EXPLANATORY STATEMENT

Select Legislative Instrument 2011 No. 153

Issued by the authority of the Minister for Tertiary Education, Skills, Jobs and Workplace Relations

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2011 (No. 2)

Section 4 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Act) provides that the Governor-General may make regulations prescribing 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.

Item 8 of Schedule 2 to the Act provides that the Governor-General may make regulations to modify provisions of the transitional Schedules to the Act.

The Regulations amend the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (the Principal Regulations), to modify Schedule 3 and Schedule 20 to the Act to rectify an unintended effect of provisions in those Schedules that result in the ongoing operation of federal transitional instruments in relation to employers and employees who have been excluded from the national system under section 14 of the *Fair Work Act 2009* (FW Act).

The FW Act generally applies to national system employers and their employees. Subsection 14(1) and sections 30D and 30N of the FW Act set out the meaning of national system employer. Subsection 14(2) of the FW Act allows States and Territories to declare (subject to Commonwealth ministerial endorsement under subsection 14(4)) that certain State public sector or local government employers, over which the Commonwealth would otherwise have jurisdiction, are not national system employers. The effect of an endorsed declaration is that an employer specified in it (and that employer's employees) will not generally be subject to the FW Act and will instead be subject to the workplace relations arrangements prescribed by the relevant State or Territory.

Queensland, South Australia and New South Wales have declared a number of State public sector and local government bodies to be excluded from the operation of the FW Act. The Minister for Workplace Relations has endorsed these declarations. The Minister endorsed declarations on 17 December 2009 in the *Fair Work (State Declarations - employers not to be national system employers) Endorsement 2009*. Four other declarations have since been endorsed, namely the *Fair Work (State Declarations – employer not to be a national system employer Endorsement 2010 (No. 1), Fair Work (State Declarations – employer not to be a national system employer Endorsement 2010 (No. 2)*, and *Fair Work (State Declarations – employer not to be a national system employer Endorsement 2011 (No. 1).*

Although these 'excluded' employers and their employees are no longer in the national workplace relations system, transitional instruments made before 1 January 2010 under the WR Act may nonetheless continue to operate in relation to these employers and their

employees. This is because item 3 of Schedule 3 to the Act and item 1 of Schedule 20 to the Act provide for the continuing coverage by transitional instruments (such as workplace agreements and transitional awards) of employers and employees previously covered by such instruments under the WR Act. While these instruments continue to cover 'excluded' employers and employees, they prevail over State industrial instruments to the extent of any inconsistency. This is not the intention of the framework for exclusions from the national system under subsections 14(2) and (4) of the FW Act, which envisages that 'excluded' employers and their employees should be subject to State or Territory workplace relations arrangements.

The Regulations modify item 3 of Schedule 3 and item 1 of Schedule 20 to the Act by providing that federal transitional instruments specified in those Schedules do not cover, and can never again cover, an employer and employees excluded under subsection 14(2) of the FW Act, if:

- the employer has ceased to be a national system employer under subsection 14(2) of the FW Act;

- transitional arrangements have been made under a State law for a State industrial instrument to cover that excluded employer and its employees;

- the State instrument would not cover the excluded employer and its employees because of the operation of the federal transitional instrument; and

- the State instrument provides terms and conditions of employment that are substantially similar to those in federal transitional instruments that would otherwise cover these employers and employees.

The Parliaments of Queensland, South Australia and New South Wales have each enacted transitional arrangements (under the *Industrial Relations Act 1999* (Qld), the *Fair Work Act 1994* (SA) and the *Industrial Relations Act 1996* (NSW) respectively) that create State transitional instruments (in the same terms as federal instruments applying to employers and employees immediately before an 'exclusion' declaration is made) to apply to excluded employers and employees.

Details of the Regulations are in the Attachment.

The Act does not specify any conditions that need to be satisfied before the power to make the proposed Regulations may be exercised.

State and Territory Governments were consulted during the development of the Regulations.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations are taken to have commenced on 1 January 2010 and provide for the cessation of federal transitional instruments in relation to excluded employers and their employees from the later of the day on which the endorsement of a State declaration commences, or the day on which State transitional arrangements provide for a State industrial instrument to come into effect.

Authority:	*Section 4 of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*

ATTACHMENT

Details of the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2011 (No. 2).*

Regulation 1 – Name of Regulations

This regulation sets out the name of the Regulations as the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2011 (No. 2).*

Regulation 2 – Commencement

This regulation provides that the Regulations are taken to have commenced on 1 January 2010.

Regulation 3 – *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* (the Principal Regulations) are amended in accordance with Schedule 1.

Schedule 1 – Amendments

Item [1] – After regulation 3.04

This item inserts new regulation 3.05 – Transitional instruments not to cover certain employers and employees after regulation 3.04 of the Principal Regulations.

New regulation 3.05 modifies Schedule 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Act) by inserting new subitems 3(3A) and 3(3B).

Schedule 3 generally provides for the continued operation of industrial instruments made or given effect by the *Workplace Relations Act 1996* (WR Act) such as workplace agreements in effect before 1 January 2010. Sub-item 3(1) of Schedule 3 provides for the continuing coverage by such instruments of employers and employees previously covered by these instruments under the WR Act. This provision operates in relation to employers and employees even if they are no longer national system employers and national system employees as a result of an endorsed declaration under section 14 of the *Fair Work Act 2009* (FW Act), because Schedule 3 is not limited in its operation to national system employers and nationals system employees (see item 1).

While these instruments continue to cover excluded employers and employees, they prevail over State industrial instruments to the extent of any inconsistency. This is not the intention of the framework for exclusions from the national system under subsections 14(2) and (4) of the FW Act, which envisages that excluded employers and their employees should be subject to State or Territory workplace relations arrangements.

New sub-item 3(3A) provides that a federal transitional instrument does not cover the excluded employer and its employees, and can never again cover them, if:

- an employer has ceased to be a national system employer under subsection 14(2) of the FW Act;

- transitional arrangements have been made under a State law for a State industrial instrument to cover that excluded employer and its employees;

- the State instrument would not cover the excluded employer and its employees because of the operation of the federal transitional instrument; and

- the State instrument provides terms and conditions of employment that are substantially similar to those in federal transitional instruments that would otherwise cover these employers and employees.

New sub-item 3(3B) provides for a federal transitional instrument to cease to cover an excluded employer and its employees from the later of the day on which the endorsement of a State declaration commences, or the date on which State transitional arrangements provide for a State industrial instrument to come into effect.

Item [2] – After Part 4

This item inserts new Part 4A – Transitional provisions for Schedule 20 to Act (WR Act transitional awards etc) into the Principal Regulations.

<u>New regulation 4A.01 – Continuing Schedule 6 instruments not to cover certain employers and employees</u>

This regulation modifies Schedule 20 to the Act by inserting new sub-items 1(4) and 1(5).

Schedule 20 of the Act provides for the continued operation of Schedule 6 to the WR Act, which provided for the operation of transitional awards (awards made under the conciliation and arbitration power of the Constitution, before the commencement of amendments to the WR Act by the *Workplace Relations Amendment (Work Choices) Act 2005*). These 'continuing Schedule 6 instruments' lapsed on 27 March 2011 (reflecting their maximum duration under Schedule 6 to the WR Act), but it is possible that an excluded employer may have been covered by one of these instruments during the period 1 January 2010 to 27 March 2011.

New sub-item 1(4) provides that a continuing Schedule 6 instrument does not cover an excluded employer and its employees, and can never again cover them, if:

- the employer has ceased to be a national system employer under subsection 14(2) of the *Fair Work Act 2009*;

- transitional arrangements have been made under a State law for a State industrial instrument to cover that excluded employer and its employees;

- the State instrument would not cover the excluded employer and its employees because of the operation of the continuing Schedule 6 instrument; and

- the State instrument provides terms and conditions of employment that are substantially similar to those in the continuing Schedule 6 instrument that would otherwise cover the employer and its employees.

New sub-item 1(5) would provide for a continuing Schedule 6 instrument to cease to cover an excluded employer and its employees from the later of the day on which the endorsement of a State declaration commences, or the date on which State transitional arrangements provide for a State industrial instrument to come into effect.