

EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 322

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

Fair Work Legislation Amendment Regulation 2012 (No. 2)

The *Fair Work Amendment (Transfer of Business) Act 2012* (the Amendment Act) passed the House of Representatives on 27 November 2012 and will commence on the day after the Bill receives Royal Assent. The Amendment Act introduced new Part 6-3A to the *Fair Work Act 2009* (FW Act) to protect employee entitlements in circumstances where there is a transfer of business from an old State employer (old employer) to a national system employer (new employer). A transfer of business occurs where there is a transfer of employment of an employee of the old employer to the new employer within a three month period, the employee performs the same or similar work for the new employer as they did with their old employer and there is a relevant connection between the old employer and new employer, such as a transfer of assets or outsourcing arrangement.

The Amendment Act provides that in a transfer of business as outlined above, transferring employees retain the benefit of existing terms and conditions of employment in State awards and agreements and their service and accrued entitlements. The preservation of entitlements in State industrial instruments is achieved through the creation of new federal instruments that copy the terms and conditions of employment contained in the relevant State award and/or agreement that covered the transferring employee.

Section 768BB of the FW Act provides that regulations may provide for the circumstances in which FWA may make an order that a copied State instrument for a transferring employee covers a particular employee organisation. The Regulation prescribes that Fair Work Australia (FWA) may make an order on its own initiative or on application by prescribed persons.

Section 768BK of the FW Act provides that if a copied State instrument does not include a term that provides a procedure for settling disputes about matters arising under the instrument, then the instrument is taken to include the model term that is prescribed by the *Fair Work Regulations 2009* (the Principal Regulations) for settling disputes. The Regulation amends the Principal Regulations to prescribe such a model term. The prescribed model term is similar to the existing model term for dealing with disputes for enterprise agreements under the FW Act. It contains detailed procedures for settling disputes that relate to a matter arising under the instrument, at first instance at the workplace and then allowing escalation to, FWA. FWA is able to mediate or conciliate, and if necessary, make a binding determination. The model term also deals with representation for employees and the requirement that work continue normally during the dispute (subject to health and safety matters).

The Amendment Act also makes amendments to the *Fair Work (Registered Organisations) Act 2009* (RO Act) to enable certain State-registered associations to apply to the General Manager of FWA for transitional recognition in the federal workplace relations system. Section 138A of the RO Act provides that regulations may be made in relation to the representation rights of former state registered associations. Clause 4 of Schedule 1 to the

RO Act provides that regulations may be made in relation to the representation rights of transitionally recognised associations of employees.

- The Regulation amends the *Fair Work (Registered Organisations) Regulations 2009* (RO Regulations) to insert new regulations to make provision for FWA to make orders about the right of an organisation which, before becoming registered was a transitionally recognised association, to represent transferring employees in the national workplace relations system;
- insert new regulations to make provision for FWA to make orders about the right of transitionally recognised associations to represent transferring employees in the national workplace relations system;
- make amendments to regulations dealing with the cancellation of transitional recognition in the RO Regulations consequential to amendments made to the RO Act by the Amendment Act; and
- make certain technical amendments to correct existing drafting errors.

Details of the Regulation are included in the Attachment.

Consistent with the requirements of the *Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector*, State and Territory jurisdictions have been consulted in relation to the Regulation. Members of the National Workplace Relations Consultative Council have also been consulted in relation to the Regulation.

The Acts specify no conditions that need to be satisfied before the power to make the Regulation may be exercised.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation commences on the day after registration.

ATTACHMENT**Details of the *Fair Work Legislation Amendment Regulation 2012 (No. 2)*****Section 1 – Name of regulation**

This section sets out the name of the Regulation as the *Fair Work Legislation Amendment Regulation 2012 (No. 2)*.

Section 2 – Commencement

This section provides that the Regulation commences on the day after it is registered.

Section 3 – Amendment of *Fair Work Regulations 2009*

This section provides that Schedule 1 to the Regulation amends the *Fair Work Regulations 2009* (the Principal Regulations).

Section 4 – Amendment of *Fair Work (Registered Organisations) Regulations 2009*

This section provides that Schedule 2 to the Regulation amends the *Fair Work (Registered Organisations) Regulations 2009* (the RO Regulations).

Schedule 1 – Amendments of *Fair Work Regulations 2009***Item [1] – After Part 6-3**

This item inserts Part 6-3A of the Principal Regulations.

Section 768BB of the *Fair Work Act 2009* (the FW Act) provides that the Principal Regulations may prescribe the circumstances in which Fair Work Australia (FWA) may make an order that a copied State instrument for a transferring employee does or does not cover an employee organisation but instead covers, or will cover, another employee organisation.

Regulation 6.03A provides that for paragraph 768BB(3)(a) of the FW Act, the circumstances in which FWA may make an order is that the order is made:

- on FWA's own initiative;
- on application to FWA by a transferring employee, or a person who is likely to be a transferring employee;
- on application to FWA by the new employer, or a person likely to be the new employer;
- on application to FWA by an employee organisation that is entitled to represent the industrial interests of an employee referred to in subparagraph 6.03A(b).

Section 768BK of the FW Act provides that where a copied State instrument for a transferring employee does not include a procedure for settling disputes about matters arising

under the instrument, then the instrument is taken to include the model term that is prescribed by the Principal Regulations.

Regulation 6.03B provides that the model term for dealing with disputes for the purposes of section 768BK of the FW Act is as set out in Schedule 6.1A.

Item [2] – After Schedule 6.1

Schedule 6.1A prescribes the model dispute resolution term for copied State instruments.

The model term for copied State instruments provides for an employee who is a party to the dispute to be represented at any stage in the dispute resolution process.

The model term then provides for a number of stages in the dispute resolution process.

Initially, parties attempt to resolve the dispute at the workplace level, via discussion between employees and relevant supervisors and/or management. If discussions at the workplace level are unsuccessful, either party may apply to FWA to resolve the dispute.

Once either of the parties has referred the matter to FWA, the model term for copied State instruments prescribes a two stage dispute resolution process. In the first instance FWA may use all of its powers under section 595(2) to resolve the dispute. The note to clause (5) clarifies that FWA can use any dispute resolution technique it thinks fit, including:

- engaging in conciliation or mediation;
- ordering compulsory conferences; and
- requiring a party to provide information to FWA or another party.

If conciliation or mediation cannot resolve the dispute the model term empowers FWA to arbitrate the dispute and make a determination that is binding on the parties. FWA may be empowered to use any power available to it under the FW Act for the purpose of resolving disputes in accordance with the model term.

Clause (7) makes it clear that the parties agree to be bound by a decision of FWA. This means that a failure to comply with a decision of FWA is a breach of a term of the copied State instrument and can be enforced in the Courts.

A decision that FWA makes when exercising its power to arbitrate under the model term for dealing with disputes about matters arising under a copied State instrument is a decision for the purpose of subsection 598(1) of the FW Act. A decision by FWA is therefore appealable by either of the parties under Subdivision E of Division 3 of Part 5.1.

While the parties are trying to resolve the dispute using the procedures in this term, the model term for copied State instruments provides that work must continue normally unless an employee has a reasonable concern about an imminent risk to his or her health or safety. An employee is required to comply with the employer's direction to perform other available work either at the same or another workplace, unless:

- the work is unsafe;
- the work would not be permitted under applicable work health and safety legislation;
- it would be inappropriate for the employee to perform the work; or
- there are other reasonable grounds for the employee to refuse to comply with the direction.

This means that while a dispute resolution process is happening, an employee may refuse a direction to work if the employee has reasonable health or safety concerns about performing the work.

Schedule 2 – Amendments of Fair Work (Registered Organisations) Regulations 2009

Item [1] – Regulation 114A, heading

Item [2] – Regulation 114B, heading

Item [3] – Regulation 114C, heading

These items make technical amendments that correct existing drafting errors in the headings of regulations 114A – 114C.

Item [4] – After regulation 114C

This item inserts new regulation 114CA, which deals with the application of regulations 114A to 114C. It makes clear that those regulations do not apply to applications for an order about the right to represent transferring employees.

- Applications for orders under regulations 114A to 114C broadly relate to preserving the effect of state demarcation orders that were in place immediately before the introduction of the *Workplace Relations Amendment (Work Choices) Act 2005*.

Applications about the right to represent transferring employees may be made under new regulations 114E and 114F (see item 5).

Item [5] – After regulation 114D

This item inserts regulations that are made under 138A of the *Fair Work (Registered Organisations) Act 2009* (RO Act) to modify the way in which the RO Act applies in relation to the right to represent transferring employees for an organisation which, before becoming registered, was a transitionally recognised association.

The effect of inserting these regulations is that FWA is enabled to convert state representation orders into federal representation orders insofar as they applied to transferring employees.

New regulation 114E applies in relation to an organisation which, prior to being registered as an organisation:

- was a State registered association that was subject to a State demarcation order;
- became a transitionally recognised association;
- had no demarcation order made in relation to it while transitionally recognised that was similar to the State order in relation to the right of the organisation to represent the industrial interests of the relevant transferring employees; and
- had no demarcation order made in relation to it since it became an organisation that was similar to the State order in relation to the right of the organisation to represent the industrial interests of transferring employees.

Subregulation 114E(2) provides that Chapter 4 of the RO Act applies in relation to the organisation as if the Chapter gave FWA the discretion to make an order that was of the same effect as the State demarcation order in relation to the right to represent the industrial interests of transferring employees under the RO Act or the FW Act.

This means that even if the State order applied more broadly, FWA may only replicate its effect in the federal system in relation to the relevant transferring employees.

In considering whether to make an order, FWA is required to consider the wishes of transferring employees who would be affected by the order and if relevant the other matters specified in paragraph 114E(3)(b).

In relation to an organisation subject to 114E, Chapter 4 applies in relation to the organisation as if the Chapter allowed FWA to make an order in the absence of a demarcation dispute (subregulation 114E(4)).

Subregulation 114E(5) makes clear that any order made by FWA under regulation 114E may be subject to conditions or limitations.

New regulation 114F applies in relation to an organisation, which prior to being registered as an organisation:

- was a State registered association that was subject to a State demarcation order;
- became a transitionally recognised association;
- while transitionally recognised a demarcation order was made in relation to the right of the organisation to represent the industrial interests of the relevant transferring employees; and
- no demarcation order of a similar kind was made in relation to the right of the organisation to represent the industrial interests of the relevant transferring employees.

Subregulation 114F(2) provides that Chapter 4 of the RO Act applies in relation to the organisation as if the Chapter gave FWA the discretion to make an order that was of the same effect as the order made while the organisation was transitionally recognised.

In considering whether to make an order FWA is required to consider the wishes of transferring employees who would be affected by the order and if relevant the other matters specified in paragraph 114F(3)(b).

In relation to an organisation subject to 114F, Chapter 4 applies in relation to the organisation as if the Chapter allowed FWA to make an order in the absence of a demarcation dispute (subregulation 114F(4)).

Subregulation 114E(5) makes clear that any order made by FWA under the regulation 114F may be subject to conditions or limitations.

Item [6] – Schedule 1, before clause 1.1

Item [7] – Schedule 1, before clause 1.4

Item [9] – Schedule 1, before clause 1.7

These items insert new regulations 1.1A, 1.3A and 1.6A.

Regulations 1.1A and 1.3A provide that Divisions 1 and 2 of Part 1 of Schedule 1 to the *Fair Work (Registered Organisations) Regulations 2009* (RO Regulations) do not apply to applications for an order about the right to represent transferring employees.

Divisions 1 and 2 relate to orders about the representation rights of transitionally recognised associations in relation to the existence or otherwise of a state demarcation order immediately before the introduction of the *Workplace Relations Amendment (Work Choices) Act 2005*.

Orders about the right of transitionally recognised associations to represent transferring employees may be made under new regulation 1.7A inserted by item 11 (see below).

Regulation 1.6A provides that Division 3 of Part 1 of Schedule 1 to the RO Regulations does not apply to a transitionally recognised association recognised under subclause 2(1A) of Schedule 1 to the RO Act.

Division 3 deals with proceedings about representation rights in a State or Territory immediately before the introduction of the *Workplace Relations Amendment (Work Choices) Act 2005*.

Item [8] – Schedule 1, subclause 1.4 (3)

Item [10] – Schedule 1, subclause 1.7 (1)

These items make technical amendments that correct existing drafting errors.

Item [11] – Schedule 1, after clause 1.7

This item inserts new Division 4 of Part 1 of Schedule 1 to the RO Act, which deals with orders about the right of transitionally recognised associations to represent transferring employees in the federal system.

New clause 1.7A provides that on application by an organisation, a transitionally recognised association of employees, an employer or the Minister, FWA may make an order that:

- a transitionally recognised association is to have the right to represent the industrial interests of a particular class or group of transferring employees who are eligible for membership of the association;
- a transitionally recognised association that does not have the right to represent the industrial interests of a particular class or group of transferring employees is to have that right;
- a transitionally recognised association of employees is not to have the right to represent the industrial interests of a particular class or group of transferring employees who are eligible for membership of the association.

In considering whether to make an order FWA is required to have regard to the wishes of the transferring employees who would be affected by the order and any other matters FWA considers relevant, including the matters specified in paragraph 1.7A(3)(b).

Under paragraph 1.7A(3)(b) FWA has the discretion to consider other relevant matters in deciding whether to make an order. Depending on the circumstances, other relevant matters may include:

- the existence of a demarcation dispute or any matter relating to the existence of a demarcation dispute;
- whether the conduct or threatened conduct of a transitionally recognised association or an organisation is obstructing the performance of work; and
- the history of award coverage or agreement making in relation to the industry, workplace or in relation to the transferring employees.

Subclause 1.7A(4) provides that FWA may vary an order on application by an organisation, a transitionally recognised association of employees, an employer or the Minister. The order may also be subject to conditions or limitations (subclause 1.7A(5)).

New clause 1.7B provides that an organisation or a transitionally recognised association must comply with an order made under 1.7A(2).

Subclause 1.7B(2) provides that the Federal Court may make orders to ensure compliance with the order on application by an affected organisation, transitionally recognised association of employees affected the order, an affected employer, or on application by the Minister.

Item [12] – Schedule 1, clause 1.9

This item substitutes a new clause 1.9 of Schedule 1 to the RO Regulations that is consequential on the insertion of clause 2(1A) of RO Act by the *Fair Work Amendment (Transfer of Business) Act 2012*.

Clause 1.9 of Schedule 1 to the RO Regulations deals with the power of FWA to cancel the transitional recognition of a transitionally recognised association that was recognised by mistake. FWA is satisfied that a transitionally recognised association was recognised by mistake if, after giving the association an opportunity to be heard, it considers that at the time it was recognised it did not satisfy subclauses 2(1) or 2(1A) of Schedule 1 to the RO Act.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Fair Work Legislation Amendment Regulation 2012 (No. 2)

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of this Legislative Instrument is to amend the *Fair Work Regulations 2009* (FW Regulations) and the *Fair Work (Registered Organisations) Regulations 2009* (RO Regulations) consequential to the commencement of the *Fair Work Amendment (Transfer of Business) Act 2012* (the Amendment Act).

The Amendment Act introduced new Part 6-3A to the *Fair Work Act 2009* (FW Act) to protect employee entitlements in circumstances where there is a transfer of business from an old State employer (old employer) to a national system employer (new employer). It provides as a general rule that transferring employees retain the benefit of existing terms and conditions of employment in State awards and agreements and their service and accrued entitlements where there is a transfer of business from the old employer to a new national system employer. The preservation of entitlements in State industrial instruments is achieved through the creation of new federal instruments (copied State instruments) that copy the terms and conditions of employment contained in the relevant State award and/or agreement that covered the transferring employee.

The Amendment Act provides that if a copied State instrument does not include a term that provides a procedure for settling disputes about matters arising under the instrument, then the instrument is taken to include the model term that is prescribed by the regulations for settling disputes. The Legislative Instrument amends the FW Regulations to prescribe such a model term. The prescribed model term is similar to the existing model term for dealing with disputes for enterprise agreements under the FW Act. It contains detailed procedures for settling disputes that arise between employers and employees, at first instance at the workplace and then in Fair Work Australia (FWA).

The Amendment Act also enables the FW Regulations to provide for the circumstances in which FWA may make an order that a copied State instrument for a transferring employee does or does not cover an employee organisation but instead covers, or will cover, another employee organisation.

The Legislative Instrument prescribes that FWA may make an order on its own initiative or on application by prescribed persons.

The Amendment Act also makes amendments to the *Fair Work (Registered Organisations) Act 2009* (RO Act) to enable certain State-registered associations to apply to the General Manager of FWA for transitional recognition in the national system.

The Legislative Instrument amends the RO Regulations to:

- make amendments to the RO Regulations consequential to amendments made to the RO Act by the Amendment Act;
- insert new regulations to modify the way in which the RO Act applies in relation to the right to represent transferring employees for an organisation which, before becoming registered, was a transitionally recognised association;
- insert new regulations to make provision for FWA to make orders about the right of transitionally recognised associations to represent transferring employees in the national system; and
- make certain technical amendments to correct existing drafting errors.

Human rights implications

The Legislative Instrument engages with the following human rights:

- The right to work and rights in work including the right to just and favourable conditions of work in articles 6(1), 7 and 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).
- The right to freedom of association, including the right to form and join trade unions and the right of trade unions to function freely in Article 22 of the International Covenant on Civil and Political Rights (ICCPR) and Article 8 of the ICESCR.

The Right to Work and Rights in Work

Article 6(1) of the ICESCR recognises the right to work and obliges States to take appropriate steps to safeguard this right. The United Nations Committee on Economic, Social and Cultural Rights has stated that the right to work in article 6(1) of ICESCR encompasses the need to provide the worker with just and favourable conditions of work. Article 7 of the ICESCR sets out the right to just and favourable conditions of work.

The Legislative Instrument promotes the right to just and favourable working conditions because it ensures that employees have access to quick and cost effective mechanisms for resolving disputes that arise in the workplace. It establishes a dispute resolution procedure that allows disputes to be dealt with initially at the workplace level and, where necessary, to be escalated to FWA for arbitration.

The Right to Freedom of Association

Article 22 of the ICCPR protects the right to freedom of association with others, including the right to form and join trade unions. Article 8(1)(a) of the ICESCR similarly ensures the right of everyone to form trade unions and to join the trade union of his or her choice. In addition, Australia is a party to a range of International Labour Organisation Conventions, including Convention 87 which deals with freedom of association and protection of the right to organise.

The amendments to the RO Regulations protect the right to freedom of association by ensuring that FWA can make orders about the right of a State association to continue to

represent its members under the RO Act and the FW Act. By providing scope for State representation rights to be recognised in the national system, the Legislative Instrument protects the right of persons to join a trade union of their choice (subject to their eligibility for membership).

Conclusion

The Legislative Instrument is compatible with human rights because it promotes human rights.

The Hon William Richard Shorten MP

Minister for Employment and Workplace Relations