

LEGISLATION (EXEMPTIONS AND OTHER MATTERS)
AMENDMENT (2019 MEASURES NO. 1) REGULATIONS 2019

EXPLANATORY STATEMENT

Issued by the authority of the Attorney-General

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Legislation Act 2003* establishes a comprehensive regime for the publication of Commonwealth Acts and instruments. It also provides for the registration, tabling, parliamentary scrutiny, disallowance and sunseting of instruments.

Section 62 of the Legislation Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act.

Part 4 of Chapter 3 of the Legislation Act provides for the sunseting of legislative instruments. Sunseting is the process by which instruments are automatically repealed approximately 10 years after they are made unless steps are taken to preserve their operation, or the instruments are exempt from sunseting.

Section 51 of the Legislation Act provides that, in certain circumstances, the Attorney-General may issue a certificate to defer the sunseting of a legislative instrument to a date of 1 April or 1 October that is on or before the second anniversary of the sunseting date; that is the sunseting date may be deferred by six, 12, 18 or 24 months.

Section 42 of the Legislation Act provides for the disallowance of legislative instruments. Subsection 51(4) of the Act provides that section 42 (disallowance) does not apply to a certificate that defers sunseting for six or 12 months. Other exemptions from disallowance are created by regulations made for the purposes of paragraph 44(2)(b).

Section 54 of the Legislation Act provides for instruments to which the sunseting regime in Part 4 of Chapter 3 does not apply. Instruments which are prescribed by the regulations for the purposes of paragraph 54(2)(b) of the Legislation Act are exempt from sunseting.

The *Legislation (Exemptions and Other Matters) Regulation 2015* (the Principal Regulations) prescribe classes of instruments (at section 9) and particular instruments (at section 10) that are exempt from disallowance under paragraph 44(2)(b) of the Legislation Act. The Principal Regulations also prescribe classes of instruments (at section 11) and particular instruments (at section 12) that are exempt from sunseting under paragraph 54(2)(b) of the Act.

The purpose of the *Legislation (Exemptions and Other Matters) Amendment (2019 Measures No. 1) Regulations 2019* (the Amendment Regulations) is to remove an item from section 10 of the Principal Regulations (exemption of particular instruments from disallowance) and to prescribe additional instruments to be exempt from sunseting under section 12 of those Regulations. These additional instruments are made under the *Fair Work Act 2009*, the *Fair Work (Registered Organisations) Act 2009*, the *Fair Work (Transitional*

Provisions and Consequential Amendments Act) 2009, the Work Health and Safety Act 2011 and the Work Health and Safety (Transitional and Consequential Provisions) Act 2011.

The Legislation Act does not specify any conditions that must be fulfilled before the power to grant exemptions may be exercised. However, there are established criteria against which the Attorney-General considers all applications to exempt an instrument or class of instruments from sunseting:

- a) the rule-maker has been given a statutory role independent of the Government, or is operating in competition with the private sector
- b) the instrument is designed to be enduring and not subject to regular review
- c) commercial certainty would be undermined by sunseting
- d) the instrument is part of an intergovernmental scheme
- e) the instrument is subject to a more rigorous statutory review process, or
- f) the instrument governs a scheme that is applicable to a permanently closed class of persons.

In addition, an exemption from sunseting may also be appropriate where:

- a) the instrument is sufficiently large and complex that the administrative burden associated with remaking the instrument would outweigh any regulatory benefit, and
 - i) the instrument is subject to regular review, and
 - ii) the instrument is subject to regular amendment.

These criteria are consistent with the purpose of sunseting, which is to ensure that legislative instruments are kept up to date and continue to be fit-for-purpose.

Each new sunseting exemption contained in Schedule 1 to the Amendment Regulations was found to be justified when analysed against the above criteria. It is appropriate to provide specific exemptions in the Amendment Regulations to provide legal certainty for the status of the instruments, and to provide an accessible source of information about these exemptions for users of the legislation.

CONSULTATION

Before the Amendment Regulations were made, the Attorney-General considered the general obligation to consult imposed by section 17 of the Legislation Act.

The Minister for Jobs and Industrial Relations, who has portfolio responsibility for all the instruments exempted from sunseting by the Amendment Regulations, wrote to the Attorney-General requesting that the exemptions be made. The Department of Jobs and Small Business was consulted on, and supports, the exemptions included in the Amendment Regulations.

REGULATION IMPACT STATEMENT

Amendments to the Principal Regulations are regarded as machinery changes. Where the Attorney-General has provided policy approval for the amendments, the Office of Best Practice Regulation (OBPR) does not require further assessment or approval under the Regulatory Impact Assessment process. This standing exemption has been confirmed by the Office of Best Practice Regulation under OBPR reference 17635.

OTHER DETAILS

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

A statement of compatibility under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* is at Attachment B.

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

The Amendment Regulations are a legislative instrument for the purposes of the Legislation Act and are subject to the disallowance provisions of that Act.

The Amendment Regulations commence on the day after their registration.

ATTACHMENT A

Details of the *Legislation (Exemptions and Other Matters) Amendment (2019 Measures No. 1) Regulations 2019*.

Section 1 Name

This section provides that the instrument is named the *Legislation (Exemptions and Other Matters) Amendment (2019 Measures No. 1) Regulations 2019*. The instrument may be cited by that name.

Section 2 Commencement

This section provides for the instrument to commence on the day after it is registered.

Section 3 Authority

This section provides that the instrument is made under the *Legislation Act 2003*.

Section 4 Schedules

This section gives effect to the amendments and repeals specified in the Schedule to the instrument, according to their terms.

Schedule 1 Repeals

Schedule 1 repeals table item 19 of section 10 of the Principal Regulations to remove an item relating to disallowance, and amends the table in section 12 of the Principal Regulations to insert new exemptions from sunseting.

Item 1: Section 10 (table item 19)

Item 1 repeals table item 19 of section 10 of the Principal Regulations. Table item 19 provided that a certificate of deferral issued under subsection 51(1) of the Legislation Act was not subject to disallowance.

Prior to commencement of the *Legislation Amendment (Sunsetting Review and Other Measures) Act 2018* (Sunsetting Review Act), subsection 51(1) of the Legislation Act provided that a certificate of deferral could defer an instrument's sunset date by 6 or 12 months. The Sunsetting Review Act amended subsection 51(1) such that a certificate of deferral can now defer an instrument's sunset date by six, 12, 18 or 24 months. The Sunsetting Review Act also inserted new subsection 51(4) to provide that deferral certificates for six or 12 months are exempt from disallowance. Since the insertion of subsection 51(4) into the Legislation Act, table item 19 of section 10 is no longer required.

Item 2: Section 12 (table item 27)

For the purposes of paragraph 54(2)(b) of the Legislation Act, section 12 of the Principal Regulations provides that instruments contained in the table to that section are not subject to sunseting. Item 2 of Schedule 1 to the Amendment Regulations repeals table item 27 at

section 12 of the Principal Regulations, and inserts new table items 27, 27A and 27B into that table.

Table item 27 lists instruments made under the *Fair Work Act 2009*. New table item 27 retains the existing exemption from sunseting for instruments made under subsection 14(4) of the Fair Work Act, and provides new exemptions from sunseting for each of the following instruments (together, the Fair Work Instruments):

- a) a rule made under subsection 32A(1) made under the Fair Work Act
- b) a declaration made under subsection 388(1) of that Act
- c) an instrument made under subsection 559(3B) of that Act, and
- d) a regulation made under that Act.

The Fair Work Act and the Fair Work Instruments are essential components of the national workplace relations scheme regulating the majority of private sector employers and employees in Australia. This is an intergovernmental scheme involving the Commonwealth, territories and multiple states.

That scheme was developed in conjunction with a multilateral agreement between the Commonwealth, referring states and the Australian Capital Territory and Northern Territory, namely the *Intergovernmental Agreement for a National Workplace Relations System for the Private Sector* (National Workplace IGA). The National Workplace IGA sets out each party's commitment, role and responsibility towards achieving and maintaining a uniform national workplace relations system.

The Fair Work Regulations are explicitly subject to the National Workplace IGA. Under clause 2.11 of that agreement, the Commonwealth must consult with the referring states and the territories on proposed amendments to the Fair Work Regulations.

The other listed instruments are not specifically subject to the National Workplace IGA. However, they are made under the Fair Work Act and were developed in consultation with the referring states and the territories. As such, all of the Fair Work instruments form part of the intergovernmental scheme and it is appropriate to exempt them from sunseting.

While it is likely that the Fair Work Instruments are already exempt from sunseting under the legislated class exemption set out in subsection 54(1) of the Legislation Act, specific exemptions for the instruments are included in the Principal Regulations in order to provide greater certainty.

New table item 27A provides an exemption from sunseting for regulations made under the *Fair Work (Registered Organisations) Act 2009* (the Registered Organisations Act).

Regulations made under the Registered Organisations Act form part of the national workplace relations system, underpinned by the National Workplace IGA.

The National Workplace IGA places obligations on the Commonwealth in relation to regulations made under the Registered Organisations Act. Under clause 2.11 of the National Workplace IGA, the Commonwealth must consult with the referring states and the territories on proposed amendments to 'Fair Work legislation', which is defined in clause 3.6 of the agreement to include regulations made under the Registered Organisations Act.

As such, regulations made under that Act form part of an intergovernmental scheme and it is appropriate to exempt them from sunseting.

While it is likely that such regulations are already exempt from sunseting under the legislated class exemption set out in subsection 54(1) of the Legislation Act, a specific exemption was included in the Principal Regulations in order to provide greater certainty.

To ensure consistency across the Fair Work scheme legislation, new table item 27B provides an exemption from sunseting for regulations made under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

Item 3: Section 12 (at the end of the table)

Item 3 inserts new table items 68 and 69 into the table at section 12 of the Principal Regulations.

New item 68 provides exemptions from sunseting for:

- a) a regulation made under the *Work Health and Safety Act 2011* (WHS Act), and
- b) an instrument (code of practice) made under subsection 274(1) of that Act.

New item 69 provides exemptions from sunseting for regulations made under the *Work Health and Safety (Transitional and Consequential Provisions) Act 2011*.

Together, these three categories of instruments are referred to as the WHS Instruments.

These exempted Regulations and instruments form part of the intergovernmental scheme for a nationally consistent framework to secure the health and safety of workers and workplaces. They are part of a system of nationally harmonised work health and safety laws, based on model laws developed by Safe Work Australia.

The Commonwealth and all states and territories formally committed to the harmonisation of work health and safety laws by signing the *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*. As such, the WHS instruments form part of an intergovernmental scheme and it is appropriate to exempt them from sunseting.

While it is likely that the WHS instruments are already exempt from sunseting under the legislated class exemption set out in subsection 54(1) of the Legislation Act, specific exemptions for the instruments are included in the Principal Regulations in order to provide greater certainty.

ATTACHMENT B

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Legislation (Exemption and Other Matters) Amendment (2019 Measures No. 1)

The *Legislation (Exemptions and Other Matters) Amendment (2019 Measures No. 1) Regulations 2019* (the Amendment Regulations) are 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

The *Legislation Act 2003* (Legislation Act) establishes a comprehensive regime for the publication of Commonwealth Acts and Instruments and provides for the sunseting of legislative instruments. Sunseting is the process by which instruments are automatically repealed approximately 10 years after they are made unless steps are taken to preserve their operation or the instruments are exempt from sunseting.

The Amendment Regulations are made under section 62 of the Legislation Act and amend the *Legislation (Exemptions and Other Matters) Regulation 2015* (Exemptions Regulations) to prescribe additional instruments in the Jobs and Small Business Portfolio to be exempt from sunseting, pursuant to paragraph 54(2)(b) of the Legislation Act.

The Amendment Regulations also make a minor technical amendment to repeal item 19 in the table at section 10 of the Exemptions Regulations. This item is no longer required following the commencement of amendments made by the *Legislation Amendment (Sunsetting Review and Other Measures) Act 2018*.

The instruments that are exempted from sunseting by the Amendment Regulations are:

1. an instrument made under subsection 14(4) of the *Fair Work Act 2009*
2. a rule made under subsection 32A(1) of that Act
3. a declaration made under subsection 388(1) of that Act
4. an instrument made under subsection 559(3B) of that Act
5. a regulation made under that Act
6. a regulation made under the *Fair Work (Registered Organisations) Act 2009*
7. a regulation made under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*
8. a regulation made under the *Work Health and Safety Act 2011*
9. an instrument made under subsection 274(1) of that Act
10. a regulation made under the *Work Health and Safety (Transitional and Consequential Provisions) Act 2011*.

Human Rights Implications

Each new sunseting exemption made by the Amendment Regulations was found to be justified when analysed against established policy criteria for the granting of new exemptions. In each instance it was considered that the instruments should not be subject to the sunseting regime set out in Part 4 of Chapter 3 of the Legislation.

The creation of specific exemptions from sunseting for workplace relations legislation provides certainty to the vast majority of Australian private sector employers and employees who are subject to the national workplace relations system.

None of the sunseting exemptions made by the Amendment Regulations alter the content of the laws to which those exemptions apply. The sunseting exemptions preserve those laws and ensure they are not automatically repealed pursuant to the sunseting regime set out in the Legislation Act. As such, the Amendment Regulations do not engage any of the applicable rights or freedoms.

Conclusion

The Amendment Regulations are 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*, as they do not engage any of those rights or freedoms.