Scheme. In the producer focus group it was noted that:

These [small] businesses have a **fear of the unknown**. Even where they want to be doing the right thing, it’s difficult for them to understand where their liabilities are.

**- Producers Stakeholder Forum**

The Corporation has also expressed its opposition to the introduction of a six-year limitation period. The Corporation considers it administers a Scheme, that by its nature, may need to reach back for many decades to ensure that career coal miners can access their entitlements. The Corporation argues that being unable to receive payment of the levy from non-compliant employers would make it very difficult to effectively administer the Scheme and manage the Fund.

<sup>118</sup> FW Act (n 108) s 544(a).

Imposing a limitation period on levy liabilities hinges to a certain extent on how the levy is characterised and should be the subject of legal advice. It is generally understood that taxes and their payment are not subject to any time period, and if characterised at law as a tax, levy liabilities may also not be subject to any time period for their collection. Relevantly, as a point of comparison, the Australian Tax Office place time limits on amendment of tax assessments to provide certainty and finality for all stakeholders. These time limits include two years for simple matters, four years for complex matters (absent circumstances of fraud),<sup>119</sup> although the time limits do not change the characterisation of any liability owed.

## Resolving liabilities



### Certainty

#### **Recommendation 7:**

It is recommended that the Commonwealth consider the merits of introducing a limitation period for the assessment and collection of levy liabilities within the Scheme to promote timely administration of the Scheme.

<sup>119</sup> Australian Government, Australian Taxation Office, 'Self-assessment and the period of review', Australian Taxation Office (Web Page, May 2018) <[https://www.ato.gov.au/About-ATO/Commitments-and-reporting/In-detail/FOI/Fraud-and-evasion-guidelines/?anchor=Self\\_assessment\\_and\\_review\\_period](https://www.ato.gov.au/About-ATO/Commitments-and-reporting/In-detail/FOI/Fraud-and-evasion-guidelines/?anchor=Self_assessment_and_review_period)>.

### 5.3.3 Issue E: Limited compliance tools available

#### Section 2: Compliance and Enforcement

##### Issue D: Dispute resolution processes

##### Issue E: Limited compliance tools

Compliance tools refer to the powers and mechanisms made available to the Corporation to administer the Scheme through the current legislative framework. The limited tools currently available for the Corporation are outlined in chapter 3.

In summary, the existing compliance tools include a power to request information (through Section 52A Notices to produce) and the ability to commence proceedings. It is notable that the Corporation is not enabled with a broader suite of compliance or enforcement tools that are generally associated with the functions of a Commonwealth regulator. Accordingly, the Corporation may only approach monitoring and compliance activities with the limited compliance tools available. The Corporation's approach to compliance and the incidence of employees who are stranded, as a result of employer non-compliance, are discussed further below.

#### Approach to compliance and the use of Section 52A Notices

As discussed in chapter 3, since 2015 the Corporation has largely approached compliance through education and awareness programs, coupled with the use of Section 52A Notices. More recently, the Corporation has commenced legal proceedings to pursue levy liabilities.

On the face of public documents available, in the period to 2017, the Corporation generally described its function as 'administering' the Scheme.<sup>120</sup> From 2017 onwards a noticeable shift in discourse has occurred, with the Corporation shifting its language to refer to itself as a 'regulator'.<sup>121</sup> This shift is reiterated in feedback received from stakeholders that suggests in recent years the Corporation's has adopted a more assertive regulatory posture.

<sup>120</sup> See, e.g., Coal Mining Industry (Long Service Leave Funding) Corporation, *Coal LSL Annual Report 2015/16* (Report, October 2016) <[www.coallsl.com.au](http://www.coallsl.com.au)>; Coal Mining Industry (Long Service Leave Funding) Corporation, *Coal LSL Annual Report 2014/15* (Report, October 2015); Coal Mining Industry (Long Service Leave Funding) Corporation, *Coal LSL Annual Report 2013/14* (Report, October 2014).

<sup>121</sup> *Annual Report 2019/20* (n 23); Coal Mining Industry (Long Service Leave Funding) Corporation, *Coal LSL Annual Report 2018/19* (Report, September 2019); Coal Mining Industry (Long Service Leave Funding) Corporation, *Coal LSL Annual Report 2017/18* (Report, September 2018).

The Review received submissions from employers who have been subject to the use of the Corporation's limited compliance tools. A case study from a small business employer is provided below:



### The experience of a small business

## CASE STUDY 4

Company A states it first discovered its employees may be covered by the Scheme in 2019 after receiving a letter from the Corporation. The letter Company A received appears to have been prompted because of an employee (who exited the business in 2011) lodging a recognition of service application with the Corporation in 2015. Company A did not receive any correspondence in the four years that passed between 2015 (when the Corporation received the evidence from the employee) until the 2019 when Company A received a letter from the Corporation.

Company A states that initially the Corporation adopted the view that the employee was an 'eligible employee' captured by the Scheme, and asked Company A to provide a substantial amount of information to verify the position. Company A states it received verbal confirmation from the Corporation that it would not be liable for any levy payment prior to pre-2010, before later receiving a letter to the contrary, suggesting that all of the relevant employee's service was covered, including pre-2010 service.

Another employer stakeholder shared:



"The lack of clarity around coverage is driving an approach that is directed around not whether we are covered or not but acknowledging that we don't know and until someone ends up in court, we won't know. From a risk mitigation strategy, is the cost of opting in the cheaper method? I think this is very well understood by Coal LSL's representative, and the s52A notice is used as a mechanism to force employers in."

- Unregistered Employer



Several other stakeholders provided examples of instances where when they consider Section 52A Notices have been used inappropriately by the Corporation:



**Use of Section 52A Notices**

**CASE  
STUDY**

# 5



**Peak body  
representative**

An employer will generally receive a letter from the Corporation attempting to persuade it to register for the Scheme. Section 52A Notices are raised obliquely at this point, but the threat increases over time through subsequent engagement with the Corporation. Where employers had agreed to register, minimal information is requested of them. Where however, an employer does not register, they are transferred to a different team within the Corporation who will then issue a Section 52A Notice. These notices are onerous in terms of both timeframes and the information requested. Employers began receiving these letters in 2015 and 2016 and replied to the Corporation outlining their position (that they are not covered by the Scheme). Letters from the Corporation in response were not received by the employers until 2018/2019.

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**Employer**

**Shifting Requirements:** Employer A explained it was in negotiations with the Board where there was an initial agreement that information requested pursuant to a Section 52A Notice regarding intellectual property and costs would be redacted. Employer B submitted the documents to the Corporation. Employer B complains it did not receive a reply from the Corporation for four months, when it received a further request stating that all information was required to be submitted to the Corporation within one week. Further discussions were undertaken between lawyers and an outcome was reached that there would be more information provided without redacted information including purchase orders and marketing plans. Employer A argued that this requested information was not relevant or consistent with earlier discussions concerning commercial information being redacted, however the Corporation responded indicating that it was within its powers to request all information.

Unregistered employers have argued that the Section 52A Notice is being used erroneously on the basis that:

- there has been no attempt to align the scope of the notice with the scope of the coverage;
- the notices impose onerous obligations to respond in terms of timeframes and information requested;
- there have been requests for commercially sensitive information such as unredacted contracts; and
- the process of how and why information is requested lacks transparency.

KPMG

81

Enhancing Certainty and Fairness

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“We wouldn’t wish it on anyone to get one of these notices, given how unreasonable the Corporation [is] in the process.”

**Modern Industry Stakeholder**



These factors have led to the perception among unregistered employers that the Section 52A Notices are being used as tools for “retribution” to “bully” employers to register for the Scheme.

In contrast, participants at the unions focus group supported the compliance activities undertaken by the Corporation including the use of Section 52A Notices.

In consulting with the Corporation on the above concerns, the Review was informed that the Corporation takes the view

that it is hindered by the limited tools provided by the legislation, and as a result Section 52A Notices are required to make the Scheme function. With respect to requests for commercially sensitive information, the Corporation indicated that this information is necessary for eligibility determinations as it is relevant to the scope of work undertaken by employees.

The following information was provided by the Corporation regarding its use of the Section 52A Notices:



### The Corporation’s use of Section 52A Notices

## CASE STUDY 6

During stakeholder consultation, the Corporation advised that an employee may notify it that they have been working at Mine A for Company B. The Corporation indicates it may not know what work Company B was engaged to do at Mine A. Ordinarily, the employer will be asked for that information. The Corporation indicates it does not rush to issue a section 52A notice without first engaging with the employer. The Corporation stated that the notice is used as a last resort when the Corporation has requested information but has not received a response. The Corporation notes that the notice is inconvenient but requires the requested information to be provided to allow the Corporation to fulfil its obligations. The Corporation noted:

*“We do not use section 52A as a punitive measure if we’re not prepared continue down that route to take employers to the Federal Court.”*

On the submissions received, the Review heard that employers would like an external body (other than a court) capable of reviewing decisions concerning the use of the Corporation’s section 52A power.

In the context of its approach to compliance, the Corporation has suggested that the effectiveness of the Scheme is compromised without the Corporation holding greater powers. More specifically, the Corporation has expressed an interest in being bestowed with a general power of administration (specifically to facilitate settlements) and the ability to be able to issue Compliance Notices with respect of audit reports and payroll level returns, to improve the administration of the Scheme.

In assessing the readiness of the Corporation to have and to exercise additional powers, it is prudent to ask what enhanced functions are required, and who is best placed to perform any additional functions. Relevantly, while both the FWO and the ATO hold regulatory functions under their own enabling legislation, there is currently no mechanism for either entity to assume a comprehensive role as a regulator within the Scheme. As such, it is a matter for the Commonwealth to decide whether additional powers are required, and which entity is most appropriately positioned to exercise those powers. This is explored further in chapter 6. As part of that assessment, it is also relevant to consider the Corporation’s ability to assume enhanced functions, relevant resourcing implications and levels of stakeholder support. Through the stakeholder consultation process, employers and their representatives have suggested they have limited confidence in the Corporation assuming an enhanced regulatory function. Feedback received from stakeholders describes a Corporation which is developing its regulatory maturity. Examples received by stakeholders include:



### Inconsistent compliance activity

## CASE STUDY 7

A representative for Company A stated it had experienced the following regarding the Corporation's approach to compliance activity:

- a. an ad hoc approach to compliance activity where Company A has been pressured to register with the Scheme, then the Corporation retreats from engagement with the Company for months or years before the Corporation returns to pressure the business again;
- b. the imposition of a significant administrative burden on Company A through requirements to collate details of how many of Company A's employees have spent time on black coal mining sites over the last 10 years. The requests included employees who regularly moved across different industries and sites;
- c. receipt of additional compliance demands while the company considers settlement discussions were meaningfully progressing with the Corporation;
- d. receipt of correspondence from the Corporation suggestive of incorrect employee names; and
- e. a lack of explanation for the Corporation's change of approach in 2018.

As part of the Review's consultation, the Corporation acknowledged that a number of actions would be required should the Corporation be provided with an enhanced regulatory function, including:

- a shift in mind-set,
- restructuring operations to allow the regulatory structure to sit in a separate and independent area of the Corporation, and
- integration of additional governance arrangements.

### Ensuring the Corporation, as a custodian of the Scheme, has fit-for-purpose tools



**Accountability** **Fit-for-Purpose**

#### **Recommendation 8:**

While the adoption of recommendations 1, 2 and 5 should reduce the number of disputes and improve the administration of the Scheme, it is recommended that the Commonwealth consider refining the powers available to administer the Scheme with a focus on:

- the current operation and use of section 52A of the Administration Act;
- ensuring any non-compliance is addressed proportionately, and to preserve the Corporation's relationship with employers;
- conferring additional powers, where necessary, to an appropriate Commonwealth Regulator with the skills, resources and established culture to oversee regulatory functions.

### Implementation consideration:

A refining of compliance powers could include for example, amendments to section 52A of the Administration Act to prescribe limits to the extent of information that can be requested by the Corporation. The Commonwealth may also consider imposing timeframes on the use of such powers (which is present in other Commonwealth legislation in the interests of promoting fairness and reduce delays in decision-making).

A refining of powers could also include the ability for Compliance Notices to be issued with respect to audit reports and payroll level returns to improve the administration of the Scheme.

## Stranded employees

The lack of compliance tools also contributes to the incidence of employees effectively becoming 'stranded'.

A 'stranded employee' is one who is unable to access LSL entitlements as a result of their current or previous employer being unregistered with the Scheme. This is both a non-compliance issue, and a deficiency in the current legislative framework. Presently, while the legislation recognises an employees' entitlement in such circumstances, and employees could pursue matters through legal proceedings, there is no mechanism by which the Corporation can facilitate payment of LSL entitlements to employees. The Corporation has indicated it is focused on addressing this issue, and that legislative reform would assist it improve outcomes for employees.

The Review tested the views of stakeholders as part of the consultation process and found that there was broad consensus that the issue of stranded employees is an area for improvement within the current legislative framework that should be addressed to provide the Corporation with a means to connect employees with their accrued entitlements. While registration is one half of the issue, the Scheme must be capable of paying out entitlements to employees, regardless of the employers' non-compliance.

### Safeguarding of employees' entitlements



#### **Recommendation 9:**

It is recommended that legislative reform occur to enable the Corporation to connect employees more easily with their accrued LSL entitlements within the Scheme, particularly in circumstances involving non-compliance by an employer.

### Implementation consideration:

Existing Proposals by stakeholders (including the Corporation) have considered amendments to the legislation to safeguard employees' entitlements, especially in circumstances where employers have ceased to trade. The Commonwealth should consider the Existing Proposals when contemplating possible legislative amendments.

## 5.4 Governance

### Key points and section summary

#### Summary

This section is divided into two sub-sections, relating to structural governance and corporate conduct of the Corporation. This approach is reflective of stakeholder feedback received.

Section 5.4A Structural Governance, provides an overview of the following five issues:

- a. a perceived lack of transparency;
- b. evidentiary requirements;
- c. board arrangements;
- d. conflicts of interest; and
- e. allegations of fraud.

Section 5.4B Corporate Conduct, provides an overview of three further issues that relate to non-structural aspects of the Scheme:

- a. culture;
- b. communications; and
- c. risk management.

#### Findings

The Scheme's governance structures largely support the Corporation to discharge its performance and corporate governance responsibilities, however there are several areas for improvement. These areas of improvement relate to both the current structure of the Scheme, and conduct that can enhance transparency, accountability, and public confidence in the Scheme.

#### Recommendations

Section 5.4A includes six recommendations designed to improve the transparency and accountability of the Corporation and Scheme through the integration of best practice standards.

Section 5.4B includes one overarching recommendation directed towards the Corporation in regard to its position as the trusted custodian of the Scheme.

See recommendations 10-16.

### 5.4.1 Introduction

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

As a CCE under the PGPA Act, the Corporation is required to comply with all relevant obligations for Commonwealth agencies. As a CCE, the Corporation is permitted to act at arms-length from the Government without significant Commonwealth direction. In meeting all applicable obligations, the Corporation is required to operate to the highest standards of public accountability. The structural governance section examines central aspects of this public accountability in the context of the Scheme.

The key governance arrangements include the Corporation Board and its sub-committees (IC, TCC and RC), the Business Leadership Team, and the ARCC. These committees each oversee aspects of performance and risk management related to the Corporation's functions and activities.

The Corporation is structured to deliver against its purpose, strategic goals, and the legislative functions required to support operational activities. Policies, procedures, delegations, and authorisations are used to guide and control functions and decisions. Internal and external operational, financial and performance reporting, and risk management at multiple levels, are other key elements to facilitate effective oversight of and within the Corporation.

Collectively, the governance arrangements appear appropriate to lead, direct and control the operations and functions of the Corporation, and to provide clear accountability for the actions and decisions of the organisation. We understand the Corporation can adjust its governance arrangements if required, to collaborate with partners, innovate, and meet changing needs of stakeholders.

This section is divided into issues related to (1) structural governance and (2) corporate conduct of the Corporation. This structure has been adopted to address the submissions of some stakeholders who echoed sentiments like the following submission made by a peak industry body representative:



"It appears that [the Corporation's] hands are tied by a lack of clarity in the legislation, significant deficiencies and an organisational culture that takes the approach of making a legal determination, issuing employers with a notice of that determination, and adopting a 'brick wall' approach to any responding requests for transparency on how that determination was made."

**Peak Body Representative**



Notwithstanding that some stakeholders have adopted a negative view of the Corporation's current governance practices, it is important to note that a number of stakeholders, including employee representatives, reported that there is widespread support for the Corporation and the Scheme and did not share the same concerns expressed by other stakeholders.

## 5.4A Structural Governance

This structural governance section examines central aspects of this public accountability in the context of the Scheme.

### 5.4A.1 Issue F: A perceived lack of transparency

Section 5.4A: Structural Governance				
<b>Issue F: Lack of transparency</b>	Issue G: Evidentiary requirements	Issue H: Board Arrangements	Issue I: Conflicts of Interest	Issue J: Allegations of fraud

Throughout stakeholder consultation, a broad range of stakeholders reported to the Review that they held concerns about the lack of transparency, ownership, and visibility of their 'money', or entitlements, under the Scheme. The Review has attempted to unpack the views and found that the sentiments expressed derive from a level of opaqueness about:

- the reimbursement model that underpins the Scheme; and
- how decisions are made by the Corporation.

Each point will be addressed in turn.

#### The reimbursement model

Further to explanations provided in chapter 3, the Scheme is complex to administer and provides little transparency for stakeholders between inputs and outputs to the Scheme. More specifically, there is not a direct correlation between the quantum of levy payments, employee entitlements or reimbursement sums. This is not a reflection of the way the Corporation administers the Scheme, rather a feature and consequence of the design of the legislation. As a result, it is not presently possible for an employer to draw a line of sight between the levy payments it contributes for an individual employee, and the reimbursement amount it receives from the Corporation. Equally, an employee does not have a direct line of sight as to how their entitlements are being preserved and ultimately paid out, as the preservation of the entitlement is recorded by the Corporation, however the LSL is ultimately paid out by the current employer at the time leave is taken.

As detailed further in Appendix E, comparable portable schemes predominantly provide LSL payment directly from the respective scheme authority to the employee. The reimbursement model adopted by the Scheme is unique and not reflective of wider practices occurring in other portable schemes.

In particular, the complexity and lack of transparency regarding the reimbursable amount calculation was raised as a concern by stakeholders during consultations. A Modern Industry Stakeholder noted that determinations of reimbursable amounts appeared to be a "trial and error" process. An employee currently only has visibility of their accrued entitlements through an individualised request process which requires an employee to directly contact the Corporation. Both employees and employers reported significant delays in receiving responses. Greater real-time accessibility and visibility of entitlements (including the methods/processes by which their hours are recorded and calculated) would assist in providing comfort and confidence to employees that their LSL is being appropriately accounted for by both their employers and the Corporation.

The case studies below highlight some of the frustrations experienced by stakeholders with the reimbursement process that was brought to the attention of the Review:



### Timing of reimbursement claims

## CASE STUDY 8

Currently, employers can only make a reimbursement claim once the employee has completed the full period of LSL. For employees taking long periods of leave, e.g., 12 months, this requires the employer to pay the entirety of the LSL entitlement to the employee. Employers commented that this places a large cash flow burden on businesses until the reimbursement is finalised. One company explained to the Review that it navigates the cash flow difficulties by asking employees to make multiple leave applications for the one period, meaning it can seek reimbursement from the Corporation sooner than it otherwise would be able to.

Issues relevant to the complexity of the current reimbursement model include:

- the complexity of the reimbursement calculations;
- confusion and uncertainty among stakeholders, particularly employees, as to how amounts reimbursed to employers correspond to the hours accrued by employees;
- payout of reimbursements to employers only once an employee's LSL period has concluded; and
- the administrative burden placed on employers relating to the reimbursement process, including the inflexibility of the process and the need to resubmit data where reimbursement records are altered (see example below).



### The complexity of administration required to support the Scheme

## CASE STUDY 9

One registered employer provided an example of the high burden required of employers in their interactions with the Scheme. In this example, an incorrect classification for termination of employment was advised to the Corporation (retirement rather than resignation). In order to rectify the error, the employer advises it was required to:

- a. return the reimbursement to the Corporation;
- b. submit a cancellation form on behalf of the terminated employee;
- c. submit a new cessation form on behalf of the employee; and
- d. re-submit the reimbursement claim once the authorisation number had been received from the Corporation.

The employer expressed the views that this four-step process was too burdensome and was indicative of all of the Corporation's processes, whereby any minor mistakes made by employers in filing paperwork or submitting information required extensive rectification steps with significant cost and resourcing implications for the employer.

Similar to the issues surrounding coverage, much of the grievances expressed concerning transparency could be remedied through a simplified payment mechanism that provides a clearer line of sight for employers and employees. It is the Review's opinion that amending the Scheme to an 'Authority Pays' model, similar to other portable schemes, could address many of these issues currently experienced by stakeholders and provide greater accountability and visibility in the process. An 'Authority Pays' model is currently used by:

- ACT Leave;
- Long Service Leave Corporation (NSW);
- Portable Long Service Leave Authority (VIC);
- Construction Scheme (SA); and
- TasBuild.<sup>122</sup>

<sup>122</sup> Please see Appendix E for full details.

Providing a direct link from levy payments invested into the Fund on behalf of employees, to monies paid out of the Fund could also further assist ease concerns regarding allegations of fraud within the Scheme.

### Increasing visibility of entitlements and payments



Transparency



Fit-for-Purpose

#### **Recommendation 10a:**

It is recommended that to improve transparency in the Scheme that the Commonwealth consider introducing an Authority Pays mechanism (rather than a reimbursement model), akin to that used in many portable schemes; or

#### **Recommendation 10b:**

It is recommended that the Corporation accelerate implementation of technological solutions (per recommendation 17) to:

- improve employee visibility of entitlements;
- improve employer visibility of levy payments, liabilities and reimbursements; and
- provide more education material on its website as to how funds are managed within the Scheme, to reduce the perception of mismanagement.

### Implementation consideration:

A feasibility study to consider the utility in introducing an Authority Pays mechanism to this Scheme should occur prior to the implementation of recommendation 10a.

Recommendation 10b offers an interim solution, that draws on recommendation 17, to assist simplify LSL payment process and provide greater visibility to stakeholders as to how funds are managed within the Scheme.

The adoption of recommendation 10b is discussed further in section 6.1.1 and the introduction of an Authority Pays mechanism is discussed further in section 6.1.3.

## Decision-making: procedural fairness

Throughout the consultation process, several stakeholders raised concerns about an actual or perceived lack of procedural fairness in decision-making by the Corporation. For example, a representative for an employer indicated that:



**Evidence relied upon for decision-making**

**CASE  
STUDY 10**



*“Employers are often not provided with copies or full details of the information relied upon by the Corporation for eligibility determinations. This includes determinations made based on documents provided by employees to the Corporation, where the employer may not receive visibility, or the opportunity to comment, on evidence being tendered. This approach could be improved to provide a higher standard for procedural fairness.”*

The above example highlights that some aspects of the Corporation’s current practices could be improved to reflect the fundamental principles of good administrative decision-making.

The Review heard consistently from both employers and employees that the current review processes of the Scheme lack procedural fairness. In the context of internal reviews, there was discord among stakeholders as to the extent of evidence considered, and reasons provided for decisions. The Board refuted suggestions that additional information was not requested, stating that all decisions included reasons for the determination beyond whether the appeal was simply accepted or rejected.

The following principles of administrative law underscore procedural fairness and are relevant to the Scheme:

- 1) The Hearing Rule: requires that any person whose interests may be affected by a decision to be given an opportunity to express their case to the decision maker.
- 2) The Bias Rule: requires decisions are made free from both actual and apparent bias.
- 3) Relevant considerations: Decision makers are only permitted to consider matters that are relevant to a decision, and consideration of irrelevant matters may provide grounds for appeal. The current legislative framework provides limited guidance on what matters are relevant to a decision made by the Corporation.
- 4) Final determination: Decision makers must make a final decision and notify parties, providing reasons for a decision. Additionally, at the time a final determination is notified, parties must also be informed of any additional review rights available.

Stakeholders noted the inability to challenge the information provided by the ‘opposing party’ to their matter as a factor which is contributing to perceptions of a lack of transparency of the Scheme. As a consequence of the current Scheme design, parties may have no visibility of information being provided to the Corporation that may be relevant, or adverse, to them and may also mean that many employers are not aware of claims until written correspondence containing a final decision is received from the Corporation. This absence of an avenue to challenge adverse information disregards the notion of a fair hearing. As part of the stakeholder consultation process, employees advocated for structural changes to the Scheme to allow for information to be reviewed and challenged.

## Improving how decisions are made



### **Recommendation 11:**

**Transparency** **Fairness**

It is recommended that the Corporation improve transparency of decision-making by integrating further procedural fairness elements into the Scheme's decision-making and internal review processes.

### **Implementation consideration:**

The procedural fairness elements included above should underpin the decision-making process by the Corporation. This includes the Corporation:

- strengthening guidance on what considerations are relevant for decision-makers to take into account;
- providing parties with an opportunity to consider and comment on information obtained that is adverse to their interests;
- providing parties with reasons for its decisions; and
- providing clear guidance on any appeal rights available with respect to decisions it has made.

## 5.4A.2 Issue G: Evidentiary Requirements

Section 5.4A: Structural Governance				
Issue F: Lack of transparency	<b>Issue G: Evidentiary requirements</b>	Issue H: Board Arrangements	Issue I: Conflicts of Interest	Issue J: Allegations of fraud

Evidentiary requirements refer to the documentation and information the Corporation requires to be submitted by employees and employers when making decisions relevant to the operations of the Scheme.

Throughout the consultation process, many stakeholders expressed dissatisfaction with the current evidentiary requirements imposed by the Corporation on both employees and employers. Stakeholder grievances related to:

- 1) the fact that the legislative framework provides little guidance on what information the Corporation may rely upon when making administrative decisions; and
- 2) that the guidance provided by the Corporation regarding the evidence stakeholders may use to substantiate their claims is unclear and applied inconsistently.

Grievances expressed by employees regarding evidentiary requirements centred on a perceived over-emphasis by the Corporation, on information provided by employers, and the absence of mechanisms available to employees to challenge information provided to the Corporation from their employer, specifically in relation to:

- termination classifications; and
- reporting of hours worked.

### Termination classification

The Review heard from one former employee who had left the industry as a result of total and permanent disability (TPD). This employee told the Review their termination classification had been incorrectly recorded by their employer. While the employee was able to provide enough information that it was irrefutable that TPD was the true reason for termination, the Corporation expressed the view that it was unable to alter their records. This is an important issue, as the cessation of an eligible employee's employment within the industry directly affects the entitlements which may be paid out to them.<sup>123</sup>

The Corporation informed the Review that the current legislative framework does not empower it to alter the classifications provided by employers for an employees' termination. This includes circumstances where significant evidence has been provided by the employee demonstrating a contrary reason for termination.

The current legislative framework does not explicitly prescribe the types or quantum of evidence required to be considered by the Corporation with respect to administrative decisions. Greater prescription within the Scheme would assist in providing clarity to stakeholders and potentially resolve anomalies. This could be pursued through the development of legislative instruments or further policy to support the efficient administration of the Scheme.

### Reporting of hours

Employees also expressed concerns to the Review that they consider that the Corporation only "takes the word of the employer". The Corporation has acknowledged that to date, a large extent of information relied upon to administer the Scheme is derived from the employer, because of current legislative design which primarily mandates employer reporting to the Corporation.

<sup>123</sup> For further detail please see Division 3 of the Administration Act.

### Clarifying expectations and requirements for evidence



Accountability



Transparency



Fairness

#### **Recommendation 12:**

It is recommended that to improve administrative decision-making by the Corporation that the standards for evidence be clarified to clearly set out the type and quantum of evidence required to be produced by employers and employees.

#### **Implementation consideration:**

Recommendation 12 could be achieved by revising requirements in policy or legislative instruments. The expectations and requirements for evidence should consider the diverse range of stakeholders (including small business employers) and include options for how different stakeholders can satisfy the requirements having regard to their size and resources available.

### 5.4A.3 Issue H: Board Arrangements

Section 5.4A: Structural Governance				
Issue F: Lack of transparency	Issue G: Evidentiary requirements	<b>Issue H: Board Arrangements</b>	Issue I: Conflicts of Interest	Issue J: Allegations of fraud

Attributes of an exemplar modern Board are outlined above in the chapter 4. Stakeholder feedback received from employees, Modern Industry Stakeholders, some employers and participants at the public forum suggest that amendments to the current composition of the Board should be implemented to address:

- a perceived lack of independence in the current structure;
- a lack of appropriate representation for Modern Industry Stakeholders or those employers affected by an expansive view of the definition of ‘eligible employee’;
- concerns, perceived or otherwise, that the current structure provides an inherent conflict of interest issue; and
- a need for greater expertise, specialist knowledge and diverse skill set of board members.

There is broad consensus amongst stakeholders consulted that additional Directors be added to the Corporation’s Board, although stakeholders offered different proposals for the preferred number and composition of Directors. For example:

- peak industry bodies suggested the Board should be comprised of nine members, made up of the current representatives with an addition of three independent directors; whereas
- union stakeholders took the view that a Director representative of Modern Industry Stakeholders could be added to the current numbers, or such a Director could be introduced to the Board on a rotating basis with an existing employer representative.

There is consensus among stakeholders that additional Directors should have a broader diversity and skills-matrix than that of current members. For example, in consultations with the Board, it was noted that increasing diversity of the Board could include the recruitment of an IT specialist as a future Board member to assist in the facilitation of enhancing the scheme’s IT systems to bring it in line with contemporary best practice. Further detail on the differing proposals suggested by stakeholders can be found in chapter 6.

Drawing on aspects of contemporary best practice for Board composition, which is detailed in chapter 4, the Review considers there is merit in an expansion of the Board including adding independent Directors to the Board to assist with improved transparency and public confidence in the Corporation.

## A modern and representative Board



### Fit-for-Purpose

#### **Recommendation 13:**

It is recommended that the total board composition be increased to approximately 7 or 8 members (inclusive of the Chair), being an appropriate number of directors to oversee the Corporation having regard to the ambit of its responsibilities.

Board arrangements should be reconfigured to reflect contemporary best practices for modern corporations by ensuring:

- a minimum board composition of approximately 20% of independent directors;
- introduction of a skills-based board with the combination of skills to be benchmarked by an external organisation every three years;
- rotation of committee chairs;
- Board composition that is reflective of diversity of skills, age, gender, expertise, and interests; and mandatory refresher training on director duties (including conflict of interest, data security, privacy, and contemporary environmental, social and corporate governance (ESG) principles).

Reconfigurations to the Board composition should include:

- at least one independent director (preferably with expertise in data security; technology or corporate governance); and
- addition of one director representative of Modern Industry Stakeholders.

## 5.4A.4 Issue I: Conflicts of interest

Section 5.4A: Structural Governance				
Issue F: Lack of transparency	Issue G: Evidentiary requirements	Issue H: Board Arrangements	<b>Issue I: Conflicts of Interest</b>	Issue J: Allegations of fraud

The Review has considered the extent to which real or perceived conflicts of interest with regard to the management, operation, and administration of the Corporation may exist.<sup>124</sup> The Corporation's organisational structure was designed to ensure the Corporation maintained its identity as an industry representative organisation. The current Board composition reflects this original intent for the Corporation, through the maintenance of equal representation for employers and employees on the Board.

The Review considered claims made by stakeholders regarding potential conflicts of interest occurring within the Corporation. In particular, the Board's access to sensitive commercial information has given rise to concerns that the current Board composition is inherently vulnerable to significant conflicts of interest arising through the ability of information obtained while performing Board duties being used in external contexts. The Review was provided anecdotal evidence from unregistered employers and employer representative bodies, that an employer's registration status with the Scheme was being raised in forums external to the Scheme, such as the FWC matters and enterprise bargaining negotiations. In response to the allegations, the Corporation submitted that all Directors are appointed by the responsible Minister and conflicts that may arise are managed effectively in adherence to the Corporation's policies.

The Review has considered the structures in place and policies implemented by the Corporation to mitigate the risk of conflicts arising. While the Review acknowledges the Corporation's endeavours to comprehensively adhere to its PGPA Act requirements, and expectations of community regarding accountability, there is currently a lack of visibility of the processes and policies used by the Corporation to manage their conflicts of interest. Increasing the transparency and visibility of the risk mitigation steps for managing conflicts of interest within the organisation will assist easing public concerns and better position the Corporation as the trusted custodian of the Scheme.

### Mitigating conflicts of interest

#### **Recommendation 14:**



**Accountability Transparency**

Noting the Board composition consists of industry representatives; it is recommended that the Board's risk management practices regarding conflict of interest are made publicly available. These policies should include mitigation strategies to prevent use of information obtained in the course of Board duties being used in broader contexts, external to the operation of the Scheme.

<sup>124</sup> Terms of Reference (n 3) 1 [1a(iv)].

## 5.4A.5 Issue J: Allegations of fraud

Section 5A: Structural Governance				
Issue F: Lack of transparency	Issue G: Evidentiary requirements	Issue H: Board Arrangements	Issue I: Conflicts of Interest	<b>Issue J: Allegations of fraud</b>

A number of stakeholders have expressed concerns about potential wrongdoing within the Scheme.

Since 2019, allegations of fraud have attracted the attention of parliamentarians and the media,<sup>125</sup> which has overshadowed the reputation of the Corporation, and the Scheme. The allegations have been raised in Senate Estimates in October 2019, March 2021 and June 2021.<sup>126</sup> Allegations of fraud were first raised by Senator Roberts during the October 2019 Estimates sitting regarding the potential underpayment of workers covered by the Scheme.

### Commonwealth Fraud Control Framework

The PGPA Rules impose binding obligations on the Corporation as a CCE. These obligations include:

- that the Accountable Authority develop a fraud control framework for the Corporation, and take all reasonable measures to prevent, detect and deal with fraud relevant to the Corporation;<sup>127</sup>
- conducting regular fraud risk assessments;<sup>128</sup>
- creating and maintaining a fraud control program;<sup>129</sup>
- processes to prevent fraud such as ensuring all officials are aware of what fraud is and how to report it, and that fraud is taken into consideration when planning and conducting activities,<sup>130</sup>
- detection processes;<sup>131</sup>
- reporting significant fraud to the relevant Minister;<sup>132</sup>
- reporting and recording of incidents of fraud;<sup>133</sup>
- promoting the proper use and management of public resources;<sup>134</sup> and
- establishing and maintaining appropriate systems of risk oversight and management and internal control.<sup>135</sup>

The Commonwealth Fraud Control Framework also include several obligations which, while not binding on the Corporation, are considered as best practice for CCEs. These include:

- creation of instructions and procedures to help staff prevent, detect and deal with fraud;<sup>136</sup>

<sup>125</sup> See e.g. Ian Kirkwood, 'One Nation and Labor question Coal LSL over 'missing' long service and audit of thousands of mine worker accounts', *Newcastle Herald* (online, 30 October 2020) < <https://www.newcastleherald.com.au/story/6991031/coal-long-service-leave-fund-says-hundreds-of-industry-workers-missing-out-on-entitlements/>>; Ian Kirkwood, 'Government long service leave agency grilled at Senate estimates over treatment of 'casual' mineworkers | VIDEO', *The Singleton Argus* (online, 24 October 2019) <<https://www.singletonargus.com.au/story/6456660/one-nation-slams-abuse-of-casual-coal-miners/>>.

<sup>126</sup> Evidence to Senate Education and Employment Legislation Committee, Parliament of Australia, Canberra, [23 October 2019]; Evidence to Senate Education and Employment Legislation Committee, Parliament of Australia, Canberra, [24 March 2021]; Evidence to Senate Education and Employment Legislation Committee, Parliament of Australia, Canberra, [2 June 2021].

<sup>127</sup> *Public Governance, Performance and Accountability Rule 2014* (Cth) s 10 ('PGPA Rule').

<sup>128</sup> PGPA Rule (n127) s 10 (a).

<sup>129</sup> *Ibid* s 10 (b).

<sup>130</sup> *Ibid* s10 (c).

<sup>131</sup> *Ibid* s10 (d).

<sup>132</sup> PGPA Act (n 14) s 19.

<sup>133</sup> PGPA Rule (n127) s10 (f).

<sup>134</sup> PGPA Act (n 14) s15.

<sup>135</sup> *Ibid* s 16.

<sup>136</sup> Australian Government, Attorney-General's Department, *Commonwealth Fraud Control Framework 2017*, (Report, 2017) B2 [1] <<https://www.ag.gov.au/sites/default/files/2020-03/CommonwealthFraudControlFramework2017.PDF>> ('Commonwealth Fraud Control Policy').

- appropriately train staff who are engaged in fraud control activities;<sup>137</sup>
- investigate fraud consistent with the Australian Government Investigations Standard;<sup>138</sup>
- refer all serious matters of fraud to the Australian Federal Police;<sup>139</sup>
- dealing appropriately with all fraud matters even where law enforcement entities decline a referral;<sup>140</sup>
- ensuring that all fraud matters are investigated by appropriately qualified staff;<sup>141</sup>
- report fraud matters to the Australian Institute of Criminology;<sup>142</sup>
- make all reasonable attempts to recover financial losses;<sup>143</sup>
- disclose information about potential fraud which may affect other entities;<sup>144</sup> and
- document all decisions to take or not act against relevant entities to support consistent, transparent and accountable decision-making.<sup>145</sup>

The Corporation publishes its fraud policies in the form of its:

1. Fraud Strategy Statement;<sup>146</sup> and
2. Fraud Reporting Guide.<sup>147</sup>

The Review has considered the Corporation's Fraud Guidelines in comparison to the Commonwealth Fraud Guidelines and has found that its policies broadly meet the expectations of the Corporation as a CCE. Public facing documents do not include significant amount of detail, and while it appears from the Corporation's annual reports and corporate plans that greater detail is likely stored internally, providing greater visibility of these processes may help ease concerns regarding fraud that are prevalent in the public domain.

Throughout the stakeholder consultation, a small number of individuals participated in the Review, in their capacity as current and former employees, and expressed concerns about possible fraud. The allegations raised by individuals included concerns about phoenix companies, underpayment of casuals, misreporting of hours, and money laundering. There were also suggestions of involvement by criminal organisations. The Mining and Energy Division also raised the underreporting of hours for casual employees as an issue.<sup>148</sup> The Review also heard reports of intentional non-compliance occurring by a small number of employers who are working to 'quarantine' their employees from the Scheme, in order to gain a financial benefit and commercial advantage in related sectors. This was outlined in greater detail in section 5.2.1.

The Review has also requested further information from the Corporation as to its knowledge of potential fraud. The Corporation has assisted the Review with its enquiries and has provided evidence of instances where allegations of fraud have been considered by the Corporation, and subsequently referred to another Commonwealth agency for investigation. Those external investigations found no activity of a suspect nature and consequently no further action was taken.

<sup>137</sup> Commonwealth Fraud Control Policy (n 136) B3 [14].

<sup>138</sup> Ibid B2 [4].

<sup>139</sup> Ibid B2 [8].

<sup>140</sup> Ibid B2 [7].

<sup>141</sup> Ibid B2 [9].

<sup>142</sup> Ibid B3 [14].

<sup>143</sup> Ibid B2 [10].

<sup>144</sup> Ibid B2 [11].

<sup>145</sup> Ibid B3 [15].

<sup>146</sup> Australian Government Coal Mining Industry (Long Service Leave Funding) Corporation, 'Fraud Strategy Statement'. *Coal LSL* (Web Page) <[https://assets.ctfassets.net/w7mmu5az9koe/58uwS3g04DyNR9zc3OJ2L9/f5fe48ef35e88a759e57b398796d3ed2/Fraud\\_Strategy\\_Statement.pdf](https://assets.ctfassets.net/w7mmu5az9koe/58uwS3g04DyNR9zc3OJ2L9/f5fe48ef35e88a759e57b398796d3ed2/Fraud_Strategy_Statement.pdf)>.

<sup>147</sup> Australian Government Coal Mining Industry (Long Service Leave Funding) Corporation, 'Fraud Reporting Guide'. *Coal LSL* (Web Page) <[https://assets.ctfassets.net/w7mmu5az9koe/58uwS3g04DyNR9zc3OJ2L9/f5fe48ef35e88a759e57b398796d3ed2/Fraud\\_Strategy\\_Statement.pdf](https://assets.ctfassets.net/w7mmu5az9koe/58uwS3g04DyNR9zc3OJ2L9/f5fe48ef35e88a759e57b398796d3ed2/Fraud_Strategy_Statement.pdf)>.

<sup>148</sup> Joint submission of the Mining and Energy Division and AMWU, (n56) 10.

While the Review notes that its scope did not extend to undertaking a transactional analysis of financial documentation, it has considered the submissions made by stakeholders regarding fraud carefully. On the face of the information received, the Review has found no evidence of money laundering occurring within the Scheme, or the involvement of criminal organisations.

This conclusion notwithstanding, the Review does consider that the complexity of the Scheme and its administrative processes has left some aspects vulnerable to the potential of both unintentional and intentional under-reporting of hours worked by eligible employees. Through submissions received from the Corporation, the Review understands this view has been validated by a further third party commissioned by the Corporation to undertake a sample audit of employer compliance with levy calculations who also found evidence of under-reporting of hours. This finding is further supported by other stakeholder submissions that indicated that 10% of respondents to the Mining and Energy Division's survey of attitudes towards the Scheme reported that their hours had been under-reported.<sup>149</sup>

Underreporting of hours by employers may occur for several reasons, including:

- the complexity and ambiguity of the calculations required by the current legislative framework (see section 3.3);
- confusion arising from the separate reporting requirements between casual and permanent employees; and
- intentional misreporting to reduce a company's liabilities for the levy.

Under-reporting of casual employees' hours is exacerbated as a consequence of the current legislation. There is general agreement among stakeholders that amending the legislation to ensure reporting reflects the true hours worked, would largely resolve the issue.

The Corporation also suggested that only requiring exception reporting (notification from employers where employees have worked under 35 hours for the reporting period) would assist in addressing this issue and creating efficiencies in the Scheme's operations.

Additionally, the Review also heard allegations from stakeholders concerned that the Scheme was acting as a 'sham', whereby funds were 'lost' within the Scheme after the Corporation receives levy payments that do not get paid out to employees. The Review put this contention to the Corporation, who provided submissions noting where an employer has erroneously made payments to the Corporation, the Corporation has, and would, provide a refund. Further to discussions concerning transparency and the operation of the reimbursement model at 5.4.A1, the view that the Scheme is holding funds that are not being paid out is also a consequence of the pooled nature of the Fund, and a consequence of the legislative design of the levy liability being a separate process to the accrual and payment of entitlements.

## Safeguarding the Scheme from fraud

### Recommendation 15:

It is recommended that to safeguard against fraud (including the under-reporting of hours) that:

- the Corporation's fraud management policies be reviewed to ensure alignment with the Commonwealth's fraud control requirements and be made public to increase transparency of the Corporation's compliance with its obligations;
- visibility of employee's accrued entitlements be provided through an online platform to allow discrepancies to be identified quickly by employees, consistent with recommendation 17; and
- simplified reporting requirements be implemented for employee's hours in a uniform manner across casual and permanent employees, consistent with recommendation 4.



**Accountability** **Transparency**

<sup>149</sup> Joint submission of Mining and Energy Division and AMWU (n 56), 23.

## 5.4B Corporate Conduct

Governance of an organisation is as much directed by the structures of the entity as it is by the approach taken by those responsible for the functions of the entity. Conduct of the Corporation is an essential part of the Scheme’s governance as it informs the way aspects of the Scheme are interpreted and implemented. The Review examined corporate conduct through the following issues requested in the Terms of Reference, and raised in consultations:

1. culture;
2. communications; and
3. risk management.

Since 2017, the Corporation has undertaken an organisational transformation which has included the in-sourcing of its operations, an increase in resourcing, and enhanced compliance activities.

Additionally, the Corporation has developed several strategies and initiatives to improve the efficiency of the Scheme and the management of employee entitlements. These initiatives include:

- an enhanced communication strategy aimed at educating stakeholders and ensuring all workers who are covered by the Scheme can access their entitlements;
- conducting customer satisfaction surveys, with a 70% satisfaction result from the Corporation’s latest survey; and
- the development of further education content to demystify the complexities of the scheme.<sup>150</sup>

The Corporation considers these initiatives are indicative of its endeavours to build trust with its stakeholders by upholding its mandate to administer the scheme and connect eligible employees with their LSL entitlements.<sup>151</sup>

Notwithstanding the Corporation’s efforts, through the stakeholder consultation process, it has been identified that there are mixed views on the conduct of the Corporation. According to employee members of the Mining and Energy Division who were surveyed there is a general positive perception of the Corporation in the industry:

“There’s a general view that they’re **doing the right thing** and they’re **acting in the best interests** of employees, employers and the coal mining industry.”

**- Mining and Energy Division**

By contrast, a range of employers and employer representatives have expressed concerns about aspects of the Corporation’s conduct which could be improved:

“There’s no recognition of the restraints on entities. It’s really hard to deal with [the Corporation].”

**Unregistered Employer**

“[the Corporation’s] process[es] and approach [to eligibility claims] is unnecessarily lengthy and is not transparent nor consistent.”

**Modern Industry Stakeholder**

“[it] appears the Corporation has the attitude that they have their own legislative powers and will not bend or take on-board any differing views or suggestions from the employer community.”

**Peak Body Representative**

<sup>150</sup> Annual Report 2019/20 (n 23) 24.

<sup>151</sup> Annual Report 2020/21 (n 9) 4.

The Review has examined the work of the Corporation through its public materials such as corporate plans and annual reports, and through the consultation process. From this examination and consultation with the Corporation it is apparent that the Corporation is seeking to carry out its objective to connect eligible employees with their entitlements in good faith.

The Review has formed the view that the issues present within the Scheme are a result of this intention being implemented in an expansionary manner that was not the intent of the Scheme's enabling legislative framework. Issues K–M below speak to concerns raised by stakeholders that could be addressed to further improve the standing of the Corporation.

## 5.4B.1 Issue K: Culture

### Section 5.4B: Corporate Conduct

#### Issue K: Culture

#### Issue L: Communications

#### Issue M: Risk Management

The Terms of Reference required the Review to consider organisational culture.

The Review has considered the organisational culture as a product of the functions prescribed through the enabling legislation, and the way the Corporation approaches its objectives.

The Corporation was established as an administrator of the Scheme designed to support the black coal industry by encouraging the retention of workers within the industry, through portable LSL arrangements. The functions, as prescribed, require the Corporation to connect employees with their entitlements, manage the Fund, and to play a role in ensuring employers comply with the legislative requirements.

In its 2021/22 Corporate Plan, the Corporation outlines its strategic goals to:

- uphold prudent financial management;
- be easy to do business with;
- foster a culture of continuous organisational improvement; and
- optimise operations through innovation and streamlined processes.<sup>152</sup>

Additionally, the Corporation has noted its intention to continue its transformation over the next two years,<sup>153</sup> while also upscaling compliance strategies and frameworks to enhance client confidence.<sup>154</sup>

The culture of the Corporation can be described as progressive, within the bounds of what the legislation prescribes, although through stakeholder feedback, there are clear areas for improvement in the way the Corporation approaches its work and in particular, the direction the Corporation is advancing with respect to compliance.

Employer stakeholders provided commentary to the effect that in cases where coverage is unclear, and they attempted to engage with the Corporation to seek clarification, the Corporation did not provide them with a conclusive response, or the necessary assistance to reach a satisfactory outcome and in that sense could be said to have an unhelpful culture.

The Review considers that stakeholder feedback is largely reflective of the complexity of the Scheme's legislative framework, and indicative of the fact many public entities refrain from providing views on eligibility for certain rights or benefits, instead requiring a person or applicant for services to demonstrate how they satisfy the eligibility requirements or are exempt from such requirements.

Stakeholders have indicated they are interested in working with a Corporation that adopts an open and collaborative approach to stakeholder engagement. The Review observed that there is significant goodwill from all stakeholders and a common desire to see the Scheme work effectively. To lead and promote greater collaboration with stakeholders, there is value in the Corporation reconsidering its approach to stakeholder engagement, to endear confidence in its ability to act as a custodian of the Scheme.



[The Corporation] is part of the coal industry and should seek to assist and support industry participants, instead of taking a 'big stick' approach to all employers

**Modern Industry Stakeholder**

<sup>152</sup> Corporate Plan 2021/22 (n 2) 8-9.

<sup>153</sup> Ibid 2.

<sup>154</sup> Ibid 12.

## Conduct consistent with a custodian of the Scheme



### Accountability

#### **Recommendation 16:**

It is recommended that the Corporation review its approach to compliance and enforcement activities and stakeholder communications to position the Corporation as the trusted custodian of the Scheme by advancing initiatives designed to support stakeholders navigate, and comply with, the Scheme.

## 5.4B.2 Issue L: Communications

### Section 5B: Corporate Conduct

Issue K: Culture

**Issue L: Communications**

Issue M: Risk Management

The Review has considered communications as referring to all the Corporation's interactions with its stakeholder base, including:

- written correspondence;
- online guidance and information;
- telephone conversations;
- written guidance materials provided to industry; and
- letters and communications regarding compliance of the Scheme.

Communication was raised as an issue throughout the stakeholder consultation process. Concerns from stakeholders centred on three key issues:

1. a general lack of consultation with stakeholders;
2. disjointed and inconsistent communications regarding disputes; and
  - a. the nature of communications; and
  - b. the timeliness and cadence of communications.
3. inconsistency of information communicated to stakeholders through publication of guidance materials.

### Consultation with stakeholders

Employers and employer representative bodies noted that their employees had been receiving standard responses when seeking support from the Corporation, rather than receiving customised responses they expected. Consequently, employers have reported that their internal HR or payroll teams tend to assist employees in responding to their questions about LSL matters. Modern Industry Stakeholders and unregistered employers noted that even where they are endeavouring to comply with the Scheme they have not been provided with adequate support or information to meet their obligations under the legislation.



"We have found that where we are trying to seek advice or support from [the Corporation], they're dismissive of any work we've done to try and be compliant. They're not looking to support as employers to ensure we are doing the right thing by our employees. I find this quite disappointing, that they haven't been forthcoming with advice and support."

**Unregistered Employer**



### Disjointed and inconsistent communications

It appears that current communications strategies employed by the Corporation have contributed to the confusion experienced by stakeholders engaging with the Scheme. The confusion has resulted from both inconsistent messages provided by the Corporation through guidance materials and individual communications with stakeholders, as well as a lack of support provided to employees and employers lodging enquiries with the Corporation.

Frustration was expressed to the Review from some stakeholders who adopt the view that the Corporation's communication approach is unsupportive.



Coal LSL routinely ignores the point being made, contends some other point is being made, refutes that, then falsely infers that the issue has been dealt with.

- Employer Representative



Unregistered employers who have been asked to register with the Scheme asserted that communications from Corporation are highly litigious. This approach should be contrasted to communications and processes of other Commonwealth entities such as the ATO and the FWO where compliance is sought to be achieved through education and collaboration between the entity and the stakeholder, rather than forced compliance or punitive measures in the first instance.

Further, the Review was provided with numerous examples of communications being delayed. Examples were provided of instances in delays amounting up to four years, particularly in circumstances where there was disagreement regarding the eligibility status of an employee. Other examples cited an employer not receiving a response to a query for 12 months. The Review notes that all stakeholders reported an improvement in these timelines in recent years. Notwithstanding recent improvements, there would be value in the Corporation's streamlining its communication processes to prevent delays occurring in the future.

The Review was also provided examples of stakeholders receiving inconsistent communications from the Corporation, including receiving differing eligibility determinations for a single employee. The case study below shares an example:



### Communication concerning coverage disputes

## CASE STUDY 11

Company Y explained it is a contracting employer that provides services to the coal mining industry, often on coal mining sites. Company Y is generally covered by the Manufacturing Award.

Company Y engages its employees under Enterprise Agreements that provide more generous LSL entitlements than those under the Scheme. Company Y says bringing its workforce into the Scheme would create interaction issues between the Scheme and the enterprise agreements, and result in long-standing employees receiving less favourable conditions.

Company Y suggests it was pursued by the Corporation for more than 10 years to register for the Scheme, owing to the Corporation's view that Company Y's employs 'eligible employees'. Company Y provided the following examples and suggested the approach of the Corporation has been unnecessarily lengthy, lacking in transparency and inconsistent:

- regarding 'eligible employees', there have been inconsistent messages and approaches taken by the Corporation with some instances of the Corporation seeking information to determine whether the Company has a liability to pay the levy, and other instances of Company Y receiving a notice that they have an obligation to pay the levy and requests for Company Y to arrange meetings with the Corporation.
- The timeline between Company Y receiving notice that the Corporation is investigating eligibility and an outcome notice was approximately two years.
- Company Y received multiple letters and notices from the Corporation relating to inconsistent eligible periods of service for the same employees.

## Inconsistency of guidance materials

There is a perception among some stakeholders that the Corporation previously accepted that services companies and other Modern Industry Stakeholders fell outside the scope of the new legislative framework. This perception is based on the release of guidance material by the Corporation in the years between 2010 and 2013. For example, one document titled *Guidance Note on Coverage of the Coal Mining Industry Long Service Leave Scheme* published in 2013 provided guidance on which employees were included within remit of the Scheme. This earlier guidance adopted a narrower interpretation of 'eligible employee' than the guidance material available today. One Modern Industry Stakeholder stated that this shift is indicative of the Corporation increasing viewing itself as a fund manager and regulator, and the absence of legislative clarity.



The Corporation's changed approach has... coincided with it increasingly viewing itself as a fund manager rather than a scheme administrator, and its desire to significantly expand the inflows to the Fund.

**Modern Industry  
Stakeholder**

## Consultation during legislative reform

While not specifically directed at the Corporation's communications, for completeness, some stakeholders advised the Review that the confusion and uncertainty that has arisen concerning the Scheme's coverage is a result of a lack of consultation with industry during the reform process undertaken during the period 2009-2011. An employer representative submitted to the Review that *Coal Mining Industry (Long Service Leave Funding) Amendment Bill 2009* was introduced and passed through Parliament quickly, with no apparent reference to consultative bodies (such as a Senate Committee inquiry).

Modern Industry Stakeholders noted that the lack of adequate consultation has resulted in a sub-standard definition of what constitutes an 'eligible employee'. This has compounded the issue of coverage and compliance over the past decade. Stakeholders expressed an interest in actively participating in future legislative reform processes.

### 5.4B.3 Issue M: Risk Management

#### Section 5B: Corporate Conduct

Issue K: Culture

Issue L: Communications

**Issue M: Risk Management**

Appropriate and tailored risk management is a vital function of any business, with higher standards applied to public entities including the Corporation. While this issue was not raised by stakeholders, in accordance with the Terms of Reference, the Corporation's risk management practices have been considered broadly to determine whether they are fit-for-purpose.

The Review has concluded that the Corporation's risk management practices in relation to its investments and management of the Fund, and risk related to the Scheme's operations are currently fit-for-purpose. Collectively, the governance arrangement and structures in place provide the mechanism for sufficient accountability of the Corporation.

The Corporation's risk management practices are not public however, all recent annual reports and corporate plans make reference to a suite of risk management policies designed to manage the Corporation's risk in line with its contemporary appetite for risk,<sup>155</sup> including that the Corporation has adopted the Commonwealth Risk Management Framework.<sup>156</sup>

Increasingly, modern corporations are embracing ISO31000 risk management accreditation, although uptake by public entities has been slower in Australia. The Corporation is not currently accredited for the ISO31000; however, consideration may include whether there is benefit for the Corporation adopting this benchmark accreditation, having regard to the ambit of its responsibilities and resourcing. The Corporation should also consider the Commonwealth's Risk Management Policy, in particular what elements may need to be integrated into its existing risk management policies.<sup>157</sup>

Additionally, the Review is aware that the Corporation is a party to legal proceedings and accordingly, potential legal liabilities create an element of risk for the Corporation. As a CCE, the Corporation is subject to the model litigant rules and all other requirements imposed by the *Legal Services Directions 2017*, including the requirement to report on significant issues to the Office of Legal Services Coordination in relation to legal services, handling of claims, litigation, and involvement in dispute management. In addition to the Corporation having regard to the *Legal Services Directions*, the Corporation's risk management practices should consider the management of risk arising from legal proceedings.

<sup>155</sup> See e.g., Corporate Plan 2020/21 (n 28) 17; Coal Mining Industry (Long Service Leave Funding) Corporation, Coal LSL Corporate Plan 2019/20 (Report, 2019)

([https://assets.ctfassets.net/w7mmu5az9koe/1b3ngnFwy2Ao27stweUvaU/09478bfafa015e6033809833031a71b/Coal\\_LSL\\_Corporate\\_Plan\\_2019-20.pdf](https://assets.ctfassets.net/w7mmu5az9koe/1b3ngnFwy2Ao27stweUvaU/09478bfafa015e6033809833031a71b/Coal_LSL_Corporate_Plan_2019-20.pdf)) ('Corporate Plan 2019/20') 17; Annual Report 2020/21 (n 9) 17; Annual Report 2019/20 (n 23) 17 and 18.

<sup>156</sup> Annual Report 2020/21 (n 9) 17.

<sup>157</sup> Australian Government Department of Finance, *The Commonwealth Risk Management Policy* (Web Page, November 2019) <<https://www.finance.gov.au/government/comcover/commonwealth-risk-management-policy>>.

## 5.5 Administrative Processes

### Key points and section summary

#### Summary

In summary, the Scheme's administrative processes should:

1. facilitate the collection of levy payments from employers in a manner that does not create additional cost or excessive administrative burdens for employers;
2. ensure reimbursement of LSL payments to registered employers in a timely and efficient manner; and
3. enable employee entitlements to be recorded accurately, to provide employees with access to their entitlement records in a timely and transparent manner.

The complexity and uncertainty surrounding aspects of the current Scheme and its legislation has meant that the task of meeting these objectives has been difficult for the Corporation. The issues outlined below highlight the areas of improvement for current administrative processes:

- a. adoption of technology;
- b. data security and privacy;
- c. validation of data; and
- d. audit requirements.

#### Finding

The Review finds that a reliance on manual processes, coupled with administrative systems that are not designed with sufficient regard to industry interests, are limiting stakeholders ease of doing business with the Corporation.

To improve accessibility and ease of doing business with the Corporation, the Scheme's administrative processes should adopt greater technology-enabled systems as a priority. In-built technology will assist the speed and efficiency in which administrative processes can be completed. Administrative processes should be reviewed to consider the diverse range of employers contributing to the Scheme, and how further flexibility could be provided to assist small business employers demonstrate compliance with administrative requirements.

#### Recommendations

Section 4 includes four recommendations directed primarily towards the Corporation and are designed to assist strengthening the Corporation's operations and administrative processes to enable it to discharge its functions and meet stakeholder expectations.

## 5.5.1 Issue N: Adoption of technology

Section 4: Adoption of technology			
<b>Issue N: Adoption of technology</b>	Issue O: Data security and privacy	Issue P: Validation of data	Issue Q: Audit requirements

The Review has found that the Corporation is proactively advancing its adoption of technology through new initiatives, however a majority of current administrative processes remain largely manual in nature. This suggests the Corporation currently lags behind comparable Commonwealth entities in terms of its integration of technology into administrative processes. There was unanimous agreement across stakeholder groups that the Scheme’s processes and systems should include a higher level of technology integration to provide both employers and employees with greater visibility of, and access to, current records.

Technology enablement in this context refers to digital systems and platforms which support the Scheme’s functions and operations. The Corporation currently has a number of initiatives underway, including the roll out of the Levy Loader to employers, development of a self-service portal, and increasingly digitised processes. The Levy Loader looks to provide employers with a secure submission portal for monthly returns. The Levy Loader was in pilot stage throughout 2021 and is due to be implemented for all employers over the next two years.

The Review heard that some stakeholders would like to have access to an online system which provides real-time visibility of entitlements, liabilities, and reimbursements.

The Review considers there is value in the Corporation accelerating its adoption of technology to support the administration of the Scheme. The examples below provide further detail.

### Manual Processes - Templates and forms

The reimbursements process is one example of the Corporation’s reliance on manual systems. One registered employer described the processes as “clunky excel spreadsheets which have not been updated in years.” Case Study 12 speaks to the resourcing required by employers to respond to the existing processes:



**Evidence relied upon for decision-making**

**CASE  
STUDY 12**

A registered employer told the Review that reimbursement procedures are 25 pages long and the process requires the employer to investigate each employee’s individual SAP records to acquire and validate the required data. The registered employer reported that processing one spreadsheet with 20 employee reimbursements takes it approximately 5 hours.

The Review heard that many of the existing processes require submission via large excel spreadsheets to shared organisational email accounts. Stakeholders raised the existing templates and forms relating to monthly returns and reimbursements as particularly cumbersome.

### Timeliness of administrative processing

The manual nature of current administrative processes contributes to delays in the processing of monthly levy returns. This in turn impacts on the timeliness that employees are able to have visibility of their entitlements.

Without an avenue for real-time visibility of LSL hours accrued to date, employees have been required to contact the Corporation and request information on their accrued leave records. Many employees who

participated in the Review, and those advocating on their behalf (including Parliamentarians), note that there have been significant delays in employees' requests for their leave balance. The manual nature of record keeping also contributes to the number of enquiries the Corporation fields directing resources to respond to those queries, rather than other areas of the Corporation's operations. The accelerated adoption of technology would assist the Corporation to streamline administrative processes and provide a greater level of timeliness to client service.

### Incompatibility between employer and Corporation systems

Both registered and unregistered employers informed the Review that the systems and records used by the Corporation do not correlate to their own, or what is common practice among modern businesses operating in the black coal mining industry. Current inconsistencies between systems include:

- reporting of hours monthly whereas employers often record hours on a fortnightly basis in accordance with industry rostering practices;
- requests by the Corporation for information dating back to 2000, which may exist in archived paper formats, or which may not be available in instances where employers have only kept such records for seven years (or as required by tax law); and
- recording of hours accrued by employees under the Scheme, where only some aspects of their work is captured within the coverage provisions and hence employer systems for that purpose.

The inconsistency between systems results in employers needing to search and re-compile data in a form acceptable to the Corporation, adding to the administrative burden and compliance costs to employers.

Any future amendments to the Scheme should contemplate how administrative processes may be best aligned. It is likely that the technology enablement initiatives underway will assist, increased stakeholder consultation, including stakeholders sharing greater insights into the current human resources and payroll systems in use, could also assist the Corporation to contemplate an appropriate technology interface to arrive at options beneficial for the administration of the Scheme.

#### Accelerated adoption of technology

##### **Recommendation 17:**

It is recommended that the Corporation's digital transformation and technology enablement should be accelerated to bring the Corporation in line with contemporary best practice for modern corporations as soon as is practicable. The aim should be to provide greater automation of administrative processes, providing employees and employers with a clear line of sight between levy payments and employee entitlements. This includes:

- continued development of technology platforms, such as the Levy Loader, to provide real time access to employee entitlements, employer levy payments and reimbursements; and
- implementation of measures to increase alignment between the Corporation's and employers' systems, through stakeholder consultation to identify common practice between employers in the industry.



**Fairness**



**Fit-for-Purpose**

## 5.5.2 Issue O: Data security and privacy

Section 4: Adoption of technology			
Issue N: Adoption of technology	<b>Issue O: Data security and privacy</b>	Issue P: Validation of data	Issue Q: Audit requirements

Compliance with data security requirements and privacy law are challenges experienced by many modern corporations. It is now common, and expected practice, to have significant knowledge and robust information technology (IT) processes built into a corporation's systems. Data breaches are serious incidents and Commonwealth entities are required to have policies and procedures in place to both prevent and deal with breaches should they occur.<sup>158</sup>

Government is active in improving data and security practices across all Commonwealth entities, ensuring the highest standards of data protection.

Commonwealth entities hold obligations under a range of information management legislation including:

- the *Copyright Act 1968* (Cth);
- the *Privacy Act 1988* (Cth) and Privacy Code (including the 13 Australian Privacy Principles);
- the *Freedom of Information Act 1982* (Cth); and
- the *Archives Act 1983* (Cth).<sup>159</sup>

The Privacy Act is designed to protect personal information, including its handling, collection, use, storage, and disclosures.<sup>160</sup> Entities captured by the Privacy Act's provisions are required to comply with the Notifiable Data Breaches Scheme which mandates reporting to both the affected person/s and the Office of the Australian Information Commissioner (OAIC), when a data breach occurs.

The OAIC is the national privacy regulator, responsible for upholding Australia's privacy legislation and initiatives. The OAIC is allocated various powers and responsibilities under the *Australian Information Commissioner Act 2010* (Cth), including investigating potential acts or practices which breach privacy legislation, conducting privacy assessments on entities' handling of personal information, and compelling entities to develop enforceable privacy codes.<sup>161</sup>

In addition to compliance with the legislative obligations, there is increasing community expectation that modern Boards have data security and privacy at the forefront of their deliberations. Stakeholders expressed concerns regarding the security of data provided to the Corporation. This concern related to the submission of employees' information in monthly returns via email. Stakeholders provided examples of their staff being asked by the Corporation to remove password protection on excel spreadsheets. These concerns led to stakeholders advocating for a secure portal to transmit information to the Corporation.

In its submission to the Review, the Corporation noted that management of cyber risk and data security are key areas of operations that it is looking to strengthen. The Corporation also indicated support for the Board composition including membership of a Director with specialist IT and data security knowledge.

<sup>158</sup> Australian Government Office of the Australian Information Commissioner, *About the Notifiable Data Breaches Scheme* (Web page) <<https://www.oaic.gov.au/privacy/notifiable-data-breaches/about-the-notifiable-data-breaches-scheme/>>.

<sup>159</sup> Australian Government Department of Finance, *Information Management* (Web Page, September 2019) <<https://www.finance.gov.au/government/setting-commonwealth-entity/information-management>>.

<sup>160</sup> Australian Government Attorney-General's Department, *Privacy* (Web Page) <<https://www.ag.gov.au/rights-and-protections/privacy>>.

<sup>161</sup> Australian Government Office of the Australian Information Commissioner, *What we do* (Web Page) <<https://www.oaic.gov.au/about-us/what-we-do/>>.

The Review acknowledges the work currently underway by the Corporation regarding its digital strategy and transformation, including initiatives such as:

- the Levy Loader (providing a secure portal for monthly returns);
- implementation of the National Archives Digital Continuity Policy; and
- development of a data management framework for the Scheme.<sup>162</sup>

Notwithstanding the adoption of these initiatives, the Review notes that data security and privacy is a significant risk posed to modern corporations, and that current operations and the priorities of the Corporation need to be re-aligned to acknowledge and address this risk in an expedited manner.

### Protection of data and privacy

#### **Recommendation 18:**

It is recommended that the Corporation should implement and publish data security and privacy practices consistent with best practice standards provided by the Office of the Australian Information Commissioner (OAIC).



**Accountability**



**Fit-for-Purpose**

<sup>162</sup> Corporate Plan 2021-22 (n 2) 20.

### 5.5.3 Issue P: Validation of data

Section 4: Adoption of technology			
Issue N: Adoption of technology	Issue O: Data security and privacy	<b>Issue P: Validation of data</b>	Issue Q: Audit requirements

The current legislative framework includes no requirements or mechanism by which information provided to the Corporation is, or can be, validated as part of existing administrative processes.

Stakeholders raised concerns regarding incorrect reporting or calculation of hours, as well as allegations that the Scheme includes ‘registered employers’ which do not exist.

Stakeholders at the public forum, employees, parliamentarians, and the Corporation each proposed the inclusion of data validation processes to improve accountability of the Scheme. Proposals included adopting existing mechanisms such as the use of Australian Business Numbers (ABNs) and Tax File Numbers (TFNs).

The Review notes that the current Levy Advice Form designed by the Corporation includes reference to an employer’s ABN numbers, however it is the validation of that data with the Australian Business Register that is required and streamlined through a technology interface with the Australian Business Register. With respect to the use of TFN numbers, while the validation of such information would strengthen the Corporation’s data management, as a personal identifier, the knowledge and use of TFNs requires permission through legislative requirements and could attract significant privacy implications unless a valid exception applies. Greater data sharing with relevant agencies would strengthen the information used by the Corporation to make administrative decisions, however, would be subject to data sharing arrangements and relevant legal considerations.

#### Conduct consistent with a custodian of the Scheme



Fairness



Accountability

#### **Recommendation 19:**

It is recommended that validation processes be incorporated into the Scheme’s operations, including:

- identification of validation process undertaken in like organisations;
- identification and evaluation of areas within the Scheme which could most benefit from enhanced validation;
- use of existing mechanisms such as ABNs (and TFNs if permitted) which may be leveraged to provide greater accountability and validation within the Scheme; and
- greater data sharing with other Commonwealth agencies, to the extent permitted by law, to increase integrity in the Scheme and reduce the likelihood of underreporting of hours by employers.

## 5.5.4 Issue Q: Audit requirements

Section 4: Adoption of technology			
Issue N: Adoption of technology	Issue O: Data security and privacy	Issue P: Validation of data	<b>Issue Q: Audit requirements</b>

Section 10 of the Collection Act requires all employers of eligible employees to provide an audit report to the Corporation within six months of the end of the previous financial year. The report must state the auditor’s opinion, and reasons for that opinion, including:

- whether the employer has paid all levy amounts required in that financial year; and
- if reimbursements were paid, whether the amounts were correct.<sup>163</sup>

Non-compliance can amount to a strict liability offence, or a civil penalty.<sup>164</sup>

Current audit requirements were described as inflexible by stakeholders, in so far as it adopts a ‘one size fits all approach’ by imposing the same level of auditing requirement on both small and large businesses. It was noted that the audit requirement imposes a disproportionate burden on small business – and employer stakeholders have proposed that small businesses be permitted to have alternate methods to demonstrate compliance with requirements, such as the use of a statutory declaration.

The current audit requirements outlined in the Collection Act provide minimal guidance to employers and auditors as to the veracity of audits. Stakeholders noted that the lack of guidance as to how audits are to be conducted, and what audit reports are required to include, leads to significant variance in audit processes, and corresponding costs associated with complying with this requirement. This uncertainty creates inequity among employers and can increase compliance costs for employers.

Additionally, stakeholders noted that no consistent advice on the requirements has been provided to the industry by the Corporation, which requires them to educate their auditor on the Scheme’s processes, and the relevant intricacies of the black coal mining industry. Stakeholders also reported a significant variation in approaches (and corresponding costs) depending on the auditor the employer has engaged, leading to an unfair application of the audit requirement across the industry’s diverse stakeholders.

### Reducing audit impost on small business employers

#### **Recommendation 20:**

It is recommended that the Scheme support employer compliance by offering greater certainty of audit requirements for employers, by:

- clarifying the existing requirements through the provision of guidance material; and
- providing greater flexibility for small business employers in how they demonstrate compliance with the audit requirement.



**Certainty**



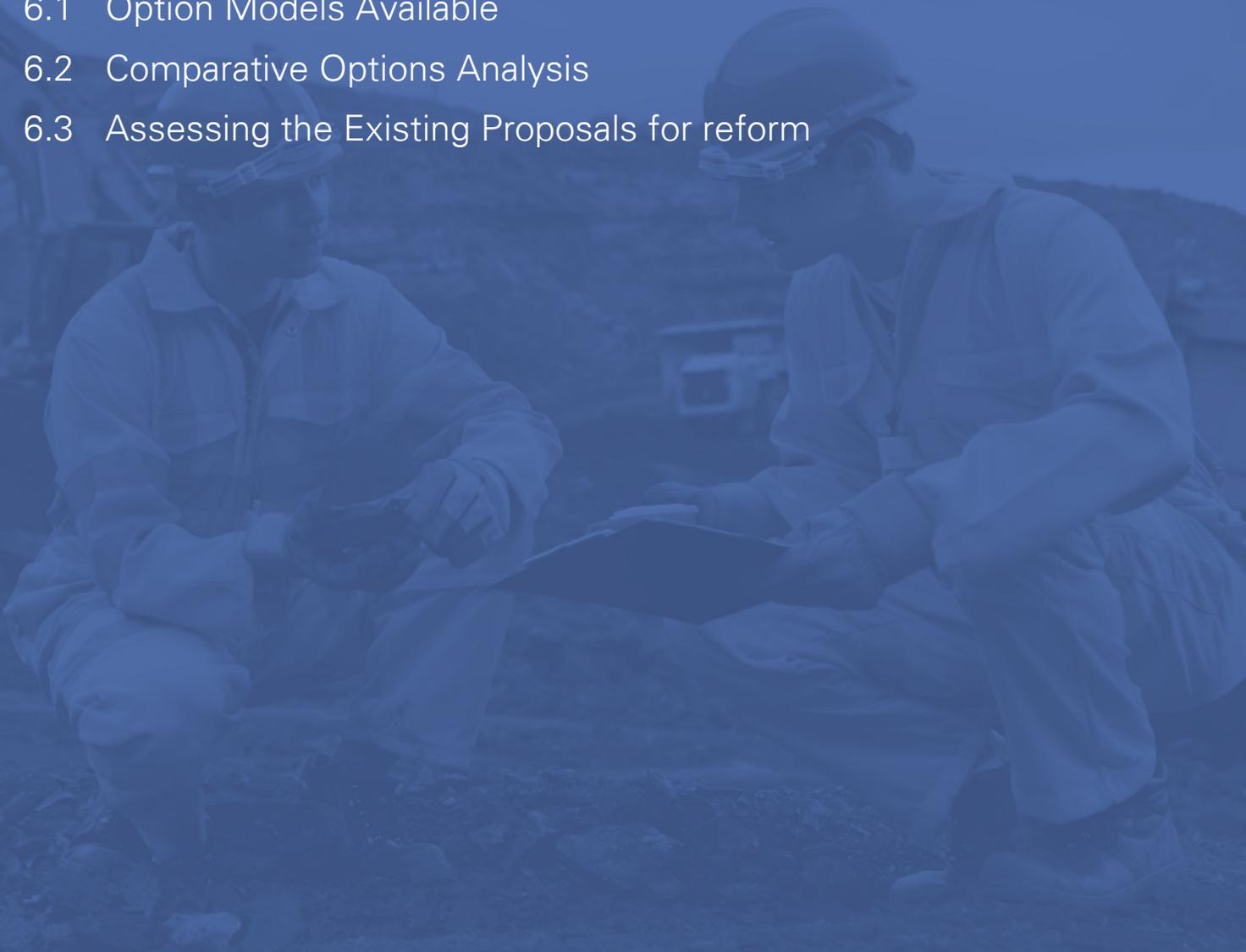
**Fairness**

<sup>163</sup> Collection Act (n 39) s 10(1).

<sup>164</sup> Ibid s 10(2).

# Chapter 6: Options to Advance the Recommendations

- 6.1 Option Models Available
- 6.2 Comparative Options Analysis
- 6.3 Assessing the Existing Proposals for reform



## 6.1 Options Models Available

There are three key option models available to assist advance the recommendations:

Option 1: Interim reform	Option 2: Targeted reform	Option 3: Structural reform	
<p>Option 1 recognises value in implementing minimalist reform through non-legislative change that can improve the current effectiveness of the Scheme.</p> <p>This option contemplates that some improvements are possible without legislative reform, and capable of being advanced by the Corporation while any potential legislative reform is being progressed.</p>	<p>Option 2 involves both legislative and non-legislative change to address current issues within the Scheme, however it is not intended to extend to broader structural reform.</p> <p>This option allows for short to medium term changes to occur that are targeted at implementing specific solutions to the issues identified by the Review. This option leaves broader structural change, including the adoption of an Authority Pays model, to a time in the future, where further change may be considered.</p>	<p>Option 3 involves significant legislative reform to address current issues identified with the Scheme and contemplates a suite of future structural changes to the Scheme including:</p> <ol style="list-style-type: none"> <li>1. re-modelling the Scheme to a direct Authority Pays model rather than a reimbursement model,</li> <li>2. considering initiatives to harmonise LSL schemes across Commonwealth, and State and Territory State jurisdictions,</li> <li>3. evaluating the potential for mutual recognition with State-based schemes, and</li> <li>4. potentially transitioning the Scheme from Commonwealth administration towards industry management.</li> </ol>	
<b>Minimal Change Required</b>		<b>Significant Change Required</b>	
	1	2	3
<b>Legislative change</b>	✘	✔	✔
<b>Non-legislative change</b>	✔	✔	✔

When mapped against the recommendations offered, the options models contemplate both legislative and non-legislative reform. A decision point exists as to what level of reform to advance, informed by the relative cost of implementing change and the desired outcome required.

## 6.1.1 Option 1 – Interim reform

Option 1 recognises that a degree of reform to improve the current effectiveness of the Scheme can be achieved through non-legislative change. This reform is capable of being advanced by the Corporation, in instances where there is limited appetite for legislative reform, or as an interim measure while legislative reform is progressed.

### Description

Through non-legislative reform only, the Corporation can pursue improvements to the client service experience of employees and employers, and the non-structural aspects of the Scheme’s governance arrangements, including:

- providing greater simplicity and visibility of entitlements and funds management (recommendation 10b);
- improving how decisions are made (recommendation 11);
- clarifying evidentiary requirements (recommendation 12);
- managing conflicts of interest (recommendation 14);
- publicising its risk and fraud management practices and procedures (recommendation 15);
- reviewing its approach to stakeholder engagement and demonstrating conduct consistent with a custodian of the Scheme (recommendation 16); and
- revisions to administrative processes (recommendations 17 – 20).

However, the adoption of Option 1 will not address the current issues with respect to coverage and treatment, compliance and enforcement matters relating to powers, review or dispute resolution, or structural governance aspects of the Scheme, that are underpinned by legislation.

Advantages	Disadvantages
<ul style="list-style-type: none"> <li>• Option 1 can be actioned without timeframes associated with legislative reform.</li> <li>• Can be pursued immediately (subject to resourcing and cost constraints) and can be used as an interim measure while other reforms take place.</li> <li>• Likely to directly improve client service experience for employers and employees within the Scheme.</li> <li>• Meets community expectations without resources and timeframes associated with legislative reform.</li> </ul>	<ul style="list-style-type: none"> <li>• Some improvements (particularly those relating to increased digital transformation) may be subject to resourcing and cost constraints.</li> <li>• Only partially addresses some issues identified by the Review (Table 4).</li> <li>• Does not provide a comprehensive solution to all the concerns raised by stakeholders.</li> <li>• Will not resolve the coverage and legacy issues facing the Scheme, without which the issues identified by the Review will continue to be detrimental to the Scheme’s operations and stakeholder relationships. Failure to address coverage issues will likely result in expensive and protracted litigation and a further deterioration in the relationship between the Corporation and some employers, both of which are undesirable outcomes and present risk to the Commonwealth.</li> <li>• Continuation of systemic disconnect between current Scheme and an evolving modern workforce.</li> </ul>

Table 1: Option 1 advantages and disadvantages

Relevant Considerations	Implementations Steps
<ul style="list-style-type: none"> <li>Resourcing and cost considerations to accelerate digitalisation of services.</li> </ul>	<ul style="list-style-type: none"> <li>Implementation of Option 1 can be considered and pursued by the Corporation without requiring broader consultation with Commonwealth entities.</li> <li>The Corporation could seek stakeholder feedback on intended improvements to administrative processes prior to implementation to ensure any refinements are fit-for-purpose.</li> </ul>

### 6.1.2 Option 2 – Targeted reform

Option 2 involves both legislative and non-legislative change to address current issues within the Scheme delivering improvements for employees and employers alike, however, does not contemplate comprehensive reform to fundamentally change the foundations of the Scheme.

This option allows for short to medium term changes that are targeted at implementing specific solutions to the issues identified by the Review. This option leaves broader structural reform, including the adoption of an Authority Pays model, to a time in the future, where further change is considered alongside long-term structural change in the industry, and further developments in the broader workplace relations framework.

#### Description

Option 2 expands on Option 1 by adopting all non-legislative reforms designed to improve administrative processes and the Corporation’s approach to fulfilling its functions and adds targeted legislative reform to existing legislation. The legislative reform contemplated by Option 2 includes:

Specific legislative amendments to existing legislation to address the coverage and treatment issues discussed in section 5.1 including the implementation of recommendations 1–2, and 4. Recommendation 3 (relating to the Scheme’s interaction with other LSL schemes is discussed further below in Relevant Considerations).

- Specific legislative amendments to existing legislation to address the compliance and enforcement issues discussed in section. 5.2, including the implementation of recommendations 5 to 9.
- Specific legislative amendments to existing legislation to address some governance-related issues discussed in section 5.3, including the implementation of recommendations 12 and 13.
- Importantly, Option 2 does not contemplate the implementation of recommendation 11, which proposes legislative amendments to existing legislation, or the creation of new legislation that would be required to reform the existing foundations of the reimbursement model to move towards an ‘Authority Pays’ model. This aspect is discussed further in Option 3.

Advantages	Disadvantages
<ul style="list-style-type: none"> <li>The adoption of non-legislative improvements (Option 1) combined with targeted legislative reform will offer substantial improvements to the operation of the Scheme, particularly to provide further certainty and fairness to employers and employees.</li> <li>Broad stakeholder support exists for legal amendments to improve the current operation</li> </ul>	<ul style="list-style-type: none"> <li>Any legislative reform requires resourcing and time to navigate legal and parliamentary processes.</li> <li>Option 2 will not alter the current operation of the reimbursement model, which will limit the extent of transparency in the Scheme’s operation, in so far that employees and employers may still not have a clear line of</li> </ul>

Advantages	Disadvantages
<p>of the Scheme, subject to further deliberations with parties to the Existing Proposals.</p> <ul style="list-style-type: none"> <li>Provides a compromise between calls for an overhaul of the Scheme, and the need to address core issues affecting the operations of the Scheme through legislative reform.</li> <li>Allows the Commonwealth to adapt the current Scheme to meet the needs and issues presented by changes in the modern workforce composition of the black coal mining industry, while preserving the current status quo of the Corporation's role and the Scheme's payment framework.</li> <li>Will address many issues identified by the Review and will assist the Corporation and Scheme evolve in a manner consistent with community expectations and the standards required of a modern public corporation.</li> </ul>	<p>sight to the levy payments and entitlements. This may be mitigated by the acceleration of digital transformation providing greater transparency by offering employees real time access to view their accrued entitlements.</p> <ul style="list-style-type: none"> <li>Will not entirely future proof the Scheme for the changing nature of the industry and the challenges likely to be faced in the future.</li> </ul>

Table 2: Option 2 advantages and disadvantages

Relevant Considerations	Implementations Steps
<ul style="list-style-type: none"> <li>Option 2 requires legislative amendments, that will need to be contemplated with considered legal advice;</li> <li>Option 2 requires resources and time to implement legislative amendments;</li> <li>With specific reference to recommendation 3 (mutual recognition arrangements), under Option 2 the Commonwealth may look to implement an interim solution by legislative reform to the Coal LSL legislative framework only. This would permit eligible employees to 'opt-out' of the Scheme, to reduce the incidence of employees mistakenly receiving LSL entitlements under two or more schemes, and to offer flexibility of choice to employees, while broader Commonwealth and State and Territory consultation occurs regarding the adoption of a mutual recognition arrangement. Given the consultation required to reach an agreement between Commonwealth, and State and Territory Governments, the Review considers the mutual recognition arrangements to be of a magnitude that better aligns with Option 3.</li> </ul>	<ul style="list-style-type: none"> <li>Detailed consideration of proposed legal amendments.</li> <li>Further stakeholder consultation to provide early visibility of proposed amendments.</li> <li>Commence consultation with State and Territory authorities with responsibilities for LSL schemes to progress discussions with respect to mutual recognition arrangements, and seek legal advice concerning ability to reform existing legislation to permit mutual recognition arrangements.</li> </ul>

### 6.1.3 Option 3 – Comprehensive reform

Option 3 involves comprehensive legislative reform to address current issues identified with the Scheme and contemplates the future needs of the Scheme.

#### Description

Option 3 represents the most comprehensive reform of all three options presented. Option 3 goes beyond the non-legislative improvements contemplated in Option 1 and the targeted reforms to existing legislation in Option 2, to embark on a broader transformational journey that looks to address current issues, simplify the legal foundations of the Scheme and consider future Government and industry priorities. Option 3 contemplates future structural changes to the Scheme to:

- a) re-model the Scheme to a direct Authority Pays model, rather than a reimbursement model;
- b) implement mutual recognition arrangements through consultation with State and Territory Governments and associated legislative reform; or alternatively
- c) consider wider-Government initiatives concerning the future of portable LSL schemes in Australia,<sup>165</sup> and possible transition of federal schemes to State or Territory Governments; or
- d) transition the Scheme away from Commonwealth administration towards industry management, as originally contemplated in the Explanatory Memorandum that accompanied the passage of the 1992 legislative amendments.<sup>166</sup>

Option 3 could effectively address all recommendations offered by the Review, however, will differ in approach from the targeted approach proffered in Option 2 in that Option 3 would not necessarily be confined to amendments of existing legislation, and rather could look to reformulate the Scheme in new, or substantially revised legislation.

Comprehensive reform would create an opportunity to potentially consolidate the Scheme's enabling legislation into a single piece of legislation, with the specific amendments required to address the recommendations being encompassed within broader legislative change. Consolidated legislation may simplify the existing legislative structure, however further consideration is required to ascertain the true value (and costs) of consolidating all enabling legislation into a consolidated framework.

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<sup>165</sup> See Feasibility Report (n 55).

<sup>166</sup> See for example, the *Explanatory Memorandum, Coal Industry Legislation Amendment Bill 1992* (Cth).

Advantages	Disadvantages
<ul style="list-style-type: none"> <li>Comprehensive legislative reforms provide an opportunity to directly address structural issues associated with the current Scheme, including re-modelling the Scheme from a reimbursement model to an 'Authority Pays' mechanism that provides greater transparency to the Scheme's operation.</li> <li>Creates an opportunity to consolidate all current Scheme legislation into a single piece of legislation.</li> <li>Creates an opportunity to future-proof the Scheme for future structural changes caused by external forces, such as broader industrial relations changes, and shifts in Government and industry priorities (potential transitioning of industry to renewable energy).</li> </ul>	<ul style="list-style-type: none"> <li>Comprehensive legislative reform will entail greater resourcing and time lags than targeted technical amendments to existing legislation discussed in Option 2.</li> <li>Significant stakeholder consultation would need to occur to support comprehensive legislative reform (including engagement with Commonwealth entities, and State and Territory Governments if mutual recognition arrangements are to be advanced).</li> <li>To achieve the greatest impact, comprehensive reform would require Commonwealth decisions with respect to broader issues, including the future of portable schemes, broader industrial relations frameworks, and Commonwealth appetite to continue administering schemes rather than divesting responsibility to industry or State or Territory Governments.</li> <li>The systemic reforms included within this option may go beyond current Commonwealth appetite and exceed the needs of the Scheme and its stakeholders as they exist presently. However, the option represents additional areas of reform or review which may become relevant for a future Scheme.</li> </ul>

Table 3: Option 3 advantages and disadvantage

Relevant Considerations	Implementations Steps
<p>In considering whether to advance comprehensive legislative reform, any decision should be informed by the following considerations:</p> <ul style="list-style-type: none"> <li>• A decision concerning whether the black coal industry’s future workforce and industry needs continue to benefit from a portable scheme, noting the 2016 Senate Standing Committee Report found stakeholders were divided on the issue of portable LSL schemes generally, and some stakeholders suggested that portable schemes should only exist in circumstances where some industries preclude workers from ongoing employment with a single employer.</li> <li>• An evaluation of whether the Commonwealth remains the administrator of the Scheme, or whether arrangements are made to transition the custody and administration of the Scheme to either: <ul style="list-style-type: none"> <li>– industry, which would necessarily require a cost benefit analysis and consideration of Commonwealth performance versus what could be achieved through industry-led practices; or</li> <li>– State and Territory Governments.</li> </ul> </li> <li>• The broader future of coal industry, noting the shift towards renewable energy, and whether comprehensive legislative reform is required to support a changing industry, or whether reform to the Scheme can support broader initiatives to transition the black coal workforce towards new areas of work.</li> </ul>	<ul style="list-style-type: none"> <li>• Detailed examination of the operation of State and Territory LSL schemes legislative operation to create a federal ‘Authority Pays’ model.</li> <li>• Engagement should occur with the Attorney-General’s Department to prepare: <ul style="list-style-type: none"> <li>– Detailed Analysis of Existing Proposals and the required legislative amendments to support reform; and</li> <li>– a cost benefit analysis of consolidating the enabling legislation into a single legislative framework.</li> </ul> </li> <li>• Stakeholder engagement process.</li> <li>• Consultation amongst wider industry stakeholders to understand appetite for the role of federal portable LSL schemes.</li> <li>• Evaluation of policy options available to develop workplace systems and entitlements capable of adaptation to the modern challenges faced by an evolving workforce.</li> </ul>

## 6.2 Comparative Options Analysis

The table below provides a comparative overview of the extent to which the Options 1 to 3 outlined above could address the issues and recommendations identified by the Review.

Legend				
<b>Addressed</b>	If the Option is implemented, it could largely address issues identified in the Review.			
<b>Addressed in part</b>	If Option is implemented, it could partially address the issues identified in the Review.			
<b>Not addressed</b>	If the Option is implemented, it is unlikely to address the issues identified in the Review.			
Issue	Recommendations	Option 1	Option 2	Option 3
<b>A: Eligibility</b>	1: Definition of eligible employees	Not addressed	Addressed in part	Addressed
	2: Addressing legacy issues	Not addressed	Addressed	Addressed
	3: Empowering workers: choice of Scheme	Not addressed	Addressed in part	Addressed
<b>B: Treatment of casuals</b>	4: Equal treatment of casual and permanent employees	Not addressed	Addressed	Addressed
<b>D: Dispute resolution processes</b>	5: Strengthening decision-making, review and dispute resolution processes	Not addressed	Addressed in part	Addressed
	6: Resolving liabilities – settlement powers	Not addressed	Addressed	Addressed
	7: Resolving liabilities – limitation periods	Not addressed	Addressed	Addressed
<b>E: Limited compliance tools</b>	8: Fit-for-purpose tools	Addressed in part	Addressed	Addressed
	9: Safeguarding employees' entitlements	Not addressed	Addressed	Addressed
<b>F: A perceived lack of transparency</b>	10: Increasing visibility of entitlements and payments	Addressed in part	Addressed in part	Addressed
	11: Improving how decisions are made	Addressed in part	Addressed	Addressed
<b>G: Evidentiary Requirements</b>	12: Clarifying expectations and requirements for evidence	Addressed in part	Addressed	Addressed
<b>H: Board Arrangements</b>	13: A modern and representative Board	Addressed in part	Addressed	Addressed
<b>I: Conflicts of interest</b>	14: Mitigating conflicts of interest	Addressed	Addressed	Addressed
<b>J: Allegations of fraud</b>	15: Safeguarding the Scheme from Fraud	Addressed in part	Addressed	Addressed
<b>K: Culture</b>	16: Conduct consistent with a custodian of the Scheme	Addressed	Addressed	Addressed
<b>L: Communications</b>		Addressed	Addressed	Addressed
<b>M: Risk Management</b>		Addressed	Addressed	Addressed
<b>N: Adoption of technology</b>	17: Systems fit-for-purpose for the technology age	Addressed	Addressed	Addressed
<b>O: Data security and privacy</b>	18: Protection of data and privacy	Addressed	Addressed	Addressed
<b>P: Validation of data</b>	19: A scheme that uses validated information	Addressed in part	Addressed	Addressed
<b>Q: Audit requirements</b>	20: Reducing audit impost on small business employers	Addressed in part	Addressed	Addressed

Table 4: Comparative options analysis

## 6.3 Assessing the Existing Proposals

The Review has been provided with information that outlines three key proposals to reform the Scheme (the Existing Proposals). The Existing Proposals (outlined in Figure 14 below) all represent an expression of Option 2: Targeted Reform and requires legislative reform for effective implementation.

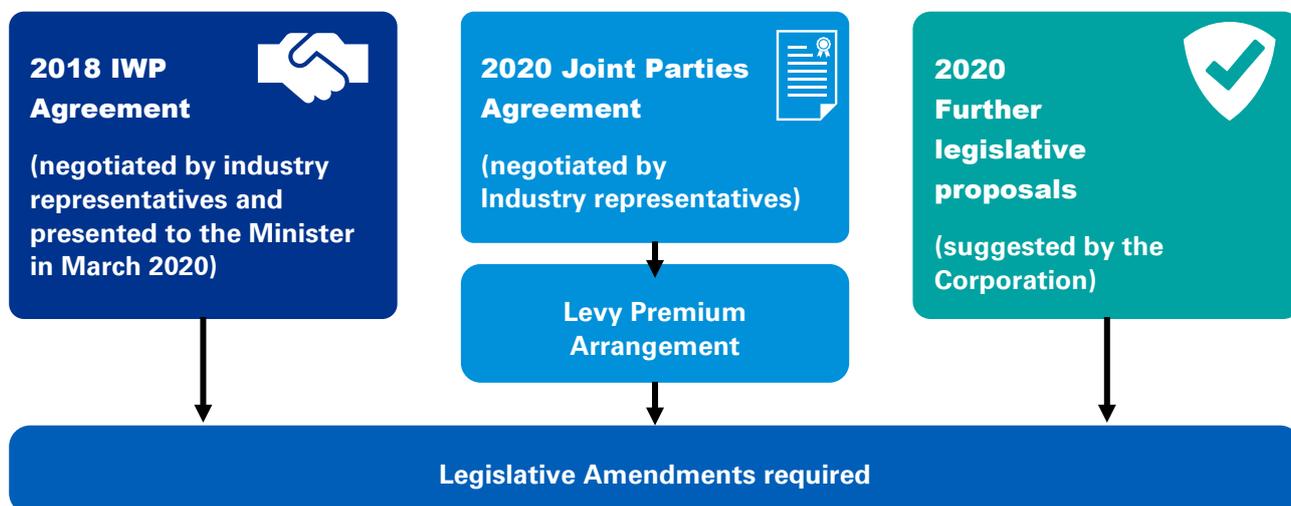


Figure 14: Summary of Existing Proposals

### 6.3.1 The 2018 Industry Working Party Agreement (IWP Agreement)

An Industry Working Party (IWP) was established in 2018 to consider possible amendments to the Corporation’s enabling legislation. The IWP was appointed by the Board of the Corporation and thus included membership reflective of the current Board composition.

In 2018, the IWP produced an agreement which included several proposals to amend the Administration Act and the Levy Collection Act.

In summary, the IWP Agreement canvassed proposals to address the four themes of coverage and treatment, compliance and enforcement, administration, and governance, in so far as it proposed:

- **Coverage:** amendments to address the issue of stranded employees and the disadvantage experienced by casual employees;
- **Compliance:** amendments to strengthen the Corporation’s regulatory powers (including the ability to issue Compliance Notices, and impose interest rates on late payments of additional levies), to address significant non-compliance from registered and unregistered employers;
- **Administration:** amendments aimed at improving the efficiency and effectiveness of the Corporation’s administration and funds managements; and
- **Governance:** amendments to enhance governance through the addition of two independent Directors to the Board.

### 6.3.2 The 2019/2020 Joint Parties Agreement

The Joint Parties Agreement represents a negotiated outcome, following conciliation facilitated through the Fair Work Commission, between:

- Ai Group
- the Mining and Energy Division;

- iii) AMWU;
- iv) CEPU;
- v) APESMA, and
- vi) CMIEG.

The Corporation was an ‘interested party’ to the Joint Parties Agreement.

The Joint Parties Agreement represents approximately 12 months of negotiation that primarily seeks to address alleged legacy non-compliance with the Scheme by unregistered employers through legislative amendments to introduce a levy premium arrangement to operate for a specified period.

Given the passage of time that has passed since its negotiation, the Review tested the parties continued support for the Joint Parties Agreement and found all parties consulted continued to support the agreement and were keen to ensure that the foundations laid by the negotiations were harnessed to resolve the legacy issues.

### 6.3.3 Further proposals offered by the Corporation

In addition to the IWG Agreement and the Joint Parties Agreement, the Review is aware that the Corporation has proactively offered additional proposals for technical amendments to occur to the Corporation’s legislation. The further proposals recognise that while the IWP Agreement and the Joint Parties Agreement may address legacy issues, without broader change the same or similar issues may occur in the future. To this end, the Corporation has suggested a further tranche of proposals to enable it to:

- make binding decisions regarding employee eligibility, appealable either in the Administrative Appeal Tribunal or the Federal Court of Australia;
- pay eligible employees LSL entitlements directly from the Fund in circumstances where employers do not make the associated levy payment for an employee (those unpaid levies becoming a debt owed to the Commonwealth); and
- reach commercial settlements of disputes.

### 6.3.4 The effect of the Existing Proposals

The Review has considered the collective impact of the Existing Proposals, should they be implemented. On their face, the Existing Proposals look to partially address the issues identified by the Review, with further details contained below in Table 5.

Legend	
<b>Addressed</b>	If the Existing Proposals are implemented, they could largely address issues identified in the Review.
<b>Addressed in part</b>	If the Existing Proposals are implemented, they could partially address the issues identified in the Review.
<b>Not addressed</b>	If the Existing Proposals are implemented, they are unlikely to address the issues identified in the Review.

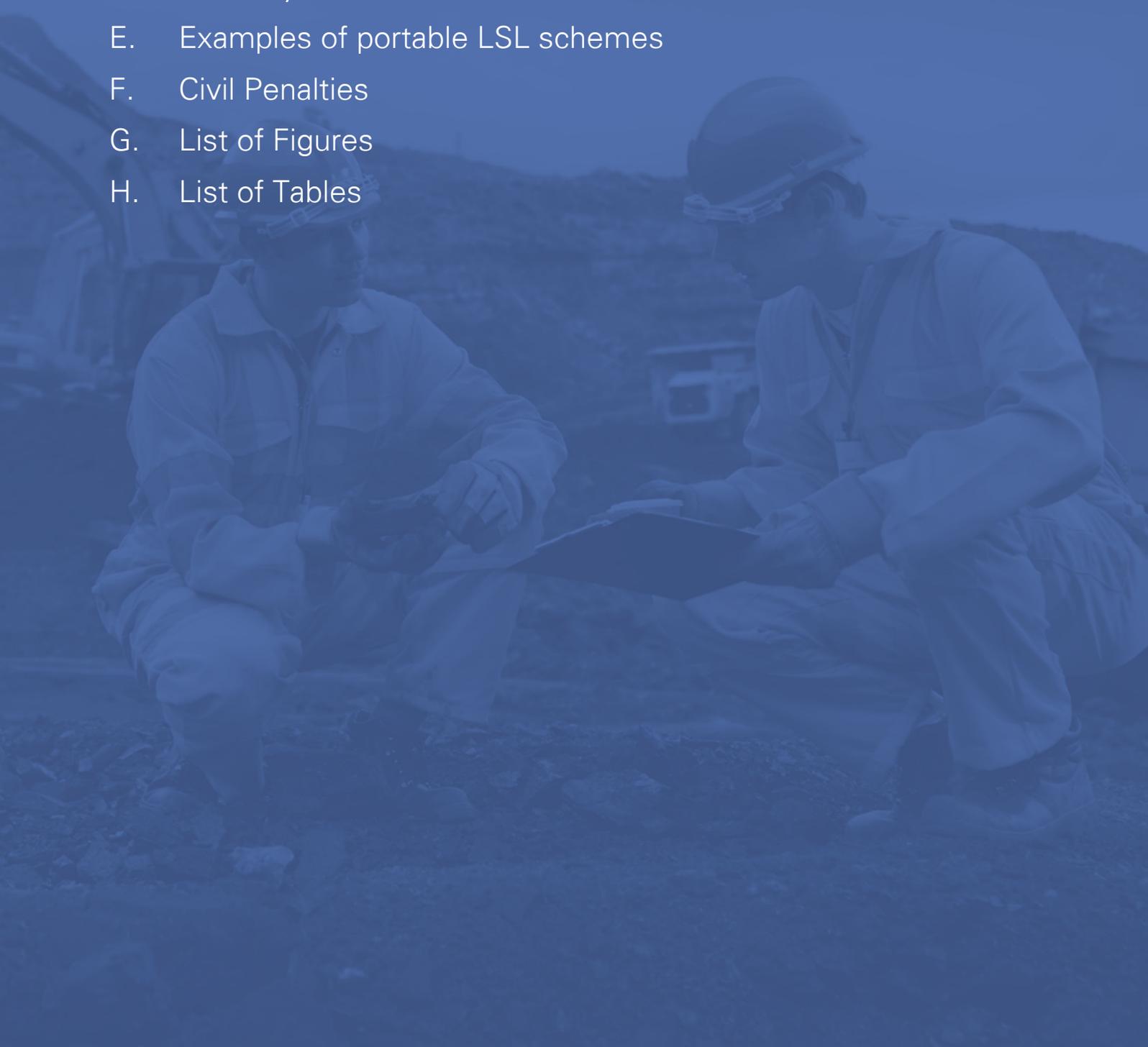
Issue	Effect	Comments
<b>A: Eligibility</b>	<b>Addressed in part</b>	The Existing Proposals look to address some aspects of the legacy issues, however, do not look to amend the definition of ‘eligible employee’ or the current occupations excluded from the operation of the Scheme. Notably, should the Existing Proposals be implemented, consideration must occur as to the possibility of waiving liabilities (debts) accrued in the past. Further engagement with the Department of Finance is recommended.

Issue	Effect	Comments
<b>B: Treatment of workers</b>	<b>Addressed in part</b>	The Existing Proposals begin to address some of the differential treatment between casuals and permanent employees under the Scheme through: <ul style="list-style-type: none"> <li>• amendments to section 39AA of the Administration Act; and</li> <li>• the addition of provisions to the Administration Act to allow casuals earlier access to their LSL entitlements.</li> </ul> Further amendments will be required to ensure equal treatment across the breadth of the Scheme.
<b>C: Waiver agreements</b>	<b>Not addressed</b>	The Existing Proposals do not substantively address this issue.
<b>D: Dispute resolution processes</b>	<b>Addressed in part</b>	The Existing Proposals address in part the issues associated with the dispute resolution process regarding additional settlement powers for the Corporation. Further consideration will need to occur to address the broader aspects of this issue explored in this Review.  The Existing Proposals also include further avenues for appeal to the AAT and Federal Court. Additional consideration and proposals will need to be developed to ensure robustness of review and dispute resolution mechanisms.
<b>E: Limited compliance tools</b>	<b>Addressed in part</b>	The Existing Proposals put forth options for expanded regulatory powers for the Corporation including: <ul style="list-style-type: none"> <li>• withholding reimbursements from employers who have not complied with their obligations; and</li> <li>• issuing compliance notices for employers who fail to submit audit reports or monthly returns.</li> </ul> A threshold question remain as to which entity is best placed to perform a regulatory role for the Scheme.
<b>F: A perceived lack of transparency</b>	<b>Addressed in part</b>	While none of the Existing Proposals directly address this issue, some aspects of the proposals are aimed at reducing the complexity and administrative burden associated with the current reimbursement process. The Review suggests these proposals will begin to improve understanding, and thereby transparency, of the funding arrangements of the Scheme, however additional policy and legislative reform work may need to be undertaken in this space.
<b>G: Evidentiary Requirements</b>	<b>Not addressed</b>	The Existing Proposals do not substantively address this issue.
<b>H: Board Arrangements</b>	<b>Addressed in part</b>	The Existing Proposals include suggestions for amendment to the composition of the Board such as: <ul style="list-style-type: none"> <li>• increasing the number of Directors to eight;</li> <li>• introducing two independent directors;</li> <li>• prohibiting independent Directors assuming the Chair or Deputy Chair; and</li> <li>• consequential amendments related to quorum.</li> </ul>
<b>I: Conflicts of interest</b>	<b>Not addressed</b>	The Existing Proposals do not substantively address this issue.
<b>J: Allegations of fraud</b>	<b>Not addressed</b>	The Existing Proposals do not substantively address this issue.
<b>K: Culture</b>	<b>Not addressed</b>	The Existing Proposals do not substantively address this issue.
<b>L: Communications</b>	<b>Not addressed</b>	The Existing Proposals do not substantively address this issue.
<b>M: Risk Management</b>	<b>Not addressed</b>	The Existing Proposals do not substantively address this issue.
<b>N: Adoption of technology</b>	<b>Not addressed</b>	The Existing Proposals do not substantively address this issue.
<b>O: Data Security and privacy</b>	<b>Not addressed</b>	The Existing Proposals do not substantively address this issue.
<b>P: Validation of data</b>	<b>Not addressed</b>	The Existing Proposals do not substantively address this issue.
<b>Q: Audit requirements</b>	<b>Addressed</b>	Through proposed amendments to address the burden of audit requirements and clarifying requirements of audit reports. The Existing Proposals address this issue in full through amendments to: <ul style="list-style-type: none"> <li>• allow smaller employers greater flexibility in meeting their obligations; and</li> <li>• tighten rules around auditors and the content of their reports.</li> </ul>

Table 5: Effect of existing proposals

# Appendices

- A. Out of Scope Issues Identified
- B. Terms of Reference
- C. Focus Groups
- D. Glossary
- E. Examples of portable LSL schemes
- F. Civil Penalties
- G. List of Figures
- H. List of Tables



## Appendix A: Out of Scope Issues Identified

<b>Out of Scope Issue identified:</b>	<b>Identified by:</b>
Changes to the Scheme to either remove or expand portability of entitlements	Employer Groups and Producers
Introduction of a federal portable scheme akin to current superannuation schemes	Employer Groups
Transition and decommission of mine sites	Employer Groups
Transition of the coal mining industry to renewables	Employer Groups and Parliamentarians

## Appendix B: Terms of Reference



**Australian Government**  
**Attorney-General's Department**

**June 2021**

### Coal LSL Review – Terms of Reference

The Coal Mining Industry (Long Service Leave Funding) Corporation – better known as ‘Coal LSL’ – is an Australian Government corporation established to regulate and manage long service leave entitlements on behalf of eligible employees in the black coal mining industry.

The scheme has over \$1.9 billion in funds under management. There are around 1000 employers registered with the scheme for over 53,000 active employees who are accruing and/or have accrued an entitlement under the scheme. Coal LSL hold an entitlement in hours for each eligible employee (over 128,000 employees within the scheme) and currently manages around 55 million hours of leave.

As an Australian Government corporation that manages portable long service entitlements for the black coal industry, 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. The review will provide an opportunity to consider Coal LSL’s current performance and framework, and enhancements that can be made to ensure there is confidence that hours worked by eligible employees are being properly and transparently reported to Coal LSL, and that Coal LSL is a model for the highest standards of public sector governance.

Coal LSL is unique as a corporate Commonwealth entity that is a public financial corporation and does not engage staff under the Public Service Act 1999. There are only five other entities across the Commonwealth Government sector that share these characteristics.<sup>167</sup>

In this context, the Minister for Industrial Relations, Senator the Hon Michaelia Cash, has requested an independent external review of Coal LSL’s legislative framework to ensure the ongoing success of the scheme taking into account the need for:

- i. the highest levels of public sector accountability
- ii. a strong and effective compliance and enforcement framework
- iii. prudent investment management of the Fund
- iv. client responsiveness

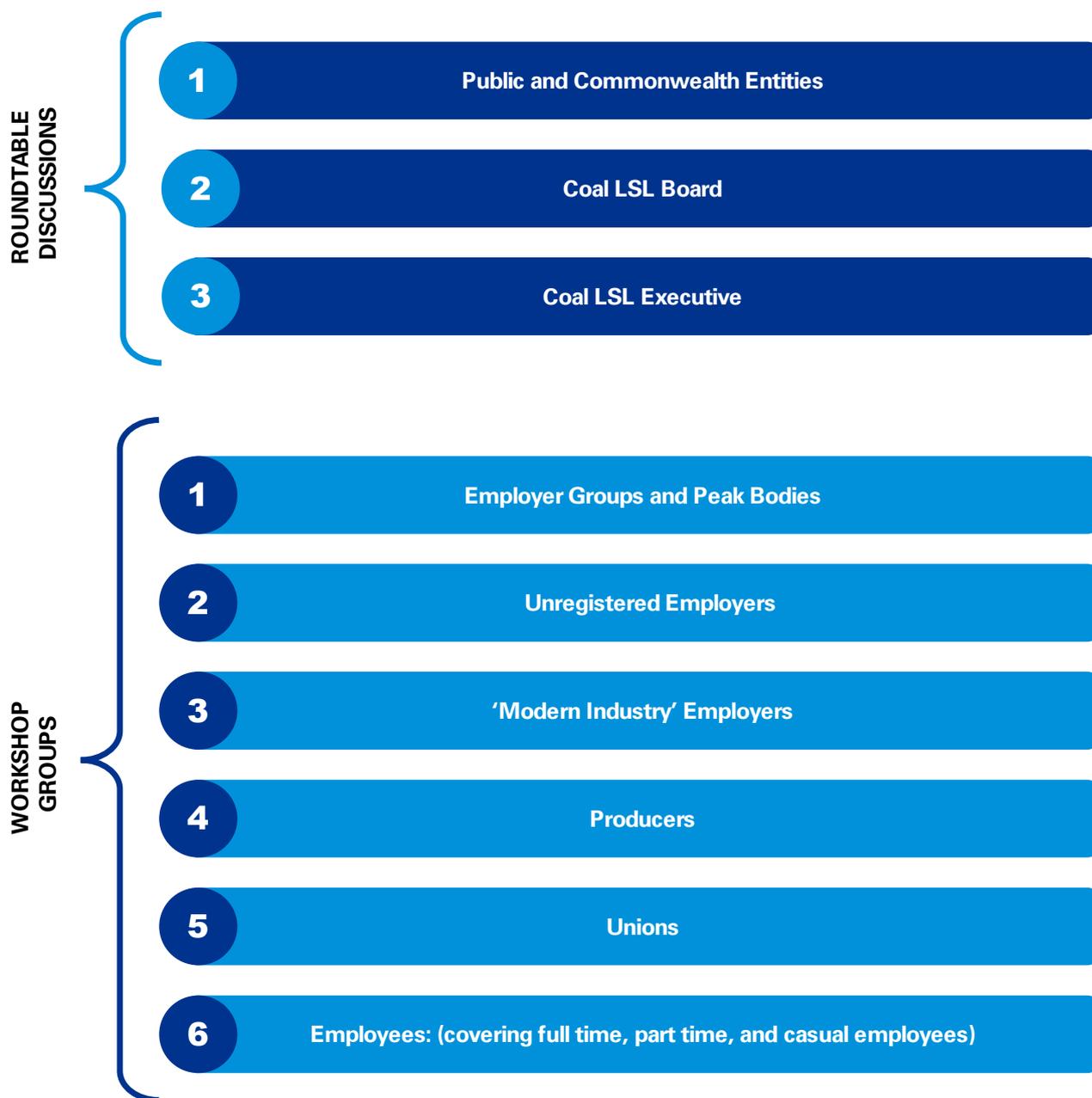
The review will have the following Terms of Reference:

1. The review will consider and report on:
  - a. The operation of Coal LSL’s legislation including potential amendments to address its relevance, clarity, usability, and enforceability, taking into account
    - i) the contemporary composition of the industry and its workforce

<sup>167</sup> The other entities are Export Finance and Insurance Corporation; Australian Reinsurance Pool Corporation; National Housing Finance and Investment Corporation and the Reserve Bank of Australia. See <https://www.finance.gov.au/government/managing-commonwealth-resources/structure-australian-government-public-sector/pgpa-act-flipchart-and-list>

- ii) potential additions to the compliance and enforcement framework to ensure adherence to employer obligations and fraud risk/s, and provide timely and cost-effective dispute resolution mechanisms
    - iii) organisational culture and risk management practices
    - iv) real or perceived conflicts of interest in regard to the management, operation and administration of Coal LSL and its Board
    - v) potential for, and instances of, identified fraud or breaches in good governance
    - vi) improvements to internal audit and review processes to ensure employees are paid their due entitlements promptly
    - vii) processes to provide assurance that investments are managed and reported on in accordance with appropriate standards of visibility, probity and risk mitigation and are free from financial irregularities.
    - viii) the relationship between long service leave entitlements under the Coal LSL scheme and long service leave entitlements that may exist elsewhere
    - ix) proposals previously provided by Coal LSL to support the scheme's governance, coverage, compliance and administration. This includes existing proposals negotiated between certain employer groups and unions to resolve issues about scheme coverage.
  - b. Governance and operational models to enable Coal LSL to effectively manage its responsibilities, risks and accountabilities – including new responsibilities – in the interests of eligible employees and their employers.
  - c. 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.
2. Interested parties will have the opportunity to provide written submissions and/or meet with the independent reviewer. Stakeholders include, but are not limited to:
  - a. Coal LSL Board
  - b. Coal LSL executive
  - c. The Coal Mining Industry Employer Group
  - d. Other employers and their employees, and their representatives, including small and medium enterprises, outsourced service providers, and labour hire companies who supply employees who work in the black coal mining industry at or about a mine, and whose duties are directly connected with the day-to-day operation of a mine
  - e. Relevant unions and employee representatives
  - f. Ex-employees and employers
3. The following matters are not in scope of the review:
  - a. The Coal LSL Investment Plan and asset allocation guidelines, and the role of the Board in preparing these
  - b. Coal LSL's legal status as a Commonwealth corporation established by the Coal Mining Industry (Long Service Leave) Administration Act 1992, rather than a private sector entity
  - c. Any proposal that would result in a reduction in the LSL entitlement of eligible employees, as defined in the Coal Mining Industry (Long Service Leave) Administration Act 1992
  - d. Potential legislative changes related to industrial relations or other policy issues in the coal mining industry beyond long service leave.
4. The review will provide its final report to the Minister for Industrial Relations in 2021.

## Appendix C: Focus Group Consultations



## Appendix D: Glossary

Glossary	
ABN	Australian Business Number
Administration Act	<i>Coal Mining Industry (Long Service Leave) Administration Act 1992</i> (Cth)
Administration Regulations	<i>Coal Mining Industry (Long Service Leave) Administration Regulations 2018</i> (Cth)
Amendment Act	<i>Coal Mining Industry (Long Service Leave) Legislation Amendment Act 2011</i> (Cth)
AMWU	Australian Manufacturing Workers' Union
AAT	Administrative Appeals Tribunal
APESMA	Professionals Australia (formerly the Association of Professional Engineers, Scientists and Managers Australia)
AGD	Attorney-General's Department
ARCC	Audit, Risk Management and Compliance Committee
AIRC	Australian Industry Relations Commission
ATO	Australian Taxation Office
Authority Pays Model	An 'Authority Pays' model is premised on employees being paid their accrued LSL entitlements directly from the Corporation.
BCMI Award	Black Coal Mining Industry Award 2010
Collection Act	<i>Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992</i> (Cth)
CCE	Corporate Commonwealth Entity
CIT	Coal Industry Tribunal
Corporation	Coal Long Service Leave Corporation
'eligible employee'	Refers to employees who is covered under the definition in Section 4(a)-(d) of the Administration Act.
Existing Proposals	the Joint Parties Agreement, the IWP Proposals, and the further proposals
EFIC / Export Finance Australia	Export Finance and Insurance Corporation
FW Act	<i>Fair Work Act 2009</i> (Cth)
FWC	Fair Work Commission
FWO	Fair Work Ombudsman
Fund	Refers to the entity into which registered employers pay a levy to the Corporation, and then pay out long service leave entitlements to employees.
IRP	Independent Review Panel
IWP	Industry Working Party
IT	Information Technology
IPAA	Institute of Public Administration Australia
IC	Investment Committee
LSL	Long Service Leave
Mining and Energy Division	The Mining and Energy Division of the Construction, Forestry, Mining and Energy Union

Glossary	
Modern Industry Stakeholders	Refers to stakeholders of the black coal mining industry that sit outside traditional organisations. Modern Industry Stakeholders include: <ul style="list-style-type: none"> <li>labour hire companies;</li> <li>contractors;</li> <li>employers of casual workers;</li> <li>employers in related sectors providing services to the black coal mining industry; and</li> <li>small businesses.</li> </ul>
MSR	Missing Service Review
NES	National Employment Standards
NDB Scheme	Notifiable Data Breaches Scheme
OAIC	Office of the Australian Information Commissioner
OECD	Organisation for Economic Cooperation and Development
Paragraph (b) definition	Paragraph (b) of the definition of 'eligible employee' within the Administration Act.
Payroll Levy Act	<i>Coal Mining Industry (Long Service Leave) Payroll Levy Act 1992</i> (Cth)
Payroll Regulations	<i>Coal Mining Industry (Long Service Leave) Payroll Levy Regulations 2018</i> (Cth)
PFC	Public Financial Corporation
PGPA Act	<i>Public Governance, Performance and Accountability Act 2013</i> (Cth)
PGPA Rule	<i>Public Governance, Performance and Accountability Rule 2014</i> (Cth)
RP Act	<i>Regulatory Powers (Standard Provisions) Act 2014</i> (Cth)
RP Regulations	<i>Regulatory Powers (Standard Provisions) Regulation 2015</i> (Cth)
Reimbursement Rules	<i>Employer Reimbursement Rules 2017</i>
RC	Remuneration Committee
RBA	Reserve Bank of Australia
Review	Refers to the Independent Review into the Coal Mining Industry (Long Service Leave Funding) Corporation
Scheme	Refers to the Coal Long Service Leave Scheme
Section 52A Notices	Notices issued by the Corporation under section 52A of the Administration Act.
Service providers	employers in related sectors providing services to the black coal mining industry
SMEs	Small to medium enterprises
Stranded employees	Refers to employees who are unable to access LSL entitlements as a result of their current or previous employer being unregistered with the Scheme, or no longer in operation.
TFN	Tax File Number
TCC	Technical Compliance Committee
TPD	Total and permanent disability

## Appendix E: Examples of Portable Schemes

	ACT	NSW	SA
<b>Legislation</b>	<b>Long Service Leave (Portable Schemes) Act 2009 (ACT)</b>	<b>Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010 No 122 (NSW)</b> <b>Building and Construction Industry Long Service Payments Act 1986 No 19 (NSW)</b>	<b>Construction Industry Long Service Leave Act 1987 (SA)</b>
<b>Scheme</b>	<p>System: Direct payment of accrued entitlements to the Employee from the ACT Long Service Leave Authority ('Authority').<sup>168</sup></p> <p><b>Payments for Leave</b></p> <p>In the ACT, employers that have employees and/or apprentices covered under the scheme must register with the Authority and pay a levy contribution to the Authority set at 2.1% of the gross ordinary wages of those employees (excluding apprentices). Contractors have the option to make their own contributions if they wish to accrue service in the scheme. Note, however, that contractor registration with the scheme is voluntary and the benefit comprises a payment instead of leave.</p>	<p>System: Direct payment of accrued entitlements to the Employee from the NSW Long Service Corporation.</p> <p><b>Payments for Leave</b></p> <p>A registered worker who has accrued LSL under this Act may apply to the Corporation for payment for the leave. The application must be in the approved form. If the Corporation is satisfied that the applicant is entitled to LSL under this Act, the Corporation must approve the application and pay to the applicant the amount payable under section 66 or 67 (as the case requires) as soon as practicable after the application is made.<sup>169</sup></p>	<p>System: Direct payment of accrued entitlement to the Employee from the Fund's administrator, Portable Long Service Leave.</p> <p><b>Payments for leave</b></p> <p>Employers of eligible workers are required by law to register with Portable Long Service Leave, lodge Employer Returns and pay a levy based on 2.00% of remuneration (excluding apprentices who are levy free).<sup>170</sup> The fund will keep a record of an employee's service and pay them directly when they become entitled to LSL.</p>
<b>Compliance and Enforcement Tools</b>	<p><b>Appointment of inspectors</b> – The Registrar may appoint a public servant as an inspector for this Act.<sup>171</sup></p> <p><b>Power to obtain, inspect and copy records</b> - An inspector may, in writing, require any of the following to give the inspector information, or produce documents or anything else, that the person has, or has access to, that are reasonably required by the inspector for this Act.<sup>172</sup></p> <p><b>The registrar may apply to the ACT Civil and Administrative Tribunal ('ACAT') for an order to enforce an obligation imposed</b></p>	<p><b>Authorisation of inspectors</b> – The Corporation may authorise any person, or persons included in a class of persons, to be an inspector or inspectors for the purposes of this Part.<sup>175</sup></p> <p><b>Power to enter premises</b> – An inspector may enter any premises at any time for a purpose designated under the Act.<sup>176</sup></p> <p><b>Power to inspect and seize things</b> – An inspector may do any activity prescribed under the Act including seize anything that the inspector has reasonable grounds for believing relates to an offence under this Act or the regulations.<sup>177</sup></p> <p><b>Proceedings for offences and debt recovery</b> – Proceedings for</p>	<p><b>Powers of inspection</b> – Under the Act, an inspector may at any reasonable time undertake activities authorised under the Act such as require an employer to produce any records relating to the service of workers or to LSL.<sup>179</sup></p> <p><b>Offences</b> – Offences under the Act are summary offences. A prosecution for an offence against this Act must be commenced within three years after the date on which the offence is alleged to have been committed or, with the authorisation of the Attorney-General, at any later time within six years after the date on</p>

<sup>168</sup> ACT Government, 'Building and Construction Industry Overview', *ACT Leave* (Web Page) <<https://actleave.act.gov.au/construction/>>.

<sup>169</sup> *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010* No 122 (NSW) ('NSW Cleaning Industry Long Service Leave Act') s 60(1)-(4).

<sup>170</sup> 'About the Scheme', *Portable Long Service Leave* (Web Page) <<https://www.portableleave.org.au/employers/about-the-scheme/>>.

<sup>171</sup> *Long Service Leave (Portable Schemes) Act 2009* (ACT) ('ACT Long Service Leave Act') s 71.

<sup>172</sup> *Ibid* s 76(1).

<sup>175</sup> *NSW Cleaning Industry Long Service Leave Act* ('NSW Cleaning LSL Act') s86(1).

<sup>176</sup> *NSW Cleaning LSL Act* (n175) s 88(1).

<sup>177</sup> *Ibid* s 91.

<sup>179</sup> *Construction Industry Long Service Leave Act 1987* (SA) (SA Construction LSL Act) s 39(1).

ACT	NSW	SA
<p><b>under the Act.</b> <sup>173</sup> The ACAT may make any order it considers appropriate in relation to the registration of an employer or worker; or the keeping of, and access to, records relating to a worker; or the recovery of any payment required to be made by an employer; or any other matter for the purpose of enforcing an obligation under this Act. <sup>174</sup></p>	<p>an offence under this Act or the regulations may be dealt with summarily before the Local Court. The provisions of the <u>Industrial Relations Act 1996</u> relating to appeals from, and the stating of a case by, the Local Court to the Supreme Court apply to proceedings before the Local Court for offences against this Act or the regulations. Proceedings for an offence against this Act or the regulations may be instituted within the period of 6 years after the act or omission alleged to constitute the offence. <sup>178</sup></p>	<p>which the offence is alleged to have been committed. <sup>180</sup></p> <p>Where, in proceedings for an offence against this Act, the court finds that the defendant has contravened, or failed to comply with, this Act, the court may, in addition to any penalty that it may impose, order the defendant to take specified action to make good the contravention or default in a manner, and within a period, specified by the court or order the defendant to furnish or make available to the Board, within a period specified by the court, such information or records as the Board may reasonably require for the purposes of this Act. <sup>181</sup></p>

<sup>173</sup> SA Construction LSL Act (n172) s 79(1).

<sup>174</sup> Ibid s 79(2).

<sup>178</sup> Ibid s 103.

<sup>180</sup> Ibid s 43(2).

<sup>181</sup> Ibid s 43(3).

## Appendix F: Civil and Criminal Penalty Provisions

Reference	Civil penalty provision
<b>Administration Act</b>	
<b>Section 39AB (3)</b>	Employer must provide employees with written responses to leave applications within 14 days stating whether the leave is granted or not, including reasons if leave is refused.
<b>Section 39AB(4)</b>	Employers may only refuse to grant LSL on reasonable business grounds.
<b>Section 39AC</b>	Employers must pay out LSL at no less than the employee's base rate of pay would have been had the leave not been taken.
<b>Section 39AD</b>	LSL to be paid at the same time income payment would normally be made, or if requested, in accordance with the employee's request.
<b>Section 39BE</b>	Employer must comply with waiver agreements.
<b>Section 39C</b>	Employers must pay out untaken LSL to employees who cease to be eligible employees no less than 30 days after a request is made (payment may also be made to an employee's personal legal representative should the employee be deceased.)
<b>Section 39CA</b>	Employers must pay out LSL for periods of qualifying service performed by employees terminated as a result of ill health or retirement.
<b>Section 39CB</b>	Employers must pay out LSL for periods of qualifying service for employees terminated as a result of redundancy.
<b>Section 39CC</b>	Employers must pay out LSL for periods of qualifying service for employees who are deceased.
<b>Section 52A</b>	Employers must comply with the Corporation's notice to produce documents.
<b>Collection Act</b>	
<b>Section 5</b>	Employers must pay returns to the Corporation for eligible employees within 28 days of the end of month.
<b>Section 10</b>	Employers must provide audit reports to the Corporation within 6 months of the end of financial year.
<b>Section 10A</b>	Auditors must provide reports to the Corporation when a notice is received for a report relating to an employer.

The Scheme’s legislative framework further includes a few obligations to which criminal offences arise for non-compliance; these include:

Reference	Criminal penalty provisions
<b>Administration Act</b>	
<b>Section 52A</b>	Notices requiring production of information or evidence
<b>Collection Act</b>	
<b>Section 5</b>	Employers must pay returns to the Corporation for eligible employees within 28 days of the end of month.
<b>Section 10</b>	Employers must provide audit reports to the Corporation within 6 months of the end of financial year.
<b>Section 10A</b>	Auditors must provide reports to the Corporation when a notice is received for a report relating to an employer.
<b>Section 14</b>	Commonwealth officers must not record or divulge information obtained for the purposes of this Act and acquired by the person in the course of their employment.
Should an agreement under section 11 be reached with the Commissioner of Taxation delegating functions to the Commissioner, the following criminal penalty provisions may apply:	
<b>Section 12</b>	Commonwealth officers may be authorised by the Commissioner of Taxation to exercise powers to full and free access to all premises and books for the purposes of performing the relevant functions. Occupiers of the premises must provide the officers with all reasonable facilities and assistance.
<b>Section 13(8)</b>	Commonwealth officers may be authorised by the Commissioner of Taxation to exercise powers to obtain information and evidence. Persons must comply with requirements to provide requested information or attend before the Commissioner or officer to give evidence and produce all books.
<b>Section 13(9)</b>	Persons complying with a section 13(2) notice must not give false or misleading information or evidence.

## Appendix G: List of Figures

Figure 1: Breadth of options available .....	18
Figure 2: Stakeholder consultation approach.....	22
Figure 3: Historical timeline .....	25
Figure 4: Overview of enabling legislation.....	28
Figure 5: Overview of key applicable Commonwealth laws and instruments relevant to the Review.....	28
Figure 6: Operation of the Scheme and funding .....	34
Figure 7: Review and dispute resolution mechanisms.....	40
Figure 8: Approach to compliance .....	42
Figure 9: Key principles for a best practice scheme.....	48
Figure 10: Regulatory Cycle.....	53
Figure 11: Heatmap of issues.....	57
Figure 12: Working hours calculation overview.....	68
Figure 13: Eligible wages calculation overview .....	69
Figure 14: Summary of Existing Proposals.....	124

## Appendix H: List of Tables

Table 1: Option 1 advantages and disadvantages .....	117
Table 2: Option 2 advantages and disadvantages .....	119
Table 3: Option 3 advantages and disadvantage .....	121
Table 4: Comparative options analysis .....	123
Table 5: Effect of existing proposals .....	126



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