

EXPLANATORY STATEMENT

Minute No. 3 of 2018 – Minister for Regional Development, Territories and Local Government

Subject - *Christmas Island Act 1958*

*Christmas Island Applied Laws Amendment (Industrial Relations)
Ordinance 2018*

The *Christmas Island Act 1958* (the Act) provides for the government of the Territory of Christmas Island.

Subsection 9(1) of the Act provides that the Governor-General may make Ordinances for the peace, order and good government of the Territory of Christmas Island.

Subsection 8A(1) of the Act provides that the laws of Western Australia (WA) are in force in the Territory of Christmas Island from time to time as applied Australian Government laws. When amending or repealing applied laws by Ordinance under subsection 8(3) of the Act, section 6 of the *Christmas Island Applied Laws Ordinance 1992* provides that applied laws specified in Schedule 4 are repealed.

The purpose of the *Christmas Island Applied Laws Amendment (Industrial Relations) Ordinance 2018* (the Ordinance) is to remove the *Industrial Relations Act 1979* (WA)(CI) and *Minimum Conditions of Employment Act 1993* (WA)(CI) (the WA industrial relations laws) from the list of repealed applied laws in Schedule 4 of the *Christmas Island Applied Laws Ordinance 1992*.

WA currently provides education services to Christmas Island under a letter of agreement. The Australian Government *Fair Work Act 2009* (Fair Work Act) currently applies to Christmas Island, including to WA Government employees working on Christmas Island, unlike WA public sector employees based in WA. The WA Government's position is that all its employees, including those engaged to deliver services on Christmas Island under service delivery arrangements between the WA Government and the Australian Government, should be subject to the WA industrial relations scheme.

The Ordinance is a technical requirement to facilitate the *Fair Work Amendment (Christmas Island and Cocos (Keeling) Islands) Regulations 2018* (the Regulations), which amend the *Fair Work Regulations 2009* (the Principal Regulations) to provide that the Fair Work Act operates in relation to WA Government employers and their public sector employees while working on Christmas Island in the same way it does in WA.

The combined effect of the Ordinance and the Regulations results in the WA industrial relations laws applying on Christmas Island to WA Government employers and their public sector employees. All other employees continue to be covered by the Fair Work Act.

Before the proposed Ordinance was drafted, the Minister with responsibility for Territories considered the general obligation to consult imposed by section 17 of the *Legislation Act 2003*. The Minister was satisfied that consultation was appropriate and reasonably practicable to be undertaken.

Government departments and agencies likely to be affected by the proposed Ordinance and affected areas within the Minister's Department were given an opportunity to comment on its proposed content. The Department consulted with the then Australian Government Department of Employment, the WA Department of Education and the WA Department of the Premier and Cabinet regarding the application of the WA industrial relations laws to WA Government employees undertaking work on Christmas Island, including the Ordinance. The WA Department of the Premier and Cabinet has overseen the changes to ensure that appropriate consultation with all affected parties in WA has been undertaken.

The Office of Best Practice Regulation advised that a Regulatory Impact Statement is not required for the Ordinance.

Details of the Ordinance are set out in the Attachment.

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

The Ordinance is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Ordinance commences on 1 May 2018.

Authority: Section 9(1) of the *Christmas Island Act 1958*

Details of the *Christmas Island Applied Laws Amendment (Industrial Relations) Ordinance 2018*

Section 1 – Name

This section provides that the title of the instrument is the *Christmas Island Applied Laws Amendment (Industrial Relations) Ordinance 2018*.

Section 2 – Commencement

This section provides that the Ordinance is to commence on 1 May 2018.

Section 3 – Authority

This section provides that the Ordinance is made under the *Christmas Island Act 1958*.

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to the Ordinance is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Ordinance has effect according to its terms.

Schedule 1 – Amendments

Christmas Island Applied Laws Ordinance 1992

Item 1 amends Schedule 4 to omit *Industrial Relations Act 1979 (W.A.) (C.I.)*.

Item 2 amends Schedule 4 to omit *Minimum Conditions of Employment Act 1993 (W.A.) (C.I.)*.

Statement of Compatibility with Human Rights

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

Christmas Island Applied Laws Amendment (Industrial Relations) Ordinance 2018

This Ordinance 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 Ordinance

The *Christmas Island Applied Laws Amendment (Industrial Relations) Ordinance 2018* (the Ordinance) makes minor amendments to laws of the Territory of Christmas Island. In order to have consistent employment arrangements across its workforce, the Western Australian (WA) Government has requested that the *Fair Work Act 2009* (Fair Work Act) not apply and that its employees working on Christmas Island be subject instead to the *Industrial Relations Act 1979* (WA) (CI) and the *Minimum Conditions of Employment Act 1993* (WA) (CI) (the WA industrial relations laws).

The Ordinance revives the WA industrial relations laws as laws of the Territory of Christmas Island, however, due to the operation of subsection 8A(4) of the *Christmas Island Act 1958*, the WA industrial laws have no effect as they are inconsistent with the Fair Work Act.

The Ordinance ensures that the industrial relations laws of WA are in place on Christmas Island to give effect to the *Fair Work Amendment (Christmas Island and Cocos (Keeling) Islands) Regulations 2018*.

The enactment of the *Fair Work Amendment (Christmas Island and Cocos (Keeling) Islands) Regulations 2018* will mean that WA industrial relations laws will apply to WA Government employees who are working on Christmas Island on behalf of the Australian Government, rather than the Fair Work Act which has previously applied to them. This will ensure consistency between the conditions of WA Government employees working in WA and on Christmas Island.

Human rights implications

The Ordinance engages with the following rights:

- the right to work under Article 6(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR);
- the right to just and favourable conditions of work under Article 7 of the ICESCR;
- the right to an effective remedy in Article 2(3) of the *International Covenant on Civil and Political Rights* (ICCPR);
- the right to equality and non-discrimination under Article 26 of the ICCPR; and
- the right to strike under Article 8(1) of the ICESCR and Article 22 of the ICCPR.

The definition of ‘human rights’ in the *Human Rights (Parliamentary Scrutiny) Act 2011* relates to the seven core United Nations human rights treaties. The content of the rights to work and rights in work in the ICESCR may be informed by specific obligations in treaties of the International Labour Organisation (ILO), such as the *Right to Organise and Collective*

Bargaining Convention 1949 (No. 98), which deal with the right of employees to collectively bargain for terms and conditions of employment.

Right to work and rights in work

Article 6(1) of the ICESCR recognises the right to work and obliges States Parties to take appropriate steps to safeguard this right. The United Nations Committee on Economic, Social and Cultural Rights (the UN Committee) 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 requires that States Parties recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensures, among other things, remuneration that provides all workers with fair wages, rest and leisure, reasonable limitation of working hours, periodic holidays with pay, remuneration for public holidays, and safe and healthy working conditions.

Key terms and conditions of employment

It is intended that the *Industrial Relations Act 1979 (WA)(CI)* (WA IR Act) and *Minimum Conditions of Employment Act 1993 (WA)(CI)* (MCE Act) will now extend to Christmas Island and cover WA Government employees as applied laws. This will be effected by amendments to the *Christmas Island Applied Laws Ordinance 1992 (Applied Laws Ordinance)*, which will omit the WA IR Act and the MCE Act from the list of laws that do not apply to Christmas Island in Schedule 4 of the Applied Laws Ordinance.

This amendment will mean that section 8A of the *Christmas Island Act 1958* (the Act), which is a provision extending all WA Acts, subordinate legislation and principles or rules of common law or equity that are part of the law of WA to Christmas Island, operates in regard to the WA IR Act and the MCE Act.

Complementary to the application of the WA IR Act and MCE Act as applied laws, the Ordinance will have the effect that WA Government employees are no longer covered by most of the Fair Work Act when they are working on Christmas Island. These employees will be subject to the WA IR Act and MCE Act as applied laws and the Fair Work Act in the same way as WA public sector employees working in WA.

The MCE Act as an applied law will provide for the following employment terms and conditions:

- Maximum weekly hours of work for full-time employees of 38 hours, with reasonable additional hours (ss 9A and 9B, MCE Act);
- Unpaid parental leave for 52 consecutive weeks once the employee has completed 12 months' continuous service with the employer and the employee has given at least 10 weeks' written notice, with the ability to request a further consecutive period of 52 weeks (s 33, MCE Act);
- Annual leave for four weeks for each year of service, accruing pro-rata on a weekly basis (s 23, MCE Act);
- Paid leave for illness, injury or family care for two weeks for each year of service, accruing pro-rata on a weekly basis (s 19, MCE Act);

- Paid bereavement leave for up to two days on the death of a member of an employee's family or household (s 27, MCE Act); and
- Paid leave on a public holiday (s 30, MCE Act).

These provisions deal with terms and conditions of employment that, in relation to WA public sector employees working on Christmas Island had, up to this point, been dealt with in the National Employment Standards (NES) (in Part 2-2 of the Fair Work Act).

As with WA public sector employees based in WA, WA public sector employees working on Christmas Island remain covered by Part 6-3 of the Fair Work Act. Part 6-3 extends the unpaid parental leave, notice of termination, and payment in lieu of notice provisions in the NES to all employees.

In relation to WA public sector employees, a minimum entitlement to redundancy pay is provided in regulation 34 of the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA)(CI) as made under the *Public Sector Management Act 1994* (WA)(CI) (PSM Act) (being applied laws on Christmas Island).

Preservation of accrued entitlements

Entitlements accrued by WA public sector employees working on Christmas Island at the time the application of WA industrial relations laws to Christmas Island commences, including unpaid wages and annual leave, are preserved through the operation of section 8 of the *Acts Interpretation Act 1901* (as in force on 25 June 2009 – section 40A of the Fair Work Act).

Public holidays

Public holidays will generally remain unchanged for WA public sector employees working on Christmas Island. The *Public and Bank Holidays Act 1972* (WA)(CI) and *Public and Bank Holidays Act 1972* (WA)(CKI), as modified, operate as applied laws on Christmas Island. WA public sector employees working on Christmas Island have an entitlement to paid leave on public holidays (under s 20 of the MCE Act as an applied law).

Anti-bullying measures

WA public sector employees working on Christmas Island have, in the event they believe they have been subject to bullying in the workplace, the benefit of equivalent protections and avenues for redress as their counterparts based in WA.

WA Government employers have sophisticated bullying policies and grievance procedures, allowing employees to resolve matters quickly and confidentially. The applied *Occupational Safety and Health Act 1984* (WA)(CI) places relevant duties on employers to, so far as is practicable, provide and maintain a working environment in which employees are not exposed to hazards, including hazards that impact on psychological health (such as workplace bullying). Additionally, some bullying behaviours may be unlawful under other applied laws. The *Equal Opportunity Act 1984* (WA)(CI) for example, covers discrimination, including sexual and racial harassment.

As with WA public sector employees based in WA, WA public sector employees working on Christmas Island will not be covered by the bullying provisions contained in Part 6-4B of the Fair Work Act.

Right to an effective remedy

Article 2(3) of the ICCPR provides that States Parties undertake to ensure the right to an effective remedy (to be determined by competent judicial, administrative or legislative authorities, or any other competent authority).

Right to an effective remedy before competent administrative and judicial authorities

The WA Industrial Relations Commission (WAIRC) and the WA Industrial Relations Magistrates Court (WAIMC) are to be vested with jurisdiction to hear and determine matters under the WA IR Act and MCE Act as applied laws on Christmas Island through the *Christmas Island (Courts) Regulations 2018*.

WA public sector employees based on Christmas Island will accordingly be subject to the WAIRC, Public Service Arbitrator (Arbitrator) and Public Sector Appeal Board (Appeal Board) and the WAIMC.

The WAIRC has jurisdiction to deal with ‘industrial matters’ (defined in s 7 of the WA IR Act) for employees covered by the WA IR Act. The Arbitrator is a WAIRC Commissioner and has exclusive jurisdiction to deal with ‘industrial matters’ relating to government officers (s 80E, WA IR Act). The Appeal Board (as a constituent authority, or part of the WAIRC) has jurisdiction to review decisions to dismiss government officers (ss 80G(1) and 80I(1)(d), WA IR Act). Decisions relating to substandard performance or disciplinary matters may be referred to it by the Arbitrator (s 80E(7)(b), WA IR Act).

A ‘government officer’ is defined to include, among other persons, public service officers (within the meaning of the PSM Act) and every person employed on the salaried staff of a public authority and (s 80C, WA IR Act). The definition does not include certain WA public sector employees (including teachers) whose claims are dealt with under the general jurisdiction of the WAIRC.

The *Christmas Island (Courts) Regulations 2018* are a consequential amendment, as one of the effects of the application of WA industrial relations laws to Christmas Island will be that WA public sector employees will no longer be generally subject to the jurisdiction of the Fair Work Commission (FWC) and the Federal Circuit Court and Federal Court in relation to matters arising out of industrial relations issues, as they will no longer be covered by the Fair Work Act as ‘national system employees’.

Unfair dismissal

WA public sector employees working on Christmas Island will, in the event they believe they have been unfairly dismissed, have broadly equivalent rights to remedies under the WA industrial relations system (as applied on Christmas Island), as they had under the Fair Work Act. The WAIRC may order reinstatement, re-employment, payment of lost wages and other benefits or compensation (s 23A, WA IR Act). There are also additional mechanisms that allow the Arbitrator and Appeal Board to review termination of employment and disciplinary decisions.

As with WA public sector employees based in WA, WA public sector employees working on Christmas Island remain covered by Part 6-4 of the Fair Work Act. Accordingly, they may continue to make unlawful termination applications before the FWC if their employment has

been terminated and they believe that the termination was in contravention of s 772(1) of the Fair Work Act.

Rights to equality and non-discrimination in employment

Article 26 of the ICCPR recognises that all persons are equal before the law and are entitled, without any discrimination, to the equal protection of the law. It provides that the laws of the States Parties are to prohibit anyone from being discriminated against on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

WA public sector employees working on Christmas Island will be in the same position and have the same protections in relation to rights to equality and non-discrimination in employment as WA public sector employees working in WA. For example, they will continue to have access to protections from discrimination contained in federal anti-discrimination laws (for example, *Racial Discrimination Act 1975* (Cth) and *Sex Discrimination Act 1984* (Cth)) and those in the *Equal Opportunity Act 1984* (WA)(CI) (as applied laws).

They will also continue to be covered by Part 6-4 of the Fair Work Act, which makes it unlawful to terminate an employee's employment on certain prohibited grounds including trade union membership, race, colour, sex, sexual preference, age, and physical or mental disability. As with WA public sector employees based in WA, WA public sector employees working on Christmas Island will not be covered by the general protections in Part 3-1 of the Fair Work Act.

Right to Freedom of Association, Strike and Collective Bargaining

Article 22 of the ICCPR protects the right to freedom of association. Article 8(1) of the ICESCR supports this by providing that the State Parties undertake to protect the right to strike, provided it is exercised in conformity with the laws of the particular country.

Article 4 of the ILO *Right to Organise and Collective Bargaining Convention 1949* (No. 98) requires States Parties to (among other things) take measures appropriate to national conditions to encourage and promote machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Right to freedom of association

WA public sector employees working on Christmas Island will have access to the same protections in relation to the right to freedom of association as WA public sector employees working in WA. They will be covered by Part VIA of the WA IR Act as an applied law, which provides, amongst other things, that:

- an award, industrial agreement or order under this Act cannot contain certain provisions about membership of organisations;
- discriminatory acts cannot be taken against persons performing work for employers because of membership or non-membership of an employee organisation (e.g. refusal to employ); and
- discriminatory acts cannot be taken against persons because of non-membership of an employee organisation.

As with WA public sector employees based in WA, and as a result of the application of WA industrial relations laws to Christmas Island, WA public sector employees working on Christmas Island will not be covered by the general protections in Part 3-1 of the Fair Work Act.

The right to strike and collective bargaining

WA public sector employees working on Christmas Island will be in the same position as WA public sector employees working in WA, rather than being covered by the Fair Work Act as ‘national system employees’.

The ability of WA public sector employees working on Christmas Island to collectively bargain at the enterprise level under the Fair Work Act will be replaced with collective bargaining processes under WA industrial relations laws.

Under the WA IR Act as applied to CI, the relevant WA public sector employees and their employer:

- may initiate bargaining for an industrial agreement or collective agreement (ss 42 and 51R, WA IR Act);
- are required to bargain in good faith (ss 42B and 51S, WA IR Act);
- can be assisted in bargaining by the WAIRC through arbitration by consent (ss 42E and 51T, WA IR Act); and
- can apply to the WAIRC for a declaration that bargaining has ended, in order that a compulsory arbitration take place (s 42H, WA IR Act).

A no-disadvantage test is also in place under Division 6 of the applied WA IR Act to ensure a safety-net when bargaining, with the comparator instrument being an applicable WA state-based award or, if no applicable award exists, a relevant Australian Government modern award (s 97VS, WA IR Act).

The concept of protected industrial action is not specifically dealt with in the WA IR Act and MCE Act as applied laws. Applications can be made to the WAIRC to resolve industrial disputes through the making of a declaration that bargaining is over (s 42H, WA IR Act) and following a period of 21 days, parties can seek an ‘enterprise order’ (arbitrated outcome) under s 42I of the WA IR Act. The resolution of industrial disputes involving WA public sector employees on Christmas Island will be subject to the same rules as WA public sector employees working in WA.