



New South Wales

Building and Construction Industry Long Service Payments Regulation 2022

under the

Building and Construction Industry Long Service Payments Act 1986

[*The following enacting formula will be included if this Regulation is made—*]

Her 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*.

Minister for Fair Trading

Explanatory note

The object of the Regulation is to repeal and remake, with minor amendments, the *Building and Construction Industry Long Service Payments Regulation 2017*, which would otherwise be repealed on 1 September 2022 by the *Subordinate Legislation Act 1989*, section 10(2).

This Regulation provides for the following matters—

- (a) the prescribed awards under the definitions of *building and construction work* and *Commonwealth industrial instrument*,
- (b) the definition of *standard pay*,
- (c) the circumstances in which a registered worker does not accumulate a service credit,
- (d) the prescribed costs incurred by a registered worker in deriving assessable income when claiming a service credit,
- (e) the prescribed adjustment of a service period,
- (f) the retirement age for certain workers,
- (g) the prescribed interval of maximum absence from service in applications for long service benefits,
- (h) the circumstances in which a long service levy is not payable and the rates of long service levies,
- (i) appeals to the Building and Construction Industry Long Service Payments Committee,
- (j) the records required to be kept by employers about their workers,
- (k) the service of documents by electronic message using a web portal.

public consultation draft

Building and Construction Industry Long Service Payments Regulation 2022 [NSW]
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Building and Construction Industry Long Service Payments Regulation 2022

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Building and Construction Industry Long Service Payments Act 1986

Part 1 Preliminary

1 Name of Regulation

This Regulation is the *Building and Construction Industry Long Service Payments Regulation 2022*.

2 Commencement

This Regulation commences on 1 September 2022.

Note— This Regulation replaces the *Building and Construction Industry Long Service Payments Regulation 2017*, which is repealed on 1 September 2022 by the *Subordinate Legislation Act 1989*, section 10(2).

3 Definitions

In this Regulation—

county council has the same meaning as in the *Local Government Act 1993*.

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.

Part 2 Workers, service credits and long service payments

4 Awards—the Act, s 3, definition of “building and construction work”

For the Act, section 3(1), definition of *building and construction work*, paragraphs (a) and (b)(ii), 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 2020* [MA000025],
 - (iv) *Electrical Power Industry Award 2020* [MA000088],
 - (v) *Joinery and Building Trades Award 2020* [MA000029],
 - (vi) *Mobile Crane Hiring Award 2020* [MA000032],
 - (vii) *Plumbing and Fire Sprinklers Award 2020* [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—the Act, s 3, definition of “Commonwealth industrial instrument”

For the Act, section 3(1), definition of *Commonwealth industrial instrument*, 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 the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* of the Commonwealth, Schedule 3A,
- (d) an instrument given continuing effect under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* of the Commonwealth, Schedule 3.

6 Standard pay—the Act, s 3, definition of “standard pay”

- (1) For the Act, section 3(1), definition of *standard pay*, paragraph (b), ***the amount of pay prescribed*** is the amount of ordinary pay payable, at the rate applying from time to time, to a carpenter and joiner of the relevant classification for 5 working days during the hours in which ordinary pay is payable.
- (2) In this section—
relevant classification means Level 3 (CW/ECW 3) under the *Building and Construction General On-site Award 2020* [MA000020].

7 Non-service days—the Act, s 19

- (1) For the Act, section 19(1), the following must be disregarded in calculating the number of non-service days for a registered worker—
 - (a) a day a worker does not work because the worker is pregnant or has a pregnancy-related condition,
 - (b) a day a worker does not work because the worker is caring for another person for whom the worker receives a Commonwealth carer allowance under the *Social Security Act 1991* of the Commonwealth,
 - (c) a day a worker is performing building and construction work under an arrangement that does not make payments of long service benefits to the worker as an employee of—
 - (i) the Crown, or
 - (ii) a local council, or
 - (iii) a county council,
 - (d) a day a worker does not work because the worker is suffering from personal illness or injury,
 - (e) a day a worker does not work because of a serious illness, a serious injury or a death affecting the worker’s immediate family or a member of the worker’s household.
- (2) In this section—
immediate family has the same meaning as it has in the *Fair Work Act 2009* of the Commonwealth.
Note— The Act, section 19(1) provides that a non-service day means a day for which the worker did not accumulate a service credit and is used in calculations under the Act, section 19(1A) and (1B).

8 Costs for service credits claims—the Act, s 21

For the Act, section 21(4)(c), the prescribed costs are losses and outgoings that—

- (a) relate to materials and contracts for labour and services, and
- (b) are permissible to deduct, under the *Income Tax Assessment Act 1997* of the Commonwealth, from the assessable income.

9 Adjustment of service period for service credits claims—the Act, s 24

- (1) For the Act, section 24(2A), the worker’s period of service must be adjusted to 220 days, less the number of days the worker is entitled to be credited in relevant records.
- (2) In this section—
relevant records means records of building and construction workers’ service kept under 1 or more corresponding laws.

10 Retiring age for worker receiving partner service pension—the Act, s 27

For the Act, section 27(1), definition of *prescribed retiring age*, paragraph (b), the prescribed retiring age for a worker receiving a partner service pension under the *Veterans' Entitlements Act 1986* of the Commonwealth, is the age at which the worker became eligible for the partner service pension.

11 Interval between periods of service for entitlement to long service payments in reciprocating State or Territory—the Act, s 32A

- (1) For the Act, section 32A(5), 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 section—
- de-registration period* means the period specified in the corresponding law which would result in one of the following for a worker failing to accrue service credits—
- (a) the worker being removed from the building and construction workers' service record kept under the corresponding law,
 - (b) the worker being entitled to be removed from the building and construction workers' service record kept under the corresponding law.

Part 3 Long service levies

12 Exemptions from levy—the Act, ss 34 and 42(1A)

- (1) For the Act, section 34(2)(c), a long service levy is not payable in relation to the following—
 - (a) the erection of a building if the cost of erecting the building is less than—
 - (i) until 31 December 2022—\$25,000, and
 - (ii) from 1 January 2023—\$250,000,
 - (b) the erection of a building, or a part of a building, if the Corporation is satisfied—
 - (i) the building will be erected for—
 - (A) a body constituted under a State or Commonwealth Act, other than an Act prescribed for the purposes of the Act, section 3(1), definition of *worker*, paragraph (a), or
 - (B) a local council, or
 - (C) a county council, and
 - (ii) a person working on the site will be a person employed under a contract of employment with the body or council,
 - (c) the erection of a building if—
 - (i) an environmental planning instrument provides the building may be erected without development consent under the *Environmental Planning and Assessment Act 1979*, section 4.1, and
 - (ii) consent to the erection of the building is not required to be obtained under another Act or regulation, and
 - (iii) the erection of the building commenced on or after 1 May 2004,
 - (d) the voluntary component of the erection of a building if the Corporation is satisfied the building will be erected—
 - (i) by or on behalf of a relevant person, or,
 - (ii) wholly or partly by voluntary labour.
- (2) A relevant person is entitled to a refund of the part of a long service levy paid by the relevant person that is not payable because of subsection (1)(d).
- (3) In this section—

non-profit organisation means an incorporated or unincorporated body not formed or conducted for private gain.

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

relevant person means the following—

- (a) a church,
- (b) a non-profit organisation,
- (c) an owner-builder.

voluntary component, in relation to the erection of a building, means the part, not exceeding 50% of the cost of erecting the building that, in the opinion of the Corporation, is equivalent to the amount of voluntary labour involved in erecting the building.

voluntary labour includes the labour of an owner-builder.

13 Exemptions from levy—bushfire relief—the Act, ss 34 and 42(1A)

- (1) This section does not apply to the erection of a building by or on behalf of the Crown, to replace or repair a building destroyed or damaged as a result of bushfire in the period starting 1 July 2019 and ending 2 March 2020.
- (2) For the Act, section 34(2)(c), a long service levy is not payable in relation to the first \$1,000,000 of the cost of erecting a building.
- (3) Subsection (2) applies only if the person—
 - (a) is liable to pay the long service levy under the Act, section 37, and
 - (b) has made a written application to the Corporation for an exemption before—
 - (i) 2 March 2023, or
 - (ii) a later date approved by the Corporation.
- (4) A person is entitled to a refund of the part of a long service levy paid by the person that is not payable because of subsection (2).

14 Prescribed rates for long service levy—the Act, s 35

For the Act, section 35, the prescribed rate for a long service levy payable for a building is—

- (a) until 31 December 2022—0.35% of the cost of erecting the building, and
- (b) from 1 January 2023—0.25% of the cost of erecting the building.

Note— The prescribed rate for an additional amount of the long service levy under the Act, section 41(3), is also calculated at this rate.

15 Prescribed amounts—the Act, ss 41, 42 and 43

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

Part 4 Appeals to Committee

16 Definitions

In this part—

Chairperson has the same meaning as in the Act, Schedule 1.

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.

17 Time for making appeal—the Act, s 54

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

18 Making an appeal—the Act, s 54

- (1) For the Act, section 54(2), an appeal to the Committee must 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 the decision 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 to the Committee in relation to the appeal and, if so, whether the appellant intends to make the submissions—
 - (i) in person or by audio visual link, and
 - (ii) with or without a legal representative,
 - (e) other information required by the Committee.
- (3) Correspondence, submissions and other documents in connection with an appeal, including a notice of the withdrawal of an appeal, must be lodged—
 - (a) with the Committee Secretary, and
 - (b) if the Committee specifies a time period for the lodging of material—within the time period.

19 Determination of appeal—the Act, s 54(2)

- (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 written submissions from the Corporation or the appellant, or
 - (b) request further information from the appellant in relation to the appeal and consider information provided in determining the appeal.
- (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—
 - (a) in person or by audio visual link, and
 - (b) with or without a legal representative.

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Building and Construction Industry Long Service Payments Regulation 2022 [NSW]
Part 4 Appeals to Committee

- (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 matters relating to the appeal, and
 - (b) with the approval of the Committee, produce documents, records or information relating to the appeal.
- (5) The parties to an appeal, and their legal representative, may not call a person to give evidence, or to cross examine a 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 oral submissions made or 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 Interest rate on overdue long service levy—the Act, s 46

For the Act, section 46(4)(b), the prescribed rate is the rate 6% above the cash rate last published by the Reserve Bank of Australia—

- (a) for interest accrued between 1 January and 30 June—immediately before 1 January, and
- (b) for interest accrued between 1 July and 31 December—immediately before 1 July.

21 Employers' books, records and particulars—the Act, s 56

(1) For the Act, section 56(1), the following books, records and particulars are prescribed—

- (a) time sheets or attendance records for the worker,
- (b) books or records containing the following particulars, whether or not contained in the time sheets or attendance records—
 - (i) the name, address and e-mail 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 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 PAYG payment summary statements for the worker.

(2) If a book or record required to be kept under this section is in electronic form, the book or record must be able to be produced in written form.

22 Subcontract workers' books and records—the Act, s 56

(1) For the Act, section 56(2), books and records containing copies of the following are prescribed—

- (a) financial records relating to claims and proposed claims for service credits made under the Act, section 21,
- (b) claims for service credits made under the Act, section 21.

(2) If a book or record required to be kept under this section is in electronic form, the book or record must be able to be produced in written form.

23 Service of documents—the Act, s 57

For the Act, section 57(1)(f), a document may be served on a person by electronic message using a web portal if the person consents to the service of documents using the web portal.

24 Saving

An act, matter or thing that, immediately before the repeal of the *Building and Construction Industry Long Service Payments Regulation 2017*, had effect under that Regulation continues to have effect under this Regulation.

Schedule 1 Penalty notice offences—the Act, s 64A

Application of Schedule

- (1) For the Act, section 64A—
 - (a) each offence created by a provision specified in this Schedule is an offence for which a penalty notice may be issued, and
 - (b) the amount payable for the penalty notice is the amount specified opposite the provision.
- (2) If the provision is qualified by words that restrict its operation to limited kinds of offences or to offences committed in limited circumstances, the penalty notice may be issued only for—
 - (a) the limited kind of offence, or
 - (b) an offence committed in the limited circumstances.

Column 1	Column 2
Provision	Penalty
Offences under the Act	
Section 16A	\$200
Section 20(1)	\$200
Section 31A	\$200
Section 39	\$500
Section 41(2)	\$200
Section 41(4)	\$500
Section 56(3)	\$200