

Minister for Disability  
Minister for Community Services and Facilities  
Minister for Employment and Workplace Safety  
Minister for Government Services and Procurement  
Member for Yerrabi

Mrs Giulia Jones MLA  
Chair  
Standing Committee on Justice and Community Safety  
ACT Legislative Assembly  
London Circuit  
CANBERRA ACT 2601

Dear Mrs Jones

I refer to *Scrutiny Report 37* of the Standing Committee on Justice and Community Safety (the Committee) which discusses the *Long Service Leave (Portable Schemes) Bill 2019* (the Amendment Bill).

The Amendment Bill will amend the *Long Service Leave (Portable Schemes) Act 2009* (the Act) to ensure the continued effective administration of the portable long service leave schemes.

I would like to thank the Committee for their careful consideration of the Amendment Bill. I note that the Committee has raised a number of human rights concerns and sought clarification in relation to the new provisions of the Amendment Bill that relate to phoenixing activity.

In relation to the powers of inspectors under the Amendment Bill applying to anyone at the premises and the abrogation of self-incrimination, these are standard provisions that support the integrity of the scheme through effective and efficient inspector powers and also provide a number of safeguards to persons if they are required to provide information for the purposes of the Act.

The requirement for any person at a premise or workplace to be required to give information can also be found in the *Work Health and Safety Act 2011*, *Dangerous Substances Act 2004* and the *Motor Accidents Injuries Act 2019*. These provisions will bring the portable long service scheme legislation into line with inspector powers under other regulatory schemes. I do however note the Committee's interest in a human rights justification of the proportionality of these provisions and have revised the Explanatory Statement for the Amendment Bill accordingly.

Lastly, rather than waiting for phoenixing behaviour to affect employees and their entitlements to portable long service leave, the Government is being proactive about addressing this type of behaviour. This behaviour is deliberate, it disadvantages workers and hurts sub-contractors and creditors. If allowed, this behaviour could also affect the future viability of the scheme.

The portable long service scheme legislation establishes a penalty and regulatory framework to respond to non-compliance. However, this is not effective in circumstances where because of the deliberate phoenixing actions of a company, orchestrated through its directors, the Long Service Leave Authority (the Authority) is prevented from recovering unpaid levies to the scheme. This behaviour unfairly requires

other complying companies to foot the bill for levies owed by the phoenixed company to support the long service leave entitlements of workers for which levies have not been paid.

Directors need to be cautious about who they do business with. There are quite often genuine reasons why, despite good intentions, businesses fail. However, phoenixing behaviour is deliberate. It is also known to exist in the industries covered by the Act and has been known to occur particularly in the construction industry.

The phoenixing provisions in this Bill will apply a regulatory action that incentivises directors to comply with their obligations under the Act, rather than deliberately avoiding them by phoenixing.

New Section 58B establishes the connection between being a director of a defunct company that makes a creditor-defeating disposition, and a director of a new company. To ensure that these provisions are confined to phoenixing behaviour, the liability of a company to pay levies follows the director if they are a director at the time of the creditor defeating disposal of assets and subsequently become a director of a new company that carries on substantially the same business. They do not apply more broadly, for example by attaching to any director on the winding up of a company.

I trust this response addresses the Committee's comments in relation to the Bill.

Yours sincerely

Suzanne Orr MLA  
Minister for Employment and Workplace Safety