**EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Industrial Relations

***Fair Work Act 2009***

***Fair Work Amendment (Right of Entry Identification) Regulations 2019***

**Authority**

Part 3-4 of the *Fair Work Act 2009* (Fair Work Act) provides a framework within which officials of registered organisations who hold right of entry permits may enter premises for investigating suspected contraventions of the Fair Work Act or fair work instruments or for discussion purposes. Part 3-4 of the Fair Work Act also sets out additional requirements officials of organisations must meet when exercising rights under State or Territory Occupational Health and Safety laws.

Subsection 796(1) of the Fair Work Act provides that the Governor-General may make regulations that are required or permitted by the Fair Work Act to be prescribed, or are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Under section 512 of the Fair Work Act, the Fair Work Commission (the Commission) may issue a right of entry permit to an official of a registered organisation if satisfied that a person is a fit and proper person to hold an entry permit, taking into account specified permit qualification matters.

Section 521 of the Fair Work Act provides that the *Fair Work Regulations 2009* (the Principal Regulations) may provide for the form of entry permits, entry notices and exemption certificates, and provide for additional information to be included on, or given with, entry permits, entry notices and exemption certificates. The Principal Regulations may also provide for other matters in relation to entry permits, entry notices, exemption certificates and affected member certificates.

**Background**

The *Fair Work Amendment (Modernising Right of Entry) Regulations 2019* amended the Principal Regulations to require entry permits to include, amongst other things, a photograph of the permit holder for permits issued after 1 July 2019. Regulation 3.26A (the transitional regulation) was also included to specify that an existing permit holder (i.e. a person with a valid permit that was issued before 1 July 2019), must produce certain forms of photographic identification along with his or her entry permit, when requested to produce the permit under section 489 or 497 of the Fair Work Act. The transitional regulation will commence on 1 October 2019.

Regulation 3.26A currently provides that the photographic identification must either be issued by the government of the Commonwealth, a State or a Territory or an authority established for a public purpose by or under a law of the Commonwealth, a State or a Territory. It must also be in force or ceased to have been in force in the last 2 years. Subject to the prescribed requirements, this transitional regulation allows a broad range of photographic identification to be produced, including an Australian passport, a State or Territory driver’s licence or another form of photographic identification such as a KeyPass ID issued by Australia Post.

**Purpose**

The *Fair Work Amendment (Right of Entry Identification) Regulations 2019* (the Amending Regulations) amend the transitional regulation to provide clarity and certainty of the types of documents that can be produced in satisfaction of the transitional regulation, being a physical or electronic State or Territory driver’s licence, a physical or electronic State or Territory proof of age card, a physical or electronic identity verification document produced by or on behalf of Australia Post (including the current KeyPass ID in digital or physical form and the Digital iD), and an Australian passport.

Details of the Amending Regulations are set out at Attachment A. A statement of Compatibility with Human Rights is at Attachment B.

**Operation**

The Amending Regulations will commence on 1 October 2019. The Amending Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

**Consultation**

Departmental officials consulted with representatives of State and Territory Governments under *the Intergovernmental Agreement for a National Workplace Relations System for the Private Sector* on an exposure draft of the Amending Regulations. Consultation similarly occurred with the Committee on Industrial Legislation, the Fair Work Ombudsman and the Australian Building and Construction Commission.

**Regulatory Impact**

The Office of Best Practice and Regulation (OBPR) has advised that a Regulation Impact Statement is not required. The OBPR reference number is 24897.

**ATTACHMENT A**

**Details of the *Fair Work Amendment (Right of Entry Identification) Regulations 2019***

**Section 1 – Name**

This section provides that the title of the instrument is the *Fair Work Amendment (Right of Entry Identification) Regulations 2019* (the Amending Regulations).

**Section 2 – Commencement**

This section provides that the Amending Regulations commence on 1 October 2019, immediately after the commencement of Part 2 of Schedule 1 to the *Fair Work Amendment (Modernising Right of Entry) Regulations 2019*.

**Section 3 – Authority**

This section provides the legislative authority for the Amending Regulations. The Amending Regulations are made under the *Fair Work Act 2009* (Fair Work Act).

**Section 4 – Schedules**

This section provides that each instrument that is specified in Schedule 1 to the Amending Regulations is amended or repealed as set out in the applicable items in Schedule 1, and any other item in Schedule 1 has effect according to its terms.

**Schedule 1 – Amendments**

***Fair Work Regulations 2009***

**Item 1 – Regulation 3.26A**

This item amends regulation 3.26A to provide two subregulations. Regulation 3.26A commences on 1 October 2019 and is a transitional provision that will require the holder of a permit issued before 1 July 2019 to produce certain additional photographic identification along with his or her entry permit, when requested to produce the permit under section 489 or 497 of the Fair Work Act.

**Item 2 – Paragraph 3.26A(a)**

This item repeals existing paragraph 3.26A(a) and instead specifies that documents covered by subregulation (2) can be produced by a permit holder in satisfaction of the transitional requirement contained in regulation 3.26A, if they also meet the requirements in paragraphs 3.26A(1)(b) and (c).

**Item 3 – Paragraph 3.26A(b)**

This item amends paragraph 3.26A(b) to inset the words ‘or effect’ after ‘is in force’, in the requirement that the identification produced must be in force, or ceased to have been in force, no more than 2 years before it is produced. The effect of this amendment is to recognise that certain forms of digital identification may be generated without an expiry date or otherwise be considered to be generated for each single use and would therefore not have an expiry date.

**Item 4 - At the end of section 3.26A**

To provide clarity and certainty, this item comprehensively specifies the categories of documents that can be produced by a permit holder during the transitional period along with his or her entry permit issued prior to 1 July 2019. The documents that can be produced in order to satisfy regulation 3.26A are an electronic or physical State or Territory driver’s licence, an electronic or physical State or Territory proof of age card, a physical or electronic identification document produced by or on behalf of Australia Post (such as the KeyPass ID in physical or digital form or the Digital iD), and an Australian passport.

Subregulation 3.26A(2), as inserted by this item, makes it clear that, with the exception of an Australian passport, a specified document can be either ‘issued to’ or ‘generated for’ the permit holder. This language is necessary to put it beyond doubt that electronic versions of those specified document types will be captured by the subregulation as it is presently not clear that a document generated by a relevant app will amount to the ‘issue’ of a document.

**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 (Right of Entry Identification) Regulations 2019***

The *Fair Work Amendment (Right of Entry Identification) Regulations 2019* 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**

Part 3-4 of the *Fair Work Act 2009* (Fair Work Act) allows officials of registered organisations who hold right of entry permits to enter premises to investigate suspected contraventions of the Fair Work Act or fair work instruments, or hold discussions with members and potential members of the organisation on the premises. Part 3-4 also sets out additional requirements officials of organisations must meet when exercising rights under State or Territory Occupational Health and Safety laws.

The *Fair Work Regulations 2009* (the Principal Regulations) prescribe the form of entry permits that are issued by the Fair Work Commission (the Commission). From 1 July 2019, the Principal Regulations will require entry permits to include, amongst other things, a photograph of the permit holder.

Under section 512 of the Fair Work Act, the Commission may issue a right of entry permit to an official of a registered organisation if satisfied that a person is a fit and proper person to hold an entry permit, taking into account specified permit qualification matters. A permit holder exercising right of entry must produce his or her entry permit on request (sections 489 and 497 of the Fair Work Act).

The *Fair Work Amendment (Right of Entry Identification) Regulations 2019* (the Amending Regulations) amend a transitional regulation (regulation 3.26A) inserted into the Principal Regulations by the *Fair Work Amendment (Modernising Right of Entry) Regulations 2019*. From 1 October 2019, the transitional regulation will require permit holders with permits issued by the Commission prior to 1 July 2019 to produce certain forms of photographic identification along with their entry permit when requested to do so under sections 489 or 497 of the Fair Work Act.

The Amending Regulations are necessary to reduce the potential for disputes between employers/occupiers and permit holders seeking to exercise a right of entry by making clear the forms of photographic identification that may be produced in either physical or electronic form in satisfaction of regulation 3.26A.

The acceptable forms of identification will be: a physical or electronic State or Territory driver’s licence, a physical or electronic State or Territory proof of age card, physical or electronic identity verification documents produced by or on behalf of Australia Post (including the current KeyPass ID and the Australia Post Digital iD), and an Australian passport. This amended transitional arrangement will ensure that permit holders have suitable options available to them to produce a form of identification that has the appropriate level of authenticity, and is free, readily obtainable and limited in the personal information it depicts.

The identification must either be in effect, if it is a digital form of identification, or be in force, or ceased to have been in force, in the past 2 years if it is identification in a physical form.

**Human rights implications**

Amendments to the form of entry permits

The definition of ‘human rights’ in the *Human Rights (Parliamentary Scrutiny) Act 2011* relates to the seven core United Nations human rights treaties. The entry permit measures in the Amending Regulations engage with the following rights:

* the right to freedom of association under Article 22 of the *International Covenant on Civil and Political Rights* (ICCPR);
* the right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society under Article 8 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR); and
* the right to protection against arbitrary and unlawful interference with privacy under Article 17 of the ICCPR.

*The right to freedom of association and the right of trade unions to function freely*

Article 22 of the ICCPR protects the right to freedom of association, including the right to form and join trade unions. Article 8(1) of the ICESCR supports the right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society.

The Amending Regulations have the effect that from 1 October 2019, permit holders with a permit issued prior to 1 July 2019 can produce a broad range of photographic identification (such as an electronic form of a driver’s licence or Digital iD), where the permit holder is required to produce the permit for inspection in accordance with sections 489 or 497 of the Fair Work Act.

These amendments positively engage with the right to freedom of association by expanding the forms of photographic identification to include electronic forms of photographic identification that have the appropriate level of authenticity. Allowing such forms of photographic identification limits costs and the regulatory burden on registered organisations and their permit holders exercising right of entry. It also allows permit holders to limit the personal information that is available to an occupier or employer who requests to inspect the identification.

The amendments do not alter the substantive operation of the right of entry framework under Part 3-4 of the Fair Work Act. A permit holder with a permit issued prior to 1 July 2019 will be able to continue to exercise the rights and privileges afforded by Part 3-4 by producing photographic identification that has the appropriate level of authenticity when seeking to exercise statutory right of entry.

*The right to protection against arbitrary and unlawful interferences with privacy*

Article 17 of the ICCPR provides that no one should be subjected to arbitrary or unlawful interference with their privacy. For interference with privacy not to be arbitrary, it must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the circumstances. Reasonableness in this context incorporates notions of proportionality to the end sought and being necessary in the circumstances.

The Amending Regulations modify the photographic identification requirements for permits issued before 1 July 2019 to include forms of electronic photographic identification that have the appropriate level of authenticity. Some of these forms of identification do not show a user’s residential address. It is necessary and reasonable for a permit holder to be required to identify themselves prior to entering the premises of an occupier. It is not, however, necessary to require a permit holder to disclose private information such as their residential address when exercising their statutory entry rights. The range of photographic identification that has the appropriate level of authenticity means that permit holders will either already have a suitable form of identification, or will be able to obtain such identification readily and free of charge and therefore would not constitute an arbitrary or unlawful interference with their privacy.

**Conclusion**

The Amending Regulations are compatible with the right to freedom of association and protection against arbitrary and unlawful interferences with privacy.