EXPLANATORY STATEMENT

Select Legislative Instrument 2006 No. 118

Issued by the authority of the Minister for Employment and Workplace Relations

Workplace Relations Act 1996

Workplace Relations Amendment Regulations 2006 (No. 2)

Section 846 of the *Workplace Relations Act 1996* (the Act) provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act.

The purpose of the proposed Regulations is to make technical and minor corrections to the *Workplace Relations Regulations 2006*.

The Regulations make amendments to provisions dealing with record-keeping requirements; the range of courts which can deal with breaches of jurisdiction for civil remedy matters; the calculation of annual leave for piece rate employees; the 'more generous' test in the Australian Fair Pay and Conditions Standard; the exemption of awards that apply to Victorian referral employees from the hours of work guarantee in the Standard; cashing out of personal/carer's leave, exemptions from redundancy pay obligations; and the exclusion of Victorian laws and the powers of workplace inspectors. The Regulations also prescribe additional State and Territory laws for the purposes of the definition of 'OHS law' in section 737 of the Act, and otherwise correct some typographical errors. Details of the Regulations are in the Attachment.

The Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised. The Regulations are a legislative instrument for the purpose of the *Legislative Instruments Act 2003*.

Regulations 1, 2 and 3 and Schedule 1 to the Regulations are taken to have commenced on reform commencement, within the meaning of the Act, which is 27 March 2006. The amendment in Schedule 1 is made under the transitional regulation making power in item 1 of Part 1 of Schedule 4 to the *Workplace Relations Amendment (Work Choices) Act 2005*. That item provides expressly that the regulation-making power extends, despite subsection 12(2) of the *Legislative Instruments Act 2003*, to making regulations which take effect before the regulations are registered. The retrospective application of the regulation does therefore not infringe subsection 12(2) of the *Legislative Instruments Act 2003*. That subsection provides that a retrospective amendment has no effect if the amendment disadvantages a person's rights or imposes liabilities for anything done before the amendment takes effect.

Schedule 2 to the Regulations commenced on the day after the Regulations were registered.

ATTACHMENT

Details of the *Workplace Relations Amendment Regulations 2006 (No. 2)*

Regulation 1 – Name of Regulations

This clause sets out the name of the Regulations as the *Workplace Relations Amendment Regulations 2006 (No. 2)*.

Regulation 2 – Commencement

This clause provides that regulations 1, 2 and 3 and Schedule 1 to the Regulations are taken to have commenced on reform commencement within the meaning of the *Workplace Relations Amendment (Work Choices) Act 2005* and that Schedule 2 to the Regulations commences on the day after the Regulations are registered.

Regulation 3 – Amendment of *Workplace Relations Regulations 2006*

This clause provides that Schedules 1 and 2 to the Regulations amend the *Workplace Relations Regulations 2006* (the Principal Regulations).

Schedule 1 – Amendments

Item [1] – Chapter 7, Part 2, after Division 4

Item [1] amends the regulations with effect from the reform commencement. The amendment provides that the guarantee of maximum of 38 ordinary hours of work in the Australian Fair Pay and Conditions Standard (the Standard) (Part 7 of the Act) does not apply to an employee whose employment is subject to a transitional award or a common rule, for a period of 3 years from the reform commencement. This means that such transitional awards or common rules may provide for ordinary hours of work in excess of 38.

Schedule 2 - Amendments

Item [1] – Chapter 1, regulation 1.3, after definition of *pre-reform Regulations*
Item [24] – Chapter 2, Part 19, regulation 19.24
Item [25] – Chapter 2, Part 19, regulation 19.25
Item [27] – Chapter 2, Part 19A, regulation 19.41
Item [28] – Chapter 2, Part 19A, regulation 19.42
Item [29] – Chapter 2, Part 19B, paragraph 19.47(1)(h)
Item [30] – Chapter 2, Part 19B, paragraphs 19.48(a) and (b)

Item [1] inserts a new definition of a 'section 717 court' to mean an eligible court as defined in section 717 of the *Workplace Relations Act 1996* (the Act). 'Eligible court' in section 717 of the Act is defined to mean the Federal Court; the Federal Magistrates Court; a District, County or Local Court; a magistrate's court; the Industrial Relations Court of South Australia, or any other State or Territory court that is prescribed by the regulations.

Items [24], [25], [27], [28], [29] and [30] amend regulation 19.24, regulation 19.25, regulation 19.41, regulation 19.42, paragraph 19.47 (1) (h) and paragraphs 19.48 (a) and (b) to omit the words 'the Court or the Federal Magistrates Court' and replace them with a reference to a 'section 717 court'.

The effect of these amendments is to expand the range of courts that can deal with civil remedy provisions regarding the various pay slip and record-keeping requirements in Parts 19 and 19A of the Principal Regulations. Currently, only the Federal Court or Federal Magistrates Court can hear these matters, which creates difficulties for workplace inspectors to bring enforcement action in areas where there may not be a Federal Court or Federal Magistrates Court.

Item [6] – Chapter 2, Part 7, subregulation 7.1(4)
Item [31] – Chapter 2, Part 21, subregulation 21.3(4)

These items substitute subregulations 7.1(4) and 21.3(4). These amendments are required to ensure that a salary sacrifice arrangement, if not authorised by the employee, would breach the employee's guaranteed basic rate of pay under the Standard.

Item [7] – Chapter 2, Part 7, after paragraph 7.1(6)(d)
Item [8] – Chapter 2, Part 7, subregulation 7.1(11), after the example
Item [32] – Chapter 2, after paragraph 21.3(6)(d)
Item [33] – Chapter 2, Part 21, after subregulation 21.3(11), after the example

These items insert new subregulations to clarify the circumstances in which workplace agreements or contracts of employment may provide for an amount of paid personal/carer's leave and paid compassionate leave to be forgone in return for an amount of pay or other benefit ("cashing out") and be considered more favourable than the Standard.

The Standard prevails over a workplace agreement or contract of employment to the extent that it provides a more favourable outcome for the employee in a particular respect. Item 7 inserts a new paragraph 7.1(6)(da), which provides that paid personal/carer's leave is a particular respect for the purposes of subregulations 7.1(11A), (11B), (11C) and (11F).

Subregulations 7.1(11A) and 7.1(11D) provide that the Standard provides a more favourable outcome than a workplace agreement or contract of employment that permits the cashing out of any of the Standard's *minimum* entitlement to paid personal/carer's leave or paid compassionate leave. The effect of this is that the Standard will prevail over a provision in an agreement to cash out any of the Standard's minimum entitlement to personal/carer's leave each year or compassionate leave per occasion. The Standard's minimum entitlement to paid personal/carer's leave is cumulative (subsection 246(5)). This subregulation therefore does not permit the cashing out of the Standard's minimum entitlement to personal/carer's leave, even where this has been accumulated over a period of years.

Subregulations 7.1(11B) and 7.1(11E) provide that the Standard does not provide a more favourable outcome where a workplace agreement or contract provides for a

greater amount of paid personal/carer's leave or paid compassionate leave than the Standard, and allows the employee to cash out some or all of the amount of leave by which the agreement or contract exceeds the Standard. The effect of these subregulations is to enable an employer and an employee to agree that the 'above-Standard' component of personal/carer's leave or compassionate leave may be cashed out.

Under the Standard a full time employee will accrue 10 days of paid personal/carer's leave each year (subsection 246(2)), of which any amount can be used as sick leave, and of which 10 days in a 12 month period can be used as carer's leave (section 249). This means that an employee may take paid personal/carer's leave as paid sick leave up to the amount credited to the employee, or as paid carer's leave of up to 10 days each year. Subregulation 7.1(11B) ensures that an arrangement to cash out personal/carer's leave will only be more favourable than the Standard if it is consistent with these flexible arrangements.

Subregulation 7.1(11C) provides that accumulated personal/carer's leave may be paid out on termination of employment if provided for in a workplace agreement or contract of employment.

Under subregulation 7.1(11F), a provision in an agreement or contract providing for paid personal/carer's leave or paid compassionate to be cashed out is more favourable than the Standard where it does so in a manner consistent with the Regulations, and where the decision to cash out such leave is at the employee's written election.

Items [32] and [33] have the same effect as items [7] and [8] in relation to Victorian employees bound by an employment agreement entered into before 1 January 1997 under Part 2 of the *Employee Relations Act 1992* of Victoria. These employment agreements continue in force by Division 12 of Part 21 of the Act.

Item [9] – Chapter 2, Part 7, after regulation 7.7

This item inserts a new regulation 7.7A that provides a mechanism to calculate the annual leave payment rate for piece rate employees when a period of annual leave is taken or cashed out under the Standard.

Section 235 of the Act provides that if an employee takes annual leave during a period, the leave must be paid at a rate that is no less than the employee's *basic periodic rate of pay* immediately before the period begins. The section does not refer to a *basic piece rate of pay* for piece rate (including commission only) employees.

Section 231 of the Act enables the regulations to prescribe a different definition of *basic periodic rate of pay* in relation to piece rate employees to that which applies generally. A *piece rate employee* is an employee who is paid a piece rate of pay (as defined in section 178).

The regulation sets out a formula that converts an employee's output-based piece rate of pay into an hourly basic periodic rate of pay, by dividing the employee's total piece rate earnings by the total nominal hours worked (as defined in section 229) over the

relevant period (the previous 12 month period, or a lesser period for employees who have worked for less than 12 months).

Item [11] – Chapter 2, Part 8, paragraph 8.5(1)(k)
Item [12] – Chapter 2, Part 8, after paragraph 8.5(1)(k)

Item [12] inserts new paragraph 8.5(1)(l) in regulation 8.5 of Chapter 2 of the Principal Regulations, and item [11] makes a minor consequential amendment. Regulation 8.5 provides that various matters are prohibited content in workplace agreements. Section 358 of the Act provides that a term of a workplace agreement that contains prohibited content is void.

This paragraph prohibits a workplace agreement from containing terms that enable an employee to forgo an employee's minimum entitlement to paid personal/carer's leave or paid compassionate leave, otherwise than in a manner that provides a more favourable outcome to the employee than the Standard, consistent with the Principal Regulations.

Item [15] – Chapter 2, Part 10, paragraphs 10.3(3)(a) and (b)

A preserved award term about annual leave, personal/carer's leave and parental leave continues to apply to an employee if it is 'more generous' than the Standard. Existing regulation 10.3 (Part 10, Chapter 2) explains how to determine whether an employee's preserved award entitlement is more generous than the Standard. That regulation provides that the 'more generous' test is based on the effect on an individual employee alone (rather than the effect on employees generally), and that a preserved award entitlement is 'more generous' than the Standard if it provides a higher quantum of entitlement.

This item makes a minor technical amendment to regulation 10.3 by replacing each reference to 'total quantum' with 'total *annual* quantum'. The amendment is required to clarify that the quantum of leave in a preserved award term to be compared with the Standard is the amount provided in a year.

Item [16] – Chapter 2, Part 10, subregulation 10.3(3), table of examples, heading

This item substitutes a new heading for the table of examples under subregulation 10.3(3) so that it refers to examples of comparisons between preserved award terms and the Standard *for a full-time employee*.

Item [17] – Chapter 2, Part 10, subregulation 10.3(3), after the examples

This item inserts a new subregulation 10.3(3A) in Part 10 of Chapter 2 of the Principal Regulations. Subregulation 10.3(3A) provides that for the purpose of the 'more generous' comparison table in subregulation 10.3(3), it is only the *paid* quantum of annual leave or personal carer's leave that is relevant for the comparison.

Item [34] – Chapter 3, Part 7, paragraphs 7.4(3)(a) and (b)
Item [35] – Chapter 3, Part 7, subregulation 7.4(3), table of examples, heading
Item [36] – Chapter 3, Part 7, subregulation 7.4(3), after the table of examples
Item [37] – Chapter 3, Part 7, paragraphs 7.11(3)(a) and (b)
Item [38] – Chapter 3, Part 7, subregulation 7.11(3), table of examples, heading
Item [39] – Chapter 3, Part 7, subregulation 7.11(3), after the table of examples

These items have the same effect as items [15], [16] and [17] in relation to preserved terms of transitional Victorian reference awards, and transitional awards insofar as these award terms are applicable in Victoria (the Standard is otherwise not applicable to transitional awards).

Item [18] – Chapter 2, Part 12, after paragraph 12.6(1)(a)
Item [19] – Chapter 2, Part 12, after paragraph 12.6(2)(a)
Item [21] – Chapter 2, Part 19, subregulation 19.9(1)
Item [22] – Chapter 2, Part 19, before paragraph 19.12(1)(a)
Item [23] – Chapter 2, Part 19, before paragraph 19.13(1)(a)

Item [21] amends Chapter 2, regulation 19.9. It substitutes subregulation 19.9(1) and inserts new subregulation 19.9(1A). Item [18] amends Chapter 2, regulation 12.6(1) to provide for the annual indexation of the amount mentioned in paragraph 19.9(1)(b). Item [19] amends Chapter 2, regulation 12.6(2) to provide details of what constitutes the 'base weekly earnings average' for the amount mentioned in paragraph 19.9(1)(b) Items [22] and [23] amend subregulation 19.12(1) and subregulation 19.13(1), respectively, so that records relating to annual leave and personal leave must contain records for the employee's nominal hours within the meaning of section 229 of the Act.

The effect of these amendments is to modify the record-keeping requirements on employers in relation to hours worked by their employees. Employers will be required to keep records relating to daily starting and finishing times where overtime is payable to the employee under an industrial instrument as set out in paragraph 19.9(1)(a).

Paragraph 19.9(1)(b) provides that employers will be required to keep records relating to the total number of hours worked by an employee, being hours that the employee was required or requested to work, where the employee's 'specified annual salary' is less than $55,000 (indexed). Indexation occurs after July 1 each year on and after 1 July 2007 and is in accordance with regulation 12.6.

Subregulation 19.9(1A) sets out what the employee's *base annual salary* is, by reference to whether the employee is a full-time or part-time employee whose annual salary is specified in a written instrument, or whether the employee does not have an annual salary specified in a written instrument and is paid at a rate of regular salary or not during a period.

Paragraph 19.9(1A)(a) provides that if the employee is a full-time employee whose annual salary is specified in a written instrument, the employee's annual earnings are the base annual salary, excluding certain listed entitlements. Paragraph 19.9(1A)(b) provides if the employee is a part-time employee whose annual salary is specified in a

written instrument, the employee's annual earnings are the base annual salary excluding certain listed entitlements. Paragraph 19.9(1A)(c) provides that if the employee does not have an annual salary of the type mentioned in paragraphs 19.9(1A)(a) or (b) and the employee is paid at a rate of regular salary during a period, the base annual salary is the annual salary that the employee would earn at that regular rate. Paragraph 19.9(1A)(d) provides that if the employee does not have an annual salary of the type mention in paragraphs 19.9(1A)(a) or (b) and the employee is a piece rate employee or another employee who is not paid at a rate or regular salary during the period, the base annual salary is the employee's annual earnings as reasonably estimated by the employee's employer excluding certain listed entitlements.

The regulations include examples to illustrate how the $55,000 threshold will apply and how an employer might reasonably estimate the employee's annual salary.

Item [20] - Chapter 2, Part 15, paragraph 15.1(1)(b)

Item [20] amends Chapter 2, subregulation 15.1(1). It substitutes paragraph 15.1(1)(b) and inserts new paragraphs 15.1(1)(c) and 15.1(1)(d).

The Act imposes additional conditions on Right of Entry for union officials under State and Territory Occupational Health and Safety legislation (being those that meet the definition of an 'OHS law' in the Act). Section 737 provides that an OHS law of a State or Territory is to be prescribed by the regulations.

Regulation 15.1 sets out the laws that are prescribed for the definition of "OHS law" in section 737.

Paragraph 15.1(1)(c) prescribes the *Workplace Health and Safety Act 1995* of Queensland in response to amendments to this legislation which provide union officials with a Right of Entry for occupational health and safety purposes.

Paragraph 15.1(1)(d) prescribes the *Occupational Health and Safety Act 1989* of the Australian Capital Territory.

Item [40] – Chapter 3, after Part 7

This item inserts a new regulation 8.1 in part 7 of Chapter 3, enabling the Australian Industrial Relations Commission (the Commission) to determine an application to vary or set aside an obligation under a transitional award to pay redundancy pay in limited circumstances.

Where a term of a transitional award allows an employer to apply for redundancy pay obligations to be varied or set aside, on the basis that the employer found alternative employment for the redundant employee, the Commission may determine the application if it is satisfied that the alternative employment is acceptable.

The note to this subregulation makes clear that acceptability of the alternative employment involves an objective assessment requiring the Commission to consider a range of factors, including pay and hours of work.

In the absence of this regulation, the Commission would have no jurisdiction to determine such applications.

Item [41] – Chapter 5, before Part 3
Item [45] – Chapter 5, Part 3, after regulation 3.4
Item [51] – Chapter 7, Part 2, after Division 17

These items have the same effect as item [41], in relation to preserved State agreements (PSAs), notional agreements preserving State awards (NAPSAs) and federal awards.

Items [41] and [45] insert regulations to enable the Commission to determine an application to vary or set aside an obligation under a PSA or NAPSA to pay redundancy pay. The Commission may only determine applications where a term of a PSA or NAPSA allows an employer to make an application to a State industrial authority to have redundancy pay obligations varied, because the employer found alternative employment for the redundant employee.

- The notes to these items make clear that, because regulations can be made under clauses 30 and 55 of Schedule 8 to modify the Act, powers in relation to certain redundancy variation applications may be exercised by the Commission under these regulations despite subclauses 15(1) and 35(1) of Schedule 8 to the amended Act.

- Subclauses 15(1) and 35(1) provide that any function conferred by a PSA or a NAPSA on a State industrial authority cannot be exercised by that authority. Subclauses 15(2) and 35(2) provide that a power or function may only be conferred on the Commission by agreement of the parties bound by the PSA or NAPSA where it is not related to the resolution of a dispute about the application of the PSA or NAPSA.

Item [51] inserts a regulation enabling the Commission to determine an application to vary or set aside an obligation under a pre-reform award to pay redundancy pay. Where the award term allows an employer to apply to have redundancy pay obligations varied or set aside, on the basis that the employer found alternative employment for the redundant employee, the Commission may determine the application if it is satisfied that the alternative employment is acceptable.

This is a transitional regulation made under item 1 of Schedule 4 to the *Workplace Relations Amendment (Work Choices Act) 2005* and ceases to have effect at the end of 12 months from the day on which the regulation commences.

Item [42] – Chapter 5, Part 3, paragraphs 3.2(3)(a) and (b)
Item [43] – Chapter 5, Part 3, subregulation 3.2(3), table of examples, heading
Item [44]– Chapter 5, Part 3, subregulation 3.2(3), after the table of examples

These items have the same effect as items [14], [15] and [16] in relation to preserved notional terms of notional agreements preserving State awards.

Item [46] – Chapter 7, Part 2, after Division 2

Subregulation 2.2A(1) clarifies that a law of Victoria about a matter not referred to the Commonwealth by section 5 of the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic) (the Referral) is not excluded by subsection 898(1) of the Act.

Subregulations 2.2A(1) and (2) seek to ensure that, as far as is possible having regard to the terms of the Referral, the Victorian laws which are excluded by section 898 of the Act in their application to Victorian employers and employees covered by Part 21 of the Act are consistent with the State and Territory laws (including Victorian laws) excluded by section 16 of the Act in their application to employers and employees within the meaning of subsections 6(1) and 5(1) of the Act.

Subregulation 2.2A(2) provides that a law of Victoria that deals with EEO and is not contained in a State or Territory industrial law is not excluded by subsection 898(1) of the Act. The subregulation additionally provides that 'non excluded' matters are not excluded by subsection 898(1) of the Act.

Subregulation 2.2A(3) lists those matters which are 'non excluded' for the purposes of the regulation.

Item [47] – Chapter 7, Part 2, paragraph 2.14(a)
Item [48] – Chapter 7, Part 2, paragraph 2.14(a)
Item [49] – Chapter 7, Part 2, regulation 2.14, at the foot
Item [50] – Chapter 7, Part 2, subregulation 2.19(3)

Items [47], [48] and [49] are technical amendments which clarify the powers of workplace inspectors.

Items [47] and [48] remove the word "criminal" from paragraph 2.14(a). This amendment is necessary to clarify that workplace inspectors have power to institute civil prosecutions in respect of an alleged breach of a matter under the pre-reform Act or the pre-reform Regulations.

Item [49] inserts a note at the foot of regulation 2.14. The note clarifies that the powers of a workplace inspector under section 169 of the Act may be exercised for the purpose of a provision of the regulations that confers powers or functions on inspectors.

Item [50] omits subregulation 2.19(3), which provides that a workplace inspector is authorised to exercise the powers of a workplace inspector under Part 6 of the Act in relation to the enforcement of rights and obligations that arose under the pre-reform Act. Subregulation 2.19(3) will be redundant on commencement of the amendments made by items [48] and [49]. This is because paragraph 169(1)(b) of the Act provides that the powers of a workplace inspector under section 169 (the relevant powers under Part 6 of the Act) of the Act may be exercised for the purpose of a provision of the regulations that confers powers or functions on inspectors.

Item [2] – Chapter 2, Part 1, paragraph 1.3(c)
Item [3] – Chapter 2, Part 1, subregulation 1.5(1)
Item [4] – Chapter 2, Part 1, subparagraph 1.5(6)(b)(ii)
Item [5] – Chapter 2, Part 3, paragraph 3.3(n)
Item [10] – Chapter 2, Part 8, paragraph 8.3(1)(a)
Item [13] – Chapter 2, Part 9, subregulation 9.16(4)
Item [14] – Chapter 2, Part 9, regulation 9.21
Item [26] – Chapter 2, Part 19, subregulation 19.28(3)
Item [52] – Schedule 1, form 2, note
Item [53] – Schedule 4, item 8, column 2

Items [2], [3], [4], [5], [10], [13] and [26] are technical amendments which correct typographical errors.

Item [52] amends the note to form 2 in Schedule 1. It changes the time limit for returning a permit to enter and inspect premises to the Registrar after it expires or is revoked from fourteen to seven days.

Item [53] amends column 2 of item 8 in Schedule 4. It omits the words ‘for a secret ballot’ and replaces the reference to ‘Division 4 of Part 9’ with ‘Division 2 of Part 9’. This amendment is required as Division 2 of Part 9 of the Act does not relate to secret ballots.