

[Act 1998 No 33]



New South Wales

Building and Construction Industry Long Service Payments Amendment Bill 1998

Explanatory note

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

Overview of Bill

The object of this Bill is to amend the *Building and Construction Industry Long Service Payments Act 1986* in connection with payments and claims under that Act and other matters.

The Bill amends certain other Acts consequentially.

* Amended in committee—see table at end of volume.

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 proclaimed, except for Schedule 2, which starts on the date of assent to the proposed Act.

Clause 3 is a formal provision giving effect to the amendments to the *Building and Construction Industry Long Service Payments Act 1986* set out in Schedules 1–3.

Clause 4 is a formal provision giving effect to consequential amendments to the Acts mentioned in Schedule 4.

Schedule 1 Amendments

Calculation of long service payments

Currently long service payments due to building and construction workers under the Act are calculated on the workers' rates of pay under awards. The insertion in the Act of new definitions of *award* and *Commonwealth industrial instrument* (inserted by **Schedule 1 [2]**), and the amendments made by **Schedule 1 [33]** and **[37]**, enable the Building and Construction Industry Long Service Payments Corporation (the *Corporation*) to calculate long service payments based on rates of pay contained in State and Commonwealth industrial agreements, including certified agreements and Australian workplace agreements.

Meaning of “building and construction work”

The current definition of *building and construction work* in the Act is limited to the work done by a person “for the majority of the person's ordinary hours of work”. A new definition, inserted by **Schedule 1 [2]**, dispenses with this qualification in the definition.

Membership and procedure of the Building and Construction Industry Long Service Payments Committee

Schedule 1 [3] and **[4]** amend section 8 of the Act so as to provide for the appointment of two new members of the Committee. **Schedule 1 [50]** amends Schedule 1 to the Act so as to require a Committee member to disclose any interest the member may have in a matter that comes before a meeting of the Committee that could give rise to a conflict of interests.

Register of building and construction workers

The Act requires the keeping of a register intended to contain the names of all workers engaged in the building and construction industry (and who are therefore eligible to accrue service credits under the Act). The Bill proposes amendments in connection with the register, as follows:

- At present a person must make his or her own application for registration as a building and construction worker, but a new section 16 (2) (inserted by **Schedule 1 [6]**) imposes a duty on a person's employer to apply for the person's registration if the person is not already registered.
- At present the Corporation may register a person as a building and construction worker with retrospective effect, so as to fix a registration date up to 2 years before the date on which an application for registration is lodged, or earlier if the Corporation sees good reason to do so. Amendments made to section 18 of the Act by **Schedule 1 [8]** allow back-dating up to 5 financial years before the beginning of the financial year in which the application for registration is lodged, but remove the Corporation's discretion to fix an earlier registration date.
- By amendment of section 19 (effected by **Schedule 1 [9]**), the present requirement to cancel the registration of a building and construction worker who has not accumulated service credits in 4 years is varied so that:
 - (a) the 4-year period does not run while the worker is prevented, by a prescribed cause (such as pregnancy), from earning service credits, and
 - (b) in the case of a worker with 5 or more years' service credited, registration is not cancelled but merely suspended after any such break in credit accumulation (so that the worker's name is retained in the records of the Corporation).

A cancelled or suspended registration may be restored in accordance with new subsections (6) and (7) of section 19 (inserted by **Schedule 1 [12]**).

- Section 19 is further amended (by **Schedule 1 [10]**) so that the registration of a building and construction worker may be cancelled after payment of a death or retirement benefit or at the worker's request.

Lodgment of service credits by employers

Section 20 of the Act, which requires employers to furnish the Corporation with certified particulars of service by any building and construction worker employed under a contract of employment, specifies the time (1 month after the end of each financial year or 1 month after a worker's employment ceases) within which those particulars must be furnished and provides for extension of that time (by up to 2 months) at the discretion of the Corporation. The amendments made by **Schedule 1 [13]** and **[24]** reduce the 1-month period for furnishing particulars to 7 days after cessation of employment (unless otherwise prescribed by the regulations), but provide that the Corporation, while it is free to reject particulars that are furnished out of time, may at its discretion accept them up to 5 financial years after expiry of the period of employment to which they relate.

Schedule 1 [14] amends the section further to allow the required particulars to be transmitted electronically to the Corporation.

Service credits for activities other than actual building and construction work

Entitlements to long service payments under the Act accrue in the form of service credits. Under sections 22 and 23 of the Act, workers at present obtain credits principally for time spent performing building and construction work. In addition, however, they obtain a partial credit (two-thirds of the time so spent, subject to a ceiling equivalent to 6 months per year of full-time work) for any time during which they are unemployed following retrenchment and are at the same time incapacitated for work owing to an illness. New sections 22 and 23, inserted by **Schedule 1 [22]**, abolish the ceiling and extend it, in the case of both contract of employment workers and subcontractors, to unemployment occurring otherwise than through retrenchment. The new provisions also make service credits available for time spent in other activities or circumstances, namely:

- time spent in undertaking a work-related training course, and
- time spent in performing voluntary work of a building/construction nature following a declared emergency, and
- time spent in performing light duties while incapacitated after a work injury, and
- time spent in unpaid work for the purpose of constructing a residential building intended for sale by the worker.

Payments to employers

Section 32 of the Act provides that employers who make long service payments to building and construction workers in accordance with the *Long Service Leave Act 1955* or another approved long service scheme are entitled to a payment out of the fund established under the Act. Section 24 (3) provides that a worker who has received a long service payment in respect of service for periods of less than 10 years because of retiring from or permanently leaving the industry does not accrue service credits in the 12 months following his or her application. This subsection has operated to prevent inclusion of any service in that 12-month period for the purposes of calculations under section 32. A new section 24 (4) is inserted by **Schedule 1 [24]** to avoid the consequence that such service cannot be counted for the purposes of payments due to employers.

Retiring age

For the purpose of applications for long service payments on retirement, the Act now sets a retirement age of 65 (or a lower age, if the worker becomes entitled to a war service pension). **Schedule 1 128]** amends section 27 of the Act so as to reduce the normal retirement age from 65 to 55.

Service as an “adult”

One of the present eligibility criteria for a pro rata long service payment under the Act is that the building and construction worker must have completed 5 or more years’ service “as an adult”. The amendments made to section 28 of the Act by **Schedule 1 [30]–[33]** abolish the “adult” factor in this criterion.

Payment on total incapacity or permanent cessation of building and construction work

Section 28 of the Act provides that a building and construction worker with 5 years’ service, or who has reached the retiring age with at least 55 days’ service, is entitled to a long service payment if he or she intends permanently to cease work in the industry. The amendments made by **Schedule 1 [30]** have the result that the worker must satisfy the Corporation that the cessation of the worker’s employment in the industry is permanent (new section 28 (1) (c) and (d)).

The same section provides that a building and construction worker is entitled to a long service payment if he or she has at least 55 days’ service as a building and construction worker and is found to be totally incapacitated for further service as such a worker. **Schedule 1 [30]** also amends the section to make it clear that the incapacity must be adjudged to be permanent as well as total, in order to give rise to the entitlement (new section 28 (1) (e)).

Successive claims for long service payments

Section 28 of the Act provides that a building and construction worker is entitled to a long service payment after 10 years' service and to a further payment 5 years later. The section is amended by **Schedule 1 [30]** to make it clear that an entitlement arises every 5 years following the initial 10-year period (new section 28 (1) (f)).

Long service leave

The Act makes no provision for long service leave as such, but only for long service payments. **Schedule 1 [35]** inserts a new section 30A, the object of which is to indicate that employees have the option, with the agreement of their employers, to take a period of leave commensurate with long service payments received by them.

Benefits under other laws

Section 31 of the Act provides that service in respect of which a benefit has been paid to a building and construction worker under the *Long Service Leave Act 1955* or under other approved long service leave schemes cannot be counted for the purpose of service credits under the Act. The section precludes the recognition, for the purposes of the Act, even of service subsequent to receipt of benefits under the other scheme. **Schedule 1 [35]** repeals and replaces section 31 so that such subsequent service is recognised. The new section also makes provision for a "top-up" payment to a worker who is also eligible for a long service payment under the Act but who, when receiving a payment under another scheme, fails to obtain the full benefit to which he or she is entitled under that other scheme, owing to the insolvency of the worker's employer.

A new section 31A, also inserted by **Schedule 1 [35]**, requires an employer who intends to make a payment under the 1955 Act or under another approved scheme to notify the Corporation of its intention to do so.

Long service levies

Section 42 of the Act provides for refunds of long service levies paid under the Act. **Schedule 1 [39]** amends the section so as to provide that a refund is payable when a levy has been paid by persons, or in respect of buildings, exempt from payment of the levy. **Schedule 1 [40]** amends the section further so as to provide for refunds in cases where the levy is paid or overpaid in error.

Power to inspect premises and compel production of documents

Corporation officers have power under section 58 of the Act to gain access to premises and compel production of documents in order to ascertain whether workers are registered and whether the Act is being complied with. **Schedule 1 [43]–[47]** amend the section to provide that the officers' power can also be exercised in order to ascertain the cost of erecting a building for the purpose of calculating the appropriate levy payable under section 40 of the Act.

Offences

Schedule 1 [48] inserts a new section 58A, which provides that it is an offence for a person to make any false statement or record any false matter in any document or record made or kept under the Act or in furnishing any information for the purposes of the Act. The offence is punishable by a fine of up to 50 penalty units. (The current value of a penalty unit is \$110.)

Schedule 1 [49] amends section 64 of the Act to increase, from 1 year to 6 years, the time within which proceedings may be brought for an offence arising under the Act.

Other amendments

The Bill includes a number of other amendments of a minor character, as follows:

- **Schedule 1 [2]** amends section 3 of the Act to insert a definition of *approved* (meaning approved by the Corporation).
- a new definition of *working day* (meaning a day on which ordinary wages are payable) is also inserted into section 3 of the Act by **Schedule 1 [2]**.
- **Schedule 1 [26]** and **[42]** amend sections 25 and 57 of the Act, to relieve the Corporation of the obligation to serve notices in circumstances where the addressee's whereabouts are unknown and to permit service of notices on or by the Corporation by electronic means.
- **Schedule 1 [52]** and **[53]–[56]** insert provisions of a saving and transitional nature as a consequence of the enactment of the proposed Act, and enable further provisions of a similar nature to be made by regulation.
- Other items of Schedule 1 make amendments that are consequential on the amendments described above.

Schedule 2 Amendments by way of statute law revision

The amendments contained in this Schedule repeal obsolete provisions and replace obsolete references.

Schedule 3 Amendments consequential on enactment of Environmental Planning and Assessment Amendment Act 1997

The amendments contained in this Schedule are necessary as a consequence of the enactment of the *Environmental Planning and Assessment Amendment Act 1997*, which abolished the requirement to obtain local government building approvals.

Schedule 4 Consequential amendment of other Acts

This Schedule makes consequential amendments to the *Environmental Planning and Assessment Act 1979* and the *Long Service Leave Act 1955*.