

# *Acts Interpretation Amendment Substituted Reference Order 2019*

## **EXPLANATORY STATEMENT**

Issued by the Attorney-General in compliance with  
section 15G of the *Legislation Act 2003*

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The *Acts Interpretation Act 1901* (Acts Interpretation Act) provides rules for the interpretation of all Commonwealth Acts and instruments.

Where provisions of Commonwealth Acts and instruments made under those Acts refer to a particular authority such as a minister, a department of state or a secretary of a department of state, these references may need to be altered to reflect new administrative arrangements and facilitate the continued exercise of powers and functions from the time of those administrative changes.

Section 19B of the Acts Interpretation Act provides for the making of substituted reference orders. A substituted reference order may be made to alter a reference to a particular authority if any of the following happens (as described in subsection 19B(1)):

- the authority is abolished
- the name or title of the authority is changed
- there is a change in the matters dealt with by the authority because of the effect of an Administrative Arrangements Order (AAO), or
- the reference to the authority becomes no longer appropriate for any other reason.

Substituted reference orders avoid the need to amend legislation, but do not themselves amend the statute book. Accordingly an order must be read with the relevant legislation or instrument to obtain the correct reference. A substituted reference order can operate on references to authorities that are already the subject of existing substituted reference orders. An order cannot deal with transitional issues.

Subsection 19B(2) of the Acts Interpretation Act confers the power on the Governor-General to make a substituted reference order, which has effect for all purposes on and after the day specified in the order.

The Acts Interpretation Act also provides that a substituted reference order:

- may have retrospective effect (subsection 19B(3));
- has effect according to its terms (subsection 19B(4));
- is a legislative instrument (Subsection 19B(5)); and
- must not be made only because an authority is abolished, and another authority of the same type is then established with the same name (Subsection 19B(6)).

Subsection 19B(7) of the Acts Interpretation Act defines **authority** for the purposes of section 19B as a minister, a department of state, any other agency within the meaning of the *Public Service Act 1999*, and office or the holder of an office.

The proposed *Acts Interpretation Amendment Substituted Reference Order 2019* (Order) creates substituted references in three distinct areas.

Firstly, the Order gives effect to the machinery of government changes and the transfer of responsibilities under the AAO made on 29 May 2019 which created the new Employment, Skills, Small and Family Business portfolio, formerly the Jobs and Small Business portfolio, and transferred some responsibilities to the Attorney-General's Department.

Secondly, the Order gives effect to the transfer of responsibilities occurring as a consequence of the Executive Order to Establish the National Indigenous Australians Agency (NIAA) as an Executive Agency signed by the Governor-General on 29 May 2019.

Thirdly, the Order makes minor changes to the previous amendments to the *Acts Interpretation Substituted Reference Order 2017* (2017 Order) which gave effect to the machinery of government changes announced by the Prime Minister on 18 July 2017 and the transfer of responsibilities to the Home Affairs portfolio. These changes would ensure consistency within the 2017 Order, and ensure that it is consistent with wording used in the Acts Interpretation Act.

The Order ensures that ministers, secretaries of departments of state and Australian public service employees can exercise relevant powers granted under legislation in accordance with the responsibilities outlined in the AAO of 29 May 2019, or, in the case of the NIAA, conferred by Executive Order.

To provide an improved framework for substituted reference orders in the future, where possible the substituted reference identifies the relevant authority by reference to an Act or subject matter. This is in line with the Office of Parliamentary Counsel's 3 May 2016 Drafting Direction 2.2 on the use of various expressions in draft legislation. Over time this form of drafting is expected to reduce the need to further alter references dealt with by a substituted reference order.

Details of the Order are set out in the [Attachment](#).

All Commonwealth departments responsible for administering affected Acts and instruments were consulted on the substitutions included in the Order.

The Order is of a machinery nature only and has no direct or substantial indirect effect on business.

The Acts Interpretation Act specifies no conditions that needed to be satisfied before the power to make the Order was exercised.

The Order is a legislative instrument for the purposes of the Legislation Act. The *Legislation (Exemptions and Other Matters) Regulation 2015* provides that a substituted reference order made under section 19B of the Act is not subject to the disallowance or sunset provisions of the Legislation Act (sections 10 and 12 of that Regulation).

The Order commences the day after it is registered on the Federal Register of Legislation, however some provisions of the proposed Order have retrospective operation. This is discussed further in the [Attachment](#).

**Details of proposed *Acts Interpretation Amendment Substituted Reference Order 2019***

**Section 1 – Name**

This section provides that the title of this order is the *Acts Interpretation Amendment Substituted Reference Order 2019* (proposed Order).

**Section 2 – Commencement**

This section provides for the whole of the proposed Order to commence on the day after it is registered on the Federal Register of Legislation. Some provisions in the Order have retrospective operation, which is provided for by subsection 19B(3) of the Acts Interpretation Act.

**Section 3 – Authority**

This section provides that the proposed Order is made under section 19B of the *Acts Interpretation Act 1901* (Acts Interpretation Act).

**Section 4 – Schedules**

This section provides that each instrument specified in a Schedule to the proposed Order is amended or repealed as set out in the applicable item in the schedule. The Order includes one Schedule, which amends the *Acts Interpretation Substituted Reference Order 2017* (2017 Order).

**Schedule 1 – Amendments**

Each section in the Schedule follows the same format, specifying the date from which the substitutions have effect, and then setting out those substitutions in a table. Column 1 in each table identifies the provisions where a reference requires substitution. Column 2 specifies the existing reference. Column 3 specifies the substituted reference.

**Part 1 – Substitutions having effect on and after 29 May 2019**

***Acts Interpretation Substituted Reference Order 2017***

All substitutions in Part 1 take effect on and after 29 May 2019. This is the date of the Administrative Arrangements Order (AAO) that effected the transfer of the *Fair Entitlements Guarantee Act 2012* (FEG Act) and the *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* (FWSRCA Act) (and related responsibilities) from the then Minister for Jobs and Industrial Relations to the Attorney-General (who is now also the Minister for Industrial Relations).

## Item 1 – At the end of Part 2 of the 2017 Order

This item adds a new section 2.5 at the end of Part 2 of the 2017 Order.

### *Migration Regulations 1994*

Item 1 of the table in section 2.5 substitutes the reference to the ‘Minister administering the *Fair Entitlements Guarantee Act 2012*’ in the definition of **Employment Minister** in regulation 1.03 of the *Migration Regulations 1994*.

Prior to the 29 May 2019 AAO, the Minister administering the FEG Act was the Minister for Jobs and Industrial Relations. Therefore, the ‘Employment Minister’ was the Minister for Jobs and Industrial Relations for the purposes of the definition in the *Migration Regulations 1994*. The reference to ‘Employment Minister’ appears in the definition of **labour agreement** in regulation 1.03 and in regulation 2.26B (which deals with relevant assessing authorities for a skilled occupation) of the *Migration Regulations 1994*.

Following the 29 May 2019 AAO, the Department of Employment, Skills, Small and Family Business is the Department dealing with matters such as employment policy, including employment services. However, the Minister administering the FEG Act is now the Attorney-General. This means that the ‘Employment Minister’ is now the Attorney-General for the purposes of the provisions referring to the ‘Employment Minister’ in the *Migration Regulations 1994*. However, the reference should properly be to the Minister responsible for employment policy, including employment services. Therefore, this item substitutes the existing reference so it is read as ‘the Minister responsible for employment policy, including employment services’ to reflect the correct Minister.

### *Social Security (Administration) Act 1999*

Item 2 of the table in section 2.5 substitutes the reference to the ‘Minister administering the *Fair Entitlements Guarantee Act 2012*’ in the definition of **Employment Minister** in subsection 243A(4) of the *Social Security (Administration) Act 1999* (Administration Act).

Prior to the 29 May 2019 AAO, the Minister administering the Administration Act (insofar as it relates to the participation and activity test requirements and compliance obligations for participation payment recipients) and the FEG Act was the Minister for Jobs and Industrial Relations. Therefore, the Employment Minister was the Minister for Jobs and Industrial Relations for the purposes of section 243A of the Administration Act, which relates to the review of the operation of the Youth Jobs PaTH program.

Following the 29 May 2019 AAO, the Minister administering the relevant provisions of the Administration Act is the Minister for Employment, Skills, Small and Family Business. Further, the Department of Employment, Skills, Small and Family Business is the Department dealing with matters such as employment policy, including employment services and work programmes. Therefore, it is the Department responsible for the Youth Jobs PaTH program.

However, the Minister administering the FEG Act is now the Attorney-General. This means that the Employment Minister is now the Attorney-General for the purposes of section 243A of the Administration Act. However, the reference should properly be to the Minister responsible for employment policy, including employment services. Therefore, this item

substitutes the existing reference so it is read as ‘the Minister responsible for employment policy, including employment services’ to reflect the correct Minister.

## **Item 2 – At the end of Part 3 of the 2017 Order**

This item adds a new section 3.5 at the end of Part 3 of the 2017 Order.

### *Social Security Act 1991*

Item 1 of the table in section 3.5 substitutes the reference to the ‘Minister administering the *Fair Entitlements Guarantee Act 2012*’ in the definition of **Employment Department** in subsection 23(1) of the *Social Security Act 1991* (the Social Security Act). References to ‘Employment Department’ (which rely on this definition) appear in both the Social Security Act and the Administration Act.

Prior to the 29 May 2019 AAO, the Minister administering the Social Security Act and the Administration Act (insofar as these Acts relate to the participation and activity test requirements and compliance obligations for participation payment recipients), and the FEG Act was the Minister for Jobs and Industrial Relations. Therefore, the Employment Department was the Department of Jobs and Small Business for the purposes of the definition in the social security legislation.

Following the 29 May 2019 AAO, the Minister administering the relevant provisions of the Social Security Act and the Administration Act is the Minister for Employment, Skills, Small and Family Business. Further, the Department of Employment, Skills, Small and Family Business deals with matters such as employment policy including employment services, and participation, activity test and compliance policy for participation payment recipients.

However, the Minister administering the FEG Act is now the Attorney-General. This means that the Employment Department is now the Attorney-General’s Department in the social security legislation. However, the reference should properly be to the Department of Employment, Skills, Small and Family Business because it is responsible for employment policy, including employment services. The item substitutes the existing reference so it is read as ‘the Department responsible for employment policy, including employment services’ to reflect the correct Department.

This substitution ensures that any references to ‘Employment Department’ and ‘Employment Secretary’ in the Social Security Act and the Administration Act, including any legislative instruments made under those Acts, refer to the correct Department and Secretary (the definition of **Employment Secretary** relies on the definition of **Employment Department** – see the Social Security Act subsection 23(1) definition of **Employment Secretary**).

## **Item 3 – Section 4.1 of the 2017 Order**

Item 3 amends how Part 4 of the 2017 Order has effect. It provides that in so far as a provision mentioned in column 1 of a table applies in a particular respect, a Secretary mentioned in column 2 of that item is to be read as the reference set out in column 3 of that item. The substitution has effect on and after the day mentioned in the heading to that table. This may be a date in the past as subsection 19B(3) of the Acts Interpretation Act provides that a substituted reference order may have retrospective effect.

#### **Item 4 – At the end of Part 4 of the 2017 Order**

Item 4 adds a new section 4.4 at the end of Part 4 of the 2017 Order.

The table in section 4.4 substitutes the reference to the ‘Secretary of the Department administered by the Minister administering the *Fair Work (State Referral and Consequential and Other Amendments) Act 2009*’ (FWSRCOA Act) in:

1. subsections 202CB(6) and 202CE(7) of the *Income Tax Assessment Act 1936* (item 1);
2. item 4 of table 1 in subsection 355-65(2) in Schedule 1 of the *Taxation Administration Act 1953* in so far as that provision applies in respect of the administration of the FEG Act (see item 2); and
3. item 4 of table 1 in subsection 355-65(2) in Schedule 1 of the *Taxation Administration Act 1953* in so far as that provision applies *other than* in respect of the administration of the FEG Act (see item 3).

The note in section 4.4 explains that the reference in column 2 of the table appears as textual references to “Employment Secretary” which are applications of the definition of ***Employment Secretary*** in subsection 995-1(1) of the *Income Tax Assessment Act 1997*.

Subsections 202CB(6) and 202CE(7) of *Income Tax Assessment Act 1936* deal with the quotation of tax file numbers by applicants/recipients of certain allowances under the *Social Security Act 1991*. These provisions are relevant for the administration of the Social Security Act and the Administration Act (insofar as these Acts relate to the participation and activity test requirements and compliance obligations for participation payment recipients).

Subsection 355-65(2) (table 1; item 4) in Schedule 1 of the *Taxation Administration Act 1953* deals with records or disclosures relating to social welfare, health and safety. This provision is relevant for the administration of the Social Security Act and the Administration Act (insofar as these Acts relate to the participation and activity test requirements and compliance obligations for participation payment recipients), and also the FEG Act (insofar as it relates to determining claims for advances under the FEG Act).

Prior to the 29 May 2019 AAO, the Minister administering the Social Security Act and the Administration Act (insofar as these Acts relate to the participation and activity test requirements and compliance obligations for participation payment recipients), the FEG Act and the FWSRCOA Act was the Minister for Jobs and Industrial Relations. Therefore, the Employment Secretary was the Secretary of the Department of Jobs and Small Business for the purposes of the taxation provisions referring to ‘Employment Secretary’.

Following the 29 May 2019 AAO, the Minister administering the relevant provisions of the Social Security Act and the Administration Act is the Minister for Employment, Skills, Small and Family Business. Further, the Department of Employment, Skills, Small and Family Business deals with matters such as employment policy, including employment services, and (relevant to the tax provisions) participation, activity test, and compliance policy for participation payment recipients.

However, the Minister administering the FWSRCOA Act and the FEG Act is now the Attorney-General (who is also Minister for Industrial Relations). This means that the Employment Secretary is now the Secretary of the Attorney-General’s Department.

The items of the table in section 4.4 substitute the existing references to ‘Employment Secretary’ to reflect the correct Secretaries as follows:

1. in subsections 202CB(6) and 202CE(7) of the *Income Tax Assessment Act 1936* – the Secretary of the Department responsible for employment policy, including employment services (item 1);
2. in item 4 of Table 1 in subsection 355-65(2) in Schedule 1 of the *Taxation Administration Act 1953* in so far as that provision applies in respect of the administration of the FEG Act – the Secretary of the Department administered by the Minister administering the FEG Act (see item 2); and
3. item 4 of Table 1 in subsection 355-65(2) in Schedule 1 of the *Taxation Administration Act 1953* in so far as that provision applies *other than* in respect of the administration of the FEG Act – the Secretary of the Department responsible for employment policy, including employment services (see item 3).

### **Item 5 – Application of amendment made by item 3 of the proposed Order**

Item 5 provides that, without limiting item 3 (which amends how Part 4 of the 2017 Order is to have effect), the amendment made by item 3 applies in relation to the substitutions described in section 4.4 that have effect on and after 29 May 2019.

### **Part 2 – Substitutions having effect on and after 1 July 2019**

#### ***Acts Interpretation Substituted Reference Order 2017***

All substitutions in Part 2 take effect on and after 1 July 2019. This is because the Executive Order made on 29 May 2019 under section 65 of the *Public Service Act 1999* to establish the National Indigenous Australians Agency (NIAA) as an Executive Agency commences on 1 July 2019. The Executive Order provides for the NIAA to be headed by a Chief Executive Officer.

In accordance with the Executive Order, the NIAA will lead and coordinate Commonwealth policy development, program design and implementation and service delivery for Aboriginal and Torres Strait Islander people. This will include administration of Indigenous Australians legislation currently administered by the Department of the Prime Minister and Cabinet.

This Part changes the reference to authorities in the specified legislative provisions to facilitate the transition of Indigenous Australians functions to the NIAA.

### **Item 6 – At the end of Part 3 of the 2017 Order**

Item 6 adds a new section 3.6 at the end of Part 3 of the 2017 Order. The table in section 3.6 identifies provisions that provide for an Indigenous Australians function or power to be conferred on or able to be delegated to an officer of the Department. It changes those references so that the function or power is conferred on or able to be delegated to an equivalent officer of the NIAA.

### **Item 7 – At the end of Part 4 of the 2017 Order**

Item 7 adds a new section 4.5 at the end of Part 4 of the 2017 Order. The table in section 4.5 identifies provisions that confer an Indigenous Australians function or power on the Secretary of the Department, or enable such a function or power to be delegated to the Secretary of the Department. It changes those references so that the function or power is conferred on the Chief Executive Officer of NIAA, or able to be delegated to the Chief Executive Officer of the NIAA.

### **Part 3 – Other amendments**

#### ***Acts Interpretation Substituted Reference Order 2017***

### **Item 8 – Section 1.5 of the 2017 Order**

Item 8 repeals the definition of *Home Affairs transition day* in the 2017 Order, as subsequent amendments replace this term with the actual date of transition.

### **Item 9 – Amendments of listed provisions of the 2017 Order**

Item 9 changes references from ‘substitutions made on’ a given day to substitutions ‘having effect on and after’ a given day within the 2017 Order. Subsection 19B(3) of the Acts Interpretation Act states that the day specified in a Substituted Reference Order as the day ‘on and after’ which the order is to have effect may be a day before the order is made. The changes in this Part prevent the potential for confusing the day the substitution is made (which could be retrospective) with the day the amendments to the Substituted Reference order are made.

### **Item 10 – Amendments of listed provisions of the 2017 Order**

Item 10 changes references to the Home Affairs transition day to 21 December 2017, for clarity and consistency with other sections of the 2017 Order.