

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2009 No. 337**

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

*Fair Work (State Referral and Consequential and Other Amendments) Act 2009*

*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*

*Fair Work Legislation Amendment Regulations 2009 (No. 1)*

Clause 2 of Schedule 20 of the *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* (Consequential Act) provides that the Governor-General may make regulations amending Acts (other than the *Fair Work Act 2009* (FW Act)) being amendments that are consequential on, or otherwise relate to, the enactment of the FW Act, the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Transitional Act), or the Consequential Act.

Section 4 of the Transitional Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Transitional Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Transitional Act.

The Regulations amend:

- the *Fair Work (State Referral and Consequential and Other Amendments) Regulations 2009* (Consequential Regulations) to amend various Commonwealth laws to substitute Fair Work Australia (FWA) for the Australian Industrial Relations Commission (AIRC) as the reviewing authority for occupational health and safety matters; and
- the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (Transitional Regulations) to make transitional provisions about public sector redundancy, unfair dismissal and the final annual reports for the AIRC, the Australian Industrial Registry (AIR) and the Workplace Authority.

The Regulations contain three Schedules.

Schedules 1 and 2 amend the Consequential Regulations to include consequential amendments to various Commonwealth laws that currently specify the AIRC as the reviewing authority in relation to certain occupation health and safety matters. The amendments substitute FWA as the reviewing authority.

Schedule 3 makes technical amendments to the Transitional Regulations to:

- provide a transitional rule to deal with the situation where certain public sector employees would, on commencement of the National Employment Standards (NES) on 1 January 2010, have access to both a retention or redeployment period as an alternative to having their employment terminated immediately due to redundancy (and payment of redundancy pay) and a redundancy entitlement under the NES – the rule ensures that such employees are neither advantaged or disadvantaged in terms of their minimum redundancy entitlement under the NES;
- ensure that the categories of persons covered by the unfair dismissal protections in the FW Act are consistent with those that were covered under the repealed *Workplace Relations Act 1996* (WR Act); and

- require the General Manager of FWA to prepare the AIRC and AIR annual reports for the year ending 30 June 2010 and the Fair Work Ombudsman to prepare the Workplace Authority annual report for the year ending 30 June 2010.

The amendments contained in Schedules 1 and 2 were developed in consultation with the Department of Resources, Energy and Tourism.

Consultations were conducted in relation to the development of amendments contained in items [1] to [8], [11] and [12] of Schedule 3 with relevant agencies within the Australian Public Service, the Parliamentary Service, the ACT Government, and the Northern Territory Government.

Given the technical nature of the amendment contained in item [9] of Schedule 3, no separate consultation was required.

The Fair Work Ombudsman was consulted on the development of the amendment contained in item [10] of Schedule 3.

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 purposes of the *Legislative Instruments Act 2003*.

A Regulation Impact Statement (RIS) was prepared for the *Fair Work Act 2009*, therefore a separate RIS has not been prepared for these regulations. The Office of Best Practice Regulation has also confirmed that a Business Cost Calculator report was not required for these regulations.

Regulations 1 to 3 and Schedule 1 commence on the day after they are registered on the Federal Register of Legislative Instruments. The remainder of the regulations commence on 1 January 2010 with the full commencement of the Fair Work reforms.

**Details of the *Fair Work Legislation Amendment Regulations 2009 (No. 1)***

**Regulation 1 – Name of Regulations**

This regulation sets out the name of the Regulations as the *Fair Work Legislation Amendment Regulations 2009 (No. 1)*.

**Regulation 2 – Commencement**

This regulation provides that Regulations 1 to 3 and Schedule 1 commence on the day after they are registered on the Federal Register of Legislative Instruments and the remainder of the Regulations would commence on 1 January 2010.

**Regulation 3 – Amendment of *Fair Work (State Referral and Consequential and Other Amendments) Regulations 2009***

**Regulation 4 – Amendment of *Fair Work (State Referral and Consequential and Other Amendments) Regulations 2009***

These regulations provide that the *Fair Work (State Referral and Consequential and Other Amendments) Regulations 2009* (Consequential Regulations) are to be amended in accordance with Schedules 1 and 2.

**Regulation 5 – Amendment of *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009***

This regulation provides that the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (Transitional Regulations) are to be amended in accordance with Schedule 3.

**Schedule 1 – Amendments of *Fair Work (State Referral and Consequential and Other Amendments) Regulations 2009* commencing on registration**

Schedule 1 amends the Consequential Regulations to include consequential amendments to the following Commonwealth laws that currently specify the AIRC as the reviewing authority in relation to certain occupation health and safety matters:

- the *Occupational Health and Safety Act 1991*;
- the *Occupational Health and Safety (Safety Arrangements) Regulations 1991*;
- the *Occupational Health and Safety (Maritime Industry) Act 1993*; and
- the *Occupational Health and Safety (Maritime Industry) Regulations 1995*.

The amendments substitute Fair Work Australia (FWA) as the reviewing authority. These amendments would commence on registration.

**Item [1] – Regulation 3, heading**

**Item [2] – Subregulation 3 (2)**

These items contain amendments that are consequential upon the amendments made by item [3].

### **Item [3] – After subregulation 3(2)**

This item amends regulation 3 of the Consequential Regulations to specify that:

- Part 1 of Schedule 1 amends the *Builders Labourers' Federation (Cancellation of Registration – Consequential Provisions) Act 1986*;
- Part 2 of Schedule 1 amends the *Occupational Health and Safety Act 1991*;
- Part 3 of Schedule 1 amends the *Occupational Health and Safety (Safety Arrangements) Regulations 1991*;
- Part 4 of Schedule 1 amends the *Occupational Health and Safety (Maritime Industry) Act 1993*;
- Part 5 of Schedule 1 amends the *Occupational Health and Safety (Maritime Industry) Regulations 1995*;
- Part 6 of Schedule 1 amends the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*;
- Part 7 of Schedule 1 amends the *Petroleum (Submerged Lands) (Occupational Health and Safety) Regulations 1993*.

### **Item [4] – Schedule 1, before item [1]**

This item inserts a heading for new Part 1 of Schedule 1 to the Consequential Regulations – ‘*Builders Labourers' Federation (Cancellation of Registration – Consequential Provisions) Act.*’

### **Item [5] – After item [16]**

This item inserts four new Parts and associated new items after item [16] of Schedule 1 to the Consequential Regulations as follows:

#### **Part 2 – *Occupational Health and Safety Act 1991***

The definition of ‘reviewing authority’ in section 5 of the *Occupational Health and Safety Act 1991* is amended to replace the AIRC as the ‘reviewing authority’ with FWA.

#### **Part 3 – *Occupational Health and Safety (Safety Arrangements) Regulations 1991***

Amendments are made to the notes to Forms 1 - 5 in Schedule 1 to the *Occupational Health and Safety (Safety Arrangements) Regulations 1991*. References currently in the notes to the AIRC are replaced with references to FWA.

#### **Part 4 – *Occupational Health and Safety (Maritime Industry) Act 1993***

A reference to the AIRC in the definition of ‘reviewing authority’ in section 4 of the *Occupational Health and Safety (Maritime Industry) Act 1993* is replaced with a reference to FWA.

#### **Part 5 – *Occupational Health and Safety (Maritime Industry) Regulations 1995***

Amendments are made to the notes to Forms 1 – 5 of Schedule 1 of the *Occupational Health and Safety (Maritime Industry) Regulations 1995*. References currently in the notes to the AIRC are replaced with references to FWA.

Schedule 2 – Amendments of Fair Work (State Referral and Consequential and Other Amendments) Regulations 2009 commencing on 1 January 2010

Schedule 2 amends the Consequential Regulations to include consequential amendments to the following Commonwealth laws that currently specify the AIRC as the reviewing authority in relation to certain occupational health and safety matters:

- the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*; and
- the *Petroleum (Submerged Lands) (Occupational Health and Safety) Regulations*.

The amendments substitute FWA as the reviewing authority. These amendments commence on 1 January 2010 to enable the states and the Northern Territory to amend their ‘mirror’ occupational health and safety legislation to refer to FWA.

**Item [1] – After Part 5**

This item inserts new Parts 6 and 7 into Schedule 1 to the Consequential Regulations.

**Part 6 – Offshore Petroleum and Greenhouse Gas Storage Act 2006**

New Part 6 replaces references to the AIRC with references to FWA in the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*.

**Part 7 – Petroleum (Submerged Lands) (Occupational Health and Safety) Regulations 1993**

New Part 7 replaces references to the AIRC with references to FWA in the notes to Forms 1 - 5 of Schedule 1 to the *Petroleum (Submerged Lands) (Occupational Health and Safety) Regulations 1993*.

Schedule 3 – Amendments of Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009 commencing on 1 January 2010

Schedule 3 makes technical amendments to the Transitional Regulations to:

- provide a transitional rule to deal with the situation where certain public sector employees will, on commencement of the NES on 1 January 2010, have access to both a retention or redeployment period as an alternative to having their employment terminated immediately due to redundancy (and payment of redundancy pay) and a redundancy entitlement under the NES;
- ensure that the categories of persons covered by the unfair dismissal protections in the *Fair Work Act 2009* (FW Act) is consistent with those that were covered under the repealed *Workplace Relations Act 1996* (WR Act); and
- require the General Manager of FWA to prepare the AIRC and AIR annual reports for the year ending 30 June 2010 and the Fair Work Ombudsman to prepare the Workplace Authority annual report for the year ending 30 June 2010.

*Public service redundancy*

Part 2-2 of the FW Act contains the NES which provide (among other things) a minimum entitlement to redundancy pay.

The Regulations amend the Transitional Regulations to ensure that relevant public sector employees who serve a retention or redeployment period are not advantaged or disadvantaged in terms of their minimum redundancy entitlement under the NES.

### *Application of unfair dismissal provisions*

Section 382 of the FW Act sets out the criteria for when a person is protected from unfair dismissal, one of which is coverage of a modern award. The Regulation ensures that the categories of persons covered by the unfair dismissal protections in the FW Act is consistent with those that were covered under the repealed WR Act.

### *Winding up of the AIRC, AIR and the Workplace Authority*

Clause 7 of Schedule 18 to the Transitional Act provides that the AIRC and the AIR will cease to exist on 31 December 2009, and that the Workplace Authority will cease to exist on 31 January 2010.

The Regulations require the General Manager of FWA to prepare the AIRC and AIR annual reports for the year ending 30 June 2010 and the Fair Work Ombudsman to prepare the Workplace Authority annual report for the year ending 30 June 2010.

#### **Item [1] – Regulation 1.03**

#### **Item [2] – After subregulation 1.03(1), before the note**

These items are consequential on the amendments proposed by item [12] of Schedule 3. These items provide that a provision of the Transitional Act modified in accordance with regulation 5.12 is referred to as *modified*.

#### **Item [3] – Regulation 1.03, after definition of *Act***

#### **Item [4] – Regulation 1.03, after definition of *national system employer***

#### **Item [5] – Regulation 1.03, after definition of *pre-transition collective agreement***

#### **Item [6] – Regulation 1.03, after definition of *redundancy pay application***

These items are consequential on the amendments proposed by item [8] of Schedule 3. Item [8] provides a transitional rule to deal with the situation where certain public sector employees have access to both a retention or redeployment period as an alternative to having their employment terminated immediately due to redundancy (and payment of redundancy pay) and a redundancy entitlement under the NES. Item [8] is designed to ensure that such employees are not advantaged or disadvantaged in terms of their minimum redundancy entitlement under the NES.

Items [3] to [6] defines relevant terms the terms for the purposes of item [8]:

- the definitions of *public sector employment*, *public sector employee* and *relevant enterprise agreement* relate to the coverage of the proposed regulation;
- the definitions of *amount of payments* and *NES amount* ensure that an employee to whom the regulations apply is paid the correct amount in respect of the termination of their employment because of redundancy.

#### **Item [7] – Part 2, Division 1 heading**

This item substitutes the current Division 1 heading to reflect the amendments in the proposed Regulations.

### **Item [8] – After regulation 2.02**

This item inserts new regulation 2.02A (Retention of redeployment period – entitlement to redundancy pay) after regulation 2.02 of the Transitional Regulations. This item provides a transitional rule to deal with redundancy arrangements for public sector employees where:

- a transitional instrument, or enterprise agreement made before commencement of the NES on 1 January 2010, applies to the employee;
- the transitional instrument or enterprise agreement allows an employee to enter into a retention or redeployment period as an alternative to immediate termination of employment and payment of redundancy pay;
- an employee enters into a retention or redeployment period under such an instrument or agreement, and subsequently has their employment terminated after 1 January 2010 (ie after commencement of the NES).

Item [8] is designed to ensure that employees who serve a retention or redeployment period are not advantaged or disadvantaged in terms of their minimum redundancy entitlement under the NES, by providing for reconciliation of the two sources of entitlement.

Therefore this transitional rule does not apply where an enterprise agreement that applies to the employee has already provided an equivalent offsetting arrangement in anticipation of the commencement of the NES.

Under new regulation 2.02A, a public sector employee in the situation outlined would:

- not receive redundancy pay under the NES - where the amount paid to the employee during the retention or redeployment period is greater than, or equivalent to, the amount payable under the NES; or
- receive a redundancy payment equivalent to the difference between the NES and the value of the retention period - where the retention or redeployment period is less than the benefit available under the NES.

It is intended that the NES amount is calculated on service accrued up to and including the date on which the employee's employment is terminated and therefore includes service accrued by the employee during the retention or redeployment period.

### **Item [9] – After regulation 2.05**

This item inserts new regulation 2.06 (Award-based transitional instruments including notional agreement preserving State awards) after regulation 2.05 of the Transitional Regulations. This item provides that insofar as the definition of 'award-based transitional instruments' in subitem 36(a) of Schedule 3 to the Transitional Act includes notional agreements preserving State awards (NAPSAs), it does not include NAPSAs that only contain a term or terms derived from State or Territory industrial laws. This ensures that the categories of persons covered by the unfair dismissal protections in the FW Act is consistent with those that were covered under the repealed WR Act.

### **Item [10] – After regulation 5.02**

This item inserts new regulation 5.02A (Annual Reports for AIRC, AIR and Workplace Authority) after regulation 5.02 in the Transitional Regulations.

Regulation 5.02A requires the General Manager of FWA to prepare the AIRC and AIR annual reports for the year ending 30 June 2010. Regulation 5.02A also requires the Fair Work Ombudsman to prepare the Workplace Authority annual report for the year ending 30 June 2010.

### **Item [11] - After regulation 5.11**

This item inserts provisions providing for the modification of subitem 5 of Schedule 4 to the Transitional Act in accordance with item [12].

### **Item [12] – After regulation 5.12**

This item makes a technical amendment that clarifies that an entitlement to a retention or redeployment period counts as “an entitlement to redundancy pay” for the purposes of sub-item 5(4) of Schedule 4 to the Transitional Act.

- Subitem 5(4) of Schedule 4 to the Transitional Act provides that an employee’s pre-1 January 2010 service will not be counted for the purposes of calculating the employee’s entitlement to redundancy pay under the NES if the employee did not have an entitlement to redundancy pay before 1 January 2010.

It is not intended that subitem 5(4) of Schedule 4 operate in a way that prevents a public sector employee’s pre-1 January 2010 service being counted on the grounds that the employee is entitled to, or does, enter into a retention or redeployment period.

The definition of *retention or redeployment period* ensures that it is not only the entering into a period of employment as an alternative to being made immediately redundant that is the trigger for the proposed Regulations to apply, but also the foregoing of any redundancy payment that would otherwise have applied.