

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 No. 2) 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* (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.

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 measures introduced by *Fair Work Amendment (Minor and Technical Measures No. 2) Regulations 2024* 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 (Minor and Technical Measures No. 2) Regulations 2024* (the proposed Regulations) is to amend the Principal Regulations as follows:

- prescribe the Industrial Court of New South Wales as an ‘eligible State or Territory court’ for purposes of the *Fair Work Act 2009*. This would enable that court to deal with applications under the Act that ‘eligible State or Territory courts’ can determine; see the table under subsection 539(2) of the Act. This would include, for example, underpayment claims.
- amend subregulation 3.07(8) of the Principal Regulations to restore the original policy intent of the Principal Regulations and make it clear where the Commission has expended considerable resources assisting parties, it is not required to refund an unfair dismissal application fee.

Regulatory Impact

The Office of Impact Analysis has advised that a detailed Impact Analysis is not required for this instrument as the reforms are unlikely to have more than a minor regulatory impact (OIA24- 08540).

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

Commencement

The instrument commences the day after registration.

Consultation

The Department of Employment and Workplace Relations consulted with states and territories under the *Intergovernmental Agreement for a National Workplace Relations System for the Private Sector*, and the Committee on Industrial Legislation (a subcommittee of the National Workplace Relations Consultative Council, established under the *National Workplace Relations Consultative Act 2002*).

The department also conducted targeted consultation with the Commission on the new subregulation 3.07(8)(b).

Comments from the Industrial Court of New South Wales about its jurisdiction under the Act have also been taken into account in relation to proposed regulation 1.05.

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 No. 2) Regulations 2024

The *Fair Work Amendment (Minor and Technical Measures No. 2) 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 *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 Instrument amends the *Fair Work Regulations 2009* (Principal Regulations) to:

- prescribe the Industrial Court of New South of Wales as an ‘eligible State or Territory court’ for the purposes of the Act; and
- clarify when the Fair Work Commission (Commission) must issue a refund to an applicant who has made an unfair dismissal application.

Human rights implications

Industrial Court of New South Wales

Prescribing the Industrial Court of New South Wales as an ‘eligible State or Territory court’ engages the right to an effective remedy and a fair hearing under Articles 2(3) and 14(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

Article 2(3) of the ICCPR requires the State Parties to ensure that any person whose rights or freedoms are violated has an effective remedy.

Article 14(1) of the ICCPR and General Comment 32 by the Human Rights Committee provides everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. One aspect of the right to a fair hearing is the right to access to justice.

Prescribing the Industrial Court of New South of Wales as an ‘eligible State or Territory court’ would enable that court to deal with applications under the Act that ‘eligible State or Territory courts’ can determine (for example, underpayment claims). This would promote the rights to an effective remedy and a fair hearing by providing applicants with another avenue for seeking a remedy from a court or enforcing certain rights under the Act.

Unfair dismissal fee refund

Amending subregulation 3.07(8)(b) to clarify when the Commission must refund an unfair dismissal application fee does not engage any of the applicable rights or freedoms. This is

because it only clarifies when the Commission must refund an unfair dismissal application fee.

The amendment to subregulation 3.07(8)(b) also does not alter the fees for unfair dismissal applications or the existing beneficial provisions around no application fee being payable if the Commission is satisfied that the person making an application will suffer serious financial hardship. As such the amendment does not alter access to the unfair dismissal jurisdiction.

Conclusion

The Instrument is compatible with human rights because:

- the proposed amendment to regulation 1.05 potentially promotes the rights to an effective remedy and a fair hearing; and
- the amendment to subregulation 3.07(8)(b) does not engage any of the applicable rights or freedoms.

Senator the Hon Murray Watt, Minister for Employment and Workplace Relations

Fair Work Amendment (Minor and Technical Measures No. 2) Regulations 2024
EXPLANATION OF PROVISIONS

Section 1: Name

1. This section states that the title of the Regulations is the *Fair Work Amendment (Minor and Technical Measures No. 2) Regulations 2024* (Instrument).

Section 2: Commencement

2. This section provides that the Instrument will commence the day after registration.

Section 3: Authority

3. This section provides that the Instrument is made under the *Fair Work Act 2009* (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 1.05

5. This item repeals and replaces regulation 1.05 of the *Fair Work Regulations 2009* (Principal Regulations), to prescribe the Industrial Court of New South of Wales as an ‘eligible State or Territory court’ for purposes of the Act.
6. The Industrial Court of New South Wales was established by the *Industrial Relations Amendment Act 2023* (NSW), which received Royal Assent on 5 December 2023. The re-established Industrial Court commenced operating on 1 July 2024.
7. This item enables the Industrial Court of New South Wales to exercise certain federal jurisdiction (that eligible State or Territory courts are able to exercise) under the Act. See the table under subsection 539(2) of the Act for a complete list of federal jurisdiction that ‘eligible State or Territory courts’ may exercise.
8. The definition of ‘eligible State or Territory Court’ in section 12 of the Act already lists ‘the Industrial Court of New South Wales’ as an ‘eligible State or Territory court’. That reference was inserted in 2009 by the *Fair Work Amendment (State Referrals and Other Measures) Act 2009* (item 1A of Sch 3), and refers to the former Industrial Court of New South Wales that existed at that time. The former Industrial Court of New South Wales

was abolished in 2016 by the *Industrial Relations Amendment (Industrial Court) Act 2016* (NSW).

9. The proposed amendment makes clear that the re-established Industrial Court of New South Wales is an ‘eligible State or Territory court’ for the purposes of the Act.

Item 2 – Paragraph 3.07(8)(b)

10. This item repeals and replaces subregulation 3.07(8). The purpose of the amendment is to ensure that the Fair Work Commission (Commission) is not required to refund the fee for making an application for an unfair dismissal remedy in circumstances where the Commission has expended considerable resources in dealing with that application before it is discontinued (see section 588 of the Act).
11. New subregulation 3.07(8) only requires the Commission to refund an unfair dismissal application fee where the application is subsequently discontinued and at that time either, the application:
 - has never been listed for a conciliation, conference or hearing; or
 - is or has been listed for a conciliation, conference or hearing, and has not previously been listed for a conciliation, conference or hearing and the discontinuance occurred at least 2 days before the earliest listed conciliation, conference or hearing date.
12. For example, an applicant has participated in an unsuccessful conciliation for their unfair dismissal application and then files a notice of discontinuance before a hearing is listed. This applicant would not be entitled to a refund of the filing fee as the Commission has already expended resources in conducting the conciliation and the discontinuance did not occur at least 2 days before the earliest listing of the matter. The same applicant would have been entitled to a refund of the filing fee if they had filed the notice of discontinuance at least 2 days before the initial conciliation.