EXPLANATORY STATEMENT

Select Legislative Instrument 2009 No. 164

Issued by the authority of the Minister for Employment Participation

Fair Work Act 2009

Fair Work Amendment Regulations 2009 (No. 1)

The *Fair Work Act 2009* (the Act) received the Royal Assent on 7 April 2009. However, most of the provisions of the Act are yet to commence. The Act will replace the *Workplace Relations Act 1996*, and will govern federal workplace relations.

The purpose of the Regulations is to amend the *Fair Work Regulations 2009* (the Principal Regulations) to deal with a number of matters relating to the workplace relations framework established by the Act, including:

- setting out rules for the Act's application to Australian-based employees of Australian employers working overseas; and
- providing for the application of the Act's compliance regime to the civil remedy provisions contained in the Principal Regulations.

The Regulations also repeal the *Fair Work (Oaths and Affirmation) Regulations 2009*, as oaths and affirmations will be conducted in accordance with the Principal Regulations after 1 July 2009.

Details of the Regulations are included in the Attachment.

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

Regulations 1 – 4 and Schedule 1 commence on 1 July 2009, while regulation 5 and Schedule 2 commence on 1 January 2010, to coincide with the commencement of the provisions of the Act which are related to those regulations and Schedules.

FAIR WORK AMENDMENT REGULATIONS 2009 (No. 1)

Regulation 1 – Name of Regulations

1. This regulation provides that the Regulations are to be known as the *Fair Work Amendment Regulations 2009* (No. 1) (the Regulations).

Regulation 2 – Commencement

2. This regulation provides that regulations 1 to 4 and Schedule 1 to the Regulations are to commence on 1 July 2009, and that regulation 5 and Schedule 2 to the Regulations are to commence on 1 January 2010.

Regulation 3 – Amendment of *Fair Work Regulations 2009*

3. This regulation provides that the *Fair Work Regulations 2009* (the Principal Regulations) are to be amended in accordance with Schedule 1.

Regulation 4 – Repeal of *Fair Work (Oath and Affirmation) Regulations 2009*

4. This regulation provides that the *Fair Work (Oath and Affirmation) Regulations 2009* are repealed. Those Regulations operated prior to the commencement, on 1 July 2009, of the Principal Regulations to prescribe the form of the oath or affirmation to be taken by the President of Fair Work Australia (FWA), and the persons before whom the oath or affirmation must be taken. The Principal Regulations prescribe the form of the oath or affirmation to be taken by all FWA Members, including the President, from 1 July 2009.

5. Subregulation 4(2) clarifies that the repeal does not affect an oath sworn, or an affirmation made, before 1 July 2009.

Regulation 5 – Amendment of the *Fair Work Regulations 2009*

6. This regulation provides that the Principal Regulations are to be amended in accordance with Schedule 2.

Schedule 1 – Amendments commencing on 1 July 2009

Item 1 - Part 1-3, after Division 2

New regulation 1.15A – State public sector employer

7. *The Fair Work (State Referral and Consequential and Other Amendments) Act 2009* amends the *Fair Work Act 2009* (the Act) to insert Division 2A, which enables States to refer power to the Commonwealth for a national workplace relations system. Division 2A extends the Act to all employees and employers (subject to any exceptions for State public sector employment) in a referring State.

8. Section 30A of Division 2A defines *State public sector employer* as the State, a body established for a public purpose by a State law, Governor or Minister; a body corporate in which the State has a controlling interest; or a State employer specified in the regulations. Under this regulation a public entity or special body within the meaning of the *Public Administration Act 2004* (Vic) that is not already within the definition of State public sector employer will be brought within that definition.

New regulation 1.15B – Definitions for Division 3

9. Division 3 of the Act is about the application of the Act in and beyond Australia's territorial sea, exclusive economic zone (EEZ), and continental shelf (these terms are defined in section 12 of the Act).

10. New regulation 1.15B defines terms used in this Division.

11. The terms *innocent passage* and *transit passage* are defined by reference to the United Nations Convention on the Law of the Sea, 10 December 1982, Montego Bay (the Convention) and are explained further below.

12. Schedule 2 to the regulations (explained further below) amends this regulation with effect from 1 January 2010 to insert definitions of *licensed ship*, *permit ship* and *majority Australian-crewed ship*.

New regulation 1.15D – Modification of application of Act – foreign ships engaged in innocent passage

13. The Act applies generally in Australia, including the coastal sea (which includes the territorial sea) and the territories of Christmas Island and the Cocos (Keeling) Islands (see section 15B and subsection 17(b) of the *Acts Interpretation Act 1901* (Acts Interpretation Act)). The Act's application in these areas is subject to any modifications or exclusions prescribed by the regulations (sections 32 and 35A). The Act generally applies to national system employees and national system employers (such as constitutional corporations, and persons who employ maritime employees in connection with interstate and overseas trade or commerce).

14. New regulation 1.15D provides that the Act does not apply in relation to the waters of the territorial sea of Australia (including waters within the limits of a State or Territory), or in relation to Christmas Island and the Cocos (Keeling) Islands, to the extent that this would be inconsistent with a right of innocent passage or transit passage exercised by a foreign ship.

15. Australia is bound under international law to respect the right of innocent passage of foreign ships in its territorial sea – that is, the right to traverse the territorial sea without entering a port; or to proceed to or from an Australian port. Generally, passage is innocent as long as it is 'continuous and expeditious' and not prejudicial to the peace, order and good governance of a coastal State. Under the terms of the Convention, coastal States may regulate foreign ships exercising the right of innocent passage in certain respects, but not in relation to employment relationships on those vessels. (See section 3 of Part II of the Convention).

16. Australia is also bound under international law to respect the right of transit passage of foreign ships in its territorial sea. The right of transit passage applies to straits used for international navigation, such as the Torres Strait. Like innocent passage, this is a right of freedom of navigation for the purpose of continuous and expeditious transit of the strait. (See section 2 of Part III of the Convention.)

17. *Territorial sea* is defined in section 12 of the Act and has the meaning given by Division 1 of Part 11 of the *Seas and Submerged Lands Act 1973*. That Act defines 'territorial sea' by reference to the Convention, under which the territorial sea of a coastal State generally extends 12 nautical miles from baselines determined in accordance with the Convention (generally from the low-water line).

New regulation 1.15F – Extension of Act beyond the exclusive economic zone and the continental shelf

18. Australia has jurisdiction under international law in relation to its citizens or ships, wherever they are located. Section 34 of the Act provides for the Act's extension in relation to the area beyond the EEZ and the continental shelf - for example, in the case of an Australian ship in international waters or in the case of an Australian national working overseas. As with any extraterritorial application of law, the Act's extended application in the circumstances set out in this regulation would be subject to any concurrent jurisdiction of another country.

19. Section 34 of the Act generally extends the Act beyond the EEZ and the continental shelf to *Australian ships* (see section 12 of the Act) and to any ship in the EEZ and over the continental shelf that is operated or chartered by an Australian employer and that uses Australia as a base. Subsection 34(3) authorises the regulations to extend provisions of the Act beyond the EEZ and continental shelf to any Australian employer and any Australian-based employee.

20. The definition of *Australian employer* in section 35 of the Act includes Australian trading and financial corporations (but not foreign corporations), the Commonwealth and Commonwealth authorities and bodies corporate incorporated in a Territory. This definition also includes an employer that carries on an activity in Australia, in the EEZ or on or over the continental shelf and whose central management and control is in Australia. The regulations can extend the meaning of Australian employer. From 1 January 2010 this definition will encompass the employer of a crew member of a *majority Australian-crewed ship* (see the Explanatory Memorandum to Schedule 2).

21. *Australian-based employee* is defined in section 35 of the Act to mean an employee:

- whose primary place of work is in Australia or who is prescribed by the regulations; or

- who is employed by an Australian employer, whether the employee is in Australia or elsewhere (but not an employee engaged outside Australia and the external Territories to perform duties outside these places).

22. The extension of rights and obligations under the Act to any Australian employer and any Australian-based employee may also involve the extension of reciprocal rights and obligations to the other party to the employment relationship. An employee of an Australian employer will be an Australian-based employee by reason of subsection 35(2) of the Act. However, the employer of an Australian-based employee could be an Australian employer or a foreign employer (for example, in the case of an employee whose primary place of work is in Australia but who works overseas for a period of time).

23. New subregulation 1.15F(1) extends the Act in relation to the Australian Antarctic Territory to an Australian employer, and to an Australian-based employee (whether the employee is employed by an Australian employer or another employer). As noted above, subsection 33(1) of the Act already extends the Act to certain ships and fixed platforms in the EEZ and the continental shelf. Under section 12 of the Act, the EEZ and continental shelf mean the EEZ and shelf of Australia, including its external territories. The Australian Antarctic Territory is an external territory under section 17 of the Acts Interpretation Act (read in conjunction with the Australian Antarctic Territory Act 1954).

24. Outside the Australian EEZ and continental shelf new subregulation 1.15F(2) extends Parts of the Act dealing with minimum terms and conditions of employment, including the National Employment Standards (NES), the modern award and minimum wage safety net, to:

- an Australian employer in relation to an Australian-based employee of the employer; and

- an Australian-based employee in relation to the employee's employer (whether or not an Australian employer) if the same enterprise agreement applies to both.

25. Regulation 1.15F applies minimum Australian terms and conditions of employment in Chapter 2 of the Act to Australian-based employees of Australian employers. In circumstances where an Australian-based employee and a foreign employer have chosen to make an enterprise agreement that applies to them (see below), these Parts will also apply.

26. The Act enables national system employers (including foreign corporations) to bargain and make enterprise agreements with their employees. Subregulation 1.15F(3) extends Parts of the Act dealing with enterprise agreements (Part 2-4, including bargaining), industrial action (Part 3-3) and workplace determinations (Part 2-5) to:

- an Australian employer in relation to an Australian-based employee of the employer; and

- an Australian-based employee in relation to the employee's employer (whether or not an Australian employer).

27. Part 3-1 of the Act sets out a range of workplace protections that recognise the right to freedom of association and prevent discrimination and other unfair treatment. Part 3-1 largely applies to action by or affecting national system employers and employees and organisations. Subregulation 1.15F(4) extends Part 3-1 of the Act to Australian employers and Australian-based employees. By extending Part 3-1 to these persons, subregulation 1.15F(4) also extends corresponding rights and obligations to persons or organisations:

- who take action (wherever this occurs) against an Australian employer or an Australian-based employee; or

- against whom action is taken (wherever this occurs) by an Australian employer or an Australian-based employee.

28. Subregulation 1.15F(5) extends the unfair dismissal provisions of the Act (Part 3-2) to an Australian-based employee in relation to the employee's Australian employer. This extends unfair dismissal remedies to an Australian-based employee who is unfairly dismissed by an Australian employer, wherever the dismissal occurred. Subregulation 1.15F(6) extends the Act's stand down provisions (Part 3-5) to an Australian employer in relation to the employer's Australian-based employee.

29. Subregulations 1.15F(2) to 1.15F(6) also extend provisions of the Act that relate to the extended Parts, such as those dealing with compliance and enforcement, administration and right of entry. For example, the compliance and enforcement provisions in Parts 4-1 and 5-2 of the Act will apply in relation to the investigation and contravention of an obligation under one of the extended Parts.

30. The note reflects the fact that the extended application of the Act beyond the EEZ and the continental shelf is subject to Australia's international obligations relating to foreign ships, and any concurrent jurisdiction of a foreign State.

Item 2 – Subregulation 3.13(7), at the foot

Item 3 – Subregulation 3.13(8), at the foot

Item 4 – Subregulation 3.19(10), at the foot

31. These items insert notes to a number of subregulations to inform the reader that the subregulations are civil remedy provisions to which Part 4-1 of the Principal Regulations applies. The notes also inform the reader that Division 4 of Part 4-1 deals with infringement notices relating to alleged contraventions of these provisions.

Item 5 – Regulation 3.31, including the note

32. Item 5 is a technical amendment dealing with the form requirements for employee records.

33. All records are required to be of the following kind:

- in legible form in the English language; and
- in a form that is readily accessible to an inspector.

34. This applies to records that are required to be made and kept for subsection 535(1) of the FW Act and records that are required to be made and kept for section 796 of the FW Act.

35. Failure to meet these form requirements in relation to records that are required to be made and kept for subsection 535(1) will be a contravention of that subsection. Subsection 535(1) of the FW Act is civil remedy provision and the penalty for contravention of that provision is set out in the FW Act (see section 539).

36. Item 5 sets out separately, in subregulation 3.31(2), the form requirements relating to records required to be made and kept for section 796 of the FW Act. This allows subregulation 3.31(2) to be identified as a civil remedy provision in Part 4-1 of the Fair Work Regulations 2009 (the Principal Regulations).

37. Item 5 also inserts a note informing the reader that subregulation 3.31(2) is a civil remedy provision to which Part 4-1 of the Principal Regulations applies.

38. The new note also informs the reader that Division 4 of Part 4-1 deals with infringement notices relating to alleged contraventions of civil remedy provisions.

39. The infringement notice scheme in Division 4 of Part 4-1 of the Principal Regulations will apply to contraventions of subregulation 3.31(1) or 3.31(2).

Item 6 – Subregulation 3.41(2), at the foot

Item 7 – Subregulation 3.41(4), at the foot

Item 8 – Subregulation 3.41(5), at the foot

Item 9 – Subregulation 3.41(6), at the foot

Item 10 – Subregulation 3.42(1), at the foot

Item 11 – Subregulation 3.42(2), at the foot

Item 12 – Subregulation 3.42(3), at the foot

Item 13 – Subregulation 3.42(4), note

Item 14 – Subregulation 3.43(1), at the foot

Item 15 – Subregulation 3.44(1), at the foot

Item 16 – Subregulation 3.44(2), at the foot

Item 17 – Subregulation 3.44(3), at the foot

Item 18 – Subregulation 3.44(4), at the foot

Item 20 – Subregulation 3.44(5), at the foot

Item 21 – Subregulation 3.44(6), at the foot

40. These items insert notes to a number of subregulations relating to record keeping and payslips, to inform the reader that the subregulations are civil remedy provisions to which Part 4-1 of the Principal Regulations applies. The notes also inform the reader that Division 4 of Part 4-1 deals with infringement notices relating to alleged contraventions of these provisions.

Item 19 – Subregulation 3.44(5)

41. This item corrects a drafting error in subregulation 3.44(5).

Item 22 – Part 4-1, before Division 3

42. Item 22 inserts a new Division 2 into Part 4-1 of the Principal Regulations.

43. Division 2 sets out a table of civil penalties that have been prescribed in the Regulations. In relation to each civil penalty, the table identifies who has standing to apply for an order in relation to a contravention of the provision, and the courts to which an application may be made.

44. In the table:

- Column 1 lists the civil remedy provisions contained in the Principal Regulations;

- Column 2 sets out who has standing to apply to a court for an order in relation to contravention of a civil remedy provision contained in the Principal Regulations. Column 2 is read subject to section 540 of the FW Act (which deals with limitations on who may apply for orders);

- Column 3 sets out the courts to which a person may make an application for orders in relation to a contravention of a civil remedy provision contained in the Principal Regulations. The orders that a particular court can make are dealt with in sections 545 and 546 of the FW Act; and

- Column 4 sets out the maximum pecuniary penalty that may be imposed by a court in relation to a contravention of the each civil remedy provision contained in the Principal Regulations. In the case of a contravention by a body corporate, the maximum pecuniary penalty that may be imposed is 5 times the amount referred to in the relevant item of Column 4.

45. The amounts in Column 4 are also subject to subsection 798(2) of the FW Act, which provides that the maximum pecuniary penalties that may be imposed by a court

for contravention of a civil penalty contained in the regulations are 20 penalty units for an individual and 100 penalty units for a body corporate.

Item 23 – Regulation 4.03, definition of *civil remedy provision*

46. Division 4 of Part 4-1 of the Principal Regulations provides for an infringement notice scheme. It applies to those provisions that are defined in regulation 4.05 as civil remedy provisions. This item extends the definition of civil remedy provision in regulation 4.05 to include provisions of the Principal Regulations relating to record keeping and payslips.

Item 24 – Before regulation 4.04

47. Subsection 557 of the FW Act provides that two or more contraventions of civil remedy provisions referred to in subsection 557(2) of the FW Act may be taken to constitute a single contravention. Subsection 557(2) includes any civil remedy provisions prescribed by the Regulations.

48. This item inserts a new regulation, which prescribes, for the purposes of subsection 557(2) of the FW Act, those civil remedy provisions contained in Part 3-6 of the Principal Regulations.

Item 25 – Regulation 5.01

Item 26 – Regulation 5.01

49. Subregulation 5.01(2) provides that the following functions, which relate to applications to FWA, are prescribed:

- being satisfied under subregulation 3.02(7) that a person making an application to FWA under section 365 of the Act will suffer serious hardship if the person is required to pay the prescribed application fee;
- being satisfied under subregulation 3.03(7) that a person making an application to FWA under section 372 of the Act will suffer serious hardship if the person is required to pay the prescribed application fee;
- being satisfied under subregulation 3.07(7) that a person making an application to FWA under Division 5 of Part 3-2 of the Act will suffer serious hardship if the person is required to pay the prescribed application fee; and
- being satisfied under subregulation 6.05(7) that a person making an application to FWA under section 773 of the Act will suffer serious hardship if the person is required to pay the prescribed application fee.

50. The functions may be delegated by the President to the General Manager or to specified staff of FWA.

Item 27 – Paragraph 5.04(1)(b)

51. This item corrects a drafting error in paragraph 5.04(1)(b).

Item 28 – Paragraph 6.08(1)(c)

Item 29 – After paragraph 6.08(1)(c)

52. These items prescribe employment under the *Members of Parliament (Staff) Act 1984* as 'public sector employment' for the purposes of paragraph 795(4)(h) of the Act. This is relevant to establishing the identity of the relevant employee's employing authority.

Item 30 – Schedule 5.2, Part 1, after item 1

Item 31 – Schedule 5.2, Part 1, item 2.6

Item 32 – Schedule 5.2, Part 1, item 2.7

Item 33 – Schedule 5.2, Part 1, item 11.6

Item 34 – Schedule 5.2, Part 1, after item 13

Item 35 – Schedule 5.2, Part 1, item 14.4

Item 36 – Schedule 5.2, Part 1, after item 14

Item 37 – Schedule 5.2, Part 1, after item 15

Item 38 – Schedule 5.2, Part 2, item 3.12

53. These items amend Schedule 5.2 to the Principal Regulations which, together with regulation 5.04, sets out the particular information and documents that must be provided by the President to the Minister and to the FWO.

Item 39 – Schedule 6.3, item 5, column 3

54. This item amends Schedule 6.3 to the Principal Regulations which specifies the employing authority for various categories of public sector employees for the purposes of subsection 795(6) of the Act.

Schedule 2 – Amendments commencing on 1 January 2010

Item 1 – Regulation 1.15B, after definition of *innocent passage*

Item 2 – After regulation 1.15B

Item 3 – After regulation 1.15D

55. These items insert regulations into the Principal Regulations that are expected to commence operation on 1 January 2010, at which time the NES and modern awards commence.

56. As noted in relation to Schedule 1, section 33 of the Act applies the Act generally to:

- Australian ships and fixed platforms in the EEZ and over the continental shelf;

- any ship in the EEZ and over the continental shelf that operates to and from an Australian port and that services or operates in conjunction with a fixed platform; and

- any ship in the EEZ and over the continental shelf that is operated or chartered by an Australian employer and that uses Australia as a base.

57. Item 3 further applies the Act from 1 January 2010 in the EEZ and the continental shelf to licensed ships, permit ships and majority Australian-crewed ships. The Act will extend to regulate employment relationships on these vessels, whether or not crew members and their employers are Australian.

58. Item 1 defines:

- licensed ship to mean a ship to which a licence has been granted under section 288 of the *Navigation Act 1912* (the Navigation Act) to engage in the coasting trade, for which the licence is in force, and which is operating under the licence;

- majority Australian-crewed ship to mean a ship (other than an Australian ship, licensed ship or permit ship) of which the majority of the crew are Australian residents and the operator has the requisite connection with Australia – that is, the operator is an Australian resident, or the operator's principal place of business is in Australia, or the operator is incorporated in Australia (this definition corresponds with paragraph 10(c) of the Navigation Act); and

- permit ship to mean a ship to which a permit has been granted (whether for a single voyage or as a continuing permit) under section 286 of the Navigation Act to engage in the coasting trade, for which the permit is in force, and which is operating under the permit.

59. Item 2 extends the meaning of Australian employer to include the employer of a member of the crew performing work on a majority Australian-crewed ship. A crew member who is employed by such an employer will be an Australian-based employee by reason of subsection 35(2) of the Act. The effect of this regulation will be that provisions of the Act extending beyond the EEZ and the continental shelf in the circumstances set out in regulation 1.15F will also extend to these employers and employees from 1 January 2010.

60. These regulations ensure that all seafarers working regularly in or beyond the waters of Australia's EEZ and continental shelf will have the benefit of Australian workplace relations laws and a fair safety net of employment conditions in circumstances where there is an appropriate connection with Australia.

61. The AIRC will be able make a modern award that is expressed to cover such employees and their employers under the award modernisation process set out in Part 10A of the WR Act, which is continued in operation under Schedule 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*. The *Fair*

Work (Transitional Provisions and Consequential Amendments) Regulations 2009 contain provisions that enable this to occur.

62. The note reflects the fact that the application of the Act in the EEZ and the continental shelf to licensed ships, permit ships and majority Australian-crewed ships is subject to Australia's international obligations relating to foreign ships, and any concurrent jurisdiction of a foreign State.