



# Regulatory Impact Statement

Proposed Building and Construction Industry  
Long Service Payments Regulation 2022



**July 2022**

## **Disclaimer**

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# 1. Background

## 1.1 History of scheme & current overview

The NSW Government administers a scheme which provides a portable long service benefit for registered workers in the building and construction industry in NSW. The Scheme allows eligible workers in the industry to work for different employers or as contractors while still qualifying for a long service benefit. Building and construction work is often project-based, so that workers are likely to change jobs frequently and not reach 10 years of service with the one employer which would ordinarily entitle them to long service leave.

All defined benefits and requirements are determined by the *Building and Construction Industry Long Service Payments Act 1986* (the Act). The Act is currently supported by the *Building and Construction Industry Long Service Payments Regulation 2017* (the 2017 Regulation). The Act replaced the original legislation when the Scheme was first introduced back in 1975.

The Scheme is paid for by a levy on any building and construction work in NSW costing \$25,000 or more. This is usually paid by the developer or the person for whom the work is being performed. The levy is based on the estimated value of the work and is currently set at the rate of 0.35%. All levies are pooled into a statutory Building and Construction Industry Long Service Payments Fund (BCI Fund) which, along with investment returns, is used to pay the entitlements of workers. Eligible workers are entitled to the equivalent of 8.67 weeks' pay for every ten years of recorded service. Employers of eligible workers can also benefit from the Scheme and be reimbursed when they pay a long service benefit to a worker. There is no cost to workers or employers to belong to the Scheme.

### Operational Overview<sup>1</sup>

2020-21 Financial Year	Building and Construction Industry NSW
Total number of active registered workers	473,336
New worker registrations	33,292
Total registered employers	36,305
New employer registrations approved	3,140
Amount of levy collected by the LSC	\$193.89 million
Worker claims volume	10,540
Worker claims value	\$89.67 million
Employer claims volume	962
Employer claims value	\$6.17 million

<sup>1</sup> [https://www.longservice.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0018/64080/Long-Service-AR-2021.pdf](https://www.longservice.nsw.gov.au/__data/assets/pdf_file/0018/64080/Long-Service-AR-2021.pdf)

## **1.2 Why the Regulation is being remade**

Under the *Subordinate Legislation Act 1989*, most regulations are scheduled for automatic repeal after five years to ensure that they remain relevant and fit-for-purpose. Regulations that are due for repeal can be remade either with or without amendments, postponed, or allowed to lapse.

The 2017 Regulation is due for staged repeal on 1 September 2022. As there is no particular reason to postpone the repeal at this stage, it is proposed that it be remade. Preparation of a Regulatory Impact Statement (RIS) is required for the remake of this Regulation. This RIS sets out the rationale and objectives of the proposed Regulation as well as the options available to achieve those objectives, including an assessment of the associated costs and benefits.

## **1.3 Matters outside the scope of this consultation**

Matters covered by the Act are not the subject of the consultation process. This means that the RIS deals with matters only within the scope of the Regulation and does not deal with the provisions contained in the Act or any administrative policies and procedures associated with the operation of the Scheme.

## 2. Consultation program

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### 2.1 Statement of public consultation

The proposed Regulation and this RIS have been made available on the NSW Government's 'Have Your Say' website at [www.haveyoursay.nsw.gov.au](http://www.haveyoursay.nsw.gov.au)

A notice advising of the commencement of public consultation and the availability of the proposed Regulation and RIS has been published in the NSW Government Gazette, and in the Daily Telegraph and the Sydney Morning Herald.

Copies of the proposed Regulation and this RIS have been provided directly to known key stakeholders. A list of these stakeholders is provided at Appendix 2 of this document.

### 2.2 How to make a submission

Interested organisations and individuals are invited to make a submission on any matter relevant to the proposed Regulation, whether or not it is addressed in this RIS.

We would prefer to receive submissions through the [NSW Government's Have Your Say website](http://www.haveyoursay.nsw.gov.au).

Documents provided to us should be produced in an 'accessible' format. Accessibility is about making documents more easily available to members of the public who have some form of impairment (visual, physical, cognitive).

More information on how you can make your submission accessible is available on the WebAIM website at <http://webaim.org/techniques/word/>

Submissions can also be made by email or mail:

Email to: [policy@customerservice.nsw.gov.au](mailto:policy@customerservice.nsw.gov.au)

Mail to: Building and Construction Industry Long Service Payments Regulation 2022  
Policy & Strategy, Better Regulation Division  
Level 22, 4 Parramatta Square  
12 Darcy Street  
PARRAMATTA NSW 2150

## 2.3 Confidential submissions

All submissions are generally made publicly available on the 'Have Your Say' website. If you do not want any part of your submission published, please indicate this clearly in your submission.

Automatically generated confidentiality statements in emails are not sufficient. However, it should be noted that, even if you state that you do not wish certain information to be published, there may be circumstances in which the government is required by law to release that information (for example, in accordance with the requirements of the *Government Information (Public Access) Act 2009*). It is also a statutory requirement that all submissions are provided to the Legislation Review Committee of Parliament (though not made public), with the final version of the published Regulation.

## 2.4 Evaluation of submissions

All submissions received will be considered and assessed. The proposed Regulation may be amended, if necessary, to address issues identified in the consultation process. If further information is required, targeted consultation will be undertaken before the proposed Regulation is finalised.

## 2.5 Proposed commencement of new Regulation

After the proposed Regulation has been finalised, following the round of public consultation, it will then be submitted to the Minister for Fair Trading and to the Governor for approval.

Once approved, the new Regulation will then be published on the NSW Government legislation website at [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au) prior to commencing.

The new Regulation is scheduled to commence on 1 September 2022 when the existing Regulation is due to be repealed. However, proposed changes to the levy rate and threshold amount are scheduled to commence on 1 January 2023. The intention is to align these amendments with the start of the next relevant quarterly cycle to allow adequate time to inform stakeholders and make system changes.



## 3. Objectives and rationale of the proposed Regulation

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### 3.1 Need for government action

Government action is necessary as the 2017 Regulation is due for automatic repeal on 1 September 2022. Without a Regulation in place, the Act cannot be effectively administered or enforced. It is therefore necessary for the government to make a new Regulation.

The 2017 Regulation was last amended in 2020 when bushfire relief provisions were inserted. The proposed Regulation seeks to further improve the 2017 Regulation to ensure that this important legislative regime continues to operate effectively.

### 3.2 Objective

The main purpose of the proposed *Building and Construction Industry Long Service Payments Regulation 2022* (the proposed Regulation) is to provide legislative support and administrative detail for the operation of the Act. The main objectives of the Act are to:

- make provisions for long service payments to workers engaged in the building and construction industry,
- provide mechanisms for the registration of workers, the accrual of service credits, and the entitlements of workers as well as how the Scheme is to be funded,
- establish the Building and Construction Industry Committee (the BCI Committee), and
- set out the powers of the Long Service Corporation (LSC) relating to compliance and enforcement.

The proposed Regulation is a continuation of an ongoing regulatory regime that has been in existence since the introduction of the Act. The main objectives of the proposed Regulation remain largely the same as the 2017 Regulation. The 2017 Regulation provides for the following matters:

- circumstances in which a registered worker accumulates a service credit on a non-service day,
- the long service levy rate and the threshold amount for estimated value of work,
- circumstances in which a levy is not payable,
- the procedure for appealing to the BCI Committee against certain decisions of the LSC, and
- the records to be kept by employers about their workers.

The proposed Regulation, besides the above matters, provides for introduction of penalty infringement notices for appropriate offences under the Act.



### 3.3 Rationale

The proposed Regulation is necessary to provide the legislative support and administrative detail for the effective operation of the Act.

It is necessary to remake the Regulation now because:

- the 2017 Regulation will automatically repeal on 1 September 2022 under the sunset provisions of the *Subordinate Legislation Act 1989*, and
- without a supporting Regulation, the Act cannot operate effectively or be appropriately enforced and administered.

### 3.4 Options for achieving objectives

The primary objective of the proposed Regulation is to provide administrative detail and legislative support to the operation of the Act. Three main options have been identified for achieving this objective and they are:

#### **Option 1: Take no action**

Allow the 2017 Regulation to lapse under the sunset provisions of the *Subordinate Legislation Act 1989* and do not make a replacement Regulation.

#### **Option 2: Maintain the status quo**

Remake the 2017 Regulation “as is” without amendment to maintain the current regime.

#### **Option 3: Make the proposed Regulation with changes**

Remake the 2017 Regulation with amendments to modernise and improve the current regime.

### 3.5 Criteria used to assess the regulatory options

The following criteria have been used to evaluate the options:

- the extent to which the option best:
  - supports the objectives of the Act,
  - improves administrative efficiency,
  - reduces costs on businesses, and
  - promotes a stronger compliance and enforcement regime.
- the cost effectiveness of each option, in terms of costs and benefits to businesses, workers, the broader community and government.

## 4. Impact assessment of options

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### 4.1 Assessment of Option 1 – Take no action

This option would mean that the 2017 Regulation lapses under the sunset provisions of the *Subordinate Legislation Act 1989* with no replacement.

#### **Option 1 - Costs**

Under Option 1, the obligations under the Act would remain in force. However, employers and workers would have to determine how to best comply with those obligations without the administrative guidance and procedures contained in the 2017 Regulation.

#### Industry Costs

In the absence of a Regulation, the Act would not be able to fully provide for the effective administration of the Scheme. This could create confusion for both employers and workers. For example, in the absence of provisions that prescribe the awards for defining 'building and construction work', employers may not be able to fully identify all eligible workers. Provisions relating to standard pay, non-service days and recognition of long service benefits in corresponding jurisdictions would not be realised. This means that some workers in the industry would not be able to accrue accurate service credits and use that to establish that they are entitled to long service leave benefits.

In the absence of exemptions, some builders/developers would face uncertainty about whether a levy was payable. Under the Act, employers and contractors are required to maintain financial records in accordance with provisions in the 2017 Regulation (for example, particulars of workers, type of work performed, details of payment, records relating to service credits etc.). Absence of these guidelines will lead to increased administrative costs and create uncertainty as to which records need to be kept.

#### Government Costs

Permitting the 2017 Regulation to simply lapse would cause significant administrative burden on the government. Administrative policies and procedures would need to be developed to replace the provisions in the 2017 Regulation dealing with the conduct of appeals. Inactive workers would need to be kept in the system in the absence of the provision enabling those with no service credits in four consecutive years to be culled. Enquiries to the LSC would increase if the administrative detail in the 2017 Regulation was removed and not replaced. Most importantly, without a Regulation, there would be no levy rate, jeopardising the ongoing viability of the Scheme. The government would need to fund the Scheme from the existing surplus. There will also be no threshold amount or exemptions applying to building and construction work.

### **Option 1 – Benefits**

There are no significant benefits under this option given that there will be no Regulation to support the objectives of the Act.

#### Industry Benefits

There are no tangible benefits for the industry with this option. They benefit from the guidance and clarity that the Regulation provides in ensuring that they comply with their obligations and avoid the penalties under the Act for non-compliance.

#### Government Benefits

There would be minor savings achieved in time and effort to the NSW Government in not having to remake the Regulation every 5 years. The numerous negative flow-on effects mentioned above would however, outweigh any such benefits. As such, the benefits of Option 1 have been assessed as **low**.

### **Option 1 - Conclusion**

Allowing the 2017 Regulation to lapse without any replacement Regulation would not help the Act achieve its objectives. This option would undermine the efficacy of the Scheme. The risks and costs associated with removing the Regulation would significantly outweigh any potential benefits for workers, the industry and the government. For these reasons, **option 1 is not the preferred option**.

## **4.2 Assessment of Option 2 – Maintain the status quo**

Option 2 would mean not to make the proposed Regulation and instead remaking the 2017 Regulation “as is” without any amendments.

### **Options 2 - Costs**

Under this option, the costs on workers, industry and the government would remain largely the same as they are at present.

#### Industry Costs

Existing costs for industry in complying with the 2017 Regulation would remain ongoing under this option. There may be additional costs incurred as some provisions would be out of date or not worded in simple language to understand. Option 2 would also impose an opportunity cost on the industry because the proposed changes in Option 3 would not be incorporated.

#### Government Costs

Under this option there will be no added costs for the government as existing practices and systems will not require any update. However, for the government there would be a loss of opportunity to create more robust and modern legislation. For example, a stronger compliance and enforcement regime

through the introduction of penalty infringement notices (PINs) in the proposed Regulation would not be implemented. In the absence of PINs, offences that are minor in nature that attract low penalties will still have to be dealt with through formal court proceedings, which causes significant administrative burden.

### ***Option 2 – Benefits***

The benefits in remaking the 2017 Regulation without any amendments would primarily relate to savings in time and effort for both the industry and the government. The Regulation would still achieve the objectives of the Act and provide the necessary administrative detail.

#### Industry Benefits

The industry would continue to implement existing business practices as they are familiar with the current regulatory requirements. Ongoing benefits for workers would also stay the same. However, there would be a missed opportunity to make refinements to the Scheme for the mutual benefit of the Government, employers and workers.

#### Government Benefits

Allowing the 2017 Regulation to be remade without any amendments would offer a short-term benefit to the government as it would be unnecessary to update existing procedures to implement new regulatory changes. There would be no need to update website information, amend forms, make changes to the web portal or develop and provide communication material about any changes to relevant stakeholders.

The overall benefits of this option have been assessed as **low**.

### **Option 2 - Conclusion**

This option would still allow for the Act's main objectives to be achieved, but it would not do so in the optimal way given the scope for potential improvements. Remaking the 2017 Regulation without any proposed changes will not add any costs to either the industry or the government. The overall benefits of the current regulatory regime will continue to remain the same. However, there is also an opportunity cost associated with this option because the proposed changes in Option 3 would not be incorporated. For these reasons, **option 2 is not the preferred option**.

## **4.3 Assessment of Option 3 – Remake the regulation**

Option 3 would result in the proposed Regulation with amendments being made to replace the 2017 Regulation when it lapses on 1 September 2022. The proposed Regulation largely carries forward the current regulatory framework and provides added refinements and improvements. In particular, the proposed Regulation reduces the levy rate, increases the threshold that attracts the levy and introduces Penalty Infringement Notices (PINs) to improve compliance and enforcement.

### **Option 3 - Costs**

Under this option there would be costs imposed on both the industry and the Government in order to implement and comply with the proposed changes.

#### Industry Costs

There are no substantial costs identified for the building and construction industry under this option. There may be initial administrative costs related to updating internal processes. These primarily relate to changes to the record keeping requirements. However, the costs incurred on incorporating these changes are considered as one-off and not significant. The long-term benefits in modernising the Regulation will outweigh these initial costs.

#### Government Costs

Under this option there will be initial administrative costs for the Government in implementing the proposed changes. Internal processes and systems will need to be updated in a range of areas. There will be costs associated with staff training about the changes. There will also be costs incurred by the government in communicating the proposed changes under this option to stakeholders.

The proposed Regulation will reduce the long service levy rate and increase the non-leviable threshold for the estimated value of works for building and construction projects. These proposed changes are discussed in more detail later in this RIS. Naturally, over time this will reduce the amount of money going into the BCI fund. Having said this, the Scheme's Actuary assessment has found that after the proposed changes the current large surplus, plus the projected future levy income, will be more than adequate to cover the forward estimated benefits payable to workers.

### **Option 3 – Benefits**

Making the Regulation with amendments will offer a broad range of benefits to both the industry and the Government as identified below:

#### Industry Benefits

A reduction in the levy rate and an increase in the non-leviable threshold for the estimated value of work for projects will significantly reduce costs for the industry, especially small businesses that have been suffering from the financial impacts of COVID-19. A reduced levy rate would benefit these businesses by cutting costs and making them more competitive, especially in border regions where they often bid for jobs against those from other jurisdictions paying a lower rate. The combined effect of the levy rate reduction and increase in the threshold will mean cost savings for builders and developers, many of whom are small businesses. It is expected that this cost saving could be used to employ more workers, help to meet other business expenses, reduce the amount charged to customers and/or take on more work. As a result, the changes in the proposed Regulation are likely to have

significant flow-on effects to the NSW economy, given the importance and size of the building and construction industry.

The industry will benefit from proposed changes to recognise the availability and use of technological improvements especially during times of emergencies, like the COVID-19 pandemic, where an appellant or legal representative cannot attend a hearing in person, allowing for greater flexibility and timesaving.

Industry will also benefit from a number of updates made to record keeping requirements in the proposed Regulation, including the addition of capturing workers' email addresses and the option to keep books or records electronically.

### Government Benefits

The proposed Regulation aims to achieve a more modern, up-to-date and robust regulatory regime for the government to administer. The proposed changes to the threshold amount will mean that some smaller building and construction work will no longer attract the levy. This will result in administrative savings to the government in no longer having to process these small amounts.

One of the other primary benefits of Option 3 for the government will come from improvements to the compliance and enforcement regime. This will be achieved through the introduction of PINs in the proposed Regulation. PINs will act as a deterrent and encourage greater compliance from those wishing to avoid a fine. Where a PIN is issued there will be significant cost savings for government from avoiding the need to take court proceedings.

For these reasons, the overall benefits of this option have been assessed as **high**.

### **Option 3 - Conclusion**

Making the proposed Regulation will provide an overall net benefit to the industry and the Government by providing an improved, modernised, and stronger regulatory support to the operation of the Act. The proposed amendments can be implemented without incurring any significant costs for both the industry and the government, with resulting benefits outweighing these costs. **The option to remake the current Regulation with proposed amendments is therefore the preferred option.**

## **4.4 Summary and preferred option**

Option 3 is the preferred option. Remaking the current Regulation with amendments will best support the objectives of the Act and maintain the benefits of the 2017 Regulation while providing additional improvements. The proposed refinements to the current regulatory framework include simplifying provisions for better readability, modernising outdated provisions, promoting a stronger compliance and enforcement regime, and reducing costs for businesses by lowering the levy and raising the threshold.

Option 2 is not supported as it will simply carry forward the provisions of the 2017 Regulation and will not add any material benefits to the building and construction industry. The opportunity to improve and enhance the portable long service leave scheme would be missed.

Option 1 is not supported as it would allow the Regulation to lapse. This will mean that parts of the Act will become ineffective and the objectives of the Act could no longer be achieved. Option 1 would result in the loss of important provisions relating to eligible building and construction work awards, claims for service credits, the levy rate, threshold amount and exemptions. This option would have a significant negative impact on employers, workers and the government alike.

**Table 1: Summary of costs and benefits of each option**

Option	Costs	Benefits	Overall benefit	
1	Take no action	High	Low	Negative
2	Maintain status quo	Low	Low	Neutral
3	Make proposed Regulation	Low	High	Positive

**Table 2: Summary of benefits of each option against evaluation criteria**

Evaluation criteria	Option 1: Take no action	Option 2: Maintain status quo	Option 3: Make new Regulation
Supports objectives of the Act	No	Yes	Yes
Improves administrative efficiency	No	No	Yes
Reduces costs on businesses	No	No	Yes
Promotes stronger compliance and enforcement regime	No	No	Yes

Option 3 enables the proposed Regulation to meet the regulatory objectives of the Act in the most appropriate way. Option 3 is recommended as it efficiently and effectively addresses gaps in the current regulatory regime and provides the most net benefit to both the industry and government.



## 5. Regulation making powers

The following table sets out the current regulation making powers in the Act. It also identifies which of these powers are used in the proposed Regulation.

Section of Act	Regulation making power under the Act	Clause
3(1)	Prescribe the awards under which a rate of pay is fixed for the purpose of defining 'building and construction work'.	Clause 4 prescribes various modern awards under the <i>Fair Work Act 2009</i> and the <i>Industrial Relations Act 1996</i> .
3(1)	Declare an additional agreement or a class of agreements considered to be a 'Commonwealth industrial instrument'.	Clause 5 lists different instruments under the <i>Fair Work Act 2009</i> and <i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i> .
3(1)	Determine the amount of ordinary pay that constitutes 'standard pay'.	Clause 6 provides a 'standard pay' amount to be an ordinary pay for a carpenter and joiner Level 3 under the <i>Building and Construction General On-site Award 2020</i> .
3(1)	Exempt a class of persons from being considered as a 'worker'.	None prescribed.
19(1)	List special circumstances where a worker is otherwise not working on a particular day to be disregarded for calculating service credit.	Clause 7 outlines circumstances such as pregnancy-related conditions or personal illness or injury to be disregarded as a non-service day.
20(1)(b)	Alter the 7-day timeframe to submit a certificate of service for a worker who has ended their employment.	None prescribed.
21(4)(c)	Set out the method for determining assessable income and prescribed costs for a service credit claim.	Clause 8 outlines costs to be losses and outgoings deductible from the assessable income of a registered worker
24(2A)	Adjust the period of service for which an employee may be credited in the register of workers kept under the Act.	Clause 9 notes the period a worker is entitled to be credited in records of their service under one or more corresponding laws
27(1)(b)	Specify the retiring age of a registered worker in specified situations.	Clause 10 prescribes the retirement age to be when a worker receives a partner service pension under the <i>Veterans' Entitlements Act 1986</i>
29(5)	Alter the current maximum 38 hours per week for the purpose of calculating a registered worker's ordinary pay for calculation of long service payments.	None prescribed
32(2A)	Alter the current maximum 38 hours per week for the purpose of calculating a registered worker's ordinary pay for calculation of long service benefit entitlements in other States or Territories.	Clause 11 notes that for calculating long service benefit entitlements in a reciprocating State or Territory, the interval will be either the deregistration period of the State or Territory under which the claim is made or 4 years if the service is recorded under a corresponding law.
31(4)	Extend the 3 months' time period to apply for payment of a shortfall when a person takes alternate service benefits due to reasons such as bankruptcy, liquidation etc.	None prescribed
32B	Determine average weekly hours of pay for calculating leave payments to the worker and the employer, respectively.	None prescribed

Section of Act	Regulation making power under the Act	Clause
34(2)(c) & 42(1A)	Prescribe circumstances in which a long service levy is not payable.	Clause 12 lists circumstances such as a minimum threshold for cost of construction or when construction is under a different State or Commonwealth Act etc. where a levy is not payable. Clause 13 exempts construction that was part of bushfire repair or replacement during the specified time and provides for refund of such levy if paid
35	Prescribe the long service levy rate payable for the erection of a building.	Clause 14 prescribes the rate of levy
41(6)(b) & 42(5)(b)	Specify a different amount other than \$10,000 for when a supplementary levy payment is required.	Clause 15(1) prescribes a higher amount
42(7)	Change the 12 months' time period for lodging an application for a refund.	None prescribed
43(6)(b)	Alter the \$100,000 threshold for when a person can pay a levy by instalments.	Clause 15 (2) prescribes the amount to be \$10,000,000
45	Nominate any other person than the Secretary authorised or delegated to sign a levy payment certificate.	None prescribed
46(4)(b)	Vary the 2% interest rate payable under the Act on levies not paid on time.	Clause 20 prescribes a movable rate of interest
47(5)	Nominate another person to sign an assessment certificate for recovering an unpaid levy in court.	None prescribed
54(1)(b)	Change the 21 days' timeframe to make an appeal to the Committee against a decision of the Corporation.	Clause 17 states an appeal can be made within 42 days after notification of decision or up to 6 months in exceptional circumstances
54(2)	Outline the procedure for making and determining an appeal against a decision.	Clause 18 explains the process for making an appeal. Clause 19 explains the process for determination of an appeal.
56(1)56(2)	Require additional information to be included in books and records of workers kept by an employer and a subcontractor worker.	Clause 21 provides the details to be contained in those books and records of workers and Clause 22 notes the same for subcontract workers
57(1)(f)	State other ways in which documents can be legally served.	Clause 23 provides for service of documents through the web portal on the LSC website
58AB(4)(e)	Add another person or a body as a 'relevant agency' for information sharing purposes.	None prescribed
64A(2) & (4)	List the types of offences for which penalty infringement notices and fine amounts.	Schedule 1 lists the penalty notice offences and fine amounts
65	General regulation making power.	This provision is used throughout current Regulation
Schedule 3(16)	Make savings or transitional provisions.	Clause 24 ensures that any act, matter or thing that came into effect under the 2017 Regulation will continue to have the same effect under the proposed Regulation

## 6. Discussion of the proposed Regulation

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This section highlights and provides context for substantive changes that are proposed to be made to the 2017 Regulation. Submissions are welcome on any aspect of the proposed Regulation irrespective of whether the matter is discussed below.

### 6.1 Workers, service credits and long service payments

The proposed Regulation improves the current regulatory requirements by updating references to the prescribed awards under the *Fair Work Act 2009 of the Commonwealth*. This will ensure that the correct and relevant award is captured by the Regulation and workers do not lose benefits under the modern awards simply because the award reference is out of date.

Clause 4 of the proposed Regulation adds a new award, Electrical Power Industry Award 2020 [MA000088] to the provision. This recognises employees who perform maintenance work on electric turbines which is not covered by any of the awards currently listed. Workers have a Fair Work Commission approved Enterprise Bargaining Agreement in place which nominates the 'Electrical Power Industry Award 2020' as the applicable award. Recognising this additional award will enable employees working on electrical turbines to become registered workers and have their service credits recorded.

Clause 7 of the proposed Regulation carries forward the provision from the 2017 Regulation dealing with circumstances under which non-service days can be disregarded for calculating service credits. The proposed Regulation updates the wording to make it the same as the equivalent provision under the *Contract Cleaning Industry (Portable Long Service Leave Scheme) Regulation 2017* (CCI Regulation). This will achieve legislative consistency between the two portable schemes.

The proposed Regulation adds two more circumstances under which non-service days are to be disregarded when calculating service credits. These are any day on which a worker is suffering from personal illness or injury and any day on which a worker cannot work because of serious illness, serious injury or death affecting immediate family or a household's member. These circumstances have been adopted from the CCI Regulation.

Clause 10 of the proposed Regulation carries forward the provision from the 2017 Regulation on the prescribed retiring age for pensionable workers. The heading has been expanded to clarify that the provision only applies to a worker receiving a partner service pension.

- 1. Are there any further amendments needed to the provisions in the proposed Regulation dealing with workers, service credits and long service payments?**

## 6.2 Long service levies

### (a) Exemptions (including levy threshold)

The proposed Regulation carries forward the specific exemptions from the 2017 Regulation. This includes buildings erected by a government agency or a local council and in circumstances where consent to the erection of the building is not required under the *Environmental Planning and Assessment Act 1979*. Exemptions for the voluntary component of building work done by a church, non-profit organisation or an owner-builder have been maintained, along with the special exemption for work to replace or repair a building that was destroyed or damaged in the 2019/20 bushfires. The language and layout of these exemptions have been changed to improve readability, but the substance of these exemptions remain the same.

The main change in the proposed Regulation regarding exemptions is to the general threshold amount which attracts payment of the levy. The 2017 Regulation currently sets the threshold at \$25,000. It is being proposed that the threshold amount be increased to \$250,000. This proposal has been recommended by the Scheme's actuary.

At the time the threshold was set in 1986 at \$25,000, that amount would have meant that construction activity on most home alterations would not have been subject to the levy. In 1986 the average income in Australia was \$17,322 and the average house price was \$76,278. According to the 'Residential Property Price Indexes: Eight Capital Cities' and the 'Average Weekly Earnings, Australia' published by the Australian Bureau of Statistics in March 2021 and May 2021 respectively, the mean price of residential properties in NSW was \$1.01 million, and average earnings was \$90,324. Based on these figures, the average earnings are up over 5 times and average house prices are up 14 times since 1986. Therefore the \$25,000 threshold, which in 1986 would have meant most house renovations did not require payment of the levy, now means that the large majority of renovations do require payment.

NSW has also seen consistent increase in the cost of construction as reflected in the construction industry producer price index. This has been driven by increase in labour costs and rising prices for construction material and associated costs. The index shows a steep rise in the building construction prices with an increase from 0.8% in December 2020 to 7.8% in December 2021. Increasing the threshold to \$250,000 will help alleviate some of the burden from businesses to address the rising cost of construction as they will not have to pay levy on smaller projects.

A breakdown of levy income by size of project over the 2020-21 Financial Year shows the very skewed nature of levy income receipts towards large projects. Over 72% of levy income comes from just 12% of projects, which are over \$650,000, whereas the 15% of projects valued between \$25,000 and \$50,000 produce less than 1% of the levy income.

Raising the threshold to \$250,000 has the potential to improve housing affordability, create jobs, encourage business investment, increase housing supply and reduce red tape. Some new house

builds, particularly in rural and regional NSW, and most home renovations throughout the State, would no longer pay the levy. The number of leviable projects would almost halve. In addition, the work of local councils, acting as agent for the LSC, in determining and collecting the levy on building proposals and development applications would be much reduced. A number of other jurisdictions already have moved to increase their respective thresholds. The value of building and construction work on which a levy is payable in Queensland is currently set at \$150,000, while Northern Territory has a threshold of \$1 million.

#### (b) Levy Rate

The levy rate in the proposed Regulation has been set at 0.25% on the estimated value of building and construction work. This rate has been reduced from 0.35% in the 2017 Regulation. The levy rate reduction has been recommended by the Scheme's actuary based on their current assessment and future projections of the fund.

The levy rate has varied a number of times since it was first introduced in 1986. The rate started at 0.5%, which proved higher than necessary, and the rate was soon lowered to 0.1% in 1988. It was removed altogether in 1993, after the Scheme had developed a large surplus. The levy was then re-instated in 1997 at a rate of 0.20% and this rate was subsequently increased to 0.35% from 1 January 2006. Since that time, the levy rate has remained unchanged for more than 16 years.

In 2017, the LSC introduced a funding objective for the Scheme based on the Accrued Benefit Reserve Index (ABRI). This is the ratio of assets to accrued liabilities of the Scheme. An ABRI over 100% means the Scheme has a surplus and less than 100% means that the Scheme has a deficit. The funding objective is that the Scheme should ideally aim for an ABRI of 115% with a comfortable target range for the ABRI somewhere between 105% and 120%<sup>2</sup>.

Despite COVID-19 and its impact on the NSW economy in general, the fund has continued to grow with levy income alone exceeding the benefit payments to workers each year in recent years. As at 30 June 2021, the Fund was in surplus with an ABRI at 131%.<sup>3</sup> The use of the BCI Fund is restricted by statute and can only be used for specific purposes provided by the Act. There is no reason for the BCI Fund to continue to expand unnecessarily as the Scheme is mature and the payout needs can be estimated with a high degree of certainty. If no changes are made to the levy income the surplus to liabilities is forecast to balloon out to \$1.18 billion over the next 10 years.

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<sup>2</sup> [https://www.longservice.nsw.gov.au/\\_data/assets/pdf\\_file/0018/38115/Long-Service-AR-2017.pdf](https://www.longservice.nsw.gov.au/_data/assets/pdf_file/0018/38115/Long-Service-AR-2017.pdf)

<sup>3</sup> [https://www.longservice.nsw.gov.au/\\_data/assets/pdf\\_file/0018/64080/Long-Service-AR-2021.pdf](https://www.longservice.nsw.gov.au/_data/assets/pdf_file/0018/64080/Long-Service-AR-2021.pdf)

Reducing the levy rate as proposed would be a boost to the building and construction industry and have flow-on benefits to the broader NSW economy. It would reduce business costs, particularly for small businesses, making them more competitive. The levy reduction would assist with the COVID recovery. Importantly, the levy reduction would in no way jeopardise the entitlements of workers under the Scheme. Based on actuarial projections, the Scheme would still have over \$500 million surplus assets and the ABRI is projected to be 120% i.e. at the top of the target range, by 2030.

**2. Do you support the proposed change to the levy rate? If not, why not?**

**3. Do you support the proposed change to the threshold level which attracts payment of the levy? If not, why not?**

### **6.3 Appeals to Committee**

The Act establishes an independent Building and Construction Industry Committee which hears and determines appeals on decisions made by the LSC which affect workers, employers and in some instances, levy payers. The Committee members are representatives of employer groups and unions in the building and construction industry in NSW and are appointed by the Minister.

The proposed Regulation carries forward all of the provisions from the 2017 Regulation regarding the timeframe for lodging an appeal, the process for making an appeal and how appeals are determined by the Committee.

The proposed Regulation specifically recognises that parties can appear before the Committee using audio-visual links during an appeal hearing. This arrangement has already been implemented in other contexts during the COVID-19 pandemic in NSW and has proved to work well. It creates a cost-efficient option for workers who would otherwise have to travel, including from regional areas in some cases, to attend the appeal hearings or provide additional information to the Committee.

The proposed change not only reflects the current practice but also modernises and futureproofs the Regulation by allowing for appeal processes to continue unhindered should similar events such as the COVID-19 pandemic or other emergencies arise.

**4. Are there any further amendments needed to the provisions dealing with appeals?**



## 6.4 Miscellaneous

Section 46(4)(a) of the Act, currently sets the interest rate payable on overdue levies at 2% per calendar month. This interest penalty is quite low and is a fixed rate. The proposed Regulation introduces a new provision to set the interest rate payable at 6% above the cash rate published by the Reserve Bank of Australia from time to time. The LSC, however, will continue to have the discretion to decide to extend the time to pay and waive or reduce the amount of interest charged for the late payment if it believes that special circumstances exist.

The proposed insertion of a moveable rate will ensure that the interest rate payable remains relevant and acts as a deterrent against late payment. This approach is consistent with the interest rate set under the *Civil Procedure Act 2005* and the *Building and Construction Industry Security of Payment Act 1999*.

The proposed Regulation also carries forward the provisions related to record keeping for employers and contractors. It modernises these provisions by adding a requirement to note an email address as part of each workers' records and provides an option to keep records in electronic form.

Various methods for the service of a document or notice are set out in the Act. This includes in personal delivery, post or email. It also allows the Regulation to prescribe other methods for service of documents. Clause 23 of the proposed Regulation introduces a new provision to enable service by electronic message using a web portal if the person consents to the use of that method.

The LSC is implementing a new ICT system which will provide easy access for registered workers to their annual statements. Workers will be able to sign into the portal through the LSC website and access their statement. Currently, the Act does not provide the LSC with the ability to serve a document through the portal. Section 26 of the CCI Act enables the LSC to place annual statements for registered workers in the contract cleaning industry on its website. The new clause in the proposed Regulation will align the two schemes and ensure that statements are readily accessible to all registered workers.

**5. Is the web portal an appropriate way for statements and other documents to be served?**

## 6.5 Penalty notice offences

The Act was amended in 2021 to allow authorised officers the power to issue penalty infringement notices. Schedule 1 of the proposed Regulation sets out which offences are proposed as penalty notice offences and the amount payable for the offence. Penalty notices are used to enforce compliance as an alternative to the time consuming and costly process of taking court proceedings against a



corporation or individual. Penalty notices are an important feature of a range of compliance and enforcement options available to NSW Government regulators to achieve compliance with the law and enhance consumer protection.

The penalty notice offences in the proposed Regulation are those breaches of the law that are more easily able to be proven and allow for an on-the-spot remedy to a breach. The penalty amount for the offences have been calculated to ensure a sufficient deterrent from non-compliance with the legislation. At the same time, the amounts are much lower than the maximum penalties that can be imposed under the Act to encourage those who receive one to accept it and pay the fine rather than taking the matter to court. The offences listed in Schedule 1 of the proposed Regulation are consistent with existing offences of a similar nature or seriousness in other regulatory schemes.

The ability to issue penalty notices will ensure quicker remediation to breaches of the law through swift enforcement action resulting in savings of time and money for all parties involved. It will also increase public confidence in the industry and LSC, leading to flow-on benefits for businesses and workers.

**6. Are the proposed penalty infringement notice offences and amounts appropriate and reasonable?**

## Appendix 1 – Summary of main changes to regulation

The following table sets out the main changes in the proposed Regulation:

	Clause in 2017 Regulation	Clause in 2022 Regulation	Change
<b>Updating awards</b>	4(a)(iii)-(vi)	4(a)(iii)-(vi)	Updates lists of prescribed awards for defining 'building and construction work' under the <i>Fair Work Act 2009</i> with the following: <ul style="list-style-type: none"> <li>• Electrical, Electronic and Communications Contracting Award 2020 [MA000025],</li> <li>• Joinery and Building Trades Award 2020 [MA000029],</li> <li>• Mobile Crane Hiring Award 2020 [MA000032],</li> <li>• Plumbing and Fire Sprinklers Award 2020 [MA000036]</li> </ul>
	6	6	Replaces the 'Building and Construction General On-site Award 2010 [MA000020]' in the list of awards for defining 'standard pay' with 'Building and Construction General On-site Award 2020 [MA000020]'.
<b>Non-service days to be disregarded</b>	7	7	Changes language to reflect a more inclusive and broader approach when prescribing non-service days to be disregarded. Wordings are similar to those used in the Contract Cleaning Industry (Portable Long Service Leave Scheme) Regulation 2017 (CCI Regulation).
<b>Exemptions from Levy-minimum threshold value</b>	12	12	Threshold increased to \$250,000 on the cost of erection of a building for when a levy becomes payable. The threshold has been increased following actuarial assessment and recommendation.
<b>Exemptions from Levy-voluntary component</b>	12(4)(a)	12(1)(d)	Creates a separate exemption for owner-builders to improve readability.
<b>Exemptions from Levy-meanings of terms used</b>	12(6)	12(3)	Amends the definition of non-profit organisation to make it consistent with definitions used in other legislation
<b>Prescribed rates for long service levy</b>	13	14	Levy rate reduced to 0.25% following actuarial assessment and recommendation.
<b>Certification as to payment of levy and levy due</b>	15 & 16	-	Provisions relating to issuing of certificates as proof have been removed as they were redundant and never used
<b>Making and determining appeal</b>	18(2) 19(2)	18(2) 19(2)	Provides for an option to attend appeal hearing via audio visual link
<b>Interest Rate</b>	-	20	Introduces a moveable interest rate on overdue levies
	20	21	Clarifies that records can be maintained electronically as long as they are accessible and printable
<b>Employers' books, records and particulars</b>	20(b)	21(1)(b)	Adds a requirement to include worker's email address to be kept as part of the records maintained by an employer
	21(a)	22(a)	Simplifies language by replacing wording 'accounting, taxation and other records' with 'financial records.'
<b>Service of documents</b>		23	Introduces the ability to serve annual reports through the portal on the LSC website
<b>Penalty Notices</b>	-	Sch 1	Penalty Infringement Notices have been included for certain appropriate offences under the Act

## Appendix 2 – List of targeted stakeholders

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A copy of the proposed Regulation and this RIS have been sent to key stakeholder groups and organisations. These include:

### Industry Stakeholders

- Australian Federation of Employers and Industries
- Australian Manufacturing Workers' Unions
- Australian Constructors Association
- Construction, Forestry, Mining and Energy Union
- Electrical Trades Union NSW & ACT
- Housing Industry Association
- Local Government NSW
- Master Builders Association
- NSW Plumbers Union
- United Workers Union (UWU)

### Government & Other Jurisdictions

- NSW - Office of Local Government
- NSW Treasury
- NSW Employee Relations
- ACT Long Service Leave Authority, ACT
- CoInvest, Victoria
- MyLeave, Western Australia
- NT Build, Northern Territory
- Portable Long Service Leave, South Australia
- TasBuild, Tasmania
- Qleave, Queensland

### Miscellaneous

- Members of the BCI Committee
- Audit and Risk Committee of the LSC