

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Small and Family Business, the Workplace and
Deregulation

Coal Mining Industry (Long Service Leave) Administration Act 1992

Coal Mining Industry (Long Service Leave) Administration Regulations 2018

The *Coal Mining Industry (Long Service Leave) Administration Act 1992* (the Act) is one of three Acts that together provide for a portable long service leave scheme for employees in the black coal mining industry.

Section 54 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Subsection 39B(1) of the Act provides that regulations may prescribe kinds of eligible employees who may make waiver agreements with his or her employer. These waiver agreements generally provide that in lieu of long service leave, the employee is to be paid additional remuneration and/or have additional superannuation contributions made to a superannuation fund.

Subsection 8(2) of the Act clarifies that the power of the Coal Mining Industry (Long Service Leave Funding) Corporation (the Corporation) to enter into contracts includes the power to enter into a contract with a person to administer the long service leave fund on behalf of the Board of the Corporation. The *Coal Mining Industry (Long Service Leave) Administration Regulations 1993* (the Administration Regulations) provided that the Corporation must be satisfied on reasonable grounds that a person or corporation meets the prescribed requirements to administer the fund.

The Administration Regulations also prescribed the kinds of eligible employees who may make waiver agreements with their employers.

The Administration Regulations were originally called the *Coal Mining Industry (Long Service Leave Funding) Regulations 1993*, however the name was changed in 2012 to reflect a change in name of the parent Act. The Administration Regulations were scheduled to sunset on 1 October 2018.

The *Coal Mining Industry (Long Service Leave) Administration Regulations 2018* (the Regulations) replace the sunseting Administration Regulations and are substantively the same.

The Regulations prescribe the requirements that must be met before a person or a corporation can administer the fund. Prescribing the requirements that a person or corporation must meet before administering the fund comes within the power to make regulations that are necessary or convenient for carrying out or giving effect to the Act.

The Regulations also prescribe the kinds of employees who may make a waiver agreement with his or her employer.

The Regulations also repeal the Administration Regulations. In addition to the power to make the Regulations under section 54 of the Act, subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend or vary any such instrument.

Details of the Regulations are set out at Attachment A.

The Office of Best Practice Regulation advised that a Regulation Impact Statement is not required (OBPR Ref: 23212).

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Chief Executive Officer of the Corporation was consulted during the drafting of the Regulations. The Chief Executive Officer reports to the Board of the Corporation as appropriate. The Board is made up of representatives of employers and employees in the black coal mining industry.

A Statement of Compatibility with Human Rights has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Statement). The Statement's assessment is that the Regulations are compatible with human rights. A copy of the Statement is at Attachment B.

The Regulations will commence on 1 July 2018. This date of commencement provides time to make any necessary changes to IT systems, prepare communications materials and enable the new rules to commence at the start of the new financial year in conjunction with the *Coal Mining Industry (Long Service Leave) Payroll Levy Regulations 2018*.

Details of the Coal Mining Industry (Long Service Leave) Administration Regulations 2018

Part 1 - Preliminary

Section 1 - Name

This section provides that the title of the Regulations is the *Coal Mining Industry (Long Service Leave) Administration Regulations 2018*.

Section 2 - Commencement

This section provides that the Regulations commence on 1 July 2018.

Section 3 - Authority

This section provides that the Regulations are made under the *Coal Mining Industry (Long Service Leave) Administration Act 1992*.

Section 4 - Schedules

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

Section 5 - Definitions

This section defines two terms:

Act is defined to mean the *Coal Mining Industry (Long Service Leave) Administration Act 1992*.

officer is defined to mean, in relation to a corporation, a person who:

- (a) is a director (within the meaning of the *Corporations Act 2001*) of the corporation; or
- (b) is an executive officer of the corporation; or
- (c) has control or substantial control of the corporation.

A note draws attention to the fact that a number of the expressions used in the Regulations are defined in the Act.

Part 2 – Prescribed matters

Section 6 – Qualifications of Fund administrator

Subsection 8(2) of the Act clarifies that the power of the Board of the Corporation to enter into contracts includes the power to enter into a contract with a person to administer the fund on behalf of the Board of the Corporation. Section 6 of the Regulations requires the

Corporation to be satisfied on reasonable grounds that either an individual or corporation meets prescribed criteria to be an administrator.

The criteria are substantively the same as those specified in the Administration Regulations.

Section 6 also makes clear that the qualification criteria apply to contracts which the Corporation has entered into before commencement of the proposed regulations, as well as those entered into after commencement.

Section 7 – Waiver agreements – prescribed employees

Subsection 39B(1) of the Act provides that regulations may prescribe kinds of eligible employees who may make waiver agreements with his or her employer. These waiver agreements generally provide that in lieu of long service leave, the employee is to be paid additional remuneration and/or have additional superannuation contributions made to a superannuation fund.

Section 7 of the Regulations prescribe the kinds of employee who may make waiver agreements for the purposes of subsection 39B(1) of the Act. The kinds of prescribed employees are substantively the same as those specified in regulation 4 of the Administration Regulations.

The Regulations also update the income threshold for 2017 dollars over which an eligible employee may make a waiver agreement. The Regulations prescribe a threshold of \$174,700 in paragraph 7(e). This threshold is derived by adjusting the 2012 figure of \$162 000 prescribed in table item 5 of regulation 4 of the Administration Regulations by the formula set out in that regulation. Using the relevant Consumer Price Indexes, the figure of \$174,700 is derived for 2017. The Regulations continue to provide a mechanism to update the threshold for each year after 2017.

Part 3 – Application and transitional provisions

Section 8 – Application of instrument

This section makes clear that the requirements of an administrator prescribed by section 8 apply to contracts that are in existence on 1 July 2018 in addition to contracts entered into on or after 1 July 2018. This is consistent with the drafting of subsection 6(1) of the Regulations.

Schedule 1 - Repeals

Item 1 – The whole of the instrument

This item repeals the Administration Regulations, which were originally called the *Coal Mining Industry (Long Service Leave Funding) Regulations 1993*. The name was changed in 2012 to reflect a change in name of the parent Act. The Administration Regulations were scheduled to sunset on 1 October 2018.

Statement of Compatibility with Human Rights

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

Coal Mining Industry (Long Service Leave) Administration Regulations 2018

The *Coal Mining Industry (Long Service Leave) Administration Regulations 2018* (the Regulations), as a disallowable legislative instrument, are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Regulations

The *Coal Mining Industry (Long Service Leave) Administration Act 1992* (the Act) is one of three Acts that together provide for a portable long service leave scheme for employees in the black coal mining industry.

Subsection 39B(1) of the Act provides that regulations may prescribe kinds of eligible employees who may make waiver agreements with his or her employer. These waiver agreements generally provide that in lieu of long service leave, the employee is to be paid additional remuneration and/or have additional superannuation contributions made to a superannuation fund.

Subsection 8(2) of the Act clarifies that the power of the Coal Mining Industry (Long Service Leave Funding) Corporation (the Corporation) to enter into contracts includes the power to enter into a contract with a person to administer the long service leave fund on behalf of the Board of the Corporation.

The Regulations replace the *Coal Mining Industry (Long Service Leave) Administration Regulations 1993* (the Administration Regulations) which were scheduled to sunset in October 2018.

The Regulations are substantively the same as the Administration Regulations. The Regulations prescribe the requirements that must be met before a person or a corporation can administer the fund. The Regulations also prescribe the kinds of employees who may make a waiver agreement with his or her employer. The kinds of eligible employees are each employee who:

- (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

- (ii) 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.

This means that individuals who may make a voluntary waiver agreement are those who:

- may not qualify for long service leave before retirement: paragraph (a);
- already have an entitlement to long service leave and may prefer to maximise retirement benefits in lieu of more long service leave: paragraph (b);
- employees who, due to their seniority or classification, might not traditionally have belonged to the Commonwealth scheme and who may have additional leave provisions specified in individual contracts: paragraphs (c), (d) and (e); and
- employees participating in vocational training who might not expect to work in the industry long enough to qualify for long service leave: paragraph (f).

Human rights implications

The Regulations engage paragraph (d) of Article 7 of the International Covenant on Economic, Social and Cultural Rights. This paragraph provides that:

The States Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work, which ensure, in particular:

...

(d) rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

The Regulations provide the option for eligible employees to ‘opt out’ of the long service leave scheme and is entirely voluntary. Each employee is free to make his or her own decision, informed by their own particular circumstances. In addition, opting out of the statutory scheme does not necessarily prevent employees from accessing additional leave under agreements negotiated with their employer. The ‘opt out’ mechanism also delivers benefits to employees in the form of additional remuneration or superannuation in circumstances where they might not access long service leave under the Commonwealth scheme (such as those employees falling within paragraphs (a) and (f) above).

Conclusion

The Regulations are compatible with human rights as the Regulations do not compulsorily limit or restrict the capacity of an employee to access ‘periodic holidays with pay’. The Regulations also promote human rights by continuing to support a scheme for the provision of long service leave to eligible employees while providing a voluntary mechanism for particular employees to voluntarily ‘opt out’ of the scheme.

The Hon Craig Laundy MP, Minister for Small and Family Business, the Workplace and Deregulation