



# Fair Work Legislation Amendment Regulation 2012 (No. 2)<sup>1</sup>

## Select Legislative Instrument 2012 No. 322

---

I, QUENTIN BRYCE, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulation under the *Fair Work Act 2009* and the *Fair Work (Registered Organisations) Act 2009*.

Dated 6 December 2012

QUENTIN BRYCE  
Governor-General

By Her Excellency's Command

WILLIAM RICHARD SHORTEN  
Minister for Employment and Workplace Relations

---

**Contents**

1	Name of regulation	2
2	Commencement	2
3	Amendment of <i>Fair Work Regulations 2009</i>	2
4	Amendment of <i>Fair Work (Registered Organisations) Regulations 2009</i>	2
<b>Schedule 1</b>	<b>Amendments of <i>Fair Work Regulations 2009</i></b>	<b>3</b>
<b>Schedule 2</b>	<b>Amendments of <i>Fair Work (Registered Organisations) Regulations 2009</i></b>	<b>6</b>

**1 Name of regulation**

This regulation is the *Fair Work Legislation Amendment Regulation 2012 (No. 2)*.

**2 Commencement**

This regulation commences on the day after it is registered.

**3 Amendment of *Fair Work Regulations 2009***

Schedule 1 amends the *Fair Work Regulations 2009*.

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

Schedule 2 amends the *Fair Work (Registered Organisations) Regulations 2009*.

---

## Schedule 1      **Amendments of *Fair Work Regulations 2009***

(section 3)

### [1]      **After Part 6-3**

*insert*

## **Part 6-3A      Transfer of business from State public sector employer**

### **6.03A      FWA orders about coverage for employee organisations**

For paragraph 768BB (3) (a) of the Act, a circumstance in which FWA may make an order mentioned in subsection 768BB (1) of the Act is that the order is to be made:

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

### **6.03B      Model term for dealing with disputes about matters arising under a copied State instrument**

For section 768BK of the Act, the model term for dealing with disputes about matters arising under a copied State instrument is set out in Schedule 6.1A.

**[2] After Schedule 6.1***insert***Schedule 6.1A Model term for dealing with disputes about matters arising under copied State instrument**

(regulation 6.03B)

**Model term**

- (1) This term sets out procedures to settle a dispute about a matter arising under a copied State instrument.
- (2) An employee who is a party to the dispute may appoint a representative for the purposes of the procedures in this term.
- (3) In the first instance, the parties to the dispute must try to resolve the dispute at the workplace level, by discussions between the employee or employees and relevant supervisors and/or management.
- (4) If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the matter to Fair Work Australia.
- (5) Fair Work Australia may deal with the dispute in 2 stages:
  - (a) Fair Work Australia will first attempt to resolve the dispute as it considers appropriate, including by mediation, conciliation, expressing an opinion or making a recommendation; and
  - (b) if Fair Work Australia is unable to resolve the dispute at the first stage, Fair Work Australia may then:
    - (i) arbitrate the dispute; and
    - (ii) make a determination that is binding on the parties.

*Note* If Fair Work Australia arbitrates the dispute, it may also use the powers that are available to it under the Act.

A decision that Fair Work Australia makes when arbitrating a dispute is a decision for the purpose of Division 3 of Part 5-1 of the Act. Therefore, an appeal may be made against the decision.

- 
- (6) While the parties are trying to resolve the dispute using the procedures in this term:
- (a) an employee must continue to perform his or her work as he or she would normally unless he or she has a reasonable concern about an imminent risk to his or her health or safety; and
  - (b) an employee must comply with a direction given by the employer to perform other available work at the same workplace, or at another workplace, unless:
    - (i) the work is not safe; or
    - (ii) applicable work health and safety legislation would not permit the work to be performed; or
    - (iii) the work is not appropriate for the employee to perform; or
    - (iv) there are other reasonable grounds for the employee to refuse to comply with the direction.
- (7) The parties to the dispute agree to be bound by a decision made by Fair Work Australia in accordance with this term.

---

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

(section 4)

**[1]      Regulation 114A, heading**

*substitute*

**114A      Representation rights of former State-registered  
association subject to demarcation order—  
transitional recognition without demarcation order  
and no previous order under Chapter 4 of the RAO  
Schedule (section 138A)**

**[2]      Regulation 114B, heading**

*substitute*

**114B      Representation rights of former State-registered  
associations subject to demarcation order—no  
transitional recognition and no previous order under  
Chapter 4 of the Act (section 138A)**

**[3]      Regulation 114C, heading**

*substitute*

**114C      Representation rights of former State-registered  
associations subject to demarcation order—  
transitional recognition with demarcation order and  
no previous order under Chapter 4 of the Act  
(section 138A)**

---

**[4] After regulation 114C**

*insert*

**114CA Application of regulations 114A to 114C**

Regulations 114A to 114C do not apply to an application for an order about the right to represent transferring employees.

**[5] After regulation 114D**

*insert*

**114E Right to represent transferring employees—former State-registered association subject to demarcation order—transitional recognition without demarcation order**

- (1) For subsection 138A (1) of the Act, this regulation explains the way in which Chapter 4 of the Act applies in relation to an organisation if:
  - (a) prior to being registered as an organisation:
    - (i) it was a State-registered association; and
    - (ii) a State demarcation order was in force in relation to it; and
  - (b) it became a transitionally recognised association; and
  - (c) no demarcation order of a kind similar to the State demarcation order was made in relation to the right of the organisation to represent the industrial interests of transferring employees under the Act, or under the Fair Work Act:
    - (i) while it was a transitionally recognised association; or
    - (ii) under section 133 of the Act.

- 
- (2) Chapter 4 applies in relation to the organisation as if the Chapter permitted FWA to make an order that was of the same effect as the State demarcation order mentioned in subparagraph (1) (a) (ii), in relation to the right of the organisation to represent the industrial interests of transferring employees under the Act, or under the Fair Work Act.
- (3) In considering whether to make an order, FWA:
- (a) must consider the wishes of transferring employees who would be affected by the order; and
  - (b) may consider the following:
    - (i) the terms of the State demarcation order;
    - (ii) the effect of the order on the operation of the employer of the transferring employees;
    - (iii) any agreement or understanding of which FWA becomes aware that deals with the right of a transitionally recognised association or other organisation to represent the transferring employees;
    - (iv) the consequences of not making the order for the employer, the employees, the transferring employees, the transitionally recognised association or any organisation affected by the order;
    - (v) any other matter that FWA considers relevant.
- (4) In considering whether to make an order, FWA may disregard any requirement in Chapter 4 to have regard to:
- (a) the existence of a demarcation dispute; or
  - (b) any matter relating to the existence of a demarcation dispute.
- (5) The order may be subject to conditions or limitations.

**114F Right to represent transferring employees—former State-registered association subject to demarcation order—transitional recognition with demarcation order**

- (1) For subsection 138A (1) of the Act, this regulation explains the way in which Chapter 4 of the Act applies in relation to an organisation if:



- 
- (a) prior to being registered as an organisation:
    - (i) it was a State-registered association; and
    - (ii) a State demarcation order was in force in relation to it; and
  - (b) it became a transitionally recognised association; and
  - (c) a demarcation order of a kind similar to the State demarcation order was made in relation to the right of the organisation to represent the industrial interests of transferring employees under the Act, or under the Fair Work Act, when it was a transitionally recognised association; and
  - (d) no demarcation order of a kind similar to the State demarcation order was made in relation to the organisation under section 133 of the Act.
- (2) Chapter 4 applies in relation to the organisation as if the Chapter permitted FWA to make an order that was of the same effect as the demarcation order mentioned in paragraph (1) (c).
- (3) In considering whether to make an order, FWA:
- (a) must have regard to the wishes of transferring employees who would be affected by the order; and
  - (b) may have regard to the following:
    - (i) the terms of the State demarcation order;
    - (ii) the effect of the order on the operation of the employer of the transferring employees;
    - (iii) any agreement or understanding of which FWA becomes aware that deals with the right of a transitionally recognised association or other organisation to represent the transferring employees;
    - (iv) the consequences of not making the order for the employer, the employees, the transferring employees, the transitionally recognised association or any organisation affected by the order;
    - (v) any other matter that FWA considers relevant.
- (4) In considering whether to make an order, FWA may disregard any requirement in Chapter 4 to have regard to:
- (a) the existence of a demarcation dispute; or

(b) any matter relating to the existence of a demarcation dispute.

(5) The order may be subject to conditions or limitations.

**[6] Schedule 1, before clause 1.1**

*insert*

**1.1A Application of Division**

This Division does not apply to an application for an order about the right to represent transferring employees.

**[7] Schedule 1, before clause 1.4**

*insert*

**1.3A Application of Division**

This Division does not apply to an application for an order about the right to represent transferring employees.

**[8] Schedule 1, subclause 1.4 (3)**

*omit*

subregulation (2)

*insert*

subclause (2)

**[9] Schedule 1, before clause 1.7**

*insert*

**1.6A Application of Division**

This Division does not apply to a transitionally recognised association recognised under subclause 2 (1A) of Schedule 1 to the Act.

---

**[10] Schedule 1, subclause 1.7 (1)**

*omit*

regulation

*insert*

clause

**[11] Schedule 1, after clause 1.7**

*insert*

**Division 4 Orders about the right of certain persons to represent transferring employees in the federal system**

**1.7A Order**

- (1) For subclause 4 (1) of Schedule 1 to the Act, this clause applies if an organisation, a transitionally recognised association of employees, an employer or the Minister applies to FWA to make any of the following orders:
  - (a) an order that a transitionally recognised association of employees is to have the right, to the exclusion of one or more other associations or organisations, to represent, under the Act or the Fair Work Act, the industrial interests of a particular class or group of transferring employees who are eligible for membership of the association;
  - (b) an order that a transitionally recognised association of employees that does not have the right to represent, under the Act or the Fair Work Act, the industrial interests of a particular class or group of transferring employees is to have that right;
  - (c) an order that a transitionally recognised association of employees is not to have the right to represent, under the Act or the Fair Work Act, the industrial interests of a particular class or group of transferring employees who are eligible for membership of the association.
- (2) FWA may make the order.

- (3) In considering whether to make an order under subclause (2), FWA must have regard to:
- (a) the wishes of transferring employees who would be affected by the order; and
  - (b) any other matter that FWA considers relevant, including the following:
    - (i) any prior State orders of a similar kind that were in force in relation to the transferring employees;
    - (ii) the effect of the new order on the operation of the employer of the transferring employees;
    - (iii) any agreements or understandings of which FWA becomes aware that deal with the right of the transitionally recognised association or other organisation to represent the transferring employees;
    - (iv) the consequences, for the employer, the employees, the transferring employees, the transitionally recognised association or an organisation affected by the order, of not making an order.
- (4) FWA may, on application by an organisation, a transitionally recognised association of employees, an employer or the Minister, vary an order made under subclause (2).
- (5) An order under subclause (2) may be subject to conditions or limitations.

**1.7B Organisations and transitionally recognised associations must comply with order**

- (1) An organisation, or a transitionally recognised association, to which an order under subclause 1.7A (2) applies must comply with the order.
- (2) The Federal Court may, on application by an organisation affected by an order, a transitionally recognised association of employees affected by an order, an employer affected by an order or the Minister, make such orders as it thinks fit to ensure compliance with the order.

---

**[12] Schedule 1, clause 1.9**

*substitute*

**1.9 Cancellation of transitional recognition by FWA—  
recognition by mistake**

For subparagraph 5 (5) (b) (i) of Schedule 1 to the Act, FWA will be satisfied that a transitionally recognised association was recognised by mistake if, after giving the association an opportunity to be heard, it considers that, when the association was granted transitional recognition, it did not satisfy:

- (a) subclause 2 (1) of Schedule 1 to the Act; or
- (b) subclause 2 (1A) of Schedule 1 to the Act.

---

**Note**

1. All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See [www.comlaw.gov.au](http://www.comlaw.gov.au).