EXPLANATORY STATEMENT

Select Legislative Instrument 2006 No. 247

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

Workplace Relations Act 1996

Workplace Relations Amendment (Work Choices) Act 2005

Workplace Relations Amendment Regulations 2006 (No. 3)

Section 846 of the *Workplace Relations Act 1996* (the Act) provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all 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.

Item 1 of Part 1 of Schedule 4 to the *Workplace Relations Amendment (WorkChoices) Act 2005* (the WorkChoices Act) provides that the Governor-General may make regulations dealing with matters of a transitional nature relating to amendments made by that Act.

The Regulations make amendments to the *Workplace Relations Regulations 2006* to:

- clarify that the Australian Fair Pay and Conditions Standard (the Standard) does not apply (for a five year transitional period) in relation to personal or carer's leave entitlements that accrued before the Standard applied to an employee (Schedule 1);
- restrict the operation of terms in workplace agreements and contracts of employment that penalise employees in circumstances of absence from work due to illness, injury or emergency (Schedule 2);
- clarify that a term of an agreement that provides for the cashing out of annual leave other than at the election of the employee is prohibited content;
- extend the transitional period for compliance with the record-keeping obligations imposed on employers by a further six months (to 26 March 2007); and
- correct various technical and minor typographical errors.

During the development of the Regulations, the Australian Chamber of Commerce and Industry (ACCI), the Australian Industry Group (AiG), the Office of Workplace Services (OWS) and the Office of the Employment Advocate (OEA) were consulted on some technical aspects relating to items 1 to 3, 6 and 7, and 14 to 16 of Schedule 2.

The OEA, OWS and the federal Department of the Treasury were also consulted on other aspects of the Regulations.

Details of the Regulations are in the Attachment.

Neither the Act nor the Work Choices Act specify any conditions that need to be satisfied before the power to make the Regulations is exercised.

The Regulations are a legislative instrument for the purpose of the *Legislative Instruments Act 2003*.

Schedule 1 to the Regulations is taken to have commenced on reform commencement, within the meaning of the Act (that is, 27 March 2006).

The amendments in Schedule 1 are made under the transitional regulation making power in item 1 of Part 1 of Schedule 4 to the *Workplace Relations Amendment (Work Choices) Act 2005*. That item expressly authorises the making of regulations that take affect from a date before registration, despite subsection 12(2) of the *Legislative Instruments Act 2003*. That subsection provides that a retrospective amendment has no effect if the amendment disadvantages a person's rights or imposes liabilities for anything done before the amendment takes effect. The retrospective application of these regulations does not infringe this provision.

Despite the retrospective application of the Regulations, the civil penalty provisions of Part 14 of the Act do not apply to conduct that occurred between 27 March 2006 and the registration of these amendments.

Schedule 2 to the Regulations commence on the day after registration.

ATTACHMENT

Details of the *Workplace Relations Amendment Regulations 2006 (No. 3)*

Regulation 1 – Name of Regulations

This regulation sets out the name of the Regulations as the *Workplace Relations Amendment Regulations 2006 (No. 3)*.

Regulation 2 – Commencement

This regulation provides that:

- the amendments made by Schedule 1 of the Regulations commenced on 27 March 2006 (the date of reform commencement within the meaning of the *Workplace Relations Amendment (Work Choices) Act 2005*); and
- the amendments made by Schedule 2 of the Regulations commence on the day after the Regulations are registered on the Federal Register of Legislative Instruments.

Regulation 3 – Amendment of *Workplace Relations Regulations 2006*
Regulation 4 – Amendment of *Workplace Relations Regulations 2006*

These regulations provide that Schedule 1 and Schedule 2 to the Regulations amend the *Workplace Relations Regulations 2006* (the Principal Regulations).

Regulation 5 – Application of amendments – Schedule 1

This regulation provides that the amendments made by Schedule 1 do not authorise the imposition of a civil penalty (or commencement of proceedings) under Part 14 of the *Workplace Relations Act 1996* for conduct occurring between 27 March 2006 and the date of registration of these amendments.

Schedule 1 – Amendment taken to have commenced on 27 March 2006

Item [1] – Chapter 7, Part 2, after Division 16

This item inserts new transitional regulation 2.23A (pursuant to item 1 of Schedule 4 to the *Workplace Relations Amendment (Work Choices) Act 2005*) in new Division 17 of Chapter 7 of the Principal Regulations.

The entitlement to personal/carer's leave under the Standard includes a number of rules about accrual, crediting, rate of payment, notice and evidence. Some uncertainty has arisen about whether these rules apply to leave accrued before the commencement of the Work Choices Act. The new regulation makes clear that the Standard does not apply in relation to personal/carer's leave or compassionate leave entitlements that accrued before the Standard applied to the employee (subregulation 2.23A(1)).

Subregulation 2.23A(2) ensures that a term of a workplace agreement that allows for the cashing out of personal/carer's or compassionate leave that accrued before reform commencement is not prohibited content under paragraph 8.5(1)(l) of the regulations.

- Paragraph 8.5(1)(l) provides that a term of a workplace agreement is prohibited content to the extent that it deals with the forgoing of paid personal/carer's leave or paid compassionate leave for an amount of pay or other benefit (taking into account the amendment at item [5]) other than in a manner that would result in a more favourable outcome than the Standard.

Subregulation 2.23A(3) provides that cashing out of an amount of pre-reform personal/carer's or compassionate leave must be at the employee's written election.

Subregulation 2.23A(4) provides that the transitional arrangements in new Division 17 cease after five years from the date of reform commencement (that is, on 27 March 2011). A five-year transitional period enables employers and employees to negotiate arrangements that have regard to the obligations imposed by the Standard.

Under the regulation, it is possible for the parties to agree to cash out some or all of the employee's accrued pre-reform personal/carer's or compassionate leave entitlement, and this will not be prohibited content in a new agreement. This provides flexibility for the management of large, pre-reform leave balances, but the facility is only available in respect of pre-reform leave, and does not affect the prohibition on cashing out minimum entitlements to personal/carer's or compassionate leave under the Standard, after the commencement of the Work Choices Act.

Under the regulation, pre-reform personal/carer's leave and compassionate leave will not operate under the relevant pre-reform rules indefinitely. The contingent nature of personal/carer's leave means that an employee may take many years to exhaust pre-reform leave. This would create administrative difficulties for employers, who would need to apply 'old' rules to leave accrued before WorkChoices and 'new' rules for leave accrued after reform commencement.

Note 1 under subregulation 2.23A(1) makes clear that if an employee's employment is subject to a pre-reform certified agreement, pre-reform Australian Workplace Agreement or a section 170MX award, the Standard does not apply to that employee until the pre-reform instrument is terminated or replaced (due to the operation of clause 30 of Schedule 7 to *Workplace Relations Act 1996* (the Act)).

Note 2 under subregulation 2.23A(1) makes clear that subsection 232(1) of the Act already has the effect that the Standard does not apply to pre-reform annual leave.

- Under subsection 232(1), annual leave means leave to which an employee is entitled under Subdivision B, Division 4, Part 7 of the Act.

Schedule 2 – Amendments commencing on day after registration

Item [1] – Chapter 2, Part 7, after subregulation 7.1(5)
Item [3] – Chapter 2, Part 7, after subregulation 7.1(14)

Items [1] and [3] amend the Principal Regulations in relation to the operation of the Australian Fair Pay and Conditions Standard (the Standard).

The Standard prevails over a workplace agreement or contract of employment to the extent that the Standard provides a more favourable outcome for an employee in a

particular respect (subsection 172(2) of the *Workplace Relations Act 1996* (the Act)). Paragraph 172(4)(b) of the Act provides that the regulations may prescribe the circumstances in which the Standard provides or does not provide a more favourable outcome in a particular respect. In this way the regulations can give precise meaning to the 'more favourable' test in specified circumstances.

Division 2 of Part 7 of the Act provides a statutory guarantee of minimum rates of pay. Item [1] inserts new subregulation 7.1(5A), which provides that the Standard is more favourable than, and prevails over, a penalty term in a workplace agreement or contract of employment where the effect of the clause is that the employee's guaranteed rate of pay under the Standard is not met. This makes clear that a penalty term cannot reduce an employee's rate of pay below the minimum requirement under the Standard.

Division 5 of Part 7 of the Act requires an employee to provide:

- notice to their employer of a period of sick or carer's leave (subsections 253(2) and 255(2));
- if requested, documentary evidence (a medical certificate or statutory declaration) to substantiate an entitlement to sick or carer's leave (sections 254 and 256); and
- if requested, evidence in relation to a period of compassionate leave (subsection 257(3)),

as soon as reasonably practicable before or after the leave has commenced.

Item [3] also inserts new paragraphs 7.1(15)(a)-(e), which provides that notice requirements for sick and carer's leave, and evidence requirements for sick, carer's and compassionate leave, are particular respects for the purposes of new subregulations 7.1(16) and 7.1(17).

Item [3] inserts new subregulations 7.1(16) and 7.1(17), which make clear that the Standard is more favourable than, and prevails over, a workplace agreement or contract of employment that, in any of these respects, imposes:

- more onerous notice or evidence requirements than the Standard; or
- a penalty on an employee for breaching any notice or evidence requirements.

New subregulation 7.1(18) provides for a definition of *penalty* for the purpose of items [1] and [3]. The definition of *penalty* would be the same as that provided in subregulation 8.5(10) (see item [7]).

For the purposes of subregulation 7.1(5A), a *penalty* means:

- a deduction of an amount from the employee's remuneration (i.e. wages or other monetary entitlements);
- a reduction of an employee's entitlements (e.g. leave); or
- a requirement that the employee pay an amount to his or her employer.

A *penalty* does not include a deduction, reduction or requirement that is:

- for the employee's benefit (e.g. salary sacrifice);
- authorised by a law (e.g. for superannuation purposes); or
- made or imposed on the employee because the employee was given an amount, or an entitlement, when the employee should not have been given that amount

or entitlement (for example, if the employer overpays the employee, or accidentally credits the employee with too much leave).

This means that an employer cannot 'fine' an employee for failing to provide notice of absence on sick, carer's or compassionate leave, but can legitimately withhold payment where an employee is not entitled to paid leave because of a failure to comply with his or her obligations in relation to notice or evidence.

The definition of *penalty* does not prevent employers from managing absenteeism, for example, through the awarding of 'attendance bonuses' to their employees.

Examples of penalties that would not be permitted under the proposed Regulations

Ned works as a part time pizza delivery boy after school and on weekends. Every Saturday, Ned picks up his sister from hockey practice and drops her home on his way to the pizza shop. One Saturday, his sister fell over and hurt her wrist. She was in a lot of pain and Ned decided not to leave his sister by herself. He forgot to ring his supervisor, Tony, to tell him what had happened and that he would be a late for work. Ned got to work 3 hours after his shift started. Tony said that he was going to take $100 out of Ned's fortnightly pay because he didn't give 10 hours' notice of his absence.

Emma is a retail assistant. She called her employer as soon as reasonably practicable to say she would be late for her rostered shift because she had to go to hospital after being bitten by a spider. Emma was 2 hours late for work. Her employer told her that she would have to work an extra two hours for no pay.

Donatella is an architect employed by a construction firm to work on a design project. She has been suffering a bad back for most of the year, and occasionally has to take sick leave. Her employer is concerned that the contractual deadline for the project might not be met because of Donatella's absences. For each day the design project is late, the firm must pay its client a $500 late fee. To help mitigate this loss, the firm tells Donatella that for each future day of sick leave, she will have to contribute 40 per cent of the daily late fee incurred by the construction firm.

Item [2] – Chapter 2, Part 7, subregulation 7.1(12), example

Subregulation 7.1(12), Chapter 2, Part 7 provides that accrual and crediting of leave are particular respects for the purpose of determining whether the Standard provides a more favourable outcome. The subregulation includes an example indicating that more frequent leave accrual and crediting is more favourable than the Standard. The example also indicates that crediting leave annually is less favourable than the Standard.

This item amends the example under subregulation 7.1(12) to clarify that a workplace agreement or contract of employment which provides for the crediting of leave annually in arrears of service is less favourable than the Standard, but that crediting in advance of service is more favourable, than the Standard.

Item [4] – Chapter 2, Part 8, paragraph 8.5(1)(j)

Paragraph 8.5(1)(j) of the regulations provides that a term of a workplace agreement that provides for the cashing out of annual leave otherwise than in accordance with the Act is prohibited content. Under section 233 of the Act:

- an employer must not require an employee to cash out annual leave; and
- an employee cannot cash out an amount of annual leave equivalent to more than 1/26 of the nominal hours worked by the employee during a 12 month period.

This item amends paragraph 8.5(1)(j) of Chapter 2 to replace the words 'otherwise than in accordance with the Act' with the words 'for an amount of pay or other benefit otherwise than at the written election of the employee'.

This amendment clarifies that a term of a workplace agreement is prohibited to the extent that it *requires* an employee to forgo annual leave, as distinct from providing an employee with the *choice* to do so (via written election).

This reflects the original intention of the regulations (see paragraph 186, page 40 of the Explanatory Statement to the Principal Regulations).

- Note that if a term of a workplace agreement is in any way less favourable than the other provisions of section 233 of the Act, it will be ineffective to that extent.

Item [5] – Chapter 2, Part 8, paragraph 8.5(1)(l)

This item amends paragraph 8.5(1)(l) of Chapter 2 by replacing the words 'amount of pay' with the words 'amount of pay or other benefit'. This amendment is necessary to ensure consistency with existing subregulations 7.1(11A) to 7.1(11F) of Chapter 2.

- Paragraph 8.5(1)(l) currently provides that a term of a workplace agreement is prohibited content to the extent that it deals with the forgoing of paid personal/carer's leave or paid compassionate leave for an amount of pay other than in a manner that would result in a more favourable outcome than the Standard.
- Subregulations 7.1(11A) to 7.1(11F) outline the circumstances in which personal/carer's leave or compassionate leave may be cashed out without being considered less favourable than the Standard, and refer to the forgoing of leave in return *for an amount of pay or other benefit*.
- As currently drafted, paragraph 8.5(1)(l) does not make reference to 'or other benefit', as specified in the 'more favourable' regulations.

Item [6] – Chapter 2, Part 8, after subregulation 8.5(8)

This item amends regulation 8.5 to prescribe two matters as prohibited content, if included in a workplace agreement, for the purposes of section 356 of the Act.

The effect of subregulation 8.5(8A) is that a term of a workplace agreement is prohibited content to the extent that it provides for a penalty (as defined by subregulation 8.5(10)) to be imposed on an employee for breaching a requirement to provide notice or evidence to substantiate:

- an entitlement to take sick or carer's leave; or
- an absence from work due to illness, injury or emergency affecting the employee, or a member of the employee's immediate family or household.

An example of a term that is prohibited content under the regulations is provided. Subregulation 8.5(8A) applies where an employee has an entitlement to paid or unpaid sick or carer's leave, but a term of the workplace agreement makes the employee liable to a penalty for not fulfilling a requirement to access that entitlement.

The effect of subregulation 8.5(8B) is to provide that a term of a workplace agreement is prohibited content to the extent that it provided for a penalty (as defined by proposed subregulation 8.5(10)) to be imposed on an employee for being absent from work due to an illness, injury or emergency affecting either the employee, or a member of the employee's immediate family or household.

An example of a term that is prohibited content under the regulation is provided. It is intended that subregulation 8.5(8B) applies even where an employee does not have an entitlement to paid sick or carer's leave (for example, a casual employee), but becomes liable to a penalty for being unable to attend for work due to the employee's illness, injury or emergency, or one affecting a member of the employee's immediate family or household.

Item [7] – Chapter 2, Part 8, after subregulation 8.5(9)

This item amends regulation 8.5 to provide for a new subregulation 8.5(10) with a definition of *penalty* for the purposes of proposed subregulations 8.5(8A) and (8B). The definition of *penalty* is the same as that provided in subregulation 7.1(18) (see item [3]).

Item [8] – Chapter 2, Part 19, subregulation 19.9(1A), definition of *base annual salary*, paragraph (c)

This item amends paragraph 19.9(1A)(c) of the definition of 'base annual salary'. That definition relates to paragraph 19.9(1)(b), which provides for certain exemptions from record-keeping requirements for hours of work for employees whose 'base annual salary', as defined, is more than $55,000.

The amendment clarifies the definition of 'base annual salary' in relation to employees who are paid a regular salary, and not otherwise a full-time or part-time employee with a salary of a type described in paragraphs 19.9(1A)(a) or (b). For those employees of a kind described in paragraph 19.9(1A)(c), the amendment clarifies that the definition of 'base annual salary' excludes the matters mentioned in subparagraphs (a)(i)-(vi), including incentive-based payments, bonuses, and monetary allowances. In this respect, the amendment ensures that the definition of 'base annual salary' in paragraph 19.9(1A)(c) is consistent with that definition in paragraphs 19.9(1A)(a), (b) and (d).

Item [9] – Chapter 2, Part 19, subregulation 19.15(4), definition of *contributions*

This item makes a technical amendment to the definition of 'contributions' in subregulation 19.15(4). Subregulation 19.15(4) requires that certain records be kept of superannuation contributions. The effect of the current definition of 'defined benefit fund' in relation to regulation 19.15, is that any contribution into a fund which includes a defined benefit member, even if the contribution itself is not in respect of a defined benefit interest, would be excluded from the requirement to keep records under regulation 19.15.

The amendment corrects this outcome, by ensuring that a contribution, other than a contribution in respect of a defined benefit interest, must be included in a record in accordance with regulation 19.15.

Item [10] – Chapter 2, Part 19, subregulation 19.23(4), definition of *contributions*

This item makes a similar amendment to that in item [9], in relation to the requirement under subregulation 19.23(4). Subregulation 19.23(4) relates to requirements under paragraph 19.23(1)(l), that certain particulars of superannuation contributions are specified in a payslip that must be given to an employee.

Item [11] – Chapter 2, Part 19, regulation 19.24

Part 19 of Chapter 2 of the Principal Regulations sets out record-keeping obligations on employers. To provide time for employers to adjust, regulation 19.24 provides a transitional period during which employers cannot be prosecuted for failure to comply with these requirements until after 26 September 2006 (that is, for a period of six months after reform commencement on 27 March 2006).

This item extends this transitional period by a further six months – that is, employers cannot be prosecuted for failure to comply with these requirements until after 26 March 2007. The amendments provide employers with extended time to adjust their human resource programs and procedures to achieve compliance with the record-keeping obligations imposed by the Principal Regulations.

Item [12] – Chapter 2, Part 21, after subregulation 21.3(5)
Item [14] – Chapter 2, Part 21, after subregulation 21.3(14)

Items [12] and [14] has the same effect as items [1] and [3] in relation to Victorian employees bound by an employment agreement entered into before 1 January 1997 under Part 2 of the *Employee Relations Act 1992* of Victoria. These employment agreements continue in force under Division 12 of Part 21 of the Act.

Item [12] has the same effect in relation to Victorian employment agreements as item [1] has in relation to workplace agreements and contracts of employment. Item [12] inserts new subregulation 21.3(5A), which makes clear that the Standard is more favourable than, and prevails over, a penalty term in a Victorian employment agreement that would have the effect that the employee's guaranteed rate of pay under the Standard is not met.

Item [14] has the same effect in relation to Victorian employment agreements as item [3] has in relation to workplace agreements and contracts of employment. Item [14] inserts new subregulations 21.3(15) to 21.3(18), which make clear that the Standard is more favourable than, and prevails over, a workplace agreement or contract of employment that imposes:

- more onerous notice or evidence requirements than the Standard in relation to sick, carer's or compassionate leave; or
- a penalty on an employee for breaching any notice or evidence requirements in relation to sick, carer's or compassionate leave.

This item amends regulation 21.3 to provide for a new subregulation 21.3(18) with a definition of *penalty* for the purposes of subregulations 21.3(15) to (17). The definition of *penalty* is the same as that provided in subregulation 7.1(18) (see item [3]).

Item [13] – Chapter 2, subregulation 21.3(12), example

This item amends the example under subregulation 21.3(12) of Chapter 2 to clarify that an employment agreement which provides for the crediting of leave annually in arrears of service is less favourable than the Standard, but that crediting in advance of service is more favourable than the Standard.

Item [13] has the same effect in relation to Victorian employment agreements as item [2] has in relation to workplace agreements and contracts of employment.

Item [15] – Further amendments

This item makes amendments to the regulations specified. The amendments are necessary to correct various minor and typographical errors.

Chapter 2, Parts 19 and 19A
The following amendments correct numbering errors in Chapter 2, Parts 19 and 19A:

- Paragraphs 19.9(1A)(b) and (d) – to change references to subparagraph (v) so that the references are to subparagraph (vi);
- Subregulations 19.21(4), (5), and subregulation 19.40(4), (5) – to change references to subregulation (2) to subregulation (3).
- Subregulation 19.40(5) – to delete the reference to subregulation (2).

Chapter 2, Part 21
The amendments to regulation 21.3 of Chapter 2 are necessary to ensure that regulation 21.3 makes correct reference to an employment agreement, instead of a workplace agreement or contract of employment.

- Part 21 of Chapter 2 of the Regulations sets out circumstances in which the Standard provides a more favourable outcome than an employment agreement (an agreement entered into under the *Employee Relations Act 1992 (Vic)* and continued in force under the WR Act).

Chapter 2, Part 6

Amendments to the following provisions are necessary to correctly refer to the Standard as the 'Australian Fair Pay and Conditions Standard' instead of the 'Australian Fair Pay and Condition Standard'.

- Chapter 2, Part 6, sub-subparagraph 6.2(1)(b)(i)(B); and
- Chapter 2, Part 6, paragraph 6.3(1)(b).