

Industrial Relations Regulations (Amendment) 1994 No. 386

EXPLANATORY STATEMENT

Statutory Rules 1994 No. 386

(Issued by the Authority of the Minister for Industrial Relations)

Industrial Relations Act 1988

Industrial Relations Regulations (Amendment)

Section 359 of the *Industrial Relations Act 1988* (the Act) provides that the Governor-General may make regulations prescribing (inter alia) matters that are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 170CC of the Act provides that the Industrial Relations Regulations (the Regulations) may exclude specified employees from the operation of specified provisions of Division 3 of Part VIA of the Act, which deals with termination of employment at the initiative of the employer. The section also provides that an exclusion only has effect if it is consistent with Australia's obligations under international Labour Organisation Convention 158, *Termination of Employment, 1982* (ILO C158).

Paragraph 179C(b) of the Act provides that a person who has commenced an action in a magistrate's court may indicate in a manner prescribed by the Regulations that he or she wants a small claims procedure to apply to the matter.

In accordance with Articles 2.2 and 2.3 of ILO C158, the Regulations [as previously amended by the Industrial Relations Regulations (Amendment) (Statutory Rules 1994 No. 79)] have, since 30 March 1994, excluded certain classes of employees from the operation of specified provisions of Division 3 of Part VIA of the Act.

The *Industrial Relations Amendment Act (No. 2) 1994*, which commenced on 30 June 1994, amended aspects of Division 3 of Part VIA of the Act, amongst other things, by:

- extending the range of categories of employees which can be excluded from the operation of the termination provisions of the Act, by reference to additional provisions of ILO 158 (section 170CC);
- removing access to the termination provisions for non-award employees earning more than \$60,000 per annum (or an equivalent pro rata amount for employees continuously employed for less than twelve months) (section 170CD);
- limiting the maximum compensation, in respect of dismissal, that may be awarded instead of reinstatement (section 170EE); and
- providing power to make regulations relating to indexation of certain amounts (section 170EI):
 - this section relates to the amounts referred to in subsection 170CD(2), for the purpose of excluding certain employees from the termination provisions generally, and in subsection 170EE(4), for the purpose of setting a cap to the amount of compensation payable (where reinstatement is impracticable).

The Regulations give effect to various matters which are necessary or convenient to be prescribed:

- to exclude additional categories of employees from the operation of various termination of employment provisions, pursuant to section 170CC of the Act as amended, and to vary the exclusions previously effected;
- to provide (consistent with section 170EI) a formula for indexing:
 - the maximum amount of compensation which may be awarded, in respect of dismissal, under section 170EE; and
 - the salary cap for non-award employees to be covered by Division 3 of Part VIA of the Act referred to in subsection 170CD(1); and
- to prescribe the manner by which a person is to indicate that he or she wants a small claims procedure to apply to an action that person has commenced in a magistrate's court (to give effect to subsection 179C(b) of the Act).

Article 2.5 of ILO C158 provides for the exclusion of limited categories of employees, in respect of which there are special problems of a substantial nature for implementation of the Convention. Article 2.5 requires that such exclusions are only to be made after consultation with relevant organisations of employers and employees (where they exist). The regulations prescribing matters under section 170CC of the Act were developed following consultation with organisations of employers and employees, consistent with this requirement. Details of the Regulations are attached. The Regulations commence on 16 November 1994.

ATTACHMENT

DETAILS OF THE INDUSTRIAL RELATIONS REGULATIONS (AMENDMENT)

Regulation 1: Commencement

Regulation 1.1 provides that the regulations commence on 16 November 1994.

Regulation 2: Amendment

This is a formal provision, providing that the regulations amend the Industrial Relations Regulations (the Regulations).

Regulation 3: Regulation 30A (Interpretation-Division 1)

Subregulation 30A(1) has, since 30 March 1994, provided a definition of "authorised leave" for the purposes of Division 1 of Part 5A of the Regulations.

The regulation omits this subregulation and substitutes a new subregulation 30A(1), inserting definitions necessary for the functioning of the extended range of exemptions from the termination provisions which are inserted by the amendments to regulation 30B and new regulations 30BA, 30BB and 30BC. (Details of the exclusions are set out below in relation to the amendments to regulation 30B, and new regulations 30BA, 30BB and 30BC.)

A definition of "authorised leave" is reinserted which differs slightly from that previously in the Regulations. The definition more clearly indicates that it operates in relation to a particular employee. The substance of the definition remains unchanged.

"Daily hire employee" is defined to mean an employee:

- whose employment is regulated by a federal or State award or an employment agreement;
- whose employment under that award or agreement (apart from the operation of Division 3 of Part VIA of the Act) is, or is normally, terminated at the end of each day or shift, or able to be terminated by the employer on the giving of not more than one day's notice; and
- who is working in an industry or occupation which, on 16 November 1994, was subject to an award or employment agreement of this kind.

(Note: this definition is associated with regulation 30BC, explained below, which excludes daily hire employees in the building and construction industry and the meat industry from the operation of sections 170DB, 170DD and 170EF and Subdivisions D and E of Division 3 of Part VIA of the Act.)

"Employment agreement" is defined as an agreement entered into under State law which regulates terms and conditions of employment of a particular kind and application which could, but for the agreement, have been regulated by a State arbitrator by compulsory arbitration, which prevails over any inconsistent order, award, decision or determination of a State industrial authority, and which, during a particular period only, prevents those terms and conditions from being regulated a State arbitrator by compulsory arbitration.

(Note: this definition, used by various provisions inserted by the regulations, reproduces the definition of "employment agreement" in subsection 111 (1A) of the Act.)

"NETTFORCE" is defined as the body registered by that name under the Corporations Law, having the Australian Registered Body Number specified in the regulations. (Note: this definition is associated with the definition of "traineeship agreement", for the purpose of the definition of "trainee", explained below.)

"State or Territory training authority" is defined as a body authorised by a law of a State or Territory for the purpose of overseeing arrangements for the training of employees. (Note: this definition is also associated with the definition of "traineeship agreement".)

"Trainee" is defined as an employee (other than an apprentice) who is bound by a traineeship agreement. (Note: this definition is associated with regulation 30BA, which excludes trainees from the operation of Subdivisions B, C, D and E of Division 3 of Part VIA of the Act.)

"Traineeship agreement" is defined as an agreement between an employer and an employee which is consistent with the *National Training Wage Interim Award 1994* (made under the Act), as in force on 16 November 1994, and registered with the relevant State or Territory training authority, with NETTFORCE, or under a law a State or Territory relating to the training of employees.

Regulation 4: Regulation 30B (Certain employees excluded from requirements for termination of employment)

Regulation 4 amends regulation 30B, which, since 30 March 1994, has set out categories of employees variously excluded from the operation of Subdivisions B, C, D and E of Division 3 of Part VIA of the Act.

Subregulation 4.1 amends the opening words to subregulation 30B(1), to provide that it is generally subject to subregulation 30B(2). Previously, only paragraph 30B(1)(a), which dealt with the exclusion of employees on fixed term contracts, was subject to the "main purpose" test (discussed below) in subregulation 30B(2) under regulation 30B as amended, a number of other exclusions are also subject to this test.

Subregulation 4.2 omits paragraph 30B(1)(a), which dealt with the exclusion of employees on fixed term contracts, and inserts new paragraphs 30B(1)(a) and 30B(1)(aa).

New paragraph 30B(1)(a) continues the previous exclusion of employees engaged under a contract of employment for a specified period of time, where the contract was entered into before the commencement of these regulations. (This exclusion does not operate where a main purpose of the engagement of the employee under a contract of this kind was to avoid the employer's obligations under the termination provisions - subregulation 30B(2).)

New paragraph 30B(1)(aa) excludes employees engaged under a contract of employment for a specified period of time, where the contract was entered into after the commencement of these regulations, but only if the specified period is less than 6 months. (This exclusion is also subject to the "main purpose" test, in subregulation 30B(2).) Contracts of employment for a specified period of 6 months or more are dealt with under new regulation 30BC(1)(c), inserted by regulation 5 (discussed below).

Subregulations 4.3, 4.4 and 4.5 make technical amendments to paragraphs 30B(1)(b), 30B(1)(c) and 30B(1)(d), so that they refer to "employee" in the singular. These amendments are for technical reasons of drafting style. (Paragraph 30B(1)(b), which previously excluded employees engaged under a contract of employment for a specified task, is also affected by subregulation 30B(2), discussed below.)

Subregulation 4.6 omits subregulation 30B(2) and substitutes a new subregulation 30B(2). Subregulation 30B(2) previously provided that the exclusion of employees employed under a fixed term contract applied except where a main purpose of such employment is to avoid the requirements of the Act. New subregulation 30B(2) provides that subregulation 30B(1) does not apply to contracts of the types referred to in paragraphs 30B(1)(a) and 30B(1)(aa), or contracts of the type referred to in paragraph 30B(1)(b) that were entered into after commencement of these regulations, if a main purpose of the employee's engagement under a contract of the relevant type is or was to avoid the employer's obligations under Subdivision B, C, D or E of Division 3 of Part VIA of the Act.

Subregulation 4.7 omits subregulation 30B(4). Subregulation 30B(4) previously provided that a casual employee who was not engaged for a short period within the meaning of subregulation 30B(3) was subject to the termination provisions relating to unfair dismissal, but was not covered by provisions relating to notice periods or the requirement on an employer to notify the CES of a decision to terminate the employment of 15 or more employees for economic, technological, structural or similar reasons. This situation is continued through the introduction of new paragraph 30BC(1)(a), outlined below.

Regulation 5: New regulations 30BA, 30BB and 30BC

Regulation 5.1 inserts new regulations 30BA, 30BB and 30BC.

New regulation 30BA (Exclusion of trainees):

New subregulation 30BA(1) provides that, for the purposes of section 170CC of the Act, trainees to whom subregulation 30BA(2) applies are excluded from the operation of Subdivisions B, C, D and E of Division 3 of Part VIA of the Act.

New subregulation 30BA(2) provides that this subregulation applies to a trainee if his or her employment under a traineeship agreement is for a specified period, or otherwise limited to the duration of the agreement.

New regulation 30BB (Exclusion of employees under the *Australian Federal Police Act 1979*):

New regulation 30BB excludes all employees appointed, employed or otherwise engaged under the *Australian Federal Police Act 1979* from the operation of Subdivisions B, C, D and E of Division 3 of Part VIA of the Act. Subregulation 30BB(2) provides that this regulation ceases to have effect on 1 January 1996.

New regulation 309C (Exclusion of certain casual etc. employees):

New subregulation 30BC(1) provides, for the purposes of section 170CC of the Act, for the exclusion of the following employees from the operation of sections 170DB, 170DD and 170EF and Subdivisions D and E of Division 3 of Part VIA of that Act (but not from the unfair dismissal jurisdiction):

- a casual employee, other than one engaged for a short period within the meaning of subregulation 30A(3) (new paragraph 30BC(1)(a));
- a daily hire employee performing work in the building and construction industry (as defined in subregulation 30BC(4)) or in the meat industry (new paragraph 30BC(1)(b));

- an employee engaged under a contract for a specified period, after the commencement of these regulations, where the specified period is 6 months or more - this is subject to a "main purpose" test, explained below (new paragraph 30BC(1)(c));
- an employee whose employment is regulated by Schedule X (Marine Cooks, Marine Stewards and Seaman's Engagement System Schedule) of the *Maritime Industry Seagoing Award 1983* (continued in force under the Act) as in force on 16 November 1994 (new paragraph 30BC(1)(c)).

New subregulation 30BC(2) provides that paragraph 30BC(1)(c) does not apply, where a main purpose of the engagement of the employee under a contract for a specified period is or was to avoid the employees obligations under relevant termination provisions.

New subregulation 30BC(3) provides that weekly hire employees working in or in connection with the meat industry are excluded from the operation of sections 170DB, 170DD and 170EF and Subdivisions D and E of Division 3 of Part VIA of that Act, but only in relation to any termination solely because of seasonal factors.

New subregulation 30BC(4) provides a definition of "work in the building and construction industry", for the purposes of subparagraph 30BC(1)(b)(i), which excludes daily hire employees working in that industry. This definition is for the removal of any doubt which might otherwise exist as to the scope of that subparagraph. The definition provides that "work in the building and construction industry" includes work in connection with, as well as work directly in, the repair, renovation, maintenance, ornamentation and demolition of buildings and structures, as well as work in or in connection with the erection of buildings and structures.

Regulation 6: New regulation 30DA

Regulation 6.1 inserts a new regulation 30DA into the Regulations.

The new regulation provides a formula for the indexation of the amounts stated in paragraphs 170CD(2)(a) and 170EE(4)(a) of the Act.

New regulation 300A (Formula for annual Indexation of certain amounts):

New subregulation 30DA(1) sets out the purpose of the regulation, which is to provide for the yearly indexation of the amounts stated in each of paragraphs 170CD(2)(a) and 170EE(4)(a) of the Act (referred to as the "indexable amounts").

New subregulation 30DA(2) sets out other definitions for the purposes of this regulation.

"Base weekly earnings average" is defined to mean the last amount published by the Australian Statistician before 1 July 1994 as an estimate (other than a preliminary estimate) of the average total weekly earnings (seasonally adjusted) of all employees in Australia for a particular month.

"Current weekly earnings average", in relation to an indexation day, is defined to mean the last amount published by the Australian Statistician before that day as an estimate (other than a preliminary estimate) of the average total weekly earnings (seasonally adjusted) of all employees in Australia for a particular month.

"Indexation day" is defined to mean 1 July 1995 or 1 July in a later year.

"Indexation factor", in relation to an indexation day, is defined to mean the number worked out to 3 decimal places by dividing the current weekly earnings average in relation to that indexation day by the base weekly earnings average.

New subregulation 30DA(3) provides that if the Australian Statistician publishes estimate of the average total weekly earnings (seasonally adjusted) of all employees in Australia for a particular month in substitution for an earlier estimate (other than a preliminary estimate) for the same month, this later estimate is to be disregarded for the purposes of regulation 30DA.

New subregulation 30DA(4) provides that, subject to subregulation 30DA(5), if on any indexation day the indexation factor is greater than one, then on and after that day, until a later application of this subregulation, each indexable amount is replaced by the amount arrived at by multiplying the indexable amount by the indexation factor.

New subregulation 30DA(5) provides that if the amount calculated under the indexation formula is not a multiple of \$100, it is to be rounded up or down to the nearest multiple of \$100 (and if the amount is a multiple of \$50, it is to be rounded up to the next multiple of \$100).

Regulation 7. New regulation 32AA

Regulation 7.1 inserts a new regulation 32AA into the Regulations.

New regulation 32AA (Recovery of wages etc.-small claims procedure):

New regulation 32AA provides, for the purposes of paragraph 179C(b) of the Act, the manner by which a person who has commenced an action in a magistrate's court may, in the absence of rules of court to this effect, indicate that they wish a small claims procedure (as provided by section 179D of the Act) to apply.

New subregulation 32AA(1) provides that the manner by which a person indicates that he or she wants a small claims procedure to apply to an action that person has commenced in a magistrate's court is:

- by endorsing the papers initiating the action with a statement that he or she wants a small claims procedure to apply (new subparagraph 32AA(1)(a)(i)), or by lodging with the magistrate's court a paper that identifies the action and states that he or she wants a small claims procedure to apply (new subparagraph 32AA(1)(a)(ii)); and
- by giving a copy of the papers initiating the action and of the paper (if any) referred to in subparagraph 32AA(1)(a)(ii) to every other party to the action (new paragraph 32AA(1)(b)).

New subregulation 32AA(2) provides that subregulation 32AA(1) does not apply to an action started in a magistrate's court if the rules of that court prescribe the manner in which the person indicates he or she wants a small claims procedure to apply.