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THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Long Service Leave (Portable Schemes) Amendment Bill 2019

REVISED EXPLANATORY STATEMENT

Presented by

Suzanne Orr MLA

Minister for Employment and Workplace Relations

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Purpose of the Bill

The *Long Service Leave (Portable Schemes) Act 2009* (the Act) provides portable long service leave for workers in four covered industries in the ACT: building and construction; contract cleaning; security; and community services. Employers who have workers in the covered industries are required to pay a levy to fund the relevant scheme.

The purpose of the Long Service Leave (Portable Schemes) Amendment Bill 2019 is to provide better protection for worker entitlements, remove administrative inconsistencies and provide more clarity for employers. The Bill strengthens compliance measures by modernising inspector powers, providing interest is payable on any levies that remain unpaid after the due date, and by inserting a new provision to enable the Authority to pursue company directors in situations where a levy remains unpaid and phoenix activity is involved. The Bill also make minor technical amendments to provide clarity, improve accuracy and correct omissions.

Human Rights Considerations

The amendments to the Act may engage the following rights under the *Human Rights Act 2004* (HR Act):

- section 12 (right to privacy and reputation);
- section 21 (right to fair trial);
- section 22 (rights in criminal proceedings); and
- section 8(3) (right to equality and non-discrimination).

Human rights are subject to reasonable limits which are demonstrably justifiable, as outlined in section 28(2) of the HR Act.

Liability of company directors to pay levy

Clause 13 of the Bill introduces a new debt recovery provision which allows the Authority to pursue the former director/s of a company that has an outstanding debt to the Authority in situations where phoenix activity is involved.

The nature of the right affected

The right to a fair trial includes all proceedings in a court or tribunal and all stages of proceedings. It is concerned with procedural fairness, that is, the right of all parties in proceedings to be heard and respond to any allegations, and the requirement that the court be unbiased and independent. The nature of the right may be absolute in itself, in that it can never be justified to hold an unfair trial, but many of the principles that characterise a fair trial are not absolute.

The existence of unpaid levies is not affected by the amendments and there is substantial opportunity afforded to the registered employer to affect the commencement of any recovery actions taken by the Authority.

Section 22(1) of the HR Act reads “everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to the law”.

Rights in criminal proceedings are not considered non-derogable and are capable of being subject to reasonable limitations, demonstrably justified in a free and democratic society, pursuant to section 28 of the HR Act.

The importance of the purpose of the limitation

Once a company is put into liquidation it can be difficult to recover debts. This is especially the case where a company disposes of property in a way that has the effect of preventing the property from becoming available or hindering or significantly delaying the process of making the property available for the benefit of the company's creditors in the winding-up of the company. The limitation acknowledges that a company does not act independently to its directors and is intended to target company directors who engage in phoenix activity to deliberately avoid their legal obligations.

The nature and extent of the limitation

The amendments involve minimal limitation on protected rights and these limitations will only apply in specific and limited circumstances. Namely, the new debt recovery provision will only apply where a person, who is the director of a phoenix company, was also a director of a defunct company at the time the company made a creditor-defeating disposition and the levy by the defunct company remains unpaid.

The relationship between the limitation and its purpose

The overarching intent of the new debt recovery provision is to protect portable long service leave revenue, which ultimately funds long service leave for workers in the covered industries, from phoenix practices. Debt recovery action also ensures that registered employers who pay their levies correctly and on time are not disadvantaged in relation to recalcitrant employers who avoid this obligation.

While there is currently no legal definition of phoenix activity, it is generally understood to be the process of 'rebirthing' an enterprise by stripping an insolvent company of any remaining assets and transferring them into a new entity which is essentially the same business. According to the Australian Tax Office, phoenix activity is particularly prevalent in major centres in building and construction, labour hire, payroll services and security services. Two of these industries – building and construction and security services – are industries covered by portable long service leave in the ACT.

The least restrictive means reasonably available to achieve the purpose the limitation seeks to achieve

This is considered the least restrictive means reasonably available to protect Long Service Leave revenue from phoenix activity.

Section 8(3) of the HR Act

The limited application of the new debt recovery provisions to a person, who is the director of a phoenix company and was also a director of a defunct company at the time the company made a creditor-defeating disposition and the levy by the defunct company remains unpaid, may engage the right to equality and non-discrimination under section 8(3) of the HR Act. However, this limitation is considered justified and the least restrictive means to address the effects of phoenixing behaviour.

Rather than applying a penalty to directors in the form of a debt owed to the Authority should their company simply wind up, this Bill will limit the application of the new debt recovery provisions to circumstances where that director also then starts up a new company that carries on substantially the same business. This is phoenixing behaviour and this is what is being addressed by these new provisions.

There are currently compliance and enforcement measures that apply under the Act including those that apply to the collection of levies under the Act. However, these provisions do not operate as intended if a company winds up.

The new provisions will address the behaviour of directors and their actions under the corporate structure, i.e. persons who are responsible for the decisions of the company, and make sure they are accountable for those actions and cannot avoid a liability to pay levies under the Act simply by phoenixing.

Inspector powers – privacy and reputation

Clause 15 of the Bill provides that a portable long service leave inspector may, in writing, require certain parties 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 the Act.

Section 12(a) of the HR Act states that –

Everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily.

The nature of the right affected

Section 12 of the HR Act gives effect to Article 17 of the International Covenant on Civil and Political Rights and protects individuals from unlawful and arbitrary interference with privacy relating to their family, home or correspondence. An interference that is lawful may still be arbitrary if it is unreasonable or unjustified in all the circumstances of the case.

The importance of the purpose of the limitation

A long service leave inspector who enters premises under Part 8 of the Act may, in relation to the premises or anything at the premises, require the occupier, or anyone at the premises, to give the inspector records, or copies of records, that the occupier, employee or agent has, or has access to, that are reasonably required by the inspector for the Act. This is currently the only way an inspector can require a registered employer to produce information on request. The process of obtaining information through firstly visiting a workplace is considered outdated and an inefficient use of limited resources. Clause 15 modernises inspector powers by providing inspectors can request the same type of information they would otherwise be able to obtain, inspect or copy, as part of an inspection carried out at a workplace, without having to firstly attend that workplace.

The nature and extent of the limitation

The Bill provides for modernised inspector powers to obtain, inspect and copy records. The operation of the modernised powers under the Bill have incorporated safeguards and limitations on their use to ensure that, wherever possible, the impact of these powers on individual rights is restricted. Accordingly, clause 15 provides the power to obtain, inspect and copy records can only be exercised by inspectors appointed under section 71 of the Act and is limited to records required by

the inspector for the Act. Further, requests for records must be in writing and can only be given to the parties prescribed in the Bill.

In addition, regard has been had to the right to privacy and the fact that there is a long-standing expectation that businesses and undertakings will be scrutinised with respect to compliance. The use or disclosure of personal information obtained under the Act must also be read and applied in the context of the *Privacy Act 2014*.

The relationship between the limitation and its purpose

The need for an inspector to firstly enter a workplace in order to exercise powers to obtain, inspect and copy records is time consuming and impacts the Authority's capacity to efficiently perform its regulatory compliance functions. By providing that inspectors can request records without firstly needing to enter a workplace, the limitation represents a proportionate measure for obtaining necessary records as it significantly increases the effectiveness and efficiency of the Authority's regulatory operations.

The right not to self-incriminate

The modernised provisions will bring the Territory's inspector powers provisions into line with other regulatory legislation, for example the *Work Health and Safety Act 2011*, the *Dangerous Substances Act 2004* and the *Motor Accidents Injuries Act 2019*.

It will allow inspectors to require information from a person at a premise for the purposes of the Act. In doing so, this may engage rights in relation to self-incrimination. While information may be compelled to be provided, should it be given and include information that is self-incriminating there are restrictions that will apply in the use of that information as evidence against the person. This will ensure that the integrity of the scheme is maintained in allowing inspectors to obtain information relevant to the enforcement of the Act while recognising that certain safeguards are required in view of the right not to self-incriminate.

This limitation is considered to be justified and proportionate to ensuring the regulatory integrity of the portable long service scheme. A scheme designed to benefit employees in the industries covered under the Act.

The least restrictive means reasonably available to achieve the purpose the limitation seeks to achieve

This is considered the least restrictive means reasonably available for the Authority to obtain, inspect and copy the records necessary for the effective and efficient administration, compliance and enforcement of the Act.

Climate Change Vulnerability Assessment

There are no climate change implications associated with the Bill.

SUMMARY OF CLAUSES

Clause 1 Name of Act

This is a technical clause that sets out the name of the Bill, once enacted, as *the Long Service Leave (Portable Schemes) Amendment Act 2019* (the Act).

Clause 2 Commencement

This clause provides that the Act commences on 1 January 2020.

Clause 3 Legislation amended

This clause provides that the Act amends the *Long Service Leave (Portable Schemes) Act 2009* (the Act).

Clause 4 Section 10

Workers covered by the Act are currently classified as either an ‘employee’ or a ‘contractor’ (a ‘working director’ is currently classified as a ‘contractor’). This clause introduces the term ‘voluntary member’, which is a more appropriate term to cover both contractors and working directors.

The definitions given to ‘contractor’ and ‘working member’ are unchanged.

Clause 5 Service credit – employee’s prior service Section 47(1)

This clause removes a four-year time limit for an employee’s service credit prior to registration, in a covered industry, allowing for an unlimited amount of unrecorded service to be recognised in certain situations, at the discretion of the Registrar. This is to ensure an individual is not unfairly disadvantaged by the current legislative timeframe and only applies in situations where the individual’s employer complies with section 49 (Quarterly returns by employers) and section 50 (Levy payments by employers) under the Act in relation to the individual. Where one or both of these requirements have not been met, section 47 (3) continues to apply.

Clause 6 Section 47(3) and example and note

This clause ensures that up to a maximum of one year of unrecorded service of an employee can be credited by the Authority in certain circumstances where the employee was employed in the covered industry.

Clause 7 New section 47A

This clause inserts a new section which applies to a registered employee who has unrecorded service in a covered industry because their employer ceases to trade or operate in the ACT. Accordingly, the Registrar may credit a registered employee with one day of service in the workers register for a covered industry for each day of service up to a maximum of one year of unrecorded service where the employee was employed in the covered industry.

Clause 8 Section 49

This clause amends section 49 of the Act and introduces a new section 49A.

It would amend the penalty structure to shift the strict liability criminal offence from being in relation to subsection (1) for breaching the requirement to lodge a return to a strict liability offence that would apply if a return is not lodged within three months after the end of a quarter. This will facilitate the imposition of an infringement notice penalty on non-compliance at three months after the end of the quarter.

Section 49A would carry across an existing provision (currently located under section 52 of the Act) relating to where an employer for a covered industry fails to give the Authority a return for a quarter by the due date. This new section will apply late fees to non-compliance with the requirement to lodge a quarterly return at the end of a quarter. The application of a late fee is used as a regulatory incentive to encourage employers to lodge their quarterly returns on time. Regulatory incentives also acknowledge that where employers are late in lodging a return there are administrative costs associated with regulatory activities of the Authority.

As a result, late fees will no longer apply to non-compliance with section 50 in relation to the payment of levies.

Clause 9 Section 52

The long service leave portable schemes are funded through levies on employers in covered industries. Where an employer fails to pay the levy on time or at all, the shortfall is absorbed by compliant employers.

This section has been amended to apply an interest rate to be determined by the Long Service Leave Governing Board in accordance with Guidelines made by the Minister. This would provide employers with a greater incentive to lodge their return and pay levies on time as interest would be apportioned and commensurate with the outstanding debt. The Registrar maintains the power to waive all or part of the additional payment (interest) in certain circumstances, as specified in the Bill.

The new interest regime will come into force on 1 January 2020.

Clause 10 Quarterly returns by contractors **Section 54(4), definition of *required information*, paragraph (a)**

This clause makes a minor technical amendment to ensure consistent wording throughout the Act.

Clause 11 Minor changes to levy—employers and contractors **Section 56A (2) and (3) and note**

This clause substitutes the current section 56A (2) and (3) to provide that a minor change in the levy as determined by the Board under section 56A would be a disallowable instrument and revokes a levy determination made by the Minister under section 51 or section 56. This is to ensure that there is no confusion about the applicable levy rate.

Clause 12 Employers to keep records

Section 57(2)

This clause increases the time that the employer must keep records from 6 years to 7 years, which is consistent with relevant taxation law obligations.

Clause 13 New part 5A

Once a company is put into liquidation it can be difficult to recover debts. This clause introduces a new debt recovery provision which allows the Authority to pursue the former director/s of a company that has an outstanding debt to the Authority in situations where phoenix activity is involved. The purpose of this provision is to help ensure that registered employers who pay their levies correctly and on time are not disadvantaged by funding the liabilities of employers who avoid their obligations.

This new provision will only apply where a person, who is the director of a covered company, was also a director of a defunct company at the time the company made a creditor-defeating disposition and the levy by the defunct company remains unpaid.

Clause 14 Removing people from workers register New Section 65 (3) (d)

Section 65 (1) of the Act provides that the Registrar must remove a person from the workers register if the person has not been credited under the Act or a corresponding law with at least 1 day of service for 4 consecutive years. Under section 65 (2), where a person is removed from the register in accordance with section 65 (1), the person is not entitled to apply for, or to be paid an amount for or instead of, long service leave for any days of service entered in the register before the day the person stopped being a registered worker.

Clause 14 inserts a new paragraph to provide that section 65 (2) does not apply if the person would have been entitled to payment for the period under schedule 4, section 4.9 of the Act, had the person not ceased being registered. This amendment ensures that, if the Governing Board is satisfied a registered worker for the security industry has five years recognised service and the worker has left the industry because of total incapacity, has reached the prescribed retiring age or has died, the worker is entitled to payment instead of long service leave. This is consistent with the other three industry schemes established by the Act.

Clause 15 Section 76

This clause provides an inspector may, in writing, require certain persons (as specified in the Bill) 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 the Act. This amendment modernises inspector powers by providing that an inspector can request (e.g. via email) information, documents or anything else reasonably required by the inspector for the Act without firstly needing to enter the relevant premises. In doing so, it preserves employers' rights in relation to self-incrimination.

Clause 16 Authority reimbursement of certain payments
Section 89A (2)

This clause rewords the existing provision to provide that, where an employer has paid a long service leave entitlement to their employee under a corresponding law, the Registrar may reimburse the employer the lesser of the amount the employer paid the employee or the amount the Authority would have paid the employee. This ensures that the Authority does not reimburse an employer more than the amount the employer paid the employee.

Clause 17 Schedule 1, section 1.5

Under the Act, there are two formulas for calculating leave payments for service as a registered employee for the building and construction industry – one relates to service that occurred before 20 December 1996 and the other relates to service that occurred after this period. Currently only one of these formulas is listed under schedule 1, section 1.5.

Clause 17 inserts the other formula for completeness and consistency with the provisions under the Act. Neither formula has been changed.

Clause 18 How are leave payments worked out for the building and construction industry?
Schedule 1, section 1.11, example and note

As a consequence of amendments in clause 4, this clause substitutes references to *contractor* with *voluntary member*.

Clause 19 Leave payments for service as registered contractor—building and construction industry
Schedule 1, section 1.13 (4), definitions of *FB*, *FE*, *I* and *total equity*

This clause removes definitions for *FB*, *FE*, *I* and *total equity* as reference to these terms were removed from the Act in a previous amendment.

Clause 20 Leave payments for service as registered employee—contract cleaning industry
Schedule 2, section 2.12(2), definition of *R* and example and note

This clause inserts new wording to clarify that, in cases where a registered worker is receiving compensation under the *Workers Compensation Act 1951* (WC Act), *R* is the weekly average of the ordinary remuneration received by the worker during the four quarters before the injury to which the compensation relates occurred. This is consistent with the rest of the Act which provides that ordinary remuneration means salary or wages, and allowances, paid or payable to a worker for work and includes workers' compensation payments made to a worker by the worker's employer. It also aligns with the Act providing that a registered worker's service period is not taken to end if a person stops being a worker because of incapacity for an injury for which the worker is entitled to compensation under the WC Act.

The definition of *R* for any other case (cases where a registered worker is not receiving compensation under the WC Act) remains the same.

Clause 21 Leave payments for service as registered contractor—contract cleaning industry
Schedule 2, section 2.13 (4), definitions of *FB*, *FE*, *I* and *total equity*

This clause removes definitions for *FB*, *FE*, *I* and *total equity* as reference to these terms were removed from the Act in a previous amendment.

Clause 22 What is the *community sector industry*?
Schedule 3, section 3.1 (a)

This clause makes a minor technical amendment to clarify that, in order to meet the definition of *community sector industry*, each of the industries listed are separate industries covered under the community sector. This amendment is for clarification purposes and not intended to change the nature of employers captured within the community sector industry.

In addition, this clause amends (a)(i) to provide clarity to the industry of providing child care services by formalising the types of services covered by reference to education and care services in line with modern language for this industry. This amendment is consistent with the current scope of the industry and does not broaden its current coverage.

Clause 23 Schedule 3, new section 3.1 (2)

This clause is consequential on the amendments to section 3.1 (a)(i) in clause 22 and clarifies the meaning of education and care services by defining this term using the definition in the *Education and Care Services National Law (ACT) Act 2011*. This formalises the current scope of the industry covered under section 3.1 (a)(i) using modern language for this industry.

Clause 24 Service credit—community sector industry—s 64
Schedule 3, section 3.5 (1)

This clause makes a minor technical amendment to provide consistency with the definition of *community sector work*, as provided by schedule 3, section 3.2 of the Act.

Clause 25 Schedule 3, section 3.5 (1), example

This clause amends the example in this section to refer to community sector work, rather than cleaning work, consistent with the subject matter of schedule 3, section 3.5.

Clause 26 Leave payments for service as registered employee—community sector industry
Schedule 3, section 3.13(2), definition of *R* and example and note

This clause inserts new wording to clarify that, in cases where a registered worker is receiving compensation under the *Workers Compensation Act 1951* (WC Act), *R* is the weekly average of the ordinary remuneration received by the worker during the four quarters before the injury to which the compensation relates occurred. This is consistent with the rest of the Act which provides that ordinary remuneration means salary or wages, and allowances, paid or payable to a worker for work and includes workers' compensation payments made to a worker by the worker's employer. It also aligns with the Act providing that a registered worker's service period is not taken to end if a person stops being a worker because of incapacity from an injury for which the worker is entitled to compensation under the WC Act.

The definition of *R* for any other case (cases where a registered worker is not receiving compensation under the WC Act) remains the same.

Clause 27 Leave payments for service as registered contractor—community sector industry
Schedule 3, section 3.14 (4), definitions of *FB*, *FE*, *I* and *total equity*

This clause removes definitions for *FB*, *FE*, *I* and *total equity* as reference to these terms were removed from the Act in a previous amendment.

Clause 28 Service credit—security industry—s 64
Schedule 4, section 4.5 (1), example

This clause amends the example in this section to refer to security work, rather than cleaning work, consistent with the subject matter of schedule 3, section 3.5.

Clause 29 How are payments worked out for the security industry?
Schedule 4, section 4.12, example and note

Following on from clause 4, mentions of *contractor* are substituted with *voluntary member*.

Clause 30 Leave payments for service as registered employee—security industry
Schedule 4, section 4.13, definition of *R* and example and note

This clause inserts new wording to clarify that, in cases where a registered worker is receiving compensation under the *Workers Compensation Act 1951* (WC Act), *R* is the weekly average of the ordinary remuneration received by the worker during the four quarters before the injury to which the compensation relates occurred. This is consistent with the rest of the Act which provides that ordinary remuneration means salary or wages, and allowances, paid or payable to a worker for work and includes workers' compensation payments made to a worker by the worker's employer. It also aligns with the Act providing that a registered worker's service period is not taken to end if a person stops being a worker because of an incapacity for which the worker is entitled to compensation under the WC Act.

The definition of *R* for any other case (cases where a registered worker is not receiving compensation under the WC Act) remains the same.

Clause 31 Leave payments for service as registered contractor—
Schedule 4, new section 4.14 (4)

This clause inserts a definition for *designated day* for the purposes of calculating the amount payable to a registered worker for the security industry for long service leave for service accrued as a registered contractor.

Clause 32 Reviewable decisions
Schedule 5, items 9 and 10

This clause updates the reference to the existing reviewable decisions in items 9 and 10, in accordance with the revised number of these provisions in the Bill.

This clause also inserts item 9A – refuse to allow employer additional time for giving return to Authority – as a new reviewable decision under the Act, in accordance with the introduction of section 49A.

Clause 33 Dictionary, definition of *contractor*

This is a technical amendment which removes *contractor* from the dictionary as a consequence of the definition of *voluntary member* in section 10. The term *contractor* is now defined within section 10 of the Act.

Clause 34 Dictionary, new definition of *voluntary member*

As a consequence of the amendment in clause 4, this clause inserts a new definition of *voluntary member*, which will be provided for under section 10 of the Act.

Clause 35 Further amendments, mentions of *contractor*

As a consequence of the amendment in clause 4, references to *contractor* are substituted with *voluntary member*.

Clause 36 Further amendments, mentions of *contractors*

As a consequence of the amendment in clause 4, references to *contractors* are substituted with *voluntary members*.

Clause 37 Further amendments, mentions of *contractor's*

As a consequence of the amendment in clause 4, all further mentions of *contractor's* are substituted with *voluntary member's*.