

EXPLANATORY STATEMENT

Issued by authority of the Minister for Employment and Workplace Relations

Fair Work Act 2009

Fair Work (State Declarations — employers not to be national system employers) Endorsement 2022 (No. 1)

The *Fair Work (State Declarations – employers not to be national system employers) Endorsement 2022 (No. 1)* (the Endorsement) is made under paragraph 14(4)(a) of the *Fair Work Act 2009* (Fair Work Act), and endorses a declaration made under the *Industrial Relations (General) Regulations 1997* (WA) that each of the named Western Australian local government employers and regional local government employers (the declared employers) are not national system employers. The Endorsement commences on 1 January 2023.

The Fair Work Act sets out the workplace relations framework for national system employers and national system employees.

Under subsection 14(1) of the Fair Work Act a national system employer means any of the following in its capacity as an employer of an individual:

- a constitutional corporation;
- the Commonwealth or a Commonwealth authority;
- a person who employs a flight crew officer, maritime employee or waterside worker in connection with constitutional trade or commerce;
- a body corporate incorporated in a Territory; or
- a person who carries on an activity in a Territory and employs a person in connection with the activity.

A national system employee is an individual employed by a national system employer (section 13 of the Fair Work Act).

Under subsection 14(2) of the Fair Work Act a particular employer is not a national system employer if there is a declaration to that effect made by or under a law of a State or Territory and a written endorsement by the Minister administering the Fair Work Act is in force in relation to the employer. 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.

A State or Territory declaration may only be made in respect of an employer that is:

- a body established for a public purpose by or under a law of a State or Territory, by the Governor of a State, by the Administrator of a Territory or by a Minister of a State or Territory; or
- a body established for a local government purpose by or under a law of a State or Territory or an entity that is wholly owned or controlled by such a body.

Under subsection 14(6) of the Fair Work Act, unless the employer is a local government employer (or an entity that is wholly-owned or controlled by such an employer), a State or Territory declaration cannot be made in relation to an employer that:

- generates, supplies or distributed electricity;
- supplies or distributes gas;
- provides services for the supply, distribution or release of water; or
- operates a rail service or a port.

A State or Territory declaration cannot be made in relation to an employer that is an Australian university within the meaning of the *Higher Education Support Act 2003* established under a law of a State or Territory (subsection 14(7) of the Fair Work Act).

The Western Australian local governments and regional local governments are bodies established for a local government purpose by or under a law of a State, specifically, the *Local Government Act 1995* (WA).

The effect of the Endorsement is that the declared employers will not generally be subject to the Fair Work Act and will instead be subject to the workplace relations arrangements under Western Australian laws. The Endorsement has the effect that the declared employers' employees are not generally subject to the Fair Work Act, because only employees of national system employers can be national system employees. However, Parts of 6-3 and 6-4 of the Fair Work Act, which relate to unlawful termination of employment, notice of termination and parental leave, and which apply to all employers and employees, will continue to apply.

The Endorsement is a legislative instrument for the purposes of the *Legislation Act 2003* (Legislation Act) but is not subject to disallowance and sunseting under that Act (subsection 14(5) of the Fair Work Act and item 27 in the table in s 12 of the *Legislation (Exemption and Other Matters) Regulation 2015* (2015 Regulation)). The Explanatory Statement to the 2015 Regulation outlines the objective behind the exemption of instruments made under subsection 14(4) of the Fair Work Act from sunseting, including that it 'is designed to ensure certainty for the employment arrangements that apply to the relevant State or Territory employers and employees' and that such instruments are 'enduring and not appropriate for sunseting'.