

EXPLANATORY STATEMENT

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

Fair Work Act 2009

Fair Work Amendment (Minor and Technical Measures) Regulations 2024

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* (Fair Work Regulations) support matters of detail within the framework established by the Act.

Subsection 796(1) of the Act empowers the Governor-General to 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.

The *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Closing Loopholes No. 2 Act) received the Royal Assent on 26 February 2024. Part 1 of Schedule 1 of the Closing Loopholes No. 2 Act inserted new subsection 548(1C) into the Act to expand the small claims jurisdiction. This amendment will commence on 26 August 2024.

Schedule 2 to the *Fair Work Amendment (Minor and Technical Measures) Regulations 2024* (Instrument) is made before the commencement of subsection 548(1C) of the Closing Loopholes No. 2 Act in reliance on section 4 of the *Acts Interpretation Act 1901*. Section 4 provides that a power to make a legislative instrument may be exercised prior to the commencement of the provision where the provision has received the Royal Assent.

Pursuant to row 27 of section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*, sunseting of legislative instruments does not apply to regulations made under the Act. Pursuant to section 12, the Instrument will not be subject to ordinary sunseting processes.

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

PURPOSE AND OPERATION

The purpose of the Instrument is to update the Fair Work Regulations to ensure alignment with the Act and make consequential amendments related to the:

- *Work Health and Safety Act 2020* (WA) (WA WHS Act)
- *Member of Parliament (Staff) Amendment Act 2023* (MOPS Amendment Act) amending the *Members of Parliament (Staff) Act 1984* (MOPS Act), and
- Closing Loopholes No. 2 Act.

The Instrument amends the Fair Work Regulations to:

- reflect the commencement of the WA WHS Act and the consequential repeal or amendment of other Western Australian legislation, for the purposes of subsection 494(4) of the Act

- reflect amendments made by the MOPS Amendment Act in relation to the employing authority of persons employed under the MOPS Act and to correctly identify the individual parliamentarian or officeholder who, on behalf of the Commonwealth, as a person's employing authority, and
- reflect amendments made by the Closing Loopholes No. 2 Act to ensure that people raising disputes under the new casual employment provisions can indicate whether they want the small claims procedure to apply.

REGULATORY IMPACT

The Office of Impact Analysis assessed that an Impact Analysis was not required for the Instrument as the amendments are unlikely to have a more than minor regulatory impact.

COMMENCEMENT

Sections 1 to 4 and Schedule 1 to the Instrument commence the day after registration. Schedule 2 to the Instrument commences the later of the day after registration, or 26 August 2024.

CONSULTATION

The Department of Employment and Workplace Relations consulted referring states and territories under the *Intergovernmental Agreement for a National Workplace Relations System for the Private Sector*, and the Committee on Industrial Legislation. The department also consulted the Department of Finance and the Parliamentary Workplace Support Service on the amendments relating to the MOPS Act.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Fair Work Amendment (Minor and Technical Measures) Regulations 2024

The *Fair Work Amendment (Minor and Technical Measures) Regulations 2024* (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 Instrument will make minor and technical amendments to the *Fair Work Regulations 2009* (Fair Work Regulations) to reflect recent changes to work health and safety legislation in Western Australia and to Commonwealth laws regulating the employment of parliamentarians' staff and casual employees.

The amendments are minor and technical in nature and make no change, or only minor changes to the substance of the law.

Human rights implications

This Instrument does not engage any human rights issues as it makes minor and technical amendments to the Fair Work Regulations to ensure consistency, clarity and accuracy across Commonwealth legislation.

Conclusion

The Instrument is compatible with human rights because it does not engage any human rights issues.

The Hon Tony Burke, Minister for Employment and Industrial Relations

FAIR WORK AMENDMENT (MINOR AND TECHNICAL MEASURES) REGULATIONS 2024

EXPLANATION OF PROVISIONS

Section 1 - Name

1. This section provides that the title of the Regulations is the *Fair Work Amendment (Minor and Technical Measures) Regulations 2024*.

Section 2 - Commencement

2. This section provides for Schedule 1 of the Regulations to commence the day after registration of the instrument. Schedule 2 of the Regulations will commence on either 26 August 2024 or the day after registration of the instrument, whichever is later.

Section 3 - Authority

3. This section provides that the *Fair Work Amendment (Minor and Technical) Regulations 2024* is made under the Act.

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

Fair Work Regulations 2009

Item 1 - Regulation 3.25 (table item 4)

5. Division 3 of Part 3-4 of the Act imposes requirements on an official of an organisation exercising a 'State or Territory OHS right'. That term is defined in subsection 494(2) of the Act as a right to enter premises, or access an employee record, conferred by a 'State or Territory OHS law'. Subsection 494(3) of the Act provides that a 'State or Territory OHS law' means a law of a state or territory prescribed by the Fair Work Regulations. Regulation 3.25 of the Fair Work Regulations lists the relevant 'State or Territory OHS law' for each Australian jurisdiction for the purposes of subsection 494(3) of the Act.
6. This item repeals existing table item 4 in regulation 3.25 of the Fair Work Regulations and replaces it with new table item 4 to reflect the commencement of the substantive provisions of the WA WHS Act, the repeal of the *Occupational Safety and Health Act 1984* (WA) and key provisions of the *Mines Safety and Inspection Act 1994* (WA), and consequential amendments to the *Industrial Relations Act 1979* (WA).

7. The stand-alone reference to the WA WHS Act at paragraph (b) of new table item 4 is intended to include a right of entry provided under the WA WHS Act for the purposes of subsections 494(2) and (3) of the Act (for example, a right to enter premises to assist a health and safety representative under paragraphs 68(2)(g) and 70(1)(g) of the WA WHS Act).

Item 2 - Schedule 6.3 (table item 5)

8. Division 2 of Part 6-5 of the Act provides that the employer of a public sector employee must act only through the employee's employing authority acting on behalf of the employer (subsection 795(1)). Subsection 795(6) provides that an 'employing authority' is a person prescribed by the Fair Work Regulations as the employee's employing authority. Regulation 6.09 of the Fair Work Regulations defines employing authority by reference to the table at Schedule 6.3 which sets out the employing authorities for various public sector employees, including for MOPS Act employees at table item 5.
9. This item repeals the existing table item 5 at Schedule 6.3 of the Fair Work Regulations and replaces it with new table item 5. The table at Schedule 6.3 contains two columns, specifying in the first column the relevant 'person' to whom the 'employing authority' in the second column relates. This item removes from the 'person' column references to persons engaged as consultants under Part II, or employed under Parts III or IV, of the MOPS Act, and instead refer only to a person employed under the MOPS Act. This amendment reflects changes made to the MOPS Act by the MOPS Amendment Act, which repealed Parts II, III and IV and replaced them with new Parts II and III. The changes repealed provisions in the MOPS Act that dealt with ministerial consultants, which are no longer dealt with under that Act.
10. The item also repeals the reference to each person empowered under the MOPS Act to employ persons as an employing authority, and instead refers to the employing individual, within the meaning of the MOPS Act, for the person. This amendment ensures that the individual parliamentarian or officeholder who, on behalf of the Commonwealth, employs the person is correctly identified as the employing authority.

Schedule 2 - Amendments

11. Division 3 of Part 4-1 of the Act provides that a person may choose for certain proceedings to be dealt with as a small claims proceeding. Subsection 548(1B) of the Act provides the small claims procedure may be used for disputes relating to certain matters about casual conversion and fixed term contracts, if in accordance with paragraph 548(1B)(b) the person indicates, in the manner prescribed by the Fair Work Regulations, they want the small claims procedure to apply. The Closing Loopholes No. 2 Act inserted new subsection 548(1C) into the Act, to expand the small claims procedure jurisdiction.

Item 1 - Subregulation 4.01(1)

12. This item extends the current prescribed manner by which a person may indicate they want the small claims procedure to apply in subregulation 4.01(1) of the Fair Work Regulations to disputes about whether on commencement with their employer the person was a casual employee within the new definition of casual employee introduced by the Closing Loopholes No. 2 Act.

Item 2 - Regulation 4.01

13. This item removes gendered language in line with modern drafting practices.

Item 3 - In the appropriate position in Chapter 7

14. This item makes it clear regulation 4.01 of the Fair Work Regulations as in force immediately prior to the commencement of the regulation continues to apply for the purposes of disputes about casual conversion as preserved by clause 102 of Schedule 1 of the Closing Loopholes No. 2 Act.
15. It also makes it clear the regulation does not affect the continuity of regulation 4.01 as it applies to disputes about fixed term contracts.