

EXPLANATORY STATEMENT

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

Fair Work Act 2009

Fair Work Amendment (Fixed Term Contracts) Regulations 2023

AUTHORITY

The *Fair Work Act 2009* (the Act) provides a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians. The *Fair Work Regulations 2009* (the Principal Regulations) support matters of detail within the legislative framework contained in the Act.

Section 796(1) of the 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 333F of the Act provides, in part, that the Governor-General may make regulations prescribing exceptions that may apply to the limitations on fixed term contracts, and regulations prescribing the method for calculating the high-income threshold for the purposes of the exception contained in subsection 333F(2).

Row 27 of the table at section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015* provides that sunseting of legislative instruments does not apply to regulations made under the Act. Pursuant to section 12, these regulations would not be subject to ordinary sunseting processes.

The Act specifies no conditions that need to be satisfied before the power to make the proposed Regulations may be exercised.

PURPOSE AND OPERATION

The purpose of the *Fair Work Amendment (Fixed Term Contracts) Regulations 2023* (the Regulations) is to amend the Principal Regulations to prescribe:

- the method of calculating the high-income threshold for the purpose of subsection 333F(2) of the Act, where an employee is required to work fewer than full-time hours for a year and where an employee is required to work for only part of a year.
- further sources of funding, in addition to legislated sources, for the purposes of the exception contained in subsection 333F(1)(f)(i) of the Act. Types of excepted funding include philanthropic funding, and testamentary gifts or contributions for charitable purposes. This exception will apply to contracts entered into on or after 6 December 2023 and before 1 July 2024.
- further exceptions for the purposes of subsection 333F(1)(i) in relation to organised sports, high performance international sporting events, the live performance sector, and the higher education sector. This exception will apply to contracts entered into on or after 6 December 2023 and before 1 July 2024.

On 6 December 2022, the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Secure Jobs, Better Pay Act) received Royal Assent. Part 10 of Schedule 1 of the Secure Jobs, Better Pay Act amended the Act to prohibit the use of fixed term contracts for the same role beyond two years or two consecutive contracts (whichever is shorter), including renewals, providing limited exceptions for genuine fixed term contracts, and expanded the regulation making powers under the Act. The provisions were introduced to provide protections for employees engaged under successive fixed term contracts, while allowing employers to continue to use fixed term contracts for legitimate purposes. The provisions will commence operation on 6 December 2023.

New sections 333E to 333L of the Act provide for the limitation on the use of fixed term contracts, including provisions dealing with disputes and anti-avoidance, with section 333F providing principles-based exceptions for certain fixed term contracts to which the limitation will not apply. Section 333F also contains regulation making powers that allow for regulations to be made prescribing exceptions to the limitations on certain fixed term contracts.

REGULATORY IMPACT

The Office of Best Practice Regulation (OBPR) (now known as the Office of Impact Analysis) advised that a Regulation Impact Statement (now known as an Impact Analysis) was not required to be published for the fixed term contract measures in the Secure Jobs, Better Pay Act, as the measures would have a minor regulatory impact (refer Regulation Impact Statement OBPR22-02411).

The Office of Impact Analysis further confirmed that a separate Impact Analysis is not required for the Regulations.

COMMENCEMENT

The Regulations commence on 6 December 2023 at the same time as Part 10 of Schedule 1 to the Secure Jobs, Better Pay Act.

CONSULTATION

The Department of Employment and Workplace Relations undertook more than 55 targeted confidential consultation sessions with key stakeholders who will be affected by the Regulations, as well as consultation with the Committee on Industrial Legislation (a subcommittee of the National Workplace Relations Consultative Council, established under the *National Workplace Relations Consultative Council Act 2002*), and with states and territories pursuant to the *Intergovernmental Agreement for a National Workplace Relations System for the Private Sector*.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Fair Work Amendment (Fixed Term Contracts) Regulations 2023

The *Fair Work Amendment (Fixed Term Contracts) Regulations 2023* (the Regulations) are 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 *Fair Work Act 2009* (the Act) provides a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.

The Regulations amend the *Fair Work Regulations 2009* (Principal Regulations) to prescribe:

- the method of calculating the method for calculating the high-income threshold for the purpose of subsection 333F(2) of the Act, where an employee is required to work fewer than full-time hours for a year and where an employee is required to work for only part of a year.
- further sources of funding, in addition to legislated sources, for the purposes of the exception contained in subsection 333F(1)(f)(i) of the Act. Types of excepted funding include philanthropic funding, and testamentary gifts or contributions for charitable purposes. This exception will apply to contracts entered into on or after 6 December 2023 and before 1 July 2024.
- further exceptions for the purposes of subsection 333F(1)(i) in relation to organised sports, high performance international sporting events, the live performance sector, and the higher education sector. This exception will apply to contracts entered into on or after 6 December 2023 and before 1 July 2024.

Human rights implications

The Regulations engage the following rights:

- the right to the enjoyment of just and favourable conditions of work under Articles 6 and 7 of the *International Covenant on Economic Social and Cultural Rights* (ICESCR).

Right to work and rights in work

Article 6 of the ICESCR requires the State Parties to the Covenant to recognise the right to work and 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) encompasses the need to provide the worker with just and favourable conditions of work.

Article 7 of the ICESCR requires the State Parties to the Covenant to recognise the right of everyone to the enjoyment of just and favourable working conditions.

The Regulations provide certain exceptions to the limitation on the use of fixed term contracts. As with the exceptions contained in the primary legislation, the employer bears the evidentiary burden to prove that an exception applies. Where a fixed term contract contravenes the exceptions provided for in the Regulations, the employee is not deprived of their employment. Rather, the employment contract would continue as if the fixed termination date had no effect and the employee would be entitled to notice of termination and redundancy pay under the Act.

The Regulations facilitate just terms and conditions of employment for fixed term employees under Article 7 of the ICESCR, including protecting employees' rights not to be unfairly deprived of work, by ensuring that fixed term contracts are used only where subject to an appropriate exception and employees are otherwise entitled to the same rights and entitlements under the Act.

Conclusion

The Instrument is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

The Hon. Tony Burke, Minister for Employment and Workplace Relations

Fair Work Amendment (Fixed Term Contracts) Regulations 2023

EXPLANATION OF PROVISIONS

Section 1: Name

1. This section states that the title of the Regulations is the *Fair Work Amendment (Fixed Term Contracts) Regulations 2023*.

Section 2: Commencement

2. This section provides for commencement of the provisions of the Regulations. The Regulations commence at the same time as Part 10 of Schedule 1 to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*, which commences on 6 December 2023.

Section 3: Authority

3. This section provides that the *Fair Work Amendment (Fixed Term Contracts) Regulations 2023* is made under the *Fair Work Act 2009*.

Section 4: Schedules

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

Schedule 1 – Amendments

Item 1 – Regulation 1.03

5. This item inserts ‘high performance sport’ and ‘performance support professional’ into regulation 1.03 of the Principal Regulations, which contains a list of defined terms.
6. ‘High performance sport’ directs readers to new subregulation 2.15(4), which contains the definition of ‘high performance sport’ for the purposes of the Principal Regulations.
7. ‘Performance support professional’ directs readers to new subregulation 2.15(2), which contains the definition of ‘performance support professional’ for the purposes of the Principal Regulations.

Item 2 – After subregulation 2.13(1)

8. This item inserts a note into regulation 2.13 to clarify that new regulation 2.14 should be referred to when calculating the high-income threshold for the purposes of the exception to the fixed term contracts provisions, in respect of employees working part-time or for less than a full year.

Item 3 – At the end of Part 2-9 of Chapter 2

9. This item inserts new Division 5 into Part 2-9 of Chapter 2, in respect of section 333F of the Act.

New Regulation 2.14 – Limitations on fixed term contracts – high income threshold exception

10. New subregulation 2.14(1) provides that the high-income threshold in respect of employees working part-time or for less than a full year is calculated in accordance with the formula at subregulation 2.14(2).
11. New subregulation 2.14(2) sets out a formula for calculating the high-income threshold for employees who are employed on a part-time basis or for part of a year, as follows:
 - a. First, employers should work out the number of hours that the employee is required to work under their employment contract for the year.
 - b. Second, divide that number by the number of hours a full-time employee (the full-time comparator) would be required to work in the same role for an entire year. This would establish the proportion of the yearly full-time hours that the employee is required to work. The proportion can be rounded to three decimal places, and rounded up when the fourth decimal place is 5 or more.
 - c. Third, multiply the proportion of yearly full-time hours that the employee is required to work, by the high-income threshold as it is calculated under the current regulation 2.13. The resulting number will be the high-income threshold that applies to the employee when determining whether the employee is paid more than the high-income threshold, for the purposes of applying the exception in subsection 333F(1)(e) of the Act.

Illustrative Example:

Ed and Lachlan are chemical engineers at Matt’s Manufacturing Mill. Ed is employed full-time on 38 hours a week (7.6 hours, five days a week). Lachlan is engaged on a three-year fixed term contract working part-time for three days a week at 6.5 hours each day, earning an annual salary of \$90,059. Lachlan started his employment on 1 August 2023 in the 2023-24 financial year, when the high-income threshold was \$167,500.

To calculate whether Lachlan is earning above the high-income threshold on a pro rata basis, his employer, Matt, takes the following steps:

- a) Calculate the number of hours Lachlan is required to work in a year under his contract:
$$6.5 \text{ hours} \times [\text{the number of working days Lachlan will be paid for in the calendar year}]$$
- b) Calculate the total number of hours Ed is required to work in a year:

7.6 hours × [the number of working days Ed will be paid for in the same calendar year]

- c) Divide Lachlan's total hours by Ed's total hours
- d) Multiply the proportion of yearly full-time hours by the applicable high-income threshold:

[Lachlan's total hours divided by Ed's total hours] × 167,500

If Lachlan's annual income of \$90,059 is higher than the result of the calculation at paragraph d) above, he is earning above the high-income threshold on a pro rata basis in the year his contract was entered into.

- 12. New subregulation 2.14(3) clarifies that the number of hours referred to in new subregulation 2.14(2) can include a part of an hour.
- 13. New subregulation 2.14(4) provides further guidance about how to determine the number of hours that the full-time comparator is required to work (for the purposes of the second part of the calculation set out above), where the employee works for only part of a year. Where the employee is covered by a modern award or enterprise agreement, the full-time comparator is taken to work full time hours as specified in that award or enterprise agreement. Where the employee is both award and agreement free, the standard hours in the contract of an actual full-time employee of the employer, working in the same or similar role, may be taken as the hours that the full-time comparator would work. If there is no actual full-time employee of the employer in the same or a similar role, then the full-time comparator is taken to work for 38 hours per week.
- 14. Subsection 333F(3) of the Act also provides guidance about calculating the hours of work of a full-time comparator where the employee works part time.

New Regulation 2.15 – Contracts to which limitations on fixed term contracts do not apply

Organised sport

- 15. Section 333F(1)(i) of the Act provides that the regulations may prescribe types of contracts in respect of which an exception to subsection 333E(1) would apply.
- 16. The new subregulation 2.15(1)(a) provides that an exception to subsection 333E(1) of the Act would apply to contracts between an employer and an employee, where the employee is employed to primarily perform in an organised sport as either an athlete, coach for an athlete, match official, or a performance support professional who directly works to support or assess an athlete or match official participating in an organised sport.
- 17. The new subregulation 2.15(2) defines a performance support professional as a person whose work primarily involves direct support or assessment of an athlete's participation in an organised sport, or the performance of a match official for an organised sport. A performance support professional directly supports an athlete or

match official where they work to assist that athlete or match official to be physically or mentally able to perform their role. This includes support provided to a team of athletes.

18. A performance support professional does not directly support an athlete or match official if their role is to generally support the sport or its development in ways that do not directly allow that athlete or match official to perform their role. For example, a physiotherapist who is contracted to provide services to a team of athletes, to allow them to meet the physical standards required to participate in the sport, would be considered to directly support those athletes, whereas a person who sells memberships to support the team would not.
19. A performance support professional directly assesses an athlete where their role is to primarily analyse the performance of an athlete or team and/or make decisions about the composition of a team based on that analysis. It is not required that the performance support professional have direct contact with the athletes to fulfill their role. For example, list managers, selectors, and performance analysts are considered to assess athletes for the purposes of the exception.
20. The exception generally does not apply to administrative or management roles or non-player facing roles.
21. The new subregulation 2.15(1)(b) further provides that, for the purposes of the exception, the employer entering the contract must be:
 - the recognised National Sporting Organisation;
 - the recognised National Sporting Organisation for People with Disability;
 - the State and Territory governing bodies for an organised sport (this will cover metropolitan-based governing bodies, and where there is only a single governing body in a State or Territory that is not based in a metropolitan area);
 - if a governing body for an organised sport at the State or Territory level is split between metropolitan and non-metropolitan areas, the governing body for non-metropolitan areas; or
 - an organisation that is a member of, or affiliated with, one of these bodies.
22. For example, sporting teams who compete in a competition carried out by a National Sporting Organisation or state equivalent are a member or affiliate of that body.
23. New subregulation 2.15(1)(c) provides that the exception is limited to contracts that are entered into on or after 6 December 2023 and before 1 July 2024.

High performance sport—international event organising bodies

24. New subregulation 2.15(3) provides that for the purposes of paragraph 333F(1)(i) of the Act, an exception to subsection 333E(1) applies to contracts between an employer and an employee, where the employee is employed to directly support the administration or organisation of an international event for a high-performance sport.
25. The particular international event must not be regularly held in Australia, and either an international organisation body has granted Australia the right to host the

particular international event or an Australian organising body is seeking the right to host the particular international event. International events could include the Summer Olympics, the Commonwealth Games, the International Federation of Association Football World Cup, and the International Cricket Council Women's Cricket World Cup. International events that are regularly held in Australia, even if Australia is required to seek the right to host the event, are not subject to the exception. For example, the Australian Open tennis tournament or the Formula One Australian Grand Prix motor racing event are not subject to the regulatory exception.

26. New subregulation 2.15(3)(d) further provides that, for the purposes of the exception, the employer entering the contract must be the international organising body or the Australian organising body for the international event.
27. New subregulation 2.15(3)(e) provides that the contract must be entered into on or after 6 December 2023 and before 1 July 2024.
28. New subregulation 2.15(4) defines 'high performance sport' for the purposes of the new subregulation 2.15(3) as being part of a sport that is performed at the elite level by athletes or athletes with disability.

Live performance industry employees

29. New subregulation 2.15(5) prescribes, for the purposes of subsection 333F(1)(i) of the Act, that an exception to subsection 333E(1) would apply to contracts between an employer and an employee, where the employee is covered by the *Live Performance Award 2020*. The contract must be entered into on or after 6 December 2023 and before 1 July 2024, and the fixed term of the contract must not be greater than 12 months.

Higher education employees

30. New subregulation 2.15(6) prescribes, for the purposes of subsection 333F(1)(i) of the Act, that an exception to subsection 333E(1) applies to contracts between an employer and an employee, where the employee is covered by the *Higher Education Industry – Academic Staff – Award 2020*, or the *Higher Education Industry – General Staff – Award 2020*. The contract must be entered into on or after 6 December 2023 and before 1 July 2024.

Non-government funded – philanthropic entities

31. Subsection 333F(1)(f)(i) of the Act permits regulations to prescribe types of funding, where an exception applies to positions for the performance of work that are funded in whole or in part by that funding, and where the funding is to be paid for longer than two years but there are no reasonable prospects of the funding being renewed after the end of that period.
32. New subregulation 2.15(7)(a)(i) provides that positions for the performance of work that is funded by a philanthropic entity registered under the *Australian Charities and Not-for-Profits Commission Act 2012* would be excepted from the legislative restrictions on the use of fixed term contracts.

33. Pursuant to this provision, organisations will be exempt from the limitations in subsection 333E where a role is funded in whole or in part by philanthropic funding from a registered charitable entity. This exception does not apply to positions for the performance of work where philanthropic funding is received by charities from non-charitable entities. The recipient organisation will be responsible for verifying the charitable status of the funder to confirm if an exception applies.
34. The new subregulation 2.15(7)(a)(ii) also provides that positions for the performance of work that is funded by a testamentary gift or contribution to a philanthropic entity for a charitable purpose of that entity are also prescribed. This subregulation applies to positions for the performance of work that is funded by a bequest made in a will of a donor. The funding must be a gift or contribution for a charitable purpose within the meaning of the *Charities Act 2013*. The regulation does not apply to gifts, donations, and trust distributions made for the purposes of estate planning, and not for charitable purposes.
35. The new subregulation 2.15(7)(b) provides that the employer entering a contract with an employee must not be an associated entity of the philanthropic entity.
36. The new subregulation 2.15(7)(c) provides that the contract must be entered into on or after 6 December 2023 and before 1 July 2024.