EXPLANATORY STATEMENT

Issued by the authority of the Minister for Small and Family Business, the Workplace and Deregulation

Subject – *Fair Work Act 2009*

Fair Work Amendment (Christmas Island and Cocos (Keeling) Islands) Regulations 2018

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

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

Section 32 of the Fair Work Act provides that the Governor-General may make regulations prescribing modifications of the application of the Fair Work Act in relation to certain parts of Australia, including the Territory of Christmas Island (CI) and the Territory of Cocos (Keeling) Islands (CKI).

The Fair Work Act in its entirety currently applies to Western Australian (WA) Government public sector employees working in CI or the CKI, unlike WA public sector employees based in WA. In order to have consistent employment arrangements across its workforce, the WA Government has requested that the Fair Work Act not apply in that way and its employees working in CI or the CKI be instead subject to WA industrial relations laws.

The *Fair Work Amendment (Christmas Island and Cocos (Keeling) Islands) Regulations 2018* (the Regulations) amend the Principal Regulations to provide that the Fair Work Act operates in relation to WA Government employers and their public sector employees while working in either CI or the CKI in the same way it does in WA.

Specifically, the Regulations provide that the WA Government is not a national system employer for the purposes of carrying on an activity (whether of a commercial, governmental or other nature) in CI or the CKI, so far as the WA Government employs, or usually employs, an individual in connection with the activity carried on in CI or the CKI.

The Regulations also provide that Part 3-1 (General Protections) does not apply to actions taken in either CI or the CKI by or in relation to a WA Government employer, or an individual (so far as he or she is employed, or usually employed by, a WA Government employer). Finally, the Regulations provide that Part 6-4B (Workers Bullied at Work) does not apply to a business or undertaking conducted in either CI or the CKI by a WA Government employer.

Following the request by the WA Government that WA industrial relations laws apply to WA Government public sector employees working in CI or the CKI consultation has taken place with the WA Government regarding the form of the Regulations. The WA Department of Premier and

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Cabinet has had oversight of the process to ensure that appropriate consultation has been undertaken with affected parties.

It is intended that the *Industrial Relations Act 1979* (WA), and *Minimum Conditions of Employment Act 1993* (WA) will now extend to CI and CKI and cover a WA Government employer and its employees as applied laws. This will be effected by amendments to the *Christmas Island Applied Laws Ordinance 1992* and the *Cocos (Keeling) Islands Ordinance 1992*. Those applied laws will provide comparable terms and conditions to those which the employees currently have.

Additionally, all other States and Territories have been consulted under the *Intergovernmental Agreement for a National Workplace Relations System for the Private Sector*.

Details of the Regulations are set out in the Attachment A.

The Office of Best Practice Regulation (OPBR) has advised that a Regulatory Impact Statement is not required. The OPBR ID for the Regulation is 22693.

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

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

The Regulations commence on 1 May 2018.

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ATTACHMENT A

Details of the *Fair Work Amendment (Christmas Island and Cocos (Keeling) Islands) Regulations 2018*

Section 1 – Name

This section sets out the name of the Regulations as the *Fair Work Amendment (Christmas Island and Cocos (Keeling) Islands) Regulations 2018.*

Section 2 – Commencement

This section provides that the whole of the Regulations commence on 1 May 2018.

Section 3 – Authority

This section provides that the Regulations are made under the *Fair Work Act 2009* (the Fair Work Act).

Section 4 – Schedules

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

Schedule 1 – Amendments

Item 1 – Regulation 1.15B, definition of WA government employer

This item inserts a new definition of 'WA government employer' being a 'public sector body' as defined by section 3 of the *Public Sector Management Act 1994* (WA), as in force at the commencement of Schedule 1 to the Regulations.

To avoid doubt, the definition makes clear that the Shire of Christmas Island and the Shire of Cocos (Keeling) Islands are not WA government employers.

The definition of WA government employer is relevant to item 2.

Item 2 – After regulation 1.15D

This item inserts new regulation 1.15DA to provide for modifications of the Fair Work Act in relation to the Territory of Christmas Island (CI) and the Territory of Cocos (Keeling) Islands (CKI) for the purpose of section 32 of the Fair Work Act.

Under paragraph 14(1)(f) of the Fair Work Act, a national system employer is a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs an individual in connection with that activity. Currently, the WA Government is a national system employer in relation to its public sector employees performing work in CI and the CKI.

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New sub-regulation 1.15DA(a) modifies the application of paragraph 14(1)(f) of the Fair Work Act by providing that it does not apply to the extent it would make a WA government employer a national system employer. This new sub-regulation ensures that the WA Government and its public sector employees working on either CI or the CKI are not covered by those Parts of the Fair Work Act that apply on the basis of an employer being a national system employer and its employees being national system employees (because of the application of paragraph 14(1)(f) of the Fair Work Act).

Division 2 of Part 3-1 (General Protections) of the Fair Work Act provides for the application of that Part. It relevantly provides that Part 3-1 applies to action in the CI or the CKI and to action taken by or in relation to an employer that is a national system employer on the basis of paragraph 14(1)(f) of the Fair Work Act, or action taken by or in relation to an employee of such an employer. New sub-regulation 1.15DA(b) modifies the application of Part 3-1 so that it does not apply to action taken in either CI or the CKI by or in relation to:

- a WA government employer that would be a national system employer but for sub-regulation 1.15DA(a); or

- an individual so far as he or she is employed, or usually employed, by a WA government employer that would be a national system employer but for sub-regulation 1.15DA(a).

The anti-bullying provisions in Part 6-4B of the Fair Work Act apply where a worker being 'bullied at work' is at work in a constitutionally covered business. The definition of 'constitutionally covered business' in paragraph 789FD(3)(b) relevantly includes a business or undertaking that is conducted principally in a Territory. New sub-regulation 1.15DA(c) modifies the application of paragraph 789FD(3)(b) to provide that it does not apply to a business or undertaking principally conducted in either CI or the CKI by a WA government employer.

Note 1 clarifies that sub-regulation 1.15DA(a) does not prevent provisions of the Fair Work Act that apply in relation to a WA government employer as a non-national system employer from continuing to apply. It lists examples of Parts of the Fair Work Act which apply to non-national system employers, being Part 6-3 (which extends some National Employment Standards entitlements to non-national system employees) and Part 6-4 (which gives effect to certain international agreements relating to discrimination and termination of employment).

Note 2 explains that sub-regulation 1.15DA(c) does not prevent Part 6-4B of the Fair Work Act applying in relation to a business or undertaking conducted by a WA government employer that is a constitutional corporation under subparagraph 789FD(3)(a)(i) of the Fair Work Act.

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ATTACHMENT B

Statement of Compatibility with Human Rights

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

Fair Work Amendment (Christmas Island and Cocos (Keeling) Islands) Regulations 2018

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 *Fair Work Act 2009* (Fair Work Act) in its entirety currently applies to the Western Australian (WA) Government and its public sector employees working in the Territory of Christmas Island (CI) or the Territory of Cocos (Keeling) Islands (CKI). This is not the case for WA public sector employees based in WA. In order to have consistent employment arrangements across its workforce, the WA Government has requested the Fair Work Act not apply in that way and that its employees working in CI or the CKI be subject instead to WA industrial relations laws.

The *Fair Work Amendment (Christmas Island and Cocos (Keeling) Islands) Regulations 2018* (the Regulations) amend the *Fair Work Regulations 2009* (the Principal Regulations) to provide that the Fair Work Act operates in relation to a WA Government employer and its public sector employees while working in CI or the CKI in the same way it does in WA.

The Regulations provide that a WA Government employer is not a national system employer for the purposes of carrying on an activity (whether of a commercial, governmental or other nature) in CI or the CKI, so far as the WA Government employer employs, or usually employs, an individual in connection with that activity.

The Regulations also provide that Part 3-1 of the Fair Work Act (General Protections) does not apply to actions taken in CI or the CKI by or in relation to a WA Government employer, or an individual so far as he or she is employed, or usually employed by a WA Government employer. Finally, the Regulations provide that Part 6-4B of the Fair Work Act (Workers Bullied at Work) does not apply to a business or undertaking conducted in CI or the CKI by a WA Government employer.

Human rights implications

The Regulations engage 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 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) (WA IR Act) and the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act) will now extend to CI and the CKI and cover a WA Government employer and its employees as applied laws. This will be effected by amendments to the *Christmas Island Applied Laws Ordinance 1992* and *Cocos (Keeling) Islands Ordinance 1992* which will omit the WA IR Act and the MCE Act from the list of dis-applied laws in Schedule 4 of each Ordinance.

These amendments will mean that sections 8A of the *Christmas Island Act 1958* (CI Act) and *Cocos (Keeling) Islands Act 1955* (CKI Act) respectively (which are provisions extending all WA Acts, subordinate legislation and principles or rules of common law or equity that are part of the law of Western Australia to CI and the CKI respectively) operate 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 Regulations will have the effect that a WA Government employer and its employees are no longer covered by most of the Fair Work Act when they are working in CI or the CKI. 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);

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- 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 in CI or the CKI had, up to this point, been dealt with in the National Employment Standards (NES) (contained in Part 2-2 of the Fair Work Act).

As with WA public sector employees based in WA, WA public sector employees working in CI or the CKI 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) and *Public Sector Management (Redeployment and Redundancy) Regulations 2014* (WA)(CKI) as made under the *Public Sector Management Act 1994* (WA)(CI) and *Public Sector Management Act 1994* (WA)(CKI) (PSM Act) (being applied laws in CI and CKI).

Preservation of accrued entitlements

Entitlements accrued by WA public sector employees working in CI or the CKI at the time the Regulation 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 in CI or the CKI. The *Public and Bank Holidays Act 1972* (WA)(CI) and *Public and Bank Holidays Act 1972* (WA)(CKI), as modified, operate as applied laws in CI and CKI. WA public sector employees working in CI or the CKI have an entitlement to paid leave on public holidays (under s 30 of the MCE Act as an applied law).

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Anti-bullying measures

WA public sector employees working in CI or the CKI 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) and *Occupational Safety and Health Act 1984* (WA)(CKI) place 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) and *Equal Opportunity Act 1984* (WA)(CKI) for example, covers discrimination, including sexual and racial harassment.

As with WA public sector employees based in WA, WA public sector employees working in CI or the CKI 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 in CI and the CKI) through the *Christmas Island (Courts) Regulations 2017* and *Cocos (Keeling) Islands (Courts) Regulations 2017*.

WA public sector employees based in CI or the CKI will accordingly now be subject to the WAIRC, the Public Service Arbitrator (Arbitrator), the 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.

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The Regulations complement this extension of jurisdiction as one of its effects 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 in CI or the CKI 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 in CI and the CKI), 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 in CI or the CKI 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 in CI or the CKI 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 the *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984*) and those in the *Equal Opportunity Act 1984* (WA)(CI) and *Equal Opportunity Act 1984* (WA)(CKI) (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, and as a result of the Regulations, WA public sector employees working in CI or the CKI 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.

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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 in CI or the CKI 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);
- 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 Regulations, WA public sector employees working in CI or the CKI 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 in CI or the CKI 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 Regulations will allow the replacement of the ability of WA public sector employees working in CI or the CKI to collectively bargain at the enterprise level under the Fair Work Act with collective bargaining processes under the WA industrial relations system.

Under the WA IR Act as applied to CI and the CKI, 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);
- 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 Commonwealth 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 Regulations will ensure that the resolution of industrial disputes involving WA public sector employees in CI or the CKI will be subject to the same rules as WA public sector employees working in WA.

Conclusion

The Regulations are compatible with human rights because they do not limit human rights.

Senator the Hon Craig Laundy, Minister for Small and Family Business, the Workplace and Deregulation