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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE HOUSE OF REPRESENTATIVES

COAL MINING INDUSTRY (LONG SERVICE LEAVE FUNDING)
BILL 1992

EXPLANATORY MEMORANDUM

(Circulated on the authority of the Minister for Industrial
Relations, Senator Peter Cook)

Coal Mining Industry (Long Service Leave Funding) Bill 1992

Outline

The Coal Mining Industry (Long Service Leave Funding) Bill 1992 (the "Bill") is introduced in conjunction with the Coal Mining Industry (Long Service Leave) Payroll Levy Bill 1992, the Coal Mining Industry (Long Service Leave) Payroll Levy Collection Bill 1992 and the State Grants (Coal Mining Industry Long Service Leave) Amendment Bill 1992 (collectively referred to as the "bills"). The bills give effect to the Government's proposals to reform the funding of long service leave in the black coal mining industry in New South Wales, Queensland, Western Australia and Tasmania. The reforms are in response of the Willett Inquiry Report entitled, "Review of Funding Arrangements: Coal Mining Industry Long Service Leave", commissioned by the Minister for Industrial Relations, Senator Peter Cook, in August 1990.

Under the existing legislative scheme comprising the States Grants (Coal Mining Industry Long Service Leave) Act 1949, the Coal Excise Act 1949, the Excise Tariff Act 1921 and the complementary legislation in the four participating states money collected from an excise on the production of black coal is paid into consolidated revenue. Amounts equal to these collections are appropriated for payment into the trust fund established and maintained pursuant the States Grants (Coal Mining Industry Long Service Leave) Act 1949. Under the present scheme, long service leave payments made to employees by participating employers are reimbursed by the relevant State which is in turn reimbursed from the trust fund.

Projected excise collections under the existing scheme will be sufficient to meet current long service leave liabilities. The Willett Report, however, identified a number of deficiencies in the existing scheme including:

- the subsidisation by highly mechanised mining operations of labour intensive operations; and
- a net accrued unfunded liability for untaken long service leave estimated as at 30 June 1990 at \$250.2 million.

The Government aims to establish a compulsory, national industry scheme, to fully fund, on an accrual basis, the long service leave entitlements of persons employed in the black coal mining industry by firms participating in the scheme.

The Bill provides for the creation of a statutory corporation to be known as the Coal Mining Industry (Long Service Leave Funding) Corporation. The Corporation will administer the new scheme and is to advise the Minister on the operation of the Act and the rates of levy to be imposed on employers participating in the scheme. Membership of the Corporation is to be drawn from representatives of the industry with employers and unions being represented in equal numbers.

Financial Impact Statement

The Bill and the Government's overall reform package will not involve significant outlays by the Commonwealth. In particular, it is noted that the Coal Mining Industry (Long Service Leave Funding) Bill 1992 provides for recovery by the Commonwealth of costs incurred in connection with the development and administration of the scheme.

Importantly, the objective of the reforms is to ensure that the currently unfunded liability for long service leave is accounted for without imposing an unreasonable burden on the industry.

It is intended that when the accrued liability is fully funded, the scheme will be wound up and responsibility for provision of long service leave entitlements will be returned to the industry.

Notes on Clauses

Part 1 – Preliminary

Clause 1: Short title

The short title of the Act is given.

Clause 2: Commencement

It is intended that the new scheme will operate from 1 January 1993.

Those portions of the Act relating to the creation and functioning of the Corporation are to come into effect on a date to be set by proclamation but no later than 6 months after the date of Royal Assent.

The transition from the old to the new scheme, however, entails the transfer of current assets and liabilities as well as bringing to an end the existing excise funded arrangements. This hinges on the passage of separate legislation in four States.

Whilst it is anticipated that the necessary changes will be enacted by the States by the end of 1992, it is not possible at this time to fix a date of effect for clauses 35 and 44 to 49 nor is it possible at present to say whether the necessary State legislation will be enacted within 6 months of this bill receiving Royal Assent.

To allow time for the State Parliaments to pass complementary legislation, the commencement provision affecting clauses 35 and 44 to 49 extends the period in which the Government may choose to proclaim the provisions in question.

Clause 3: Object

This clause states that the Bill's object is to establish a new compulsory scheme for funding the long service leave of a defined class of employees in the black coal mining industry in New South Wales, Queensland, Tasmania and Western Australia.

The Act establishes the Corporation and charges it with the administration of the Fund.

The scheme is to be funded by a levy on payroll of participating employers. This levy is to be collected by or on behalf of the Corporation and paid into the Consolidated Revenue Fund. Levy monies are to be appropriated from Consolidated Revenue and paid into the Fund. When an employer makes a

payment to an eligible employee in respect of a long service leave entitlement covered by the scheme, the employer may seek reimbursement from the fund.

Clause 4: Interpretation

Significant terms defined in this clause include:

"approved bank" is defined so as not to restrict the Corporation to banking with those institutions referred to in subsection 5(1) of the *Banking Act 1959*.

"Board" means the board of the Corporation.

"Corporation" means the Coal Mining Industry (Long Service Leave Fund) Corporation to be established under clause 6 of the Coal Mining Industry (Long Service Leave Fund) Act 1992.

"Director" means a member of the Board.

"eligible employee" means:

- (a) an employee under a relevant black coal mining industry industrial award, determination or agreement including an enterprise or workplace agreement whose duties are carried out at or about a place where black coal is mined;
- (b) a person employed by a company mining black coal whose duties are directly connected with the day to day operation of the mine;
- (c) a person employed on a permanent and full time basis in connection with a rescue service associated with the black coal mining industry whose employment requires him or her to be located in a mines rescue station;
- (d) any other person or class of person prescribed by regulation.

but does not include:

- (e) a person performing duties in South Australia; or
- (f) a person who is, as an individual, or as part of a class of persons, prescribed not to be an eligible employee

This provision allows coverage of the scheme to be varied, without the need for further legislation, to take account of changed circumstances including revised work practices and job classifications. The Minister's powers in relation to the scope of the Act are to be exercised on the advice of the Board.

"eligible wages" are not restricted to award wages and conditions prescribed by an industrial tribunal but may include other recognised payments of the type specified in the legislation.

"relevant industrial instrument" includes any industrial agreement, award or determination registered with, recognised or approved by an "industrial authority" (as defined in the Act) providing an entitlement to long service leave that is portable within the industry.

Clause 5: The Crown

The Act binds the Crown.

Part 2 – Establishment, Functions and Powers of the Corporation

Claus 6: Establishment of Corporation

The Coal Mining Industry (Long Service Leave Funding) Corporation is established as a body corporate.

Clause 7: Functions of the Corporation

The functions of the Corporation include:

- the creation and maintenance of the Fund;
- the payment of monies in and out of the Fund and the making of investments on behalf of the fund;
- advising the Minister on the operation of the Fund and the relevant legislation generally; and
- such functions as are conferred on the Corporation by the Payroll Levy Collection Bill.

The Corporation is not able to perform its functions in excess of its powers which are found in clause 8.

Clause 8: Powers of the Corporation

Subclause 8(1) lists the powers of the Corporation.

Subclause 8(2) provides that the Corporation may "contract out" the administration of the Fund to a person or body who will manage the Fund on its behalf.

Subclause 8(3) provides that the Corporation cannot, without the written consent of the Minister, enter into a contract where the amount of commission, brokerage or other fee to be paid by it exceeds \$100,000. This provision does not prevent the

Corporation making any single investment the value of which exceeds that amount. It does, however, prevent the Corporation, where the Minister's written agreement has not been obtained, from making an investment, for example in shares, where the commission, fee or brokerage payable on that transaction exceeds \$100,000.

Subclause 8(4) provides that the failure on the part of the Corporation to meet the obligation imposed on it under this section does not, of itself, render any contract entered into in good faith by the Corporation and another party inoperative or invalid.

Part 3 – Board of Directors of the Corporation

Division 1 – Constitution of the Board

Clause 9: The Board

The Corporation is required to have a board of directors.

Clause 10: Board to manage affairs of the Corporation

The Board is required to manage the Corporation and be responsible for the administration of the Fund.

Clause 11: Guidelines for managing affairs of Corporation

The Board is to administer the Corporation within guidelines approved by the Minister.

The Board is also required to prepare a plan for the investment of the Fund and the Minister may establish guidelines concerning such investments. Clause 42 provides for the formulation of investment plans and strategies.

Clause 12: Constitution of the Board

The Board is to consist of six directors including a Chairperson and Deputy Chairperson but the performance of a function or the exercise of a power will not be invalidated by a vacancy on the Board.

Clause 13: Appointment of Directors

Subclause 13(1) provides that Directors be appointed by the Minister and hold office on a part-time basis.

Subclause 13(2) provides that two members of the Board are to be drawn from companies involved in the black coal mining industry in the States of Queensland, Tasmania and New South Wales.

Subclause 13(3) entitles companies involved in the black coal mining industry in Western Australia to be represented by one member of the Board.

Subclause 13(4) entitles the United Mine Workers Division of the Construction, Forestry and Mining Employees Union to be represented by one member of the Board.

Subclause 13(5) and subclause 13(6) list six associations and unions from which two Board members are to be selected.

Subclause 13(7) and subclause 13(8) make provision for circumstances where an organisation changes its name, ceases to exist, is succeeded by another organisation or merges with another body.

Subclause 13(9) provides that appointments are to be made by the Minister after the Minister has consulted with the person or body which that appointee is to represent. It is the Government's intention that a decision of the Minister as to representation on the Board may only be challenged on the ground that it was so unreasonable that no reasonable person could have made such an appointment.

Clause 14: Appointment of Chairperson and Deputy Chairperson

Subclause 14(1) provides that one of the Directors is to be appointed Chairperson and another, Deputy Chairperson.

Subclause 14(2) stipulates that to facilitate the setting up of the Corporation, the first appointment in each case is to be made by the Minister.

Subclause 14(3) stipulates that subsequent appointments are to be made by the Board.

Subclause 14(4) provides that appointments are for a maximum of 2 years. There is no limit on the number of terms that a person may serve as a Director.

Subclause 14(5) requires, as far as possible, the Chair and Deputy Chair are to be rotated every 2 years between employer and union representatives. Subject to this provision, there is nothing to prevent a Director holding either position on more than one occasion.

Division 2 – Meetings of the Board

Clause 15: Convening of meetings

Subclause 15(1) requires meetings to be held as necessary for the efficient running of the Corporation.

Subclause 15(2) provides that, generally speaking, it is for the Chairperson to determine how frequently the Board should meet but that on receipt of a written request from the Minister or a Director, the Chairperson must convene a meeting of the Board.

Clause 16: Presiding at meetings

This clause provides that the Chairperson is to preside at meetings at which he or she is present. If he or she is absent the Deputy Chairperson is to preside. If both are absent, the Directors present must elect a Chair.

Clause 17: Quorum

Subclause 17(1) preserves the integrity of the Board and promotes acceptance by the parties affected by decisions taken by it, by setting a quorum requirement of two-thirds of the total number of Directors with the additional requirement that at least two employee and two employer representatives be present.

Subclause 17(2) provides that where, on account of the operation of the disclosure and disqualification provisions contained in clause 22, a quorum cannot or could not be formed, the Minister may determine an appropriate quorum.

Clause 18: Voting at meetings

This clause provides for the manner in which a decision of the Board may be made.

Clause 19: Conduct of meetings

Under this clause the Board, subject to the Act, is able to regulate its own proceedings.

Clause 20: Resolutions without meetings

The clause provides for the manner in which the board may make decisions without calling a meeting. The provisions are broadly similar to paragraph 77 of Schedule 1, Table A, of the Corporations Law.

Clause 21: Records relating to meetings

The Board is required to keep minutes of its meetings and records of decisions made in accordance with clause 20.

Clause 22: Disclosure of interests

Subclause 22(1) requires a Board member to disclose to a Board meeting any direct or indirect pecuniary interest in a matter being considered by the Board.

Subclause 22(2) requires that any disclosure be recorded in the minutes. In addition, unless the Minister or the Board has determined otherwise, a member with such an interest may not to be present at any stage of the relevant decision-making process.

Subclause 22(3) provides that any Director with a pecuniary interest in a matter is to be excluded from any deliberation on a determination referred to in subclause 22(2).

Division 3 – Provisions Relating to Directors**Clause 23: Term of appointment**

Directors are to be appointed for a term of 2 years. There is no limitation on the number of terms that a person may serve as a Director.

Clause 24: Remuneration and allowances

The clause stipulates that Directors' remuneration and allowances are to be set by the Remuneration Tribunal.

Clause 25: Leave of absence

Subclause 25(1) allows the Minister to grant leave of absence to the Chairperson on such terms as the Minister considers appropriate.

Subclause 25(2) allows the Chairperson to grant leave of absence to any other Director. This is to include the Deputy Chairperson.

Clause 26: Resignation

A Director may resign by giving notice in writing to the Minister. The Chairperson and Deputy Chairperson may resign, by notice in writing to the Minister, from office without also resigning as a Director.

Clause 27: Outside employment

A Director may not engage in outside employment which the Minister considers to conflict with the proper performance of his or her duties as a Director.

Clause 28: Termination of appointment

The clause sets out circumstances in which the Minister may terminate a Director's appointment. The circumstances include, misbehaviour, mental or physical incapacity, bankruptcy and failure to comply with certain provisions of this Act.

Clause 29: Terms and conditions of appointment not provided for by Act

The Act does not set down an exhaustive list of conditions in relation to holding the office of Director of the Corporation but provides for the conditions to be determined from time to time by the Minister, in writing. This is a standard provision. Conditions of engagement may not be altered retrospectively by the Minister.

Clause 30: Directors not to be sued

Directors may not be sued in relation to any act done or not done where they have acted in good faith.

Clause 31: Acting Chairperson and Acting Deputy Chairperson

Subclause 31(1) makes provision for the Deputy Chairperson to act as Chairperson of the Board in the absence of the Chairperson or if the office of Chairperson is temporarily vacant.

Subclause 31(2) makes provision for the Minister to appoint a Director to act as Deputy Chairperson of the Board in the absence of the Deputy Chairperson or if the office of Deputy Chairperson is temporarily vacant.

Subclause 31(3) allows the Minister to determine terms and conditions applying to a person acting in other positions with the exception of remuneration and allowances which, Subclause 31(4) provides, must be paid at the same level as is payable to a duly appointed Chairperson or Deputy Chairperson, as the case may be.

Subclause 31(5) is a savings provision.

Clause 32: Acting Director

This clause provides for the appointment of an acting Director by the Minister after consultation with the body or bodies that the absent Director represents when that absent director is unable to conduct his or her duties for any period.

Part 4 – Staff of the Corporation

Clause 33: Employees

The Board may employ such staff on such terms and conditions as it considers appropriate for the performance of its functions and exercise of its powers.

Clause 34: Consultants

The Board may hire persons on a contract basis and determine their level of remuneration.

Part 5 – Finance

Clause 35: Transfer of previous Fund to Corporation

The clause provides for the termination of the existing scheme. Any funds held in the current Trust Account or owing to the existing Fund, as well as any assets forming part of it, are to form part of the new Fund.

Clause 36: Payments to Corporation

This clause qualifies the Commonwealth's obligation to pay to the Corporation monies paid under the Coal Mining Industry (Long Service Leave) Payroll Levy Collection Bill 1992 out of monies paid into the Consolidated Revenue Fund. Money is to be retained in the Consolidated Revenue Fund to meet expenses incurred by the Commonwealth in procuring the enactment of this legislation and in connection with the administration of the scheme.

Clause 37: Borrowing

For amounts which, when added to amounts previously borrowed for the same purpose, exceed \$50,000, the Corporation may borrow money on terms and conditions approved in writing by the Minister. Other amounts may be borrowed without Ministerial approval.

Clause 38: Corporation may give security

In relation to borrowings, the Corporation may give security over the whole or any part of its assets, including the Fund.

Clause 39: Application to the Corporation of Division 2 of Part XI of the Audit Act

Subclause 39(1) provides that the Audit Act 1901 applies to the Corporation, subject to this clause.

Subclause 39(2) provides that section 63E of the Audit Act 1901 (dealing with investment of monies) does not apply to the Corporation.

Subclause 39(3) provides that the report required to be submitted by the Corporation under clause 63H(1) of the Audit Act 1901 in respect of the year ending 30 June 1993 must be submitted by 31 October 1993.

Subclause 39(4) provides that money standing to the credit of the Fund is deemed to be money of the Corporation for the purposes of Division 2 of Part XI of the Audit Act 1901.

Subclause 39(5) provides that transactions and affairs of the Fund are transactions and affairs of the Corporation for the purposes of the Audit Act 1901 in a like manner to subclause 39(4) above.

Part 6 – The Coal Mining Industry (Long Service Leave) Fund

Clause 40: Establishment of the Fund

Subclause 40(1) requires the Corporation to establish and account for a fund to be known as the Coal Mining Industry (Long Service Leave) Fund.

Subclause 40(2) provides that monies received by the Corporation, other than payments by employers in respect of payroll levy are to be paid into the Fund.

Subclause 40(3) provides that payment into a bank account maintained by the Corporation is a payment into the Fund.

Clause 41: Application of the Fund

This is a formal provision restricting the purposes for which payments can be made from the fund.

Clause 42: Investment of the Fund

Subclause 42(1) allows the Minister to set guidelines or principles to be followed in the investment of the Fund.

Subclause 42(2) requires the Board to prepare an investment strategy for the Fund.

Subclause 42(3) requires the Board to revise the investment plan at least every twelve months.

Subclause 42(4) requires that the investment plan be in accordance with the Minister's guidelines and subject to those guidelines be aimed at maximising the return on the Fund consistent with prudent financial management practices.

Subclause 42(5) requires the Board to forward a copy of each financial plan to the Minister on its formulation or revision.

Subclause 42(6) allows the Minister to return the plan or revised plan for reconsideration in accordance with his or her directions where the plan or revised plan does not conform with the guidelines.

Subclause 42(7) requires the Board to revise the plan in accordance with the Minister's directions if it is returned by the Minister. A copy of the revised plan is to be forwarded to the Minister.

Subclause 42(8) provides that any asset in which the Fund invests becomes part of the Fund.

Clause 43: Sufficiency of the Fund

Subclause 43(1) requires the Board to obtain actuarial advice within 6 months of the commencement of the Coal Mining Industry (Long Service Leave) Payroll Levy Bill 1992 (the "commencing date") as to:

- (a) the total accrued liability of employers at the commencing date in respect of long service leave to eligible employees;

- (b) the rate of payroll levy required to be imposed, having regard to the amount transferred to the Fund under clause 35 from the Trust Fund to ensure that:
- the Fund is sufficient to discharge the liability, accruing after the commencing date, of long service leave entitlements for eligible employees; and
 - the Fund will be sufficient at the end of a period of 10 years to discharge the estimated liability of employers for long service leave entitlements for eligible employees in respect of total liability that accrued before the commencing date and remains unpaid at the end of such period.

Subclause 43(2) requires the Board to obtain actuarial advice within 6 months prior to a review date (specified in subclause 43(3)) to ensure that the rate of payroll levy is sufficient to ensure that:

- (a) the Fund will be sufficient on and after the review date to discharge long service leave liabilities to eligible employees that have accrued since the commencing date; and
- (b) the Fund will be sufficient at the end of the period of 10 years after the commencing date to discharge liabilities for long service leave for eligible employees that accrued before the commencing date and remain unpaid at the end of such period.

Subclause 43(3) specifies review dates to be 3 years, 5 years, and 7 years after the date of commencement.

Subclause 43(4) requires the Board to obtain actuarial advice within 6 months before the end of the period of 10 years from the commencing date as to:

- (a) whether the Fund will be sufficient to meet total accrued but unpaid long service leave liabilities of eligible employees and if not the amount of any deficiency; and
- (b) the amount of payroll levy required to ensure the Fund continues to be sufficient to discharge long service leave liabilities to eligible employees as they accrue and to meet the deficiency referred to in paragraph 43(4)(a), if any.

Subclause 43(5) requires the Board to notify the Minister of the advice received under this clause and to recommend to the Minister whether any change in the rate of the levy is required, and if so, the recommended rate.

Subclause 43(6) requires the Board to report, in writing, to the Minister if it forms the opinion that the Fund will, in the ensuing 12 months, be sufficient to discharge the liability of employers to make payments to eligible employees in respect of long service leave.

Subclause 43(7) allows the Board to distribute, as it considers equitable, any amounts in the Fund that it considers to be in excess of the requirements under this Act, to persons who have paid amounts of payroll levy.

Part 7 – Reimbursement of Employees for Long Service Leave Payments

Clause 44: Reimbursement of payments under relevant industrial instruments

An employer who makes a payment in relation to a long service leave entitlement to an eligible employee after commencement of this clause is entitled to be reimbursed from the Fund. Such an entitlement may arise by virtue of a "relevant industrial instrument" or under a contract of employment.

To promote horizontal equity between contributors to the Fund, the clause limits the amount that may be reimbursed in respect of each claim. Contributors are prevented from entering into artificial arrangements with eligible employees which may result in inflated and disproportionate claims being made on the Fund.

A claim for reimbursement may only be in respect of "eligible wages" as defined in the Payroll Levy Collection Act 1992. Such a claim may, however, include an amount for production related bonuses (if any) which have accrued to an eligible employee in accordance with usual industry custom and practice in the black coal mining industry in the relevant State.

Clause 45: Reimbursement of other payments

This clause deals with an existing anomaly.

It provides that an employer is also entitled to be reimbursed for payments to an employee, employed within the black coal mining industry, under a relevant industrial instrument, where the payment is made other than under that instrument, between 9 April 1990 and the date immediately preceding the date of commencement of this clause.

The clause allows for reimbursement of employers in the industry who, after 9 April 1990, continued to pay a non award-based leave loading in respect of long service leave. On the commencement of this clause, all such claims will no longer accrue. The clause does not affect entitlements that may accrue from 9 April 1990 until this provision comes into effect. Any non production-related bonuses or loadings do not from the date that this clause comes into effect, give rise to a fresh claim on the Fund.

Clause 46: Reimbursement of employer if employee ceases to be an eligible employee

A person may cease to be "eligible employee" before drawing on any or all of his or her entitlement to long service leave. This may occur where a person changes jobs either within or between firms. Where an entitlement exists and such a deferred claim is made, the original employer may seek reimbursement from the Fund for an amount paid in respect of the entitlement. Such a claim for reimbursement may be made where payment is made directly to the worker or to him or her through another employer, who requires a contribution from the original employer.

Clause 47: Reimbursement of overpayments of payroll levy

Overpayments of payroll levy are to be reimbursed by the Fund to the relevant employer.

Clause 48: Payments to employees if employer being wound up

This clause gives the Board, authority to pay an employee's long service leave entitlement where the Board is satisfied that the relevant employer has made payments to the fund sufficient to cover the employee's entitlement and is unable to pay such entitlement because it is being wound up.

Clause 49: Board may determine claims for payment

The Board is to determine questions of fact in relation to the payment of monies out of the fund.

Part 8 – Miscellaneous

Clause 50: Delegation

Subclause 50(1) entitles the Corporation to delegate any of its powers or functions under this Act and the Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992 in writing and under seal to the persons listed in this subclause.

Subclause 50(2) entitles the Board to delegate any of its powers under this Act or the Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992, other than the power to revoke or vary a decision of the Board, by an instrument signed and in writing, to those persons listed in the subclause.

Subclause 50(3) provides that with the exception of his powers under clauses 13 & 14 (dealing with the appointment of Directors and a Chairperson and Deputy

Chairperson), and clauses 31 & 32 (dealing with the appointment of an acting Deputy Chairperson and acting Directors), the Minister may delegate his powers, by a signed instrument to an officer of the Department of Industrial Relations.

Clause 51: Expenses of the Corporation

The expenses of the Corporation may be met by the Fund subject to clause 53, (which deals with transitional provisions).

Clause 52: Remuneration and allowances of Directors

The remuneration and allowances of Directors are to be paid out of the Fund, subject to clause 53 (which deals with transitional provisions).

Clause 53: Transitional

Subclause 53(1) provides for the payment from the previous Fund of amounts payable pursuant to clauses 51 and 52, prior to the transfer of the previous Fund to the Corporation, pursuant to clause 35.

Subclause 53(2) provides that amounts, due to be paid from the previous Fund that are unpaid at the time the Fund is transferred to the Corporation, are payable from the Fund.

Clause 54: Regulations

The Governor-General may make regulations prescribing matters that are required or permitted by the Act or that are convenient or necessary to give it effect.

Clause 55: Review of the Act

The Minister is to arrange for an independent review of the operation of the scheme to be conducted as soon as possible after he or she has received a report as to the sufficiency of the Fund under subclause 43(6).





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