

EXPLANATORY STATEMENT

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

Fair Work Act 2009

Section 14

Fair Work (State Declarations — employer not to be national system employer) Endorsement 2018 (No. 2)

The *Fair Work Act 2009* (the Fair Work Act) sets out the workplace relations framework for national system employers and national system employees.

Under subsection 14(1) of the Fair Work Act a national system employer means any of the following in its capacity as an employer of an individual:

- A constitutional corporation;
- The Commonwealth or a Commonwealth authority;
- A person who employs a flight crew officer, maritime employee or waterside worker in connection with constitutional trade or commerce;
- A body corporate incorporated in a Territory; or
- A person who carries on an activity in a Territory and employs a person in connection with the activity.

A national system employee is an individual employed by a national system employer (section 13 of the Fair Work Act).

The Parliaments of Victoria, South Australia, Tasmania, Queensland and New South Wales referred power to the Commonwealth Parliament to extend the Fair Work Act to employers and their employees in these States that are not already covered by sections 13 and 14. Division 2A and Division 2B of Part 1-3 of the Fair Work Act give effect to State workplace relations references by extending the meaning of national system employee and national system employer (sections 30C, 30D, 30M and 30N of the Fair Work Act).

Certain entities are integral to State, Territory and local government administration and the employment relationships of these entities may be appropriately regulated by States and Territories. Such entities may be excluded from State references. Additionally, subsection 14(2) of the Fair Work Act allows States and Territories to declare (subject to endorsement by the Commonwealth Minister) that certain employers over which the Commonwealth would otherwise have jurisdiction are not national system employers.

Under subsection 14(2) of the Fair Work Act a particular employer is not a national system employer if it is declared as such by or under a law of a State or Territory and a written

endorsement by the Minister administering the Fair Work Act is in force in relation to the employer.

A declaration may only be made in respect of an employer that is:

- A body established for a public purpose by or under a law of a State or Territory, by the Governor of a State, by the Administrator of a Territory or by a Minister of a State or Territory; or
- A body established for a local government purpose by or under a law of a State or Territory or an entity that is wholly owned or controlled by such a body.

Under subsection 14(6) of the Fair Work Act, unless the employer is a local government employer (or an entity that is wholly-owned or controlled by such an employer), a State or Territory declaration cannot be made in relation to an employer that:

- Generates, supplies or distributed electricity;
- Supplies or distributes gas;
- Provides services for the supply, distribution or release of water; or
- Operates a rail service or a port.

A State or Territory declaration cannot be made in relation to an employer that is an Australian university within the meaning of the *Higher Education Support Act 2003* established under a law of a State or Territory (subsection 14(7) of the Fair Work Act).

The effect of an endorsement is that an employer specified in it will not generally be subject to the Fair Work Act and will instead be subject to the workplace relations arrangements prescribed by the relevant State or Territory. An endorsement has the effect that a specified employer's employees are not generally subject to the Fair Work Act, because only employees of national system employers can be national system employees. However, Parts of 6-3 and 6-4 of the Fair Work Act, which relate to unlawful termination of employment, notice of termination and parental leave, and which apply to all employers and employees, will continue to apply.

The name of this endorsement is the *Fair Work (State Declarations – employer not to be national system employer) Endorsement 2018 (No. 2)* (the Endorsement). The Endorsement endorses a declaration made under the *Industrial Relations Act 1996* (NSW) that 20 named local councils are not national system employers. The Endorsement commences on 1 December 2018.

The Endorsement is a legislative instrument for the purposes of the *Legislation Act 2003* but is not subject to the disallowance or sunset provisions of that Act (subsection 14(5) of the Fair Work Act).