

Australian Capital Territory

Long Service Leave (Portable Schemes) COVID-19 Emergency Leave Determination 2020 (No 1)

Disallowable instrument DI2020–116

made under the

Long Service Leave (Portable Schemes) Act 2009, schedule 1, section 1.6 and section 1.8; schedule 2, section 2.6 and section 2.8; schedule 3, section 3.7 and section 3.9; schedule 4, section 4.7 and 4.9

EXPLANATORY STATEMENT

This instrument is the *Long Service Leave (Portable Schemes) COVID-19 Emergency Leave Determination 2020 (No 1)*.

Amendments were made to the *Long Service Leave (Portable Schemes) Act 2009* under the *COVID-19 Emergency Response Legislation Amendment Act 2020*. These amendments are designed to assist workers whose employment has been negatively impacted by the COVID-19 outbreak.

In summary, the amendments would allow eligible workers:

- to access leave earlier than is currently allowed under the portable schemes legislation;
- who have exited a covered industry permanently to apply for a payment instead of leave without having to wait for 20 weeks to pass;
- who have exited a covered industry during the COVID-19 emergency before becoming entitled to portable long service leave, to access a payment instead of leave for their recognised service.

This instrument now determines the eligibility criteria and amount of leave for workers to apply for early access to their portable long service leave. Specifically, eligibility will be for workers who meet all the following criteria:

- 18 months or more recognised service in a covered industry in the ACT; and
- recognised service in the last 12 months; and
- suffering hardship because they are unable to work and unable to earn because of COVID-19.

In relation to whether a worker has suffered hardship because they are unable to work and unable to earn because of COVID-19, examples of where this would occur are if:

- the worker's employment has been terminated due to COVID;
- the worker has been stood down without pay because of COVID and is not receiving any other form of remuneration associated with their employment;
- the worker is not ill with COVID-19 but is self-isolating because of possible past exposure to COVID-19;
- the worker is required to care for someone who is ill with COVID-19 or isolating because of potential past exposure to COVID-19; or
- the worker is ill with COVID-19 and is not able to access paid sick leave.

This instrument also determines the amount of leave that is able to be used under the COVID-19 early access to portable long service leave provisions in the Act. Eligible workers will be able to access up to two weeks leave, based on the application of the relevant long service leave formula to their period of covered service in the ACT.

Depending on the amount of portable long service leave that a worker has worked out in accordance with the long service leave formula they may not have a full two weeks of long service leave. In these cases, the operation of the requirement that long service leave be taken in blocks of two weeks or more (for example in schedule 1, section 1.7 (2) of the Act) would result in an unfair outcome to those workers who do not have a full two weeks of leave and potentially preclude them from taking the leave contrary to the intention of the amendments.

However, the rules of statutory interpretation under sections 138 and 139 of the *Legislation Act 2001* where the legislation appears to create an inconsistency state that an interpretation that best achieves its purpose is preferred.

In this case, the clear purpose and intent of the COVID-19 early access to portable long service leave provisions are to give temporary support to those workers whose employment has been negatively impacted by the COVID-19. The amendments to the Act gave broad powers for the Minister to set the eligibility criteria that would apply in these specific circumstances, including the amount of leave eligible workers would be able to access. Given this, and consistent with that purpose, workers who are eligible for the COVID-19 early access to portable long service leave would be able to take a period of leave that is less than two weeks.

This instrument will expire when the COVID-19 early access to portable long service leave provisions in the Act expire.