Coal Mining Industry (Long Service Leave) Legislation Amendment Bill 2025 – Submission to Senate Education and Employment Legislation Committee

Submission by Orica Australia Pty Ltd (ACN 004 117 828) to the Senate Education and Employment Legislation Committee

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Dear Committee Secretary

Coal Mining Industry (Long Service Leave) Legislation Amendment Bill 2025 – Submission to the Senate Education and Employment Legislation Committee

Orica is pleased to provide the following information and recommendations to the Senate Education and Employment Legislation Committee as it considers the *Coal Mining Industry (Long Service Leave) Legislation Amendment Bill 2025*.

Executive Summary

While we support the objective of providing clarity for the industry, we have identified three specific areas where the current drafting of the Bill creates regulatory uncertainty and financial risk and for the potential for further costly litigation to resolve ambiguity. We submit that the following refinements are necessary to ensure a fair and workable transition that is unambiguous in its meaning and practical to implement.

1. **Allow for extensions of time for notifying of intent to participate in repayment plans.** Provide the Minister with the flexibility to grant extensions of time to individual businesses to notify of their intent to apply for repayment plan arrangements when there are genuine grounds for them not being able to do so within the two-month time limit set by this Bill. Without amendment, Orica and others in Orica's situation (with current court proceedings which are expected to take longer than two months to resolve), may be forced to make binding participation decisions before the High Court provides necessary legal clarity. This is a practical amendment which aligns with the intent of the Bill.

2. **Expand the permissible assumptions for calculating historic liabilities.** Expand the range of 'permissible assumptions' to include all elements of remuneration where available historic records do not enable precise calculations to be made. The Bill currently limits the use of "assumptions" to the calculation of incentive-based payments or bonuses. This does not reflect the practical reality of historical record-keeping, particularly regarding legacy entities and long-term service periods. Where historical data on hours worked or base rates is fragmented, the current narrow framework may prevent Coal LSL from approving otherwise valid repayment arrangements. This is a practical amendment which aligns with the intent of the Bill.

3. **Expand permissible deductions from historic liabilities to include payments already made under State LSL legislation for long service leave taken or paid in lieu.** In calculations of historical liabilities, the Bill allows for deductions for long service paid as part of *cessation* payments only. It does not also allow for deductions to be made in those instances where an employee has either taken LSL or received payment in lieu for LSL under State schemes. There is no apparent

policy reason for this inconsistency of treatment. In its current form, the Bill may mandate a "double-payment" for the same service period: once pursuant to the previously paid State entitlement and a second time via retrospective Coal LSL levies. This imposes a punitive and inequitable financial burden on the employer. Orica understands that the intent of the Bill was not to create double-payments.

These amendments reduce the risk of future disputes and ensure funds are directed to employees rather than to litigation. Our submission provides details on each and proposes some possible wording for amendments for the Committee's consideration and which address these concerns.

Introduction

Orica is an Australian company, ASX 100 listed and operating for 151-years as one of the world's leading mining and infrastructure solutions providers. From the production and supply of civil explosives, blasting systems, speciality mining chemicals and geotechnical monitoring to our cutting-edge digital solutions and comprehensive range of services we are a critical enabler of mining activity here in Australia and in over a 100 countries globally.

In Australia our manufacturing operations are centred in regional locations in Queensland and New South Wales, and we provide blasting services predominantly to the coal and metal mines in those states and in Western Australia. Those blasting services include Orica personnel visiting customer sites (mines) to advise on and/or directly conduct shotfiring - which is the process of laying and detonating explosives to break solid rock either above or below ground so that it can be extracted for processing.

Orica's interest in this Bill relates to the provision it creates for a repayment plan for those with historical liabilities under the Coal Long Service Leave requirements and for the ability for a debt waiver component to be applied where repayment is committed and demonstrated within six years. Orica had not considered itself party to the obligations on employers operating in the black coal mining industry under the Coal Long Service Leave Scheme because it did not consider its employees conducting shotfiring met the definition of 'eligible employees' under the Act. In good faith, Orica had instead assumed it was captured by the requirements of the State long service schemes only, together with the particulars of site-specific workplace agreements, and had met those obligations.

The interpretation of the definition of 'eligible employees' in the Act has since been tested in the federal court – litigation brought by the Coal Long Service Leave Corporation in 2023. That concluded that certain of Orica's employees were captured by the definition and Orica would therefore face historical liabilities for long service leave payments for these cohorts. Whilst Orica is presently defending itself in the High Court as it responds to an appeal lodged by the Coal Long Service Leave Corporation which seeks to expand the cohort of employees captured – an action that is expected to extend through most of the 2026 calendar year - it nevertheless seeks to participate in this legislative process in good faith and which we acknowledge the government has initiated in the interests of creating a fair and equitable approach to recovering historical liabilities. Orica understands the government's intent is to create a practical implementation plan for those with significant backpay liabilities to ensure such entities have a reasonable time period in which to repay what in many instances will be significant sums. This will importantly ensure eligible employees can receive their entitlements under the Scheme.

Having committed considerable resources and expense to legal actions which seek clarification of the interpretation of legislation, Orica is keen to ensure that this new Bill is devoid of ambiguity and that all parties avoid future costly legal action. In this spirit, Orica makes recommendations for improvements to the Bill and commends these to the Committee and ultimately the parliament.

Recommendations

1. Extensions of time for notifying of intent to participate in repayment plans (Clause 5)

The Bill requires that parties with historic liabilities will have a two-month time limit (from Assent) in which to provide notice of their intention to participate in the repayment plan and which creates the possibility of a 20 per cent discount (debt waiver) under certain conditions.

The timing for submitting a notice of intention to participate in the repayment plan under the Bill presents practical difficulties for Orica given it is currently awaiting a final determination by way of hearing in the High Court of Australia. The High Court has listed the matter for hearing on Thursday, 9 April 2026.

The High Court's decision, which is relevant to the determination of Orica's (and a small number of other employers') obligations, is unlikely to be handed down until later this year. This decision could affect a significant number of current and former Orica employees performing shotfiring or other explosive services on black coal mines.

Current drafting of the Bill suggests that the Minister may determine a "single operative day" by legislative instrument for a person to give to the Corporation a notice of intention to participate. This would ordinarily be expected to have general application, rather than a case-by-case/employer-specific basis. While we acknowledge informal guidance that employer-specific extensions may be possible, in Orica's view, Clause 5 lacks an express, statutory mechanism to allow for this and therefore creates uncertainty.

Orica says that the position is not clear because:

- Clause 5(2) provides that a notice of intention must be given before a day determined by the Minister by legislative instrument, with clause 5(3) requiring that any such day occur more than 2 months after the unpaid levy calculation day (see clause 3, which is either the commencement day, or another day determined by the Minister). Read together, these provisions appear to contemplate the Minister determining a single operative day by legislative instrument, which would ordinarily be expected to have general application, rather than to operate on a case-by-case or employer-specific basis; and

- there is no express mechanism in Clause 5 for the Minister to extend the notice period for an individual employer, nor any language indicating that the determination power may be exercised selectively rather than generally. This contrasts with other parts of the Schedule (see, for example, Clause 6(3)(b)), which expressly provide for employer-specific extensions or approvals by the Corporation on written request.

Without formal legislative amendment, Orica may be forced to notify an intention to participate and commit to a plan before the High Court clarifies the legal landscape, or otherwise risk being excluded from the repayment plan framework entirely. As such, Orica respectfully requests that the Committee consider the benefit of this being made clear in the Bill.

Proposed Remedy

Amend Clause 5 to expressly allow the Minister to grant extensions to individual employers on a case-by-case basis where reasonable grounds exist, which can be evidenced. Orica respectfully suggests that the following amended wording, introducing a new subclause 5, may be more appropriate[1] and is based on the principle of fairness:

5 Notices of intention to give unpaid levy payment arrangements

(1) A person may give to the Corporation a written notice indicating the person's intention to give to the Corporation an unpaid levy payment arrangement.

(2) The notice must be given before:

(a) the day (if any) determined under subclause (3); or

[1] In this submission we have, when suggesting amendments to a clause, included the whole clause for context and our suggested amendments are shown red text).

(b) if no day is determined—the end of the 2 months starting on the day after the unpaid levy calculation day.

(3) The Minister may, by legislative instrument, determine a day for the purposes of paragraph (2)(a). The day must occur more than 2 months after the unpaid levy calculation day.

(4) To avoid doubt, the Minister may make a determination under subclause (3) even if the 2 months mentioned in paragraph (2)(b) have ended.

(5) The Minister may, on written request by a person, determine in writing a later day by which the person must give a notice under subclause (1), if the Minister is satisfied that it is reasonable to do so.

2. Expand the permissible assumptions for calculating historic liabilities (Clause 11)

The Bill currently limits the use of "assumptions" to the calculation of incentive-based payments or bonuses. This does not reflect the practical reality of historical record-keeping, particularly regarding legacy entities and historical long service periods.

The risk is that where historical data on hours worked or base rates is fragmented, the current narrow framework may prevent the Corporation from approving otherwise valid and reasonable repayment arrangements. This creates a "compliance deadlock" for employers acting in good faith.

Proposed Remedy

Expand the assumptions framework in Clause 11 to cover broader employment data points (such as ordinary hours and base pay rates) where primary records are unavailable due to the passage of time.

Orica respectfully suggests that the following amended wording, introducing a new subclause (d), may be more appropriate:

11 Assumptions

For the purposes of specifying or including information in an unpaid levy payment arrangement that a person gives to the Corporation:

(a) the person must assume that, in this Act, "eligible wages" had, at all times before the unpaid levy calculation day, the meaning "eligible wages" has on the commencement day; and

(b) the person must assume that:

(i) paragraph 3B(1)(b) of this Act had never been enacted; and

(ii) on the unpaid levy calculation day, the reference in subsection 3B(1) to the greater of the amounts mentioned in paragraph 3B(1)(a) and (b) is a reference to the amount referred to in paragraph 3B(1)(a); and

(c) if the person does not have sufficient information to work out:

(i) whether an incentive-based payment or bonus (within the meaning of section 3B of this Act as in force on the commencement day) was paid to an employee; or

(ii) the amount or timing of such a payment or bonus;

the person may, in working out the matter mentioned in subparagraph (i) or (ii) of this paragraph, make reasonable assumptions that are based on information about incentive-based payments or bonuses paid or intended to be paid to a class of employees of which the employee was a member.

(d) if the person does not have sufficient information to work out:

(i) the hours of work performed by an employee; or

(ii) the rate of pay applicable to an employee,

the person may, in working out the matter mentioned in subparagraph (i) or (ii) of this paragraph, make reasonable assumptions that are based on information about the hours of work or rates of pay applicable to, or records maintained in respect of, a class of employees of which the employee was a member.

Consequential amendments will be required to be made to Clauses 10(3), (5), (6) and (8) to refer to the further assumptions an employer could make under proposed clause 11(d).

3. Expand permissible deductions from historic liabilities to include payments already made under State LSL legislation for long service leave taken or paid in lieu

A significant gap exists in the Bill in respect of employees who, as a consequence of the incorrect interpretation of the definition of 'eligible employees', have inadvertently accessed and been paid State-based long service leave for the same period of service that is now captured by the Coal LSL scheme.

The Bill does not contemplate circumstances where affected employees have already accessed and been paid State-based long service leave by their employer for the same period of service. In those circumstances, the employer would effectively be required to pay twice in respect of the same service period:

- first, by directly funding State-based long service leave already taken by the employee; and
- second, by retrospectively paying Coal LSL levies for that same service, which would then contribute to the employee's future Coal LSL entitlement.

The risk is in its current form, the Bill may mandate a "double-payment" for the same service period. This imposes a punitive and inequitable financial burden on the employer, resulting in the employee receiving a potential windfall.

Proposed Remedy

Orica respectfully submits that the Bill should include a "credit" or "offset" provision. This would ensure that where an employer can properly demonstrate a prior discharge of long service leave obligations for a specific period under a State-based long service leave regime, those periods are either exempt from further levies and do not form part of the unpaid levy payment arrangements or instead may be credited against the new Coal LSL liability. Such an amendment would be consistent with the principle of fairness.

Orica considers an exemption provision to be more straightforward to mandate, and proposes the following new clause 13A in Schedule 1 of the *Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992* (Cth):

13A Exemption for periods of service where State or Territory-based long service leave has been paid

(1) This clause applies if:

(a) a person is required to specify information in an unpaid levy payment arrangement in respect of an employee for a period of service; and

(b) *the person has, before the unpaid levy calculation day, discharged a long service leave obligation in respect of the employee under a law of a State or Territory for the same period of service (or part of that period of service).*

(2) *To the extent that the person has discharged the obligation mentioned in paragraph (1)(b), the period of service to which that obligation relates is not required to be included in the unpaid levy payment arrangement given by the person to the Corporation, and no levy is payable under this Act in respect of that period of service.*

(3) *For the purposes of subclause (2), the person must provide to the Corporation supporting evidence, to the Corporation's reasonable satisfaction, that the long service leave obligation was discharged, including:*

(a) *records of long service leave payments made to the employee; and*

(b) *the period of service to which those payments related; and*

(c) *the State or Territory law under which the obligation arose.*

(4) *If the Corporation is satisfied that the person has discharged a long service leave obligation as mentioned in paragraph (1)(b) for only part of the period of service that would otherwise be included in the unpaid levy payment arrangement, the exemption under subclause (2) applies only to that part.*

Final comments

Orica remains committed to meeting its obligations. However, for the Scheme to be successful, the legislation must provide the flexibility and equitable protections which we have summarised above.

The legislation must also be clear. Orica's direct experience of having to defend itself against differing interpretations of the definition of 'eligible employee' has been resource intense and costly and is ongoing. The amendments we have proposed reduce the risk of future disputes and ensure funds are directed to employees rather than to litigation.

We commend these recommendations for the Committee's consideration and look forward to further engaging with the Committee on these matters.

Yours sincerely,

[redacted]

Paul Evans
Vice President, Corporate Affairs