



WAIVER AGREEMENT GUIDELINES

MAY 2022



Australian Government

**Coal Mining Industry
(Long Service Leave Funding) Corporation**



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1. OVERVIEW

Waiver agreements provide some Eligible Employees with an alternative to long service leave in circumstances where they are unlikely to accrue enough qualifying service to take long service leave or they are unlikely to take long service leave despite accruing the necessary qualifying service.

Instead of accruing leave, some employees can choose to receive additional remuneration or additional superannuation contributions that are (at least) equal to the amount of levy which their Employer would otherwise pay into the scheme on their behalf.

Regulation 7 of the [Coal Mining Industry \(Long Service Leave\) Administration Regulations 2018](#) prescribes the categories of Eligible Employees who may enter waiver agreements with their Employers.

Waiver agreements must meet a number of legislative requirements and must be lodged with Coal LSL for approval. Coal LSL may refuse to approve a waiver agreement where it does not meet all the requirements of Coal LSL's legislation.

2. WHAT IS A WAIVER AGREEMENT?

A Waiver Agreement is an agreement between an Eligible Employee and Employer that requires the Employer to:

- a. Pay additional remuneration to the Eligible Employee (or as directed by the Eligible Employee); and/or
- b. Make additional contributions, for the Eligible Employee's benefit, to a superannuation fund nominated by the Eligible Employee.

This additional remuneration and/or contribution is made instead of:

- c. An Employer paying Levy; and
- d. An Eligible Employee accruing qualifying service, under Coal LSL's scheme.

3. WHO CAN ENTER A WAIVER AGREEMENT?

An Eligible Employee can only enter a Waiver Agreement if the employee meets one of the following pre-conditions:

- a. Is at least 55 years of age and has no Qualifying Service; or
- b. Is at least 55 years of age and has at least 8 years of Qualifying Service; 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 at least \$174,700 as at 2017, adjusted annually based on the Consumer Price Index (being \$187,664.02 as at December 2021); or
- f. Is employed under an undergraduate placement or a work training placement.

The Waiver Agreement must identify which pre-condition is being relied upon and any lodgement of a Waiver Agreement for approval with Coal LSL must be accompanied by evidence of the key facts underpinning that pre-condition.

4. SHOULD YOU ENTER A WAIVER AGREEMENT?

Waiver Agreements are voluntary

An Eligible Employee and Employer are not required to enter into a Waiver Agreement.

Impact on Employer's obligation to pay Levy

The Employer who pays the Eligible Employee's eligible wages is not required to pay Levy for that employee while the Waiver Agreement is in effect.

Impact on Eligible Employee's Qualifying Service accrual

If an Eligible Employee is paid under the terms of a Waiver Agreement, that employee **cannot** accrue Qualifying Service under Coal LSL's scheme while the Waiver Agreement is in effect. An Employee will need to consider what impact this may have on their entitlement to long service leave under [the Administration Act](#).

An Eligible Employee's entitlement to accrue Qualifying Service returns as soon as a Waiver Agreement is terminated, provided that person remains an Eligible Employee.

Financial impact on parties

The value of the additional remuneration and/or contributions an Eligible Employee receives under a Waiver Agreement or Variation must be equal to, or greater than, the amount of payroll levy that would have otherwise been payable by the Employer. However, an Eligible Employee should consider their personal circumstances and obtain their own advice before entering into a Waiver Agreement.

We recommend an Eligible Employee and their Employer separately consult their financial advisers before entering a Waiver Agreement.

Providing false or misleading information

It is a serious offence for a person (including an individual or a corporation) to provide false or misleading information or documents to Coal LSL.

5. TERMS OF YOUR WAIVER AGREEMENT

A Waiver Agreement or Variation is not effective until it is approved (or deemed approved) by Coal LSL.

Coal LSL requires Eligible Employees and Employers to use Coal LSL's approved [Waiver Agreement form](#). That approved form must also be used for a Variation. Although the approved form must be used, the Eligible Employee and Employer can still negotiate some terms including:

- ▶ The amount and nature of additional remuneration and/or contributions;
- ▶ The frequency of those payments; and
- ▶ The date the agreement takes effect.



6. HOW A WAIVER AGREEMENT OR VARIATION IS APPROVED

A Waiver Agreement or Variation is not effective unless it has been approved (or deemed approved) by Coal LSL.

Coal LSL cannot approve a Waiver Agreement unless:

- ▶ The Eligible Employee is a prescribed person as detailed in part 3 of these guidelines.
- ▶ The value of the additional remuneration and/or contributions in the Waiver Agreement is, and continues to be, at least equal to the amount of payroll levy the Employer otherwise would have paid.
- ▶ The Waiver Agreement includes terms on how that agreement will be varied if the minimum remuneration and/or contribution requirement above no longer complies. Coal LSL's approved contract template includes a term which satisfies this condition.
- ▶ The Waiver Agreement is in writing, signed, specifies the date on which the agreement is made and the date on which the agreement takes effect (being a date after the agreement is lodged with Coal LSL).
- ▶ The Waiver Agreement sets out the frequency of additional payments and/or contributions.
- ▶ Coal LSL does not have reasonable grounds for believing the Waiver Agreement has not been genuinely agreed to by the parties.

To lodge a Waiver Agreement, all the following information must be **emailed to Coal LSL**:

- ▶ The executed Waiver Agreement.
- ▶ The Eligible Employee's contract of employment, employment instrument and other documents setting out the terms of their employment.
- ▶ The Eligible Employee's last payslip (or draft first payslip if they are a new employee).
- ▶ Evidence that the Eligible Employee satisfies at least one of the pre-conditions in Part 3 of these guidelines as follows:

<ul style="list-style-type: none"> a. Is at least 55 years of age and has no Qualifying Service; or b. Employee is at least 55 years of age and has at least 8 years of Qualifying Service; or 	<p>Eligible Employee's driver licence, birth certificate or other document issued by the Commonwealth or relevant State or Territory government which shows the Eligible Employee's date of birth.</p>
<ul style="list-style-type: none"> 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 at least \$174,700 as at 2017, adjusted annually based on the Consumer Price Index (being \$187,664.02 as at December 2021); or f. Is employed under an undergraduate placement or a work training placement. 	<p>The Eligible Employee's employment contract.</p>

- ▶ Calculations showing the Eligible Employees 'eligible wages' under section 3B of the Collection Act. **Refer to Coal LSL's Guidance Note** on how to perform these calculations.

Coal LSL will determine whether to approve or refuse a Waiver Agreement within 30 days of lodgement and will communicate this decision promptly to the Eligible Employee and Employer after that decision is made.

NOTE: Under section 8 of the *Privacy (Tax File Number) Rule 2015 (TFN Rule)*, Coal LSL is unable to collect or store TFN information. TFN information displayed within evidence must be removed before emailing to Coal LSL.

7. EMPLOYER'S ONGOING REQUIREMENTS

All Employers must submit a monthly return to Coal LSL under section 5 of the Collection Act. Returns must be submitted even if all the Employer's Eligible Employees are subject to Waiver Agreements.

Returns are made using [Coal LSL's Levy Advice Form](#) which is available on Coal LSL's website. When reporting Eligible Employees on Waiver Agreements using the Levy Advice Form, Employers must:

- ▶ Show 'Levy Paid \$' as 0;
- ▶ Include the words 'Waiver Agreement' in the 'Comments'; and
- ▶ Record all other information relating to the Eligible Employee in the usual manner.

If a Waiver Agreement is in effect, the Employer must pay the remuneration and/or contributions in accordance with the terms of the Waiver Agreement. An Employer who fails to do so could incur a civil penalty of 60 penalty units (being \$13,320 as at October 2021) or face other remedies for contraventions set out in Part 5A Division 4 of the Administration Act.

The Employer also has an obligation to provide written notice to Coal LSL when a Waiver Agreement has been terminated. Where a Waiver Agreement terminates because an Eligible Employee is no longer employed by the Employer, Coal LSL will accept clear notice of that termination in the Levy Advice Form.

8. TERMINATING A WAIVER AGREEMENT

A Waiver Agreement is terminated if:

- ▶ The Employer and Eligible Employee agree to terminate that agreement. An Employer may only refuse to terminate on reasonable grounds. Any agreement to terminate must be in writing, signed and must specify the date of termination; or
- ▶ Coal LSL withdraws its approval of the Waiver Agreement; or
- ▶ The Eligible Employee is no longer an Eligible Employee in accordance with section 4 of the Administration Act, including if their employment is terminated.

As soon as practicable after a Waiver Agreement is terminated, the Employer must give the Corporation written notice of the termination. That Notice must state the date of termination.

9. DEFINITIONS

1. **Administration Act** means the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth).
2. **Coal LSL** means the Coal Mining Industry (Long Service Leave Funding) Corporation established under section 6 of the Administration Act.
3. **Collection Act** means the *Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992* (Cth).
4. **Director** means a person appointed to the Board of Directors of the Coal Mining Industry (Long Service Leave Funding) Corporation.
5. **Eligible Employee** means a person who is an eligible employee in accordance with section 4 of the Administration Act.
6. **Employer** means a person (including a corporation) that employs, or that contemplates employing, an Eligible Employee.
7. **Levy** means Levy under section 4 of the *Coal Mining Industry (Long Service Leave) Payroll Levy Act 1992* (Cth).
8. **Levy Advice Form** means the form published on Coal LSL's website for submitting returns under section 5 of the Collection Act.
9. **Long Service Leave** means the period of long service leave an Eligible Employee is entitled to under the Administration Act and associated instruments.
10. **Qualifying Service** means a period during which an employee is an Eligible Employee of one or more employers, but does not include certain periods set out in section 39A(2) of the Administration Act.
11. **Variation** means a variation of a Waiver Agreement under section 39BA of the Administration Act.
12. **Waiver Agreement** means an agreement between an Eligible Employee and Employer in accordance with Part 5A Division 2 of the Administration Act.
13. **Worker** means Coal LSL's employees (but does not include Directors).



10. PRIVACY STATEMENT

Any personal information a person provides to Coal LSL will be collected, used and disclosed in accordance with [Coal LSL's Privacy Statement](#).

Personal information collected by Coal LSL is protected by the Privacy Act 1988. Your personal information will be used for the purposes for which you have provided it. We will not use your personal information for any other purpose or disclose it to another person except where it is necessary for the performance of Coal LSL's functions, where otherwise authorised or required by law or with your consent.

