

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Employment

Subject – *Fair Work Act 2009*

Fair Work Amendment (Protecting Vulnerable Workers) Regulations 2017

The *Fair Work Act 2009* (the Act), together with the *Fair Work Regulations 2009* (the Fair Work Regulations), establishes a national workplace relations system covering the majority of private sector employees and employers in Australia.

Section 796 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or that are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the *Fair Work Amendment (Protecting Vulnerable Workers) Regulations 2017* (the Amendment Regulations) is to support and reflect changes to the Act made by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*.

The Act, as amended, includes (among other things): a new civil penalty provision in relation to the provision of false or misleading information or documents (section 718A of the Act); higher penalties for ‘serious contraventions’ of the Act (section 557A of the Act); and new information-gathering powers for the Fair Work Ombudsman (FWO). These include a new power to require a person to attend an interview conducted by the FWO to answer questions, if certain pre-conditions are met. The new information-gathering powers are triggered when an ‘FWO notice’ is given to the intended recipient (see sections 712A – 712F of the Act).

To support these changes, the Fair Work Regulations are amended to:

- repeal regulations which have been effectively replaced by the new prohibition relating to the provision of false or misleading information under section 718A of the Act;
- clarify that the new, higher penalties for ‘serious contraventions’ under the Act, section 557A, have no application in relation to the issue of an infringement notice by a Fair Work Inspector;
- prescribe forms for the three ‘FWO notice’ types, which require the recipient: to give information, to produce documents or attend and answer questions (see paragraph 712AC(a) of the Act);
- prescribe certain entitlements for persons who incur specified expenses in attending an interview as required by an FWO notice (see section 712C of the Act); and
- make a number of minor consequential amendments.

A detailed explanation of each amendment is at [Attachment A](#).

The Office of Best Practice Regulation advised that a Regulation Impact Statement was not required (OBPR ID: 21137).

The Amendment Regulations constitute a legislative instrument for the purposes of the *Legislation Act 2003*.

The Act specifies no conditions that need to be satisfied before the power to make the Amendment Regulations may be exercised.

For the purposes of section 17 of the *Legislation Act 2003*, appropriate consultation has been undertaken. The responsible regulator, the FWO, was consulted on the text of the proposed amendments throughout their development. In accordance with the *Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector*, all states and territories were consulted, and a draft of the Amendment Regulations was provided to all states and territories for the purpose of consultation. No jurisdiction expressed concerns with the draft.

A Statement of Compatibility with Human Rights has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's assessment is that the Amendment Regulations are compatible with human rights. A copy of the Statement is at Attachment B.

The Amendment Regulations commence the day after being registered on the Federal Register of Legislation.

Authority: Section 796 of the *Fair Work Act 2009*

Details of the *Fair Work Amendment (Protecting Vulnerable Workers) Regulations 2017*

Part 1—Preliminary

Section 1 – Name

Section 1 provides that the title of the instrument is the *Fair Work Amendment (Protecting Vulnerable Workers) Regulations 2017* (the Amendment Regulations).

Section 2 – Commencement

Section 2 provides that the Amendment Regulations commence on the day after being registered on the Federal Register of Legislation.

Section 3 – Authority

Section 3 specifies that the Amendment Regulations are made under the *Fair Work Act 2009* (the Act).

Section 4 – Schedules

Section 4 provides that each instrument that is specified in a Schedule to the Amendment Regulations is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Item 1 – Subregulation 3.44(1)

Item 2 – Regulation 4.01A (table item 14)

Items 1 and 2 of the Amendment Regulations repeal the specified provisions relating to false and misleading records, on the basis that these have been effectively replaced by a new civil penalty provision under section 718A of the Act.

Item 3 – After subregulation 4.05(2) (before the note)

Item 4 – Regulation 4.05 (note)

Item 3 inserts new subregulation 4.05(3) to clarify that the scheme of higher penalties introduced by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* for ‘serious contraventions’ (see s 557A of the Act), have no application in relation to an infringement notice issued by a Fair Work Act Inspector.

Subsection 558(2) of the Act provides that the penalty specified in an infringement notice must not exceed one-tenth of the penalty that could be imposed by a court. This Item clarifies that, when determining that maximum by reference to the table in subsection 539(2), the

higher penalties that may be available for a ‘serious contravention’ of a civil penalty provision must be disregarded, and only the lower amount used in the calculation.

This reflects the policy under the Attorney-General Department’s *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) that infringement notices should only be used for relatively minor contraventions and where Fair Work Inspectors can easily make an assessment about whether a contravention took place. Serious contraventions are not suitable because the maximum penalty for a serious contravention is relatively high, and section 557A also requires the state of mind of the alleged contravener to be established. This exercise may involve a degree of complexity, so issuing an infringement notice would be inappropriate in these circumstances.

Item 4 makes a consequential amendment to the note after subregulation 4.05(2), to reflect the changes to the regulations.

Item 5 – Before Regulation 5.05

Item 6 – Before Regulation 5.06

Items 5 and 6 would insert new Subdivision headings to improve the structure and readability of the regulations.

Item 7 – At the end of Division 3 of Part 5-2

Item 7 inserts a new Subdivision DB at the end of Division 3 of Part 5-2, to prescribe an entitlements scheme for persons who incur specified expenses in attending an interview as required by an FWO notice. The new regulations cover travelling, accommodation, attendance and legal allowances, subject to any overriding conditions prescribed under the Act.

New regulation 5.07 inserts several definitions for terms used in new Subdivision DB.

New regulation 5.08 prescribes three new forms that FWO notices must take, for the purposes of paragraph 712AC(a) of the Act. These are included in new Schedule 5.3 to the Fair Work Regulations.

New regulation 5.09 explains that regulations 5.10 to 5.13 prescribe the allowances payable to a person who is required to attend an interview to answer questions under an FWO notice. The note directly underneath cross-references key conditions that apply in relation to the entitlement under the Act.

New regulation 5.10 prescribes the travelling allowance for domestic travel, which is subject to a cap under new subregulation 5.10(3).

New regulation 5.11 prescribes an accommodation allowance, to go towards meeting the expenses that the attendee incurs for accommodation when necessarily absent overnight from their place of residence. It is calculated by reference to the Taxation Office Determination (as defined in regulation 5.07 and in force or existing when the regulation commenced) for the lowest salary range. The Determination (reference [TD 2017/19](#)) is a public ruling for the purposes of the *Tax Administration Act 1953* and can be readily accessed, free of charge, via the Australian Taxation Office’s website (<http://www.ato.gov.au>).

New regulation 5.12 prescribes an attendance allowance, to go towards meeting any loss of earnings that the attendee incurs when necessarily absent from the attendee's work, to attend an interview as required by the FWO notice. Subregulation 5.12(3) sets out evidence requirements, which require a claimant to provide evidence of their usual pay, and proof of loss of earnings over the relevant period.

New regulation 5.13 prescribes a legal allowance, to go towards meeting the legal costs and disbursements that the attendee reasonably incurs for a single lawyer's attendance (i.e. daily hearing fee and disbursements) during the interview. This is capped by reference to the costs for general federal law proceedings set out in the *Federal Circuit Court Rules 2001*, as in force when this regulation commenced. The *Federal Circuit Court Rules 2001* are made under the *Federal Circuit Court of Australia Act 1999* and can be accessed readily and free of charge via the Federal Register of Legislation (<http://www.legislation.gov.au>).

Item 8 – After Schedule 5.2

Item 8 inserts a new Schedule 5.3 into the Fair Work Regulations to prescribe the three forms an FWO notice may take, as referred to in new regulation 5.08. These forms are made under paragraph 712AC(a) of the Act. This Item is consequential upon the insertion of new information-gathering powers for the Fair Work Ombudsman (FWO).

The forms reflect the FWO's powers to give an FWO notice to obtain information, to produce documents and require a person to attend an interview to answer questions. Each form clearly sets out what is required of the recipient, a summary of key rights and responsibilities, and the consequences of failing to comply with the notice.

Statement of Compatibility with Human Rights

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

Fair Work Amendment (Protecting Vulnerable Workers) Regulations 2017

This Disallowable 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 Disallowable Legislative Instrument

The *Fair Work Amendment (Protecting Vulnerable Workers) Regulations 2017* amend the *Fair Work Regulations 2009* (Fair Work Regulations) to reflect changes to the *Fair Work Act 2009* (the Act) made by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (the Vulnerable Workers Act).

The Act, as amended, includes (among other things): a new civil penalty provision in relation to the provision of false or misleading information or documents (section 718A of the Act); higher penalties for ‘serious contraventions’ of the Act (section 557A of the Act); and new information-gathering powers for the Fair Work Ombudsman (FWO). These include a new power to require a person to attend an interview conducted by the FWO to answer questions, if certain pre-conditions are met. The new information-gathering powers are triggered when an ‘FWO notice’ is given to the intended recipient (see ss 712A – 712F of the Act).

To support these changes, the amendments to the Fair Work Regulations:

- repeal regulations which have been effectively replaced by the new prohibition relating to the provision of false or misleading information under section 718A of the Act;
- clarify that the new, higher penalties for ‘serious contraventions’ under the Act, section 557A, have no application in relation to the issue of an infringement notice by a Fair Work Inspector;
- prescribe forms for the three types of ‘FWO notice’;
- prescribe certain entitlements for persons who incur specified expenses in attending an interview as required by an FWO notice; and
- make a number of minor consequential amendments.

Human rights implications

While the Vulnerable Workers Act engages with applicable human rights or freedoms, as explained in the Explanatory Memorandum which accompanied that Act, the proposed amendments to the Fair Work Regulations here are merely consequential to assist with the administration of arrangements put in place by the Act.

To the extent the proposed amendments affect the administration of the information-gathering powers introduced by the Vulnerable Workers Act, they enhance the safeguards underpinning the scheme by:

- prescribing the form FWO notices may take to ensure procedural fairness, by standardising procedures and the provision of information to recipients; and

- prescribing detailed entitlements to support the reimbursement scheme for persons attending an interview pursuant to an FWO notice.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights.

Senator the Hon Michaelia Cash, Minister for Employment