

**FAIR WORK AMENDMENT (VARIATION OF ENTERPRISE AGREEMENTS)
REGULATIONS 2020**

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General
under subsection 211(6) of the *Fair Work Act 2009*

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020* (the Amendment Regulations) shortens the period that employees must have access to a copy of a proposed variation of an enterprise agreement, and before which employees must be notified of the details of the vote on the variation, from seven calendar days to one calendar day. Employees will still be required to have genuinely agreed to a variation of an enterprise agreement.

Part 2-4 of the *Fair Work Act 2009* (the Act) provides for the making and variation of enterprise agreements between employers and employees. To approve a variation of an enterprise agreement, the Fair Work Commission (FWC) must be satisfied that the employees covered by the agreement have genuinely agreed to the variation.

There are a number of steps that must be met to satisfy the ‘genuine agreement’ requirement, including that the employer must take all reasonable steps to provide employees with a copy of the proposed variation to an agreement, and any other incorporated material, during the seven calendar day period before the vote on a proposed variation. This seven day period is referred to as the ‘access period’. The employer must also take all reasonable steps to notify employees of the time and place of the vote on the proposed variation, and the voting method, by the start of the ‘access period’.

Subsection 211(6) of the Act provides that the *Fair Work Regulations 2009* (the Fair Work Regulations) may prescribe modifications to the matters that the FWC must be satisfied of when deciding whether to approve a variation of an enterprise agreement. This includes the procedural steps for ‘genuine agreement’ and the requirements that must be met in respect of the ‘access period’.

The Amendment Regulations shorten the ‘access period’ for a proposed variation of an enterprise agreement from seven calendar days to one calendar day. It is intended that this will assist to reduce the minimum time taken to make a variation of an enterprise agreement.

The Amendment Regulations apply in relation to the ‘access period’ for a proposed variation of an enterprise agreement that starts on or after the commencement of the Amendment Regulations.

As this is only intended to be a temporary measure to support employers and employees during the current pandemic, the measure will be repealed six months after commencement, or at a later time prescribed by the Fair Work Regulations.

The FWC has a further six months after the repeal of the measure to consider an application to approve a variation of an enterprise agreement made with a one day ‘access period’.

Details of the Amendment Regulations are set out in the Attachment.

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

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

The Amendment Regulations commence the day after they are registered on the Federal Register of Legislation.

CONSULTATION

The Government consulted with the referring states and territories under the *Intergovernmental Agreement for a National Workplace Relations System for the Private Sector*.

REGULATION IMPACT STATEMENT

The Prime Minister has granted an exemption from the need to complete regulatory impact analysis for all Australian Government measures made in response to COVID 19. No regulatory impact statement is therefore required.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

The *Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020* 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*.

Right to work and right to favourable conditions of work

The Amendment Regulations engage the right to work in Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the right to just and favourable conditions of work in Article 7 of ICESCR. The content of these rights can be informed by treaties of the International Labour Organisation (ILO), such as the *Freedom of Association and Protection of the*

Right to Organise Convention 1948 (No. 87) (ILO Convention 87) and the Right to Organise and Collective Bargaining Convention 1949 (No. 98) (ILO Convention 98).

Article 4 of ILO Convention 98 informs these rights by providing for the right to collectively bargain for terms and conditions of employment. It requires States Parties to (among other things) take measures appropriate to national conditions to encourage and promote machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

The Amendment Regulations will enable employers and employees to quickly agree to new terms and conditions by shortening the minimum period that employees must have access to a copy of a proposed variation to an enterprise agreement, and by which employees must be notified of the details of the vote on the variation, from seven clear calendar days to one clear calendar day. Employees will still be required to genuinely agree to the variation of the agreement, and employers may continue to provide access for longer than the minimum, as appropriate.

The Amendment Regulations are a temporary measure to support employers and employees to expedite variation of enterprise agreements to suit their workplace during the COVID-19 pandemic, and will cease to operate after six months or at a later time prescribed by the Fair Work Regulations.

The Amendment Regulations are compatible with human rights because, to the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate.

NOTES ON SECTIONS

Section 1 – Name

This section provides that the title of the instrument is the *Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020*.

Section 2 – Commencement

This section provides that the whole of the instrument will commence the day after it is registered.

Section 3 – Authority

This section provides that the instrument is made under the *Fair Work Act 2009* (the Act).

Section 4 – Schedules

This section provides that each instrument 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 this instrument will have effect according to its terms.

SCHEDULE 1 – Amendments

Item 1 – After regulation 2.09A

Item 1 inserts new regulation 2.09B.

Subregulation 2.09B(1) provides that the regulation is made for the purposes of subsection 211(6) of the Act.

Subregulation 2.09B(2) provides that for the purposes of approving a variation of an enterprise agreement under paragraph 211(1)(a) of the Act, the requirements in subsection 180(2) and (3) (which concern the requirement for the employer to take all reasonable steps to give employees a copy of the proposed variation to the agreement and incorporated materials, and inform employees of the time and place, and method of voting) have effect despite subsection 180(4) (which concerns the seven -day access period) such that references in those subsections to the access period were modified to refer to the one-day period ending immediately before the start of the voting process referred to in subsection 181(1).

Subregulation 2.09(3) provides that regulation 2.09B is repealed six months after the commencement of Schedule 1 of the *Fair Work Amendment (Variation of Enterprise Agreements) Regulations 2020*, or at a later time prescribed by the Fair Work Regulations.

Item 2 – In the appropriate position in Chapter 7

Item 2 inserts new Part 7-4 in Chapter 7 to provide for the application of the amendments.

Subregulation 7.04(1) provides that regulation 2.09B applies to an access period under subsections 180(2) and (3) of the Act that starts on or after the commencement of the Schedule, for the purposes of the FWC deciding whether to approve a variation of an enterprise agreement under paragraph 211(1)(a) of the Fair Work Act.

Subregulation 7.04(2) provides that regulation 2.09B continues to apply, despite the repeal of regulation 2.09B under regulation 2.09(3), to an application to approve a variation of an enterprise agreement where the access period started before the date regulation 2.09B is repealed.

Regulation 7.05 provides that Part 7-4 is repealed six months after the day regulation 2.09B is repealed. This has the effect of providing the FWC with a further six months after the repeal of regulation 2.09B to consider an application to approve a variation of an enterprise agreement made with a one day access period pursuant to regulation 2.09B.