



Australian Capital Territory

# Long Service Leave (Portable Schemes) Amendment Act 2019

A2019-44

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Australian Capital Territory

# Long Service Leave (Portable Schemes) Amendment Act 2019

A2019-44

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An Act to amend the *Long Service Leave (Portable Schemes) Act 2009*

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The Legislative Assembly for the Australian Capital Territory enacts as follows:

**1 Name of Act**

This Act is the *Long Service Leave (Portable Schemes) Amendment Act 2019*.

**2 Commencement**

This Act commences on 1 January 2020.

*Note* The naming and commencement provisions automatically commence on the notification day (see [Legislation Act](#), s 75 (1)).

**3 Legislation amended**

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

**4 Section 10**

*substitute*

**10 Who is a *voluntary member*?**

- (1) An individual is a *voluntary member* for a covered industry if—
  - (a) the individual is—
    - (i) a contractor; or
    - (ii) a working director; or
    - (iii) declared to be a voluntary member for the industry under section 12; and
  - (b) the individual is not declared not to be a voluntary member for the industry under section 13.
- (2) In this section:

*contractor* means an individual (other than an employee) who carries out work in the industry for another person for fee or reward on the individual's own account.

*working director* means a person who is both a director and an employee of a company.

## 5 Service credit—employee’s prior service Section 47 (1)

*omit*

no earlier than 4 years

## 6 Section 47 (3) and example and note

*substitute*

- (3) If subsection (2) does not apply, the registrar may credit the employee with 1 day of service in the workers register for the covered industry for each day of the employee’s service in the covered industry, up to a maximum of 1 year, before the employee’s registration if the registrar is satisfied that the person was employed in the covered industry.

### Example

The registrar is satisfied that Joe, before his registration day, had separate periods of service as an employee in the contract cleaning industry of 25 and 125 days. The registrar may credit Joe in the workers register for the contract cleaning industry with 150 days (being less than 1 year) of service.

## 7 New section 47A

*insert*

### 47A Service credit—unreported service

- (1) This section applies in relation to an employee’s service in a covered industry for work in the industry if—
- (a) the employee is a registered worker in a covered industry; and
  - (b) the employee’s employer has failed to give the authority a return (a *quarterly return*) under section 49; and

- (c) the employee's employer ceases to trade in the ACT.
- (2) The registrar may credit the employee with 1 day of service in the workers register for the covered industry for each day of the employee's service in the covered industry, up to a maximum of 1 year, if the registrar is satisfied that—
  - (a) the employee was employed in the covered industry; and
  - (b) a quarterly return has not been given to the authority in relation to the employee's day of service.

**Example**

Belinda worked in the security industry for Moonlight Security Pty Ltd for 30 days in the quarter before the company ceased trading and went into liquidation without giving a return to the authority for the period Belinda worked. She then started work in the same covered industry for Bob the Bouncer for 45 days. Bob the Bouncer also failed to give a return in relation to Belinda's employment, but continues to operate in the industry. The registrar is satisfied that Belinda works as an employee in the security industry, and that quarterly returns have not been given to the authority in relation to Belinda's employment with either employer. The registrar may credit Belinda in the workers register for the security industry with 75 days (being less than 1 year) of service.

**8 Section 49**

*substitute*

**49 Quarterly returns by employers**

- (1) A person who is an employer for a covered industry during a quarter must give the authority a return (a **quarterly return**) containing the required information for the quarter.

*Note* A late fee is payable if a quarterly return is not given to the authority within the later of 1 month after the end of the quarter and any additional time allowed by the registrar (see s 49A).

- (2) A person commits an offence if the person—
  - (a) is required to give the authority a quarterly return for a quarter; and



(b) fails to give the quarterly return to the authority within the later of—

- (i) 3 months after the end of the quarter; and
- (ii) any additional time the registrar allows.

Maximum penalty: 20 penalty units.

(3) This section does not apply in relation to an employee who carried out work for the employer for less than 5 days during the quarter.

*Note* The defendant has an evidential burden in relation to a matter mentioned in s (3) (see [Criminal Code](#), s 58).

(4) An offence against this section is a strict liability offence.

(5) The registrar may allow additional time under subsection (2) (b) (ii) before or after the end of the 3-month period mentioned in subsection (2) (b) (i).

(6) In this section:

***required information***, for an employer for a quarter, means—

- (a) the name of each of the employer's employees who carried out work for the employer during the quarter; and
- (b) for each of the employer's employees—
  - (i) the total ordinary remuneration paid or payable by the employer to the employee for work done during the quarter; and
  - (ii) the number of days, or part days, during the quarter to which the remuneration relates; and
- (c) anything else prescribed by regulation.

**49A Late fee—quarterly return**

- (1) This section applies if an employer for a covered industry fails to give the authority a quarterly return mentioned in section 49 (1) within the later of—
  - (a) 1 month after the end of the quarter; and
  - (b) any additional time the registrar allows.
- (2) The employer is liable to pay to the authority a late fee of \$200 for each month or part of a month, up to a maximum of \$400, that the employer fails to give the authority the quarterly return after the later of the periods stated in subsection (1).
- (3) However, the registrar may waive all or part of a late fee if satisfied that the circumstances for the failure—
  - (a) were not caused by the employer; or
  - (b) make it unfair or unreasonable to charge the late fee.

*Note* An amount owing under a law may be recovered as a debt in a court of competent jurisdiction or the ACAT (see [Legislation Act](#), s 177).

**9 Section 52**

*substitute*

**52 Interest payable on levy payment**

- (1) This section applies if an employer for a covered industry fails to pay the authority the levy payable under section 50, in relation to a return for a quarter at the time the return is required to be given to the authority under section 49 (1).
- (2) The employer is liable to pay to the authority interest on the amount of the levy unpaid, worked out daily from the end of the last day for payment until the day it is paid at the interest rate from time to time worked out under section 53.

- (3) However, the registrar may waive all or part of the interest if satisfied that the circumstances for the failure—
- (a) were not caused by the employer; or
  - (b) make it unfair or unreasonable to charge the premium rate component.

*Note* An amount owing under a law may be recovered as a debt in a court of competent jurisdiction or the ACAT (see [Legislation Act](#), s 177).

- (4) If a court finds a person guilty of an offence under section 50, whether or not it convicts the person, the court may, whether or not it imposes a penalty on the person, order the person to pay the authority—
- (a) the levy to which the prosecution relates; and
  - (b) the interest accrued on the amount of the levy unpaid.

### **53 Interest rate**

- (1) The interest rate is the sum of—
- (a) the discount rate component; and
  - (b) the premium rate component.
- (2) The Minister must, after consultation with the governing board, make guidelines for determining the interest rate components mentioned in subsection (1).
- (3) A guideline is a disallowable instrument.

*Note* A disallowable instrument must be notified, and presented to the Legislative Assembly, under the [Legislation Act](#).

- (4) The governing board must—
- (a) in accordance with the guidelines, determine the interest rate; and
  - (b) tell the Minister, in writing, about the determination.

- (5) A determination is a notifiable instrument.

*Note* A notifiable instrument must be notified under the [Legislation Act](#).

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

*omit*

weekdays

*substitute*

days

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

*substitute*

- (2) If the governing board determines the levy—
- (a) if the levy is payable by employers—the determination repeals a determination made by the Minister under section 51 (2); and
  - (b) if the levy is payable by registered voluntary members—the determination repeals a determination made by the Minister under section 56 (1); and
  - (c) the governing board must tell the Minister, in writing, about the determination.
- (3) A determination is a disallowable instrument.

*Note* A disallowable instrument must be notified, and presented to the Legislative Assembly, under the [Legislation Act](#).

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**12 Employers to keep records  
Section 57 (2)**

*omit*

6 years

*substitute*

7 years

**13 New part 5A**

*insert*

**Part 5A Liability of company directors to pay levy****58A Application—pt 5A**

This part applies if—

- (a) a company (the *defunct company*)—
  - (i) is an employer in a covered industry; and
  - (ii) fails to pay the authority a levy payable by the company under section 50 for a quarter; and
  - (iii) disposes of property (a *creditor-defeating disposition*) in a way that has the effect of—
    - (A) preventing the property becoming available for the benefit of the company's creditors in the winding-up of the company; or
    - (B) 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; and

- (iv) ceases to trade; and
- (b) another company (the *phoenix company*) is incorporated that—
  - (i) is an employer in the covered industry; and
  - (ii) conducts substantially the same business as the business conducted by the defunct company; and
- (c) at least 1 of the directors of the phoenix company was a director of the defunct company at the time the creditor-defeating disposition happened.

**58B Liability of directors to pay levy**

- (1) This section applies if—
  - (a) a person—
    - (i) is a director of a phoenix company; and
    - (ii) was a director of a defunct company at the time the company made a creditor-defeating disposition; and
  - (b) the levy payable by the defunct company under section 50 remains unpaid.
- (2) The authority may recover as a debt from the person—
  - (a) the amount of the levy that remains unpaid; and
  - (b) any interest payable under section 52 on the amount of the levy unpaid; and
  - (c) any costs reasonably incurred by the authority in recovering the unpaid levy.

*Note* An amount owing under a law may be recovered as a debt in a court of competent jurisdiction or the ACAT (see [Legislation Act](#), s 177).

- (3) If 2 or more people are together and separately liable to pay an amount under subsection (2), the authority may recover the whole of the amount from them, or any of them, or any 1 of them.
- (4) In this section:
  - creditor-defeating disposition*—see section 58A (a) (iii).
  - defunct company*—see section 58A (a).
  - phoenix company*—see section 58A (b).

**14 Removing people from workers register  
New section 65 (3) (d)**

*insert*

- (d) schedule 4, section 4.9 (Entitlement to payment instead of leave—security industry).

**15 Section 76**

*substitute*

**76 Power to obtain, inspect and copy records**

- (1) An inspector may, in writing, require any of the following 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 this Act:
  - (a) an employer for a covered industry;

- (b) a voluntary member for a covered industry;
- (c) a bank or other financial institution that holds accounts for an employer, or voluntary member, for a covered industry;
- (d) an accountant or bookkeeper engaged by an employer, or voluntary member, for a covered industry.

**Example**

request and obtain by email a list of employees

- (2) An inspector who enters premises under this part may, for this Act, do 1 or more of the following in relation to the premises or anything at the premises:
  - (a) examine anything;
  - (b) examine and copy, or take extracts from, documents relating to a contravention, or possible contravention, of this Act;
  - (c) take photographs, films, or audio, video or other recordings;
  - (d) require the occupier, or anyone at the premises, to give information, answer questions, or produce documents or anything else (whether the information, document or other thing is at the premises or elsewhere) that the occupier or person at the premises has, or has access to, that are reasonably necessary to exercise a function under this Act;
  - (e) require the occupier, or anyone else at the premises, to give the inspector copies of documents produced under paragraph (d) that are reasonably necessary to exercise a function under this Act;



- (f) require the occupier, or anyone else at the premises, to give the inspector reasonable help to exercise a power under this part.

**Example—par (d)**

An inspector is conducting an inspection at a construction site. The inspector forms the view that relevant documents are held at the head office of the company operating the construction site. A person at the premises may be required to produce the documents that are held at the head office.

*Note* A reference to an Act includes a reference to statutory instruments made or in force under the Act, including regulations and any law or instrument applied, adopted or incorporated by the Act (see [Legislation Act](#), s 104).

- (3) A person must take reasonable steps to comply with a requirement made of the person under subsection (1) or subsection (2) (d), (e) or (f).

Maximum penalty: 50 penalty units.

**76A Abrogation of privilege against self-incrimination**

- (1) A person is not excused from answering a question or providing information or a document under this part on the ground that the answer to the question, or the information or document, may tend to incriminate the person or expose the person to a penalty.
- (2) However, any information, document or thing obtained, directly or indirectly, because of the giving of the answer or the production of the document is not admissible in evidence against the person in a civil or criminal proceeding, other than a proceeding for an offence arising out of the false or misleading nature of the answer, information or document.

**76B Warning to be given**

- (1) Before requiring a person to answer a question or provide information or a document under this part, an inspector must—
  - (a) warn the person that failure to take reasonable steps to comply with a requirement mentioned in section 76 (2) would constitute an offence; and
  - (b) warn the person about the effect of section 76A.
- (2) It is not an offence for an individual to refuse to answer a question put by an inspector or provide information or a document to an inspector under this part on the ground that the question, information or document might tend to incriminate the individual, unless the individual was first given the warning in subsection (1) (b).
- (3) Nothing in this section prevents an inspector from obtaining and using evidence given to the inspector voluntarily by any person.

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

*substitute*

- (2) If the registrar is satisfied that the employer has paid a long service leave entitlement to the employee under a corresponding law, the registrar may reimburse the lesser of—
  - (a) the amount the employer paid to the employee; and
  - (b) the amount the authority would have paid the employee.

**17 Schedule 1, section 1.5**

*substitute*

**1.5 Long service leave formula—building and construction industry**

The *long service leave formula* for the building and construction industry is—

(a) for service before 20 December 1996—

$$W = 0.8667 \times \frac{RS}{220}$$

(b) for service on or after 20 December 1996—

$$W = 1.3 \times \frac{RS}{220}$$

**RS** means the registered worker's number of days recognised service.

**W** means the number of weeks long service leave held by the registered worker.

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

*substitute*

**Example**

John has 10 years of service in the building and construction industry, giving him an entitlement to 13 weeks long service leave. He first worked in the industry as a registered employee and accrued 7 weeks of the entitlement in that capacity. John then worked as a registered voluntary member and accrued 6 weeks of the entitlement in that capacity.

John decides to take 9 weeks long service leave. The payment for the leave is the total of the following amounts:

- the amount calculated under section 1.12 where ‘D’ is 1185 (ie it took 1185 days of service as a registered employee to accrue the first 7 weeks of his long service leave entitlement);
- the amount calculated under section 1.13 which is the total of the amounts paid to the authority under section 56 for his first 1.54 years work as a registered voluntary member (ie it took 338 days of service as a registered voluntary member to accrue the next 2 weeks of his long service leave entitlement) and the interest under section 1.13 on those amounts.

**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***

*omit*

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

*substitute*

***R*** is—

- (a) if the registered worker is receiving compensation under the *Workers Compensation Act 1951*—the weekly average of the ordinary remuneration received by the worker during the 4 quarters before the injury to which the compensation relates happened; or
- (b) in any other case—the highest of the weekly averages of the ordinary remuneration received by the registered worker during each of the following periods that applies to the worker:
  - (i) the most recent 2 quarters of service as a registered employee before the designated day;
  - (ii) the most recent 4 quarters of service as a registered employee before the designated day;
  - (iii) the most recent 20 quarters of service as a registered worker before the designated day;

- (iv) the most recent 40 quarters of service as a registered worker before the designated day.

**Example—R, par (b)**

Henry has worked in the cleaning industry for 7 years. The periods in par (b) (i), (ii) and (iii) apply to Henry because he has completed more than 20 quarters (or 5 years), but less than 40 quarters (or 10 years), relevant service.

Henry's average weekly income for the 2 quarters before the designated day is \$283. His weekly averages for the 4 and 20 quarters before the designated day are \$427 and \$375, respectively. Accordingly, 'R' is \$427 because it is the highest of the weekly averages.

**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***

*omit*

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

*substitute*

- (a) in relation to the ACT, any of the following:
  - (i) the industry of providing education and care services;
  - (ii) the industry of providing residential aged care services;
  - (iii) the industry of providing community aged care services;
  - (iv) the industry of providing employment placement services for disabled people;
  - (v) the industry of providing the following residential care services:
    - (A) care accommodation or homes for disadvantaged people where nursing or medical care is not provided as a major service;

- (B) residential corrective services for young offenders;
- (vi) the industry of providing community service advocacy services;
- (vii) the industry of providing non-residential care welfare services (including fund-raising services for welfare services) not included in subparagraphs (i) to (vi); and

**23 Schedule 3, new section 3.1 (2)**

*after the note, insert*

- (2) In this section:

***education and care service*** means an approved education and care service under the *Education and Care Services National Law (ACT)*, section 5 (1).

Note The *Education and Care Services National Law (ACT) Act 2011*, s 6 applies the Education and Care Services National Law set out in the *Education and Care Services National Law Act 2010* (Vic), schedule as if it were an ACT law called the *Education and Care Services National Law (ACT)*.

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

*omit*

community sector industry work

*substitute*

community sector work

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

*omit*

cleaning work

*substitute*

community sector work

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

*substitute*

***R*** is—

- (a) if the registered worker is receiving compensation under the [Workers Compensation Act 1951](#)—the weekly average of the ordinary remuneration received by the worker during the 4 quarters before the injury to which the compensation relates happened; or
- (b) in any other case—the highest of the weekly averages of the ordinary remuneration received by the registered worker during each of the following periods that applies to the worker:
  - (i) the most recent 2 quarters of service as a registered employee before the designated day;
  - (ii) the most recent 4 quarters of service as a registered employee before the designated day;



- (iii) the most recent 20 quarters of service as a registered worker before the designated day.

**Example—R, par (b)**

Harry has worked in the community sector industry for 5 years. The periods in par (b) (i), (ii) and (iii) apply to Harry because he has completed more than 20 quarters (or 5 years) relevant service.

Harry's average weekly income for the 2 quarters before the designated day is \$283. His weekly averages for the 4 and 20 quarters before the designated day are \$427 and \$375, respectively. Accordingly, 'R' is \$427 because it is the highest of the weekly averages.

**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***

*omit*

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

*omit*

cleaning work

*substitute*

security work

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

*substitute*

**Example**

Trevor has 7 years of service in the security industry giving him an entitlement to 6.0669 weeks long service leave. He first worked in the industry as a registered employee and accrued 4.3335 weeks of the entitlement in that capacity. Trevor then worked as a registered voluntary member and accrued 1.7334 weeks of the entitlement in that capacity.

Trevor decides to take 6.0669 weeks long service leave. The payment for the leave is the total of the following amounts:

- the amount calculated under s 4.13 where ‘D’ is 1825 (ie it took 1825 days of service as a registered employee to accrue the first 4.3335 weeks of his long service leave entitlement);
- the amount calculated under s 4.14 which is the total of the amounts paid to the authority under s 56 for his 730 days work as a registered voluntary member (ie it took that period of service as a registered voluntary member to accrue the next 1.7334 weeks of his long service leave entitlement) and the interest under s 4.14 on those amounts.

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

*substitute*

***R*** is—

- (a) if the registered worker is receiving compensation under the *Workers Compensation Act 1951*—the weekly average of the ordinary remuneration received by the worker during the 4 quarters before the injury to which the compensation relates happened; or

- (b) in any other case—the highest of the weekly averages of the ordinary remuneration received by the registered worker during each of the following periods that applies to the worker:
- (i) the most recent 2 quarters of service as a registered employee before the designated day;
  - (ii) the most recent 4 quarters of service as a registered employee before the designated day;
  - (iii) the most recent 20 quarters of service as a registered worker before the designated day.

**Example—R, par (b)**

Danijela has worked in the security industry for 5 years. The periods in par (b) (i), (ii) and (iii) apply to Danijela because she has completed more than 20 quarters (or 5 years) relevant service.

Danijela's average weekly income for the 2 quarters before the designated day is \$283. Her weekly averages for the 4 and 20 quarters before the designated day are \$427 and \$375, respectively. Accordingly, 'R' is \$427 because it is the highest of the weekly averages.

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

*insert*

- (4) In this section:

***designated day*** means—

- (a) if the registered worker is taking long service leave—the day the leave begins; and
- (b) if the registered worker is being paid instead of taking long service leave—the day the payment is made.

**32 Reviewable decisions  
Schedule 5, items 9 and 10***substitute*

9	49 (2) (b) (ii)	refuse to allow employer additional time for giving return to authority	employer	registrar
9A	49A (1) (b)	refuse to allow employer additional time for giving return to authority	employer	registrar
9B	49A (3)	refuse to waive all or part of late fee payable by employer	employer	registrar
10	52 (3)	refuse to waive all or part of interest payable by employer	employer	registrar

**33 Dictionary, definition of *contractor****omit***34 Dictionary, new definition of *voluntary member****insert****voluntary member***—see section 10.

**35 Further amendments, mentions of *contractor***

*omit*

contractor

*substitute*

voluntary member

*in*

- section 8
- section 11, definition of **work**, paragraph (b) (ii)
- sections 12 (2) (c) and 13 (2) (c)
- section 48
- sections 54 and 55
- section 58 (1) and (2)
- section 60 (2) (b)
- section 61 (1) (b)
- section 62 (4)
- section 65 (4) (c)
- section 67 (d)
- schedule 1, section 1.4A (3) (c)
- schedule 1, section 1.9 (1)
- schedule 1, section 1.11 (1) (b)
- schedule 1, section 1.13
- schedule 2, section 2.4A (3) (c)
- schedule 2, section 2.9 (1)
- schedule 2, section 2.11
- schedule 2, section 2.13
- schedule 3, section 3.5A (3) (c)
- schedule 3, section 3.10 (1)

- schedule 3, section 3.12
- schedule 3, section 3.14
- schedule 4, section 4.5A (3) (c)
- schedule 4, section 4.10 (1)
- schedule 4, section 4.12 (1) (b)
- schedule 4, section 4.14
- schedule 5, items 7, 8 and 11

### **36 Further amendments, mentions of *contractors***

*omit*

contractors

*substitute*

voluntary members

*in*

- section 38 (1) (b)
- section 48 (2)
- sections 54 and 55 headings
- sections 56 and 56A
- section 58 heading
- section 60 (1)
- section 61 (1) (b)
- section 62 (4)
- section 67 (d)
- section 76 (1), example
- section 79I
- section 79K (a)
- section 79N (3)
- section 83

- schedule 1, section 1.4 (1), note
- schedule 1, section 1.13 (1) (a)
- schedule 2, section 2.4 (1), note 1
- schedule 2, section 2.13 (1) (a)
- schedule 3, section 3.5 (1), note 1
- schedule 3, section 3.14 (1) (a)
- schedule 4, section 4.5 (1), note 1
- schedule 4, section 4.14 (1) (a)

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

*omit*

contractor's

*substitute*

voluntary member's

*in*

- section 48
- section 54 (4), definition of *required information*, paragraph (b)
- section 58 (1)
- schedule 1, section 1.4A (3) (c)
- schedule 2, section 2.4A (3) (c)
- schedule 3, section 3.5A (3) (c)
- schedule 4, section 4.5A (3) (c)

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## Endnotes

**1 Presentation speech**

Presentation speech made in the Legislative Assembly on 24 October 2019.

**2 Notification**

Notified under the [Legislation Act](#) on 6 December 2019.

**3 Republications of amended laws**

For the latest republication of amended laws, see [www.legislation.act.gov.au](http://www.legislation.act.gov.au).

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I certify that the above is a true copy of the Long Service Leave (Portable Schemes) Amendment Bill 2019, which was passed by the Legislative Assembly on 26 November 2019.

Clerk of the Legislative Assembly

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