

FAIR WORK (NORFOLK ISLAND) AMENDMENT (QUEENSLAND PUBLIC SECTOR EMPLOYEES) RULES 2021

EXPLANATORY STATEMENT

Issued by the authority of the Attorney-General and Minister for Industrial Relations
under section 32A of the *Fair Work Act 2009* (Cth)

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Fair Work Act 2009* (Cth) (Fair Work Act) and the *Fair Work Regulations 2009* (Cth) provide the legislative framework underpinning the national industrial relations system, which covers the majority of Australian workplaces.

Section 32A of the Fair Work Act provides that the Minister for Industrial Relations, by legislative instrument, may prescribe modifications of the Fair Work Act for their application in relation to Norfolk Island.

The *Fair Work (Norfolk Island) Amendment (Queensland Public Sector Employees) Rules 2021* (Cth) (the Amendment Rules) modify the Fair Work Act to provide that the Fair Work Act operates in relation to Queensland public sector employees and their employers while working in Norfolk Island in the same way it does in Queensland.

Without the Amendment Rules, the Fair Work Act in its entirety would apply to Queensland public sector employees and their employers providing state type services in Norfolk Island, unlike Queensland public sector employees based in Queensland. In order to have consistent employment arrangements across its workforce, the Queensland government has requested, and the Commonwealth Government has agreed, that industrial relations laws apply consistently across its workforce.

Specifically, the Amendment Rules provide that an employer of a “Queensland public sector employee” (as defined) is not a national system employer merely because the person employs, or usually employs, a Queensland public sector employee in connection with an activity the person carries on in Norfolk Island.

The Amendment Rules also provide that Part 3-1 (General Protections) does not apply to actions taken in Norfolk Island by or in relation to employers of a Queensland public sector employee, or an individual (so far as he or she is employed, or usually employed, by an employer of a Queensland public sector employee). Finally, the Amendment Rules provide that Part 6-4B (Anti-Bullying) does not apply to a business or undertaking conducted in Norfolk Island by an employer of a Queensland public sector employee.

Nothing in the Amendment Rules prevent provisions of the Fair Work Act that currently apply to Queensland public sector employees and their employer as non-national system employees and a non-national system employer respectively (see in particular Parts 6-3 and 6-4 of the Fair Work Act) from applying in the same way in Norfolk Island.

The *Industrial Relations Act 2016* (Qld) now extends to Norfolk Island and covers Queensland public sector employees and their employers as an applied law. This has been effected by the introduction of the *Norfolk Island Applied Laws and Service Delivery (Queensland) Ordinance 2021* (Cth). The applied law provides comparable terms and conditions to those which the employees would have had under the Fair Work Act.

The Amendment Rules constitute a legislative instrument for the purposes of the *Legislation Act 2003* (Cth) and commence on 1 January 2022.

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

CONSULTATION

Following the request by the Queensland Government that Queensland industrial relations laws apply to Queensland public sector employees working in Norfolk Island, consultation has taken place with the Queensland Government regarding the form of the Amendment Rules. The Queensland Government and the Commonwealth Department of Infrastructure, Transport, Regional Development and Communications have had oversight of the process to ensure that appropriate consultation has been undertaken with affected parties.

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

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation (OPBR) has advised that a Regulatory Impact Statement is not required. The OPBR ID for the Regulation is OBPR21-01218.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Overview of the Legislative Instrument

The *Fair Work (Norfolk Island) Amendment (Queensland Public Sector Employees) Rules 2021* (the Amendment Rules) modify the *Fair Work Act 2009* (Cth) (Fair Work Act) to provide that the Fair Work Act operates in relation to Queensland public sector employees and their employers while working in Norfolk Island in the same way it does in Queensland.

Without the Amendment Rules, the Fair Work Act in its entirety would apply to Queensland public sector employees and their employers providing state type services in Norfolk Island, unlike Queensland public sector employees based in Queensland. In order to have consistent employment arrangements across its workforce, the Queensland government has requested, and the Commonwealth government has agreed, that industrial relations laws apply consistently across its workforce.

Specifically, the Amendment Rules provide that an employer of a “Queensland public sector employee” (as defined) is not a national system employer merely because the person employs, or usually employs, a Queensland public sector employee in connection with an activity the person carries on in Norfolk Island.

The Amendment Rules also provide that Part 3-1 (General Protections) does not apply to actions taken in Norfolk Island by or in relation to an employer of a Queensland public sector employee that would be national system employer but for subsection 14(9) of the Fair Work Act, or an individual (so far as he or she is employed, or usually employed by, an employer of such an employee). Finally, the

Amendment Rules provides that Part 6-4B (Anti-Bullying) does not apply to a business or undertaking conducted in Norfolk Island by an employer of a Queensland public sector employee.

Nothing in the Amendment Rules prevent provisions of the Fair Work Act that currently apply to Queensland public sector employees and their employer as non-national system employees and a non-national system employer respectively (see in particular Parts 6-3 and 6-4 of the Fair Work Act) from applying in the same way in Norfolk Island.

The *Industrial Relations Act 2016* (Qld) (Qld IR Act) now extends to Norfolk Island and covers Queensland public sector employees and their employers as an applied law. This has been effected by the introduction of the *Norfolk Island Applied Laws and Service Delivery (Queensland) Ordinance 2021* (Cth) (the Ordinance). The Qld IR Act provides comparable terms and conditions to those which the employees would have had under the Fair Work Act.

Human rights implications

The Amendment Rules 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

As a result of the Ordinance, the Qld IR Act extends to Norfolk Island and applies to Qld public sector employees as an applied law from 1 January 2022.

Complementary to the application of the Qld IR Act as an applied law, the Amendment Rules have the effect that a Qld public sector employee and his or her employer are no longer covered by most of

the Fair Work Act when they are working in Norfolk Island. These employees are subject to the Qld IR Act as an applied law and the Fair Work Act in the same way as Qld public sector employees working in Qld.

The Qld IR Act as an applied law provides for the following employment terms and conditions:

- Maximum weekly hours of work for full-time employees of 38 hours, with reasonable additional hours (ss 23-26, Qld IR Act);
- Unpaid parental leave for 52 consecutive weeks once the employee has completed 12 months' continuous service with the employer or the employee is a long-term casual employee and the employee has given at least 10 weeks' written notice, with the ability to request a further consecutive period of 52 weeks (Division 8, Qld IR Act);
- Annual leave for four weeks for each year of service (Division 5, Qld IR Act);
- Paid sick and carer's leave for 10 days for each year of service (Divisions 6-1 and 6-2, Qld IR Act);
- Paid bereavement leave for up to two days on the death of a member of an employee's family or household (Division 6-3, Qld IR Act);
- Paid leave on a public holiday (s 117, Qld IR Act); and
- Redundancy pay where an applicable industrial instrument applies to the employee and the employee's employment is terminated because the employer no longer requires the employee's job to be done by anyone (Division 13-2, Qld IR Act).

These provisions deal with terms and conditions of employment that, in relation to Qld public sector employees working in Norfolk Island, would but for these Amendment Rules, be dealt with in the National Employment Standards (NES) (contained in Part 2-2 of the Fair Work Act).

As with Qld public sector employees based in Qld, Qld public sector employees working in Norfolk Island 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 National Employment Standards (contained in Part 2-2 of the Fair Work Act) to all employees.

Preservation of accrued entitlements

Arrangements made under applied Qld industrial relations laws, with modifications made to those laws by rules made under section 7 of the Ordinance, will ensure the preservation of accrued entitlements and service for employees engaged by the NSW Government who take up employment with the Qld Government from 1 January 2022.

Public holidays

Modifications to the applied *Interpretation Act 1954* (Qld) will be made by Rules under section 7 of the Ordinance to ensure that Norfolk Island public holidays apply to relevant employees. Qld public sector employees working in Norfolk Island have an entitlement to paid leave on public holidays (under section 117 of the Qld IR Act as an applied law).

Anti-bullying measures

Qld public sector employees working in Norfolk Island 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 Qld.

- There are comparable anti-bullying protections to Part 6-4B of the Fair Work Act provided in Chapter 7 of the Qld IR Act, which applies to work undertaken in Norfolk Island by these employees.
- The *Work Health and Safety Act 2011* (Qld) (applied Qld WHS Act) extends to Queensland public sector employees working in Norfolk Island by virtue of the Ordinance as an applied law. The applied Qld WHS Act adopts the model Work Health and Safety Act and places relevant duties on businesses to, so far as is practicable, provide and maintain a working environment in which workers are not exposed to hazards, including hazards that impact on psychological health (such as workplace bullying).
- Employers of Queensland public sector employees have sophisticated anti-bullying policies and grievance procedures, allowing employees to resolve matters quickly and confidentially.

The Amendment Rules ensure consistency for Qld public sector employees and their employers. As with Qld public sector employees based in Qld, Qld public sector employees who are at work in an undertaking of the Queensland government in Norfolk Island are not, as a result of the Amendment Rules, 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 Queensland Industrial Relations Commission (QIRC), Industrial Magistrates Court (IMC) and Industrial Court of Queensland (Industrial Court) are vested with jurisdiction to hear and determine matters under the Qld IR Act.

As a result of the Amendment Rules, Qld public sector employees working in Norfolk Island are not generally subject to the jurisdiction of the Fair Work Commission (FWC) and the Federal Court and Federal Circuit and Family Court in relation to industrial relations matters, as they are not covered by the Parts of the Fair Work Act that apply to national system employees.

The QIRC, IMC and Industrial Court provide for similar dispute resolution processes and remedies as provided for under the Fair Work Act. The QIRC is an independent tribunal that has powers and functions under various enactments, including in relation to the resolution of industrial disputes. The QIRC may resolve industrial disputes via conciliation or arbitration, can make any order it considers appropriate, and has an appellate jurisdiction. The IMC also has the power to conciliate or arbitrate matters under the Qld IR Act. The Industrial Court has the power to hear and decide matters referred to it by the QIRC, offences against the Qld IR Act, and appeals from the IMC. It may also exercise jurisdictional review of decisions of the QIRC and IMC.

Unfair dismissal

Qld public sector employees working in Norfolk Island have, in the event they believe they have been unfairly dismissed, broadly equivalent rights to remedies under the Qld industrial relations system (as applied in Norfolk Island), as they would have had under the Fair Work Act. The QIRC may order

reinstatement, re-employment, compensation or payment of lost wages (ss 321, 322 or 323, Qld IR Act).

As with the Qld public sector employees based in Qld, Qld public sector employees working in Norfolk Island 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 subsection 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.

Qld public sector employees working in Norfolk Island have the same federal protections in relation to rights to equality and non-discrimination in employment as Qld public sector employees working in Qld. For example, they continue to have access to protections from discrimination contained in federal anti-discrimination laws (for example the *Racial Discrimination Act 1975* (Cth) and the *Sex Discrimination Act 1984* (Cth)).

They 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 Qld public sector employees based in Qld, and as a result of the Amendment Rules, Qld public sector employees working in Norfolk Island are not covered by the general protections in Part 3-1 and anti-bullying provisions in Part 6-4B of the Fair Work Act.

Qld public sector employees have suitable and comparable protections under the Qld IR Act from adverse action during employment or dismissal from employment. The Qld IR Act provides for a number of general protections at work (Part 1, Chapter 8). There are three broad categories of protections: workplace rights, freedom of association and protection from workplace discrimination. See above under *Anti-bullying measures* for material on the Qld anti-bullying jurisdiction.

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 States Parties undertake to protect the right to strike, provided it is exercised in conformity with the laws of the particular country.

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

Qld public sector employees working in Norfolk Island have access to the same protections in relation to the right to freedom of association as Qld public sector employees working in Qld. They are covered by Part 1 of Chapter 8 of the Qld IR Act as an applied law, which provides, amongst other things, that:

- a person must not take adverse action against another person because the other person is or is not involved with an industrial association, or has or has not engaged in industrial activity (ss 290-291, Qld IR Act);
- a person must not organise, take, or threaten any action against another person with intent to coerce the other person or a third person to engage in industrial activity (s 292, Qld IR Act);
- an employer must not induce an employee to be or not be a member of an industrial association (s 294, Qld IR Act); and
- an employer must not discriminate against an employee or prospective employee because of their trade union activity (s 295, Qld IR Act).

These provisions are substantially similar to protections under the Fair Work Act. They engage and promote the right to freedom of association for Qld public sector employees working in Norfolk Island.

As with Qld public sector employees based in Qld, and as a result of the Amendment Rules, Qld public sector employees working in Norfolk Island are not covered by the general protections in Part 3-1 of the Fair Work Act.

Collective bargaining and the right to strike

Qld public sector employees working in Norfolk Island are in the same position as Qld public sector employees working in Qld, rather than being covered by the Fair Work Act as ‘national system employees’. The operation of the Ordinance and Amendment Rules allow Qld public sector employees working in Norfolk Island to collectively bargain at the enterprise level and take protected industrial action under the Qld industrial relations system.

The relevant Qld public sector employees and their employer(s) are covered by Chapter 4 of the Qld IR Act, under which they:

- must notify relevant parties of their intention to bargain (s 169, Qld IR Act);
- are required to bargain in good faith (s 173, Qld IR Act);
- are subject to a ‘peace obligation period’, during which the parties try to reach agreement but cannot seek assistance from the QIRC or take industrial action (s 174, Qld IR Act); and
- can be assisted in bargaining by the QIRC, including through conciliation and arbitration (Part 3 of Chapter 4, Qld IR Act).

A no-disadvantage test is in place to ensure a safety-net when bargaining. Employees are disadvantaged if the QIRC considers employees’ entitlements or protections would be reduced by the proposed bargaining instrument (ss 199 and 210, Qld IR Act).

The relevant Qld public sector employees and their employer(s) are also able to take protected industrial action in support of a proposed bargaining instrument. Part 8 of Chapter 4 of the Qld IR Act provides:

- a right to take protected industrial action (ss 232 and 237, Qld IR Act);
- the circumstances in which industrial action is protected industrial action (ss 233-4, Qld IR Act);
- approval and notification requirements for proposed protected industrial action (ss 235-236, Qld IR Act);
- limited circumstances under which protected industrial action may be suspended or terminated, including on grounds of significant economic harm (ss 240-241, Qld IR Act).

The framework for collective bargaining and protected industrial action under the Qld IR Act is similar to that provided for under the Fair Work Act. The applied provisions of the Qld IR Act engage and promote the right to collectively bargain and the right to take protected industrial action in conformity with Australian laws.

Conclusion

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

NOTES ON SECTIONS

PART 1 – Preliminary

Section 1 – Name

This section sets out the name of the Amendment Rules as the *Fair Work (Norfolk Island) Amendment (Queensland Public Sector Employees) Rules 2021*.

Section 2 – Commencement

This section provides that the whole of the Amendment Rules commence on 1 January 2022.

Section 3 – Authority

This section provides that the Amendment Rules are made under section 32A of the *Fair Work Act 2009* (Cth) (the Fair Work Act).

Section 4 – Schedules

This section provides that Schedule 1 to the Amendment Rules amends the *Fair Work (Norfolk Island) Rule 2016* (Cth) (Norfolk Island Rule).

SCHEDULE 1 – Amendments

Item 1 – At the end of Item 2 of Schedule 1

This item inserts a new definition of ‘Queensland public sector employee’ being a:

- ‘public service employee’ as defined in the *Public Service Act 2008* (Qld); or
- ‘health service employee’ as defined in the *Hospital and Health Boards Act 2011* (Qld); or
- ‘senior health service employee’ as defined in the *Hospital and Health Boards Act 2011* (Qld).

The above definitions are to be taken from the *Public Service Act 2008* (Qld) and *Hospital and Health Boards Act 2011* (Qld) as in force from time to time.

Item 2 – Item 6 of Schedule 1

This item modifies the heading to subsection 14(8) of the Fair Work Act, by inserting “New South Wales” after “Employers of” so as to make clear that the existing modification in section 14(8) relates only to New South Wales public sector employers and their employees.

Item 3 – Item 6 of Schedule 1

This item amends the Norfolk Island Rule by modifying section 14 of the Fair Work Act to repeal subsection 14(9) and insert new subsections 14(9)-(10). Repealed subsection 14(9) is effectively replicated in new subsection 14(10).

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. But for the application of these Amendment Rules, the Qld Government would be a national system employer in relation to its public sector employees performing work in Norfolk Island.

New subsection 14(9) provides that despite paragraph 14(1)(f), a person that would be an employer within the meaning of the *Industrial Relations Act 2016* (Qld) but for paragraph 7(1)(a) of that Act, is not a national system employer merely because the person employs, or usually employs, a public sector employee in connection with an activity the person carries on in Norfolk Island. This new subsection ensures that Qld public sector employees working in Norfolk Island and their employers 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).

The Note to new subsection 14(9) clarifies that this subsection does not affect the person's status as a national system employer if the person is a national system employer apart from paragraph 14(1)(f).

To avoid doubt, new subsection 14(10) of the Fair Work Act makes clear that existing subsection 14(8) and new subsection 14(9) do not prevent certain employers from being national system employers – that is, the Norfolk Island Regional Council or a body established for a public purpose by or under a law in force in Norfolk Island other than an applied law (within the meaning of the *Norfolk Island Act 1979* (Cth) (Norfolk Island Act)).

The Note to subsection 14(10) clarifies that certain laws of New South Wales and Queensland, which are both applied law jurisdictions under the Norfolk Island Act, are in force in Norfolk Island as applied laws under that Act.

Repealed subsection (9) had the same effect but narrower application – being limited to applied New South Wales laws.

Item 4 – After item 10 of Schedule 1

This item inserts new section 10A at the end of Schedule of the Norfolk Island Rule, adding new section 339A to the Fair Work Act to modify the application of Part 3-1 of the Fair Work Act in relation to Queensland public sector employees and their employers.

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 Norfolk Island 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. The Amendment Rules modify the application of Part 3-1 so that it does not apply to action taken in Norfolk Island by or in relation to:

- (a) an employer of a Queensland public sector employee that would be a national system employer but for subsection 14(9); or

- (b) an individual so far as he or she is employed, or usually employed, by a Queensland public sector employer mentioned in paragraph (a).

Item 5 – At the end of Schedule 1

This item inserts a new section 15 at the end of Schedule 1 of the Norfolk Island Rule, providing that section 789FD(3)(b) of the Fair Work Act does not apply to a business or undertaking conducted in Norfolk Island by an employer of a Queensland public sector employee.

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. The new section modifies the application of paragraph 789FD(3)(b) to provide that it does not apply to a business or undertaking principally conducted in Norfolk Island by an employer of Queensland public sector employee.

The Note clarifies that this does not prevent Part 6-4B applying in relation to a business or undertaking conducted by an employer of a Queensland public sector employee that is a constitutional corporation: see subparagraph (3)(a)(i).