

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Employment and Workplace Relations

### ***Fair Work Act 2009***

### ***Fair Work Amendment (Transitional Arrangements – Western Australian Local Government Employers and Employees) Regulations 2022***

#### **AUTHORITY**

The *Fair Work Act 2009* (the Fair Work Act), together with the *Fair Work Regulations 2009* (the Principal Regulations), establish a national workplace relations system covering the majority of employers and employees in Australia.

Subsection 796(1) of the Fair Work 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. Section 14A of the Fair Work Act allows the Commonwealth to make regulations that provide for transitional arrangements where employers and employees cease to be national system employers and national system employees by virtue of section 14(2).

The *Fair Work Amendment (Transitional Arrangements – Western Australian Local Government Employers and Employees) Regulations 2022* (Regulations) are made under section 796 of the Fair Work Act.

#### **PURPOSE AND OPERATION**

On 20 June 2022, the Western Australian government made a declaration in Schedule 4 of the *Industrial Relations (General) Regulations 1997* that its local government and regional local government employers are not national system employers for the purposes of the Fair Work Act. To be effective, the declaration must be endorsed by the Commonwealth Minister.

The Minister for Employment and Workplace Relations endorsed the declaration in the *Fair Work (State Declarations — employer not to be national system employer) Endorsement 2022 (No. 1)* (Endorsement Instrument). The Endorsement Instrument and the Regulations will commence on 1 January 2023. Western Australia's declaration is made in accordance with subsection 14(2) of the Fair Work Act, which 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. This recognises that certain entities are integral to State, Territory and local government administration and the employment relationships of these entities may be appropriately regulated by the States and Territories.

The effect of an endorsed declaration is that an employer specified in it (and that employer's employees) 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. However, Parts 6-3 and 6-4 of the Fair Work Act, which relate to unlawful termination of employment and parental leave, and which apply to employers and employees nationally, will continue to apply.

Division 2 of Part 2AA of the *Industrial Relations Act 1979* (WA) (WA IR Act) sets out transitional arrangements to move declared employers and employees from the national workplace relations system to the State system. Broadly speaking, the transitional arrangements recognise existing federal employment arrangements for a specified period, to give declared employers sufficient time to comply with the WA IR Act and other State industrial laws. The arrangements also preserve employees' continuity of employment and entitlements accrued in the national system.

These Regulations amend the Principal Regulations to provide for certain transitional arrangements relating to Western Australian local government employers, employees, and organisations that represent them. The Regulations:

- enable the Fair Work Commission (FWC) to continue to deal with particular matters involving conduct occurring before the transition date after the transition date, including in relation to unfair dismissal, stand down, and certain disputes concerning individual employment rights;
- allow the FWC to prevent double dipping where a person is pursuing a similar remedy under the Western Australian system; and
- ensure that all proceedings before the Courts at the defined transition time can be finally determined in the national system.

It is undesirable for these applications to be re-litigated in the State industrial relations system, as it will cause inconvenience and cost for both parties.

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

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

## **REGULATORY IMPACT**

The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required (OBPR22-03281).

## **COMMENCEMENT**

The Regulations commence on 1 January 2023.

## **CONSULTATION**

The Regulations have been developed at the request of the Western Australian Government. The Government consulted with State and Territory government officials under the *Intergovernmental Agreement for a National Workplace Relations System for the Private Sector* on an exposure draft of the Regulations. Targeted consultation was undertaken with key industry stakeholders, including the Western Australian Local Government Association (WALGA) and relevant Western Australian unions. Substantive feedback was received from three stakeholders: WALGA, the Australian Services Union and the Western Australian Government. The Regulations adequately address stakeholders' comments from both consultation processes.

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*  
Fair Work Amendment (Transitional Arrangements – Western Australian Local Government Employers and Employees) Regulations 2022

The *Fair Work Amendment (Transitional Arrangements – Western Australian Local Government Employers and Employees) Regulations 2022* (the Instrument) 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

The effect of the *Fair Work (State Declarations – employer not to be national system employer) Endorsement 2022 (No. 1)* (Endorsement) is that the employers specified in it (and those employers' employees) will not generally be subject to the *Fair Work Act 2009* (Fair Work Act) and will instead be subject to the workplace relations arrangements prescribed by the Western Australian industrial relations system.

The Endorsement has been designed to give industrial certainty to local government employers and employees in Western Australia about Fair Work Act coverage. The Instrument provides for transitional arrangements to, where possible, limit disruptions for the employers and their employees as they transition from the national workplace relations system to the state system.

The Instrument makes transitional arrangements, as requested by the Western Australian Government, which will reduce the inconvenience and cost for both parties that will be incurred if certain applications were to be re-litigated in the State industrial relations system.

### Human rights implications

The Instrument engages the right to a fair and public hearing and right to an effective remedy contained in Articles 14(1) and 2(3) of the *International Covenant on Civil and Political Rights* (ICCPR).

Right to a fair and public hearing before competent administrative and judicial authorities, and to an effective remedy – Articles 14(1) and 2(3) of the ICCPR

Article 14(1) of the ICCPR enshrines the right of a person to have a fair and public hearing by a competent, independent and impartial court or tribunal established by law. Article 2(3) requires States to ensure that any person whose rights and freedoms as stipulated in the ICCPR are violated, shall have an effective remedy, which is to be determined by a competent judicial authority.

The transitional provisions in Schedule 1 of the Instrument promote these rights by providing for the continuity of certain matters that are on foot before the Fair Work Commission (FWC) or an eligible court as at the transition day.

As a result of the Endorsement, Western Australian local government employers and their employees will not generally be subject to the jurisdiction of the FWC and the Federal Court, Federal Circuit and Family Court or an eligible State or Territory Court in relation to federal

workplace relations matters, as they will no longer be covered by the Parts of the Fair Work Act that apply to national system employees.

Schedule 1 ensures that litigants who have filed an application in respect of certain matters under the Fair Work Act are not disadvantaged as a result of the commencement of the Endorsement on the transition date.

#### *Preservation of certain FWC proceedings*

Regulation 6.07F promotes the rights to a fair hearing and an effective remedy by ensuring continuity in FWC proceedings that relate to individual employment rights and processes – in Part 2-2 (the National Employment Standards), 3-2 (Unfair dismissal), 3-5 (Stand down), or 6-2 (Dealing with disputes) of the Fair Work Act.

It sets out the transitional arrangements for matters that are on foot before the FWC at the transition time and the matters that may be determined in the national system after the transition date. Regulation 6.07F also contains an anti-double dipping measure, to allow for the FWC, with appropriate discretion, to determine if a second application by a person amounts to double-dipping or is a genuine, new application.

This regulation operates to ensure that all matters relating to a preserved FWC application can be conclusively determined in the national system. This includes matters that have been returned to the FWC following judicial review. Complexities and delays may arise should the processes relating to unfair dismissal, stand down, and disputes relating to individual employment rights processes not be preserved.

#### *Preservation of court proceedings*

Regulation 6.07G promotes the rights to a fair hearing and an effective remedy by ensuring continuity in court proceedings that relate to conduct that occurred prior to the transfer of Western Australian local government employers and their employees to the State workplace relations system taking effect.

An eligible court may deal with or continue to deal with a matter (whether the matter was commenced before or after the transition time) if the matter is relevant to a preserved affected person in the person's capacity, or in respect of another person's capacity, as a national system employer or national system employee. This is intended to minimise confusion and delay, and ensure that all proceedings before the courts at the transition time can be finally determined in the national workplace relations system.

#### *Western Australian industrial authorities*

The Western Australian Industrial Relations Commission (WAIRC) and Industrial Magistrates Court (IMC) and are vested with jurisdiction to hear and determine matters under the *Industrial Relations Act 1979* (WA) (WA IR Act).

The WAIRC and IMC provide for similar dispute resolution processes and remedies as provided for under the Fair Work Act. The WAIRC is an independent tribunal that has powers and functions under various enactments, including in relation to the resolution of industrial disputes. The IMC is a Court of law that exercises both 'general' and 'prosecution' jurisdiction. Both the WAIRC and IMC may resolve industrial disputes via conciliation or arbitration, make any order it considers appropriate, and have appellate jurisdiction.

## **Conclusion**

The Instrument is compatible with human rights because it promotes the protection of human rights.

**Minister for Employment and Workplace Relations, the Honourable Tony Burke MP**

# Fair Work Amendment (Transitional Arrangements – Western Australian Local Government Employers and Employees) Regulations 2022

## EXPLANATION OF PROVISIONS

### Section 1 – Name

1. This section provides that the title of the instrument is the *Fair Work Amendment (Transitional Arrangements – Western Australian Local Government Employers and Employees) Regulations 2022* (the Regulations).

### Section 2 – Commencement

2. This section provides for the Regulations to commence on 1 January 2023.

### Section 3 – Authority

3. This section provides that the *Fair Work Amendment (Transitional Arrangements – Western Australian Local Government Employers and Employees) Regulations 2022* are made under the *Fair Work Act 2009* (Fair Work Act).

### Section 4 – Schedules

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

### Schedule 1 – Amendments

#### **Item [1] – After Part 6-4C**

5. Item 1 of the Regulations amends the *Fair Work Regulations 2009* to insert a new Part 6-4D, to deal with transitional matters relating to employers and employees that cease to be national system employers and national system employees. Employers and employees can cease to be national system employers and national system employees if the process in subsection 14(2) of the Fair Work Act is carried out. Subsection 14(2) 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. The effect of an endorsed declaration is that an employer specified in it (and that employer's employees) cease to be national system employers and national system employees.

6. The *Fair Work (State Declarations — employer not to be national system employer) Endorsement 2022 (No. 1)* will endorse Western Australia's declaration as in force on 1 January 2023 under the *Industrial Relations (General) Regulations 1997* (WA) that 145 Western Australian local government and regional local government employers are not national system employers.
7. Division 1 of Part 6-4D provides for transitional matters relating to these Western Australian local government employers, employees, and organisations that represent them.

#### *Regulation 6.07D*

8. Regulation 6.07D provides definitions of terms used in Division 1. The following definitions are included:

- **endorsement** means the *Fair Work (State Declarations—employers not to be national system employers) Endorsement 2022 (No. 1)*.
- **non-preserved FWC application** means an application or referral that is not a 'preserved FWC application' that is made by a preserved affected person to the Fair Work Commission (FWC) in, or in relation to, the person's capacity, or another person's capacity, as a national system employer or national system employee at the time of the conduct that is the subject of the application or referral.

Subparagraph (b)(ii) of the definition ensures that applications or referrals made by employer organisations on behalf of an employer; or employee organisations, registered employee associations or industrial associations on behalf of an employee, are captured by the definition.

A 'non-preserved FWC application' captures all FWC applications or referrals made in a person's capacity as a national system employer or national system employee (or their representative) that is not captured by the definition of 'preserved FWC application'.

- **preserved affected person** means any of the following:
  - (a) an employer listed in Schedule 1 to the endorsement. Schedule 1 to the endorsement lists 145 Western Australian local government and regional local government employers;
  - (b) an individual who, before the transition time, was employed or usually employed by, or a prospective employee of, a Western Australian local government employer mentioned in paragraph (a);
  - (c) an employer organisation of which an employer mentioned in paragraph (a) was a member before the transition time;
  - (d) an organisation or association which represented the industrial interests of an individual mentioned in paragraph (b) before the transition time.

- **preserved FWC application** means an application or referral made by a preserved affected person to the FWC under a provision in Part 2-2 (the National Employment Standards), 3-2 (Unfair dismissal), 3-5 (Stand down), or 6-2 (Dealing with disputes) of the Fair Work Act that is made in, or in relation to, the person's capacity, or another person's capacity, at the time of the conduct that is the subject of the application or referral, as a national system employer or a national system employee.
- **transition time** means the time when the endorsement commences. The endorsement will operate to transfer the 145 listed Western Australian local and regional government employers from the national system to the Western Australian State system. The Note explains that the endorsement commences on 1 January 2023.

*Regulation 6.07E – Purpose of this Division*

9. Regulation 6.07E clarifies that Division 1 is made for the purposes of paragraphs 14A(1)(a) and (b) of the Fair Work Act. Section 14A of the Fair Work Act allows the Commonwealth to make regulations that provide for transitional arrangements where employers and employees cease to be national system employers and national system employees by virtue of section 14(2) of that Act.
10. The Regulations only affect a person in their capacity as a national system employer or national system employee. A person will still be able to make an application where it provides for such to be made in relation to:
  - a person's status as an employee or employer within the ordinary meaning of those terms (for example, Part 6-4 (Additional provisions relating to termination of employment)); and
  - where a person is not a national system employer or national system employee (for example, Part 6-4B (Workers Bullied or Sexually Harassed at Work)).

*Regulation 6.07F Transitional – FWC matters*

11. Regulation 6.07F sets out the transitional arrangements for matters that are on foot before the FWC at the transition time, and the matters that may be determined in the national system after the transition date.
12. Subregulations (1)-(3) provide transitional arrangements for applications made after the transition time in relation to conduct occurring before that time.
13. A preserved affected person will be able to make a preserved FWC application to the FWC in relation to conduct occurring before the transition time. It is intended that subregulation (1) will preserve access to the FWC for applications that relate to a person's individual employment rights and that are time limited (for example, applications relating to unfair dismissal under Part 3-2 of the Fair Work Act).



14. Subregulation (2) provides the FWC with discretion to dismiss a preserved FWC application in certain circumstances where an application has been made to another body in relation to the same conduct. The FWC will be able to dismiss a preserved FWC application if satisfied that the other body is or will be dealing with the same or substantially the same matter and has available to it the same or substantially the same remedies the FWC will be likely to apply.
15. The intention is that giving the FWC this discretion will limit, to the extent possible, the ability of a person to seek the same remedies in both the national and Western Australian workplace relations systems. This will allow for FWC to determine if a second application by a person amounts to double-dipping in both systems or is a genuine, new application.
16. Subregulation (3) clarifies that subregulation (2) will not limit when the FWC can dismiss a preserved FWC application. The Notes:
- refer to section 587 of the Fair Work Act in relation to other powers of the FWC to dismiss applications; and
  - specify that subsection 587(3) of the Fair Work Act makes clear that applications may be dismissed on the initiative of the FWC or on application by one of the parties.
17. Subregulation (4) sets out the matters that the FWC will be able to deal with, or continue to deal with, after the transition time, including:
- (a) matters commenced by a preserved FWC application (whether the application was made before or after the transition time); or
  - (b) an appeal under section 604 of the Fair Work Act in respect of such a matter; or
  - (c) a review of a decision under section 605 of the Fair Work Act in respect of such a matter; or
  - (d) matters in respect of which
    - (i) a question of law has been referred to the Federal Court under subsection 608(1) of the Fair Work Act; or
    - (ii) a court has exercised jurisdiction under section 562 of the Fair Work Act, section 39B of the *Judiciary Act 1903* or paragraph 75(v) of the Constitution

(whether the referral occurs or the jurisdiction is first exercised before or after the transition time) that is relevant to a preserved affected person in the person's capacity, at the time of the conduct relevant to the matter, as a national system employer or national system employee.

18. This provision operates to ensure that all matters relating to a preserved FWC application can be conclusively determined in the national system. This includes matters that have been returned to the FWC following judicial review. Complexities and delays may arise should the processes relating to unfair dismissal, stand down, and disputes relating to individual employment rights processes not be preserved.
19. In addition, paragraph (d) provides that matters commenced by any kind of application or referral, not just preserved FWC applications, will continue to be dealt with by the FWC in certain circumstances where a court has considered a question of law or exercised jurisdiction in respect of that matter. This means that court processes are not interfered with. The Note clarifies that paragraph 4(d) covers matters commenced by any kind of application or referral.
20. Subregulation (5) prohibits the FWC from dealing with, or continuing to deal with, a matter commenced by a non-preserved FWC application (whether the application was made before or after the transition time) other than a matter mentioned in paragraph (3)(d).
21. This provision is intended to ensure that Commonwealth resources are not unnecessarily applied to dealing with matters concerning employers and employees who are no longer covered by the national system. Paragraph 4(d) ensures that court processes are not interfered with in respect of these matters.

#### *Regulation 6.07G – Court proceedings*

22. Regulation 6.07G sets out the transitional arrangements for all proceedings before the courts.
23. Subregulation (1) provides that, after the transition time, a preserved affected person can institute proceedings in relation to conduct occurring before the transition time as if they were still a national system employer or national system employee.
24. Employer organisations, employee organisations, registered employee associations or industrial associations will also be able to institute proceedings on behalf of a person in relation to conduct before the transition time. These bodies will be able to institute proceedings as if the person was still a national system employer or a national system employee, and as if the person is still a member of the organisation (in the case of an employer representative) or still represents their interests (in the case of an employee representative).
25. Subregulation (2) clarifies that an eligible court may deal with or continue to deal with a matter (whether the matter was instituted by proceedings before or after the transition time) if the matter is relevant to a preserved affected person in:
  - the person's capacity, or

- in respect of another person's capacity  
as a national system employer or national system employee.

26. The court will only be able to deal with or continue to deal with the matter if it had jurisdiction, before the transition time, to deal with the matter.

27. This is intended to ensure that all proceedings before the courts at the transition time can be finally determined in the national system.