



New South Wales

Building and Construction Industry Long Service Payments Regulation 2017

under the

Building and Construction Industry Long Service Payments Act 1986

His Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Building and Construction Industry Long Service Payments Act 1986*.

DOMINIC PERROTTET, MP
Minister for Industrial Relations

Explanatory note

The object of this Regulation is to remake, with minor amendments, the provisions of the *Building and Construction Industry Long Service Payments Regulation 2011*, which would otherwise be repealed on 1 September 2017 by section 10 (2) of the *Subordinate Legislation Act 1989*.

This Regulation provides for the following matters:

- (a) the definition of standard pay,
- (b) the circumstances in which a registered worker does not accumulate a service credit,
- (c) the retirement age for certain workers,
- (d) the circumstances in which a long service levy is not payable in respect of the erection of a building (these include where the cost of erecting the building is less than \$25,000, or where the building is erected for a statutory body or a non-profit organisation),
- (e) the rates of long service levies based on the cost of erecting the building concerned,
- (f) the procedures for appealing to the Building and Construction Industry Long Service Payments Committee against certain decisions of the Long Service Corporation,
- (g) the records to be kept by employers about their workers, and the particulars to be contained in those records.

This Regulation is made under the *Building and Construction Industry Long Service Payments Act 1986*, including the definitions of **building and construction work**, **Commonwealth industrial instrument** and **standard pay** in section 3 (1), and sections 19 (1), 21 (4) (c), 24 (2A), 27 (1), 32A (5), 34 (2) (c), 35, 41 (6) (b), 42 (5) (b), 43 (6) (b), 45, 47 (5), 54 (1) (b) and (2), 56 (1) and (2) and 65 (the general regulation-making power).

This Regulation comprises or relates to matters set out in Schedule 3 to the *Subordinate Legislation Act 1989*, namely matters of a machinery nature and matters that are not likely to impose an appreciable burden, cost or disadvantage on any sector of the public.

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Part 1 Preliminary

1 Name of Regulation

This Regulation is the *Building and Construction Industry Long Service Payments Regulation 2017*.

2 Commencement

This Regulation commences on 1 September 2017 and is required to be published on the NSW legislation website.

Note. This Regulation replaces the *Building and Construction Industry Long Service Payments Regulation 2011*, which is repealed on 1 September 2017 under section 10 (2) of the *Subordinate Legislation Act 1989*.

3 Definitions

(1) In this Regulation:

Committee Secretary means the person, whether or not a member of the Committee, nominated by the Chairperson of the Committee to send and receive correspondence on behalf of the Committee.

the Act means the *Building and Construction Industry Long Service Payments Act 1986*.

Note. The Act and the *Interpretation Act 1987* contain definitions and other provisions that affect the interpretation and application of this Regulation.

(2) Notes included in this Regulation do not form part of this Regulation.

Part 2 Workers, service credits and long service payments

4 Prescribed awards

For the purposes of paragraphs (a) and (b) (ii) of the definition of **building and construction work** in section 3 (1) of the Act, the prescribed awards are:

- (a) the following modern awards under the *Fair Work Act 2009* of the Commonwealth:
 - (i) *Asphalt Industry Award 2010* [MA000054],
 - (ii) *Building and Construction General On-site Award 2010* [MA000020],
 - (iii) *Electrical, Electronic and Communications Contracting Award 2010* [MA000025],
 - (iv) *Joinery and Building Trades Award 2010* [MA000029],
 - (v) *Mobile Crane Hiring Award 2010* [MA000032],
 - (vi) *Plumbing and Fire Sprinklers Award 2010* [MA000036], and
- (b) the *Manufacturing and Associated Industries and Occupations Award 2010* [MA000010] as in force on 3 March 2011 (but only to the extent to which it relates to performance of work as a carpet layer), and
- (c) the following awards made (or taken to be made) under the *Industrial Relations Act 1996* (but only in relation to contracts entered into before 28 November 2011):
 - (i) *Building and Construction Industry (State) Award* published 31 August 2001,
 - (ii) *Building Crane Drivers (State) Award* published 22 April 2005,
 - (iii) *Electrical, Electronic and Communications Contracting Industry (State) Award* published 28 November 2008,
 - (iv) *Gangers (State) Award* published 25 January 2002,
 - (v) *General Construction and Maintenance, Civil and Mechanical Engineering &c. (State) Award* published 24 March 2006,
 - (vi) *Glass Workers (State) Award* published 20 April 2001,
 - (vii) *Joiners (State) Award* published 23 May 2003,
 - (viii) *Plant, &c., Operators on Construction (State) Award* published 16 November 2001,
 - (ix) *Plumbers and Gasfitters (State) Award* published 25 February 2000.

5 Commonwealth industrial instruments

For the purposes of the definition of **Commonwealth industrial instrument** in section 3 (1) of the Act, the following are prescribed:

- (a) a modern award under the *Fair Work Act 2009* of the Commonwealth,
- (b) an enterprise agreement under the *Fair Work Act 2009* of the Commonwealth,
- (c) a Division 2B State instrument under Schedule 3A to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* of the Commonwealth,
- (d) an instrument given continuing effect under Schedule 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* of the Commonwealth.

6 Standard pay

For the purposes of paragraph (b) of the definition of *standard pay* in section 3 (1) of the Act, *standard pay* means the amount of ordinary pay that is payable at the rate applicable from time to time to the classification “Level 3 (CW/ECW 3)” for a carpenter and joiner under the *Building and Construction General On-site Award 2010* [MA000020] in respect of work on 5 working days during those hours in which ordinary pay is payable.

7 Non-service days—prescribed days to be disregarded

- (1) For the purposes of section 19 (1) of the Act, any day on which, because of a circumstance specified in subclause (2), a registered worker does not accumulate a service credit is prescribed as a day to be disregarded in calculations made under section 19 (1A) or (1B) of the Act in respect of the worker.
- (2) The circumstances are the following:
 - (a) the worker does not work because she is pregnant,
 - (b) the worker does not work because he or she is caring for another person and is in receipt of a Commonwealth carer allowance under the *Social Security Act 1991* of the Commonwealth,
 - (c) the worker is performing building and construction work under an arrangement that does not provide for making payments of long service benefits to the employee and is performing that work as an employee of:
 - (i) the Crown, or
 - (ii) a county council (within the meaning of the *Local Government Act 1993*), or
 - (iii) a local council.

8 Prescribed costs

For the purposes of section 21 (4) (c) of the Act, the prescribed costs incurred by a registered worker in deriving the assessable income referred to in section 21 (4) (b) of the Act are those losses and outgoings relating to materials and to contracts for labour and services that it is permissible to deduct, under the *Income Tax Assessment Act 1997* of the Commonwealth, from that assessable income.

9 Prescribed adjustment of service period

For the purposes of section 24 (2A) of the Act, the prescribed adjustment of the period of service with which a worker may be credited in the register of workers kept under the Act is 220 days less the total number of days with which the worker is entitled to be credited in records of building and construction workers’ service kept under one or more corresponding laws.

10 Prescribed retiring age

For the purposes of the definition of *prescribed retiring age* in section 27 (1) of the Act, the prescribed retiring age in respect of a worker who has been granted a pension under section 38 of the *Veterans’ Entitlements Act 1986* of the Commonwealth is the age at which, under that Act, the worker became eligible to be granted that pension.

11 Prescribed interval

- (1) For the purposes of section 32A (5) of the Act, the prescribed interval is:
 - (a) if the last recorded service of the worker is credited under the Act, the de-registration period of the State or Territory under which the worker seeks to claim service credits, or

- (b) if the last recorded service of the worker is credited under a corresponding law—4 years.
- (2) In this clause, *de-registration period* means the period specified in the corresponding law which would either result in the worker being removed, or entitle the worker to be removed, from the building and construction workers' service record kept under that corresponding law for failing to accrue service credits.

Part 3 Long service levies

12 Exemptions from levy

- (1) For the purposes of section 34 (2) (c) of the Act, a long service levy is not payable in respect of the erection of a building (within the meaning of Part 5 of the Act) if the cost of erecting the building is less than \$25,000.
 - (2) For the purposes of section 34 (2) (c) of the Act, a long service levy is not payable in respect of the erection of a building (or a part of a building) if the Corporation is satisfied that:
 - (a) the building is to be erected for a body constituted under any State or Commonwealth Act (other than an Act prescribed for the purposes of paragraph (a) of the definition of *worker* in section 3 (1) of the Act) or for a local council or county council, and
 - (b) all the persons to be employed on site in erecting the building (or part of the building) will be persons employed under a contract of employment with that body or council.
 - (3) For the purposes of section 34 (2) (c) of the Act, a long service levy is not payable in respect of the erection of a building (within the meaning of Part 5 of the Act) if:
 - (a) consent to the erection of the building is not required to be obtained under Part 3A, 4 or 5.1 of the *Environmental Planning and Assessment Act 1979*, and
 - (b) consent to the erection of the building is not required to be obtained under any other Act or regulation, and
 - (c) the erection of the building commenced on or after 1 May 2004.
- Note.** The reference in this subclause to Part 3A of the *Environmental Planning and Assessment Act 1979* is a reference to Part 3A of that Act as continued by Schedule 6A to that Act. (See clause 4 of that Schedule.)
- (4) For the purposes of section 34 (2) (c) of the Act, a long service levy is not payable in respect of the voluntary component of the erection of a building if the Corporation is satisfied that:
 - (a) the building is to be erected by or on behalf of a church or a non-profit organisation, or by an owner-builder, and
 - (b) the building is to be erected wholly or partly by voluntary labour, or by the labour of the owner-builder.
 - (5) A church, a non-profit organisation or an owner-builder by whom or on whose behalf a long service levy has been paid is entitled to a refund of so much (if any) of the levy as was, because of subclause (3), not properly payable.
 - (6) In this clause:

non-profit organisation means:

 - (a) a non-profit organisation having as one of its objects a charitable, benevolent, philanthropic or patriotic purpose, or
 - (b) any other non-profit sporting, religious or community organisation.

owner-builder means the holder of an owner-builder permit under the *Home Building Act 1989*.

voluntary component, in relation to the erection of a building, means that proportion of the cost of erecting the building that, in the opinion of the Corporation, the cost attributable to voluntary labour (or the labour of the owner-builder) bears to the total cost of erecting the building, but not exceeding 50% nor exceeding the percentage that will result in a long service levy of less than \$50.

13 Prescribed rate of long service levy

- (1) For the purposes of section 35 of the Act, the prescribed rate is 0.35%.
- (2) For the purposes of section 35 of the Act, the prescribed rate for an additional amount of the long service levy under section 41 of the Act is 0.35% of the excess cost of erecting the building.

14 Prescribed amounts

- (1) For the purposes of sections 41 (6) (b) and 42 (5) (b) of the Act, the prescribed amount is \$25,000.
- (2) For the purposes of section 43 (6) (b) of the Act, the prescribed amount is \$10,000,000.

15 Certification as to payment of levy

For the purposes of section 45 of the Act, the following offices or positions in the staff of the Corporation are prescribed offices or positions:

- (a) Director,
- (b) Business Manager Customer Service and Operations,
- (c) Finance Controller.

16 Certification as to levy due

For the purposes of section 47 (5) of the Act, the persons holding the following offices in the staff of the Corporation are prescribed officers:

- (a) Director,
- (b) Business Manager Customer Service and Operations,
- (c) Finance Controller.

Part 4 Appeals to Committee

17 Time for making appeal

- (1) For the purposes of section 54 (1) (b) of the Act, an appeal to the Committee against a decision of the Corporation is to be made within 42 days after the appellant is notified of the decision appealed against.
- (2) However, an appeal may be made up to 6 months after the appellant is notified of the decision appealed against, if the Chairperson of the Committee is satisfied that exceptional circumstances exist.

18 Making an appeal

- (1) An appeal to the Committee is to be made by lodging with the Committee Secretary a notice of appeal in the form approved by the Committee.
- (2) A notice of appeal must contain the following information:
 - (a) the decision, or the part of a decision, that is being appealed,
 - (b) the grounds of appeal,
 - (c) the contact details of the appellant and, if the appellant has engaged a legal representative, the contact details of the legal representative,
 - (d) whether the appellant intends to make oral submissions (either in person or with a legal representative) to the Committee in relation to the appeal,
 - (e) any other information required by the Committee.

Note. Section 52 of the Act contains additional requirements for a notice of appeal in relation to decisions by the Corporation under section 46 of the Act relating to interest on unpaid levies.

- (3) All correspondence, submissions and other documents in connection with an appeal, including any notice of the withdrawal of an appeal, are to be lodged with the Committee Secretary and are to be lodged within the time period (if any) specified by the Committee.

19 Determination of appeal

- (1) If the appellant has not indicated an intention to make oral submissions in the notice of appeal, the Committee may:
 - (a) determine the appeal based on the notice of appeal and any written submissions from the Corporation or the appellant, or
 - (b) request further information from the appellant in relation to the appeal and consider any information so provided in determining the appeal.

Note. The Committee may at any time refer the matter to the Corporation for reconsideration (see section 54 (3) of the Act).

- (2) If the Committee requests further information from the appellant, the appellant may indicate an intention to make oral submissions in relation to the appeal (either in person or with a legal representative).
- (3) If the appellant indicates an intention to make oral submissions in relation to the appeal (in the notice of appeal or following a request from the Committee for further information), the Committee Secretary is, in consultation with the Chairperson of the Committee, to determine a date and place for the hearing of the appeal.
- (4) At the hearing of an appeal, the appellant and the appellant's legal representative (if any) may:
 - (a) address the Committee on any matter relating to the appeal, and

- (b) with the approval of the Committee, produce any documents, records or information relating to the appeal.
- (5) The parties to an appeal (and their legal representatives) are not entitled to call a person to give evidence, or to cross examine any person, at the hearing of the appeal.
- (6) The Committee may adjourn the hearing of an appeal to a later date if the Committee considers it necessary to enable the Committee to consider any oral submissions made, or any documents, records or information produced, at the hearing.
- (7) The Committee Secretary must give the appellant and the Corporation written notice of its decision on an appeal as soon as practicable after the decision is made.

Part 5 Miscellaneous

20 Employers' books, records and particulars

For the purposes of section 56 (1) of the Act, the prescribed books and records to be kept by an employer of a worker under a contract of employment and the particulars to be contained in those books and records are:

- (a) time sheets or attendance records disclosing the attendance at work of the worker, and
- (b) books or records containing the following particulars (whether or not contained in the time sheets or attendance records):
 - (i) the name and address of the worker,
 - (ii) the registration number of the worker,
 - (iii) the kind of work performed by the worker,
 - (iv) the award under which the worker is paid,
 - (v) details of any payments to the worker under the *Long Service Leave Act 1955*,
 - (vi) the total number of days each week on which the worker performed building and construction work for more than half the worker's ordinary work day,
 - (vii) the payslips of the worker and any PAYG payment summary statements for the worker.

21 Subcontract workers' books and records

For the purposes of section 56 (2) of the Act, the prescribed books and records to be kept by a subcontract worker and the particulars to be contained in those books and records are:

- (a) books and records containing copies of accounting, taxation and other records relating to any claim or proposed claim for service credits under section 21 of the Act, and
- (b) books and records containing copies of any claim for service credits made by the subcontract worker under that section.

22 Savings

Any act, matter or thing that, immediately before the repeal of the *Building and Construction Industry Long Service Payments Regulation 2011*, had effect under that Regulation continues to have effect under this Regulation.