



New South Wales

# Building and Construction Industry Long Service Payments Amendment Bill 2009

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

## Overview of Bill

The object of this Bill is to make amendments to the *Building and Construction Industry Long Service Payments Act 1986* (***the Principal Act***) as follows:

- (a) to provide for notification by employers to the Building and Construction Industry Long Service Payments Corporation (***the Corporation***) of the employment of workers performing building and construction work,
- (b) to clarify the process of registering workers for the purposes of the Principal Act, including enabling the Corporation to register workers on the Corporation's own initiative,
- (c) to clarify the effect of the cancellation or suspension of registration of such workers,
- (d) to remove the requirement that an employer provide a worker with a certificate of service at the end of each financial year, after the worker ceases employment and at other specified times,
- (e) to clarify how the number of days' service of part-time workers is to be calculated for the purposes of the Principal Act,

- (f) to provide that the Corporation is not required to serve an annual notice of service credits on a person whose registration has been cancelled or whose registration, in the opinion of the Corporation, is likely to be cancelled,
- (g) to provide that when calculating long service payments, a maximum figure of 38 hours per week (or such other period as is prescribed by the regulations under the Principal Act) is to be used as the hours in which ordinary pay is payable for the worker concerned,
- (h) to provide that when calculating a reimbursement payment to be paid to an employer who has provided alternative benefits to a worker (such as a long service payment under another long service leave scheme), the calculation is not to include the number of any days' service that the employer notified to the Corporation more than 2 years after the time required by the Principal Act,
- (i) to provide that, for the purpose of calculating long service payment amounts under section 29 or reimbursement payment amounts under section 32 of the Principal Act, the regulations under the Principal Act may make provision for the determination of minimum and maximum amounts for the rate of pay to be used in the calculation,
- (j) to provide that a worker or employer who is dissatisfied with the calculation of a payment affected by such a regulation may appeal to the Building and Construction Industry Long Service Payments Committee (*the Committee*),
- (k) to provide that persons contracting with a Crown instrumentality must provide the Crown instrumentality with evidence that the relevant long service levies have been paid,
- (l) to provide that the Corporation may pay a long service levy refund to a person other than the person who paid the long service levy if, in the Corporation's opinion, it is in the interests of justice to do so,
- (m) to deal with other miscellaneous matters to improve the operation of the Principal Act, including matters of a machinery, savings or transitional nature.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

**Clause 3** repeals the *Building and Construction Industry Long Service Payments Amendment Act 1998*.

## **Schedule 1      Amendment of Building and Construction Industry Long Service Payments Act 1986 No 19**

**Schedule 1 [1]** substitutes the definition of *Commonwealth industrial instrument* in the Principal Act to take account of changes to Commonwealth legislation. Under the proposed new definition, the regulations specify awards, workplace agreements or other agreements under Commonwealth legislation (or classes of them) for the purposes of the definition.

**Schedule 1 [2] and [27]** make law revision amendments to take account of the change of name of “Employers First” to the “Australian Federation of Employers and Industries”.

**Schedule 1 [4] and [5]** make amendments relating to the registration of workers in the building and construction industry long service payments scheme under the Principal Act (*the scheme*).

Currently, a building and construction worker may apply for registration, but section 16 (2) of the Principal Act also provides that an employer must apply for registration of the employer’s workers within 7 days after the worker commences to perform building and construction work (unless the worker is already registered or an application for registration is pending).

**Schedule 1 [4] and [5]** omit section 16 (2) of the Principal Act and insert instead proposed section 16A to provide that an employer of a building and construction worker must notify the Corporation within 7 days after the worker commences to perform building and construction work.

**Schedule 1 [5]** also substitutes section 17 (Registration) of the Principal Act to enable the Corporation to register a person as a worker under the scheme in response to an application by the person or on the Corporation’s own initiative.

**Schedule 1 [5]** makes further law revision amendments to modernise the language used in relation to registration. Under the new provisions a person comes under the scheme by being “registered” rather than having the person’s “registration approved”. **Schedule 1 [3], [6], [23] and [24]** make consequential amendments.

**Schedule 1 [7] and [8]** make law revision amendments that omit archaic language that refer to the cancellation of registration by the removal of a name from the register. In future a person’s registration is simply “cancelled”.

Section 19 (1B) of the Principal Act provides that a worker’s registration may be suspended in certain circumstances. **Schedule 1 [9]** inserts provisions to clarify the effect of such a suspension.

**Schedule 1 [10]** removes the requirement that an employer of a worker provide a worker with a certificate of service at the end of each financial year, after the worker ceases employment and at such other times specified by the Corporation. It is noted that workers are served with an annual notice of their service credits under section 25

of the Principal Act and can also view their accumulated service credits on the Corporation's website at any time.

**Schedule 1 [11]** makes an amendment to provide that, when calculating the number of days' service for part-time workers, the Corporation is to:

- (a) count any day on which the registered worker performed building and construction work for more than half the worker's ordinary work day as a full day of employment, and
- (b) disregard any day on which the registered worker performed non-building and construction work for more than half the worker's ordinary work day.

**Schedule 1 [12]** removes a redundant provision. **Schedule 1 [13]** makes a law revision amendment.

**Schedule 1 [14]** makes an amendment to provide that the Corporation is not required to serve an annual notice of service credits on a person whose registration has been cancelled or whose registration, in the opinion of the Corporation, is likely to be cancelled. If the Corporation has not served a notice on a person because the person's registration was likely to be cancelled and by the following 30 June the person's registration has not been cancelled, the Corporation must, as soon as possible, ensure that the relevant notice is served on the person.

**Schedule 1 [15] and [16]** provide that when calculating long service payments, a maximum figure of 38 hours per week (or such other period as is prescribed by the regulations) is to be used as the hours in which ordinary pay is payable for the worker concerned.

**Schedule 1 [17]** provides that when calculating a reimbursement payment to be paid to an employer who has provided alternative benefits to a worker (such as a long service payment under another long service leave scheme), the calculation is not to include the number of any days' service that the employer notified to the Corporation more than 2 years after the time required by section 20 of the Principal Act. This provision will not have effect until 1 July 2011.

**Schedule 1 [18]** provides that an employer who has provided alternative benefits to a worker (such as a long service payment under another long service leave scheme) is entitled to be paid a reimbursement payment under section 32 of the Principal Act in respect of a worker whose registration has been cancelled.

**Schedule 1 [19]** provides that, for the purpose of calculating long service payment amounts under sections 29 and 32 of the Principal Act, the regulations may make provision for the determination of minimum and maximum amounts for the rate of pay to be used in the calculation.

The Minister administering the Principal Act is to consult with the Committee before recommending the making of such a regulation. The Committee is to advise and make recommendations to the Minister on the operation of, and any amendment to or repeal of, any such regulation.

The proposed section also provides that if an amount of a long service payment to a worker or a payment to an employer is, because of the operation of such a regulation, less than the amount it would have been in the absence of the regulation, the Corporation is to notify the worker or employer in writing of that fact and give an explanation of the operation of the regulation.

**Schedule 1 [25]** provides that a worker or employer who has received such a notification and is dissatisfied with the calculation of the long service payment may appeal to the Committee. The Committee, in determining the appeal, may confirm the calculation of the long service payment or set it aside and make a new calculation in substitution for that calculation.

Section 38 of the Principal Act provides that where the Crown enters into a contract with a person to erect a building (or execute part of the work of erecting the building) that contractor (and not the Crown) is liable to pay any relevant long service levy. **Schedule 1 [20]** inserts a new section to provide that where section 38 applies, it is the duty of the Crown instrumentality concerned to withhold any instruction to, or permission, approval or authorisation for, the person to commence work under the contract, unless the person has produced to the Crown instrumentality evidence that the long service levy due in respect of the building has been paid by the person (such as a receipt from the Corporation). The proposed new section also provides that it is the duty of the Crown instrumentality to keep a copy of any such evidence for at least 6 years after it was produced.

Section 42 (6) of the Principal Act allows persons to apply for a refund of certain long service levies paid in error. Such an application must be made within 3 months after the payment concerned was made, or within such further time as the Corporation may in a particular case allow. **Schedule 1 [21]** makes an amendment to increase the time within which such an application must be made from 3 months to 12 months (or such other period as may be prescribed by the regulations) after the payment concerned was made.

**Schedule 1 [22]** inserts new provisions into the Principal Act to provide that the Corporation may pay a refund under section 42 of that Act to a person other than the person who paid the long service levy if, in the Corporation's opinion, it is in the interests of justice to do so.

**Schedule 1 [26]** provides that the personal representative of a deceased worker may make certain appeals under the Principal Act on behalf of the person.

**Schedule 1 [28] and [29]** make amendments of a savings and transitional nature.



First print



New South Wales

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New South Wales

# Building and Construction Industry Long Service Payments Amendment Bill 2009

No. , 2009

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## A Bill for

An Act to amend the *Building and Construction Industry Long Service Payments Act 1986* to make further provision for long service payments to workers engaged in the building and construction industry; and for other purposes.

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<b>The Legislature of New South Wales enacts:</b>	1
<b>1 Name of Act</b>	2
This Act is the <i>Building and Construction Industry Long Service Payments Amendment Act 2009</i> .	3 4
<b>2 Commencement</b>	5
This Act commences on a day or days to be appointed by proclamation.	6
<b>3 Repeal of Building and Construction Industry Long Service Payments Amendment Act 1998 No 33</b>	7 8
The <i>Building and Construction Industry Long Service Payments Amendment Act 1998</i> is repealed.	9 10

<b>Schedule 1</b>	<b>Amendment of Building and Construction Industry Long Service Payments Act 1986 No 19</b>	1
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<b>[1] Section 3 Definitions</b>		4
	Omit the definition of <i>Commonwealth industrial instrument</i> from section 3 (1).	5
		6
	Insert instead:	7
	<i>Commonwealth industrial instrument</i> means an award, workplace agreement or other agreement made under (or taken to have been made, or to have effect, under) an Act of the Commonwealth, being an award, workplace agreement or other agreement prescribed (or of a class prescribed) by the regulations for the purposes of this definition.	8
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<b>[2] Section 8 Constitution of Committee</b>		14
	Omit “Employers First” from section 8 (2) (c).	15
	Insert instead “the Australian Federation of Employers and Industries”.	16
<b>[3] Section 15 Corporation to keep register of workers</b>		17
	Omit “whose registration is approved” from section 15 (1) (a).	18
	Insert instead “who are registered”.	19
<b>[4] Section 16 Applications for registration</b>		20
	Omit section 16 (2).	21
<b>[5] Sections 16A and 17</b>		22
	Omit section 17. Insert instead:	23
<b>16A Employer to notify Corporation of employment of workers</b>		24
	An employer who employs a worker under a contract of employment must notify the Corporation of that employment within 7 days after the worker commences to perform building and construction work in New South Wales under that contract.	25
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	Maximum penalty: 20 penalty units.	29
<b>17 Registration</b>		30
	(1) The Corporation is to register every person who the Corporation is satisfied is a worker.	31
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(2)	The Corporation may register a person as a worker in response to an application by the person for registration or on its own initiative.	1 2 3
<b>[6]</b>	<b>Section 18</b>	4
	Omit the section. Insert instead:	5
	<b>18 Date of registration</b>	6
(1)	The date on which a person becomes a registered worker is:	7
(a)	if the person applied to be registered as a worker—the date on which application for the person’s registration was lodged with the Corporation, or	8 9 10
(b)	if the Corporation registered the person on its own initiative—the date of that registration.	11 12
(2)	Despite subsection (1), the Corporation may, on its own initiative or at the request of a person who is registered as a worker, fix, in respect of any person or class of persons, a date of registration that is earlier than the date referred to in that subsection.	13 14 15 16
(3)	However, if a person who is registered as a worker has requested an earlier date in accordance with subsection (2), the Corporation must not fix a date that is earlier than 2 years before the request was made, unless the Corporation is satisfied that special circumstances warrant its doing so.	17 18 19 20 21
(4)	On the fixing of a date in accordance with subsection (2):	22
(a)	the person or class of persons for whom the date is fixed are taken for all purposes to have been registered on and from that date, and	23 24 25
(b)	service credits to which the person or those persons are entitled under this Act may be credited to the person or those persons in respect of any subsequent dates.	26 27 28
<b>[7]</b>	<b>Section 19 Cancellation or suspension of registration</b>	29
	Omit the following from section 19 (2A):	30
	worker,	31
	and on such cancellation the name of the worker may be removed from the register of workers.	32 33
	Insert instead “worker.”.	34

<b>[8] Section 19 (3)–(5)</b>	1
Omit the subsections. Insert instead:	2
(3) The cancellation of the registration of a registered worker under subsection (1A) or (2) takes effect:	3
(a) on the expiration of the period of 42 days after the Corporation notifies the registered worker of the cancellation, or	4
(b) if an appeal under Part 6 is lodged against the cancellation within that period—on the date the appeal is withdrawn or the cancellation is confirmed.	5
(4) On the cancellation of the registration of a worker taking effect:	6
(a) the person ceases to be a registered worker, and	7
(b) the person or the personal representative of the person is not entitled to apply for or be paid any long service payment in respect of any days’ service then credited to the person in the register of workers.	8
(5) A person whose registration has been cancelled in accordance with this section may (if eligible) subsequently be registered as a worker.	9
<b>[9] Section 19 (8) and (9)</b>	10
Insert after section 19 (7):	11
(8) While the registration of a worker is suspended:	12
(a) the worker is not to be credited in the register of workers with any service under this Act (being service during the period of suspension), and	13
(b) the Corporation is not required to serve any notice under section 25 (1) on the worker, and	14
(c) subject to section 30:	15
(i) the worker is entitled to apply for and be paid any long service payment in respect of any days’ service then credited to the worker in the register of workers, and	16
(ii) if the worker has died (whether before or after the worker’s registration was suspended)—the personal representative of the worker is entitled to apply for and be paid any long service payment in respect of any days’ service then credited to the worker in the register of workers, but only if the application is	17
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Building and Construction Industry Long Service Payments Amendment  
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Schedule 1      Amendment of Building and Construction Industry Long Service Payments  
Act 1986 No 19

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	made within 2 years after the date of suspension or the date of the worker's death (whichever is the later).	1 2 3
	(9) If a suspended registration is restored under subsection (6) (a), any days' service under this Act that are credited to the worker as at the date of the suspension are to be restored.	4 5 6
<b>[10]</b>	<b>Section 20 Contract of employment workers—certificates of service to be supplied by employers</b>	7 8
	Omit "and the worker" from section 20 (1) (a)–(c), wherever occurring.	9
<b>[11]</b>	<b>Section 22 Service credits for building and construction work</b>	10
	Insert after section 22 (3):	11
	(3A) For the purposes of subsection (3), when calculating the number of days' service equivalent to the number of full days of employment in building and construction work, the Corporation is to:	12 13 14 15
	(a) count any day on which the registered worker performed building and construction work for more than half the worker's ordinary work day as a full day of employment in building and construction work, and	16 17 18 19
	(b) disregard any day on which the registered worker performed work (other than building and construction work) for more than half the worker's ordinary work day.	20 21 22
<b>[12]</b>	<b>Section 24 Limitations on and adjustments of service credits</b>	23
	Omit "A registered worker shall not be credited in the register of workers with more than 220 days' service in the building and construction industry in respect of any financial year." from section 24 (1).	24 25 26
<b>[13]</b>	<b>Section 24 (2)</b>	27
	Omit "year ending 30 June". Insert instead "financial year".	28
<b>[14]</b>	<b>Section 25 Notice to registered workers of service credits</b>	29
	Insert after section 25 (6):	30
	(7) Despite subsection (1), the Corporation is not required to serve a notice on a person:	31 32
	(a) whose registration has been cancelled (whether before or after the 30 June to which the notice relates), or	33 34
	(b) whose registration, in the opinion of the Corporation, is likely to be cancelled before the following 30 June.	35 36

(8)	However, if the Corporation has, by reason of subsection (7) (b), not served a notice on a person and by that following 30 June the person's registration has not been cancelled, the Corporation must, as soon as possible, ensure that the relevant notice is served on the person.	1 2 3 4 5
<b>[15]</b>	<b>Section 29 Amount of long service payment</b>	6
	Insert after section 29 (4):	7
(5)	A reference in subsection (3) in the matter relating to P to the hours in which ordinary pay is payable is a reference to a maximum of 38 hours per week or such other period as is prescribed by the regulations.	8 9 10 11
<b>[16]</b>	<b>Section 32 Payments to employers</b>	12
	Insert after section 32 (2):	13
(2A)	A reference in subsection (1) in the matter relating to P to the hours in which ordinary pay is payable is a reference to a maximum of 38 hours per week or such other period as is prescribed by the regulations.	14 15 16 17
<b>[17]</b>	<b>Section 32 (3A)</b>	18
	Insert after section 32 (3):	19
(3A)	Despite subsection (3), for the purposes of the formula in subsection (1), <i>S</i> is not to include the number of any days' service with which the worker was credited in the register of workers that was notified to the Corporation in a certificate under section 20 that was furnished more than 2 years after the time required by that section. This subsection does not have effect until 1 July 2011.	20 21 22 23 24 25 26
<b>[18]</b>	<b>Section 32 (4)</b>	27
	Omit the subsection. Insert instead:	28
(4)	Despite section 19, an employer is entitled to be paid, in respect of a registered worker whose registration has been cancelled under section 19, any amount that the employer would have been entitled to be paid under this section if that registration had not been so cancelled.	29 30 31 32 33

<b>[19] Section 32B</b>	1
Insert after section 32A:	2
<b>32B Deemed minimum and maximum rates of pay</b>	3
(1) Despite sections 29 and 32, the regulations may make provision for the determination of minimum and maximum amounts for P for the purposes of the formulae in those sections.	4 5 6
(2) The Minister is to consult with the Committee before recommending the making of a regulation under this section.	7 8
(3) The Committee is to advise and make recommendations to the Minister on the operation of, and any amendment to or repeal of, any regulation made under this section.	9 10 11
(4) If an amount of a long service payment to a worker under section 29 or a payment to an employer under section 32 is, because of the operation of a regulation made under this section, less than the amount it would have been in the absence of the regulation, the Corporation is to notify the worker or employer in writing of that fact and give an explanation of the operation of the regulation.	12 13 14 15 16 17 18
<b>[20] Section 38A</b>	19
Insert after section 38:	20
<b>38A Crown contractors to give evidence of levy payment to Crown</b>	21
(1) If a person or body representing the Crown ( <i>a Crown instrumentality</i> ) has entered into a contract with a person who is liable under section 38 to pay a long service levy in respect of the erection of a building or part of the work of erecting a building, it is the duty of the Crown instrumentality to withhold any instruction to, or permission, approval or authorisation for, the person to commence work under the contract, unless the person has produced to the Crown instrumentality evidence that the long service levy due in respect of the work concerned has been paid by the person (such as a receipt from the Corporation).	22 23 24 25 26 27 28 29 30 31
(2) It is the duty of the Crown instrumentality to keep a copy of any such evidence for at least 6 years after it was produced.	32 33
<b>[21] Section 42 Refunds of long service levies</b>	34
Omit “3 months” from section 42 (7).	35
Insert instead “12 months (or such other period as may be prescribed by the regulations)”.	36 37



<b>[22] Section 42 (8) and (9)</b>	1
Insert after section 42 (7):	2
(8) Despite any other provision of this section, the Corporation may pay a refund to a person other than the person who paid the long service levy if, in the Corporation’s opinion, it is in the interests of justice to do so.	3 4 5 6
(9) A payment of a refund under subsection (8) satisfies any liability of the Corporation to pay a refund to the person who paid the long service levy concerned.	7 8 9
<b>[23] Section 49 Appeal against refusal or cancellation of registration</b>	10
Omit section 49 (1) (a). Insert instead:	11
(a) to refuse an application for registration as a worker, or	12
<b>[24] Section 49 (3)</b>	13
Omit “approve the application by the person to become a registered worker”.	14
Insert instead “register the person as a worker”.	15
<b>[25] Section 50A</b>	16
Insert after section 50:	17
<b>50A Appeal against limitation of long service payment by operation of deemed minimum and maximum rates of pay</b>	18 19
(1) A person who has received a notification under section 32B and is dissatisfied with the calculation of the long service payment may appeal to the Committee.	20 21 22
(2) The Committee, in determining the appeal, may confirm the calculation of the long service payment or set it aside and make a new calculation in substitution for that calculation.	23 24 25
<b>[26] Section 54A</b>	26
Insert after section 54:	27
<b>54A Personal representative of deceased person may appeal on person’s behalf</b>	28 29
(1) A reference in sections 49, 50 and 50A to a person includes, where the person has died, the person’s personal representative acting on behalf of the person.	30 31 32

(2)	In this section, <i>personal representative</i> , in relation to a person who has died, means:	1
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(a)	in the case of a person who died wholly or partially intestate—any person who appears to the Committee to be entitled to obtain a grant of letters of administration of the estate of the person, and	3
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(b)	in the case of a person who died testate—any person who appears to the Committee to be entitled to receive the relevant payment under the will of the person.	7
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<b>[27]</b>	<b>Schedule 1 Provisions relating to members and procedure of Committee</b>	10
	Omit “Employers First” from clause 7 (2) (b).	11
	Insert instead “the Australian Federation of Employers and Industries”.	12
<b>[28]</b>	<b>Schedule 3 Savings, transitional and other provisions</b>	13
	Insert at the end of clause 16 (1):	14
	<i>Building and Construction Industry Long Service Payments Amendment Act 2009</i>	15
		16
<b>[29]</b>	<b>Schedule 3, Part 4</b>	17
	Insert after Part 3:	18
	<b>Part 4 Provisions consequent on enactment of Building and Construction Industry Long Service Payments Amendment Act 2009</b>	19
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<b>29</b>	<b>Definition</b>	22
	In this Part, <i>amending Act</i> means the <i>Building and Construction Industry Long Service Payments Amendment Act 2009</i> .	23
		24
<b>30</b>	<b>Definition of “Commonwealth industrial instrument”: section 3 (1)</b>	25
(1)	The substitution of the definition of <i>Commonwealth industrial instrument</i> in section 3 (1) of this Act made by the amending Act is taken to have effect on and from 27 March 2006.	26
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(2)	A regulation made for the purposes of that definition may provide that it is taken to have effect on and from a date earlier than the date of the making of the regulation (but not earlier than 27 March 2006).	29
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<b>31</b>	<b>Suspension of registration: section 19 (8) and (9)</b>	1
(1)	Section 19 (8), as inserted by the amending Act:	2
(a)	extends to a suspension of a registration that took effect before the commencement of that subsection that is still in effect, and	3 4 5
(b)	does not apply to a period of suspension that ended before the commencement of that subsection.	6 7
(2)	Section 19 (9), as inserted by the amending Act, does not apply to a restoration of a suspended registration that took effect before the commencement of that subsection.	8 9 10
<b>32</b>	<b>Service credits for part-time work and working partially on building and construction work and partially on other work: section 22 (3A)</b>	11 12 13
	Section 22 (3A), as inserted by the amending Act, extends to the performance of work before the commencement of that subsection.	14 15 16
<b>33</b>	<b>Deemed minimum and maximum rates of pay: sections 29 (5), 32 (2A) and 32B</b>	17 18
	Sections 29 (5), 32 (2A) and 32B, as inserted by the amending Act, apply to calculations of payments after the commencement of those provisions in relation to days' service credited to the worker concerned before and after that commencement.	19 20 21 22
<b>34</b>	<b>Refunds of long service levies in interests of justice: section 42 (8) and (9)</b>	23 24
	Section 42 (8) and (9), as inserted by the amending Act, extend to the refund, after the commencement of those subsections, of a long service levy that was paid to the Corporation before that commencement.	25 26 27 28