EXPLANATORY STATEMENT

Select Legislative Instrument 2009 No. 364

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

Fair Work (State Referral and Consequential and Other Amendments) Act 2009
Fair Work Act 2009
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

Fair Work Legislation Amendment Regulations 2009 (No. 2)

Item 2 of Schedule 20 to the *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* (Consequential Act) provides that the Governor-General may make regulations amending Acts (other than the *Fair Work Act 2009* (FW Act)) being amendments that are consequential on, or otherwise relate to, the enactment of the FW Act, the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Transitional Act), or the Consequential Act. Item 3 of Schedule 20 to the Consequential Act provides that despite subsection 12(2) of the *Legislative Instruments Act 2003*, the Governor-General may make regulations dealing with matters of a transitional, saving or application nature or may make regulations amending Acts (other than the FW Act) that may be expressed to take effect from a date before the regulations are registered under that Act.

Subsection 796(1) of the FW 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.

Section 4 of the Transitional Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Transitional Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Transitional Act.

The Transitional Act regulates the transition from the federal workplace relations system under the *Workplace Relations Act 1996* (WR Act) to that under the FW Act. Item 8 of Schedule 2 to the Transitional Act provides that the Governor-General may make regulations to modify provisions of the schedules in the Transitional Act.

The Regulations clarify the application of the FW Act, provide transitional provisions and make various minor and technical amendments in time for the full commencement of the new workplace relations framework on 1 January 2010.

The Regulations contain three Schedules.

Schedule 1 amends the *Fair Work (State Referral and Consequential and Other Amendments) Regulations 2009* (Consequential Regulations) to correct a small number of errors in amendments made under the Consequential Act. These changes operate retrospectively. This is necessary to ensure that no legislative gap is created by the updating of references to awards, minimum wages and employment standards. These concepts were inadvertently replaced with effect from 1 July 2009, when the majority of the FW Act commenced, rather than 1 January 2010, when the relevant parts of the FW Act commence. The amendments are not intended to create new or different rights and obligations on employers and employees.

Schedule 2 amends the *Fair Work Regulations 2009* (FW Regulations) to:

- clarify the application of the FW Act to certain ships in the territorial sea and to certain licensed ships, permit ships and majority Australian-crewed ships in the exclusive economic zone and the continental shelf. This amendment is intended to address concerns raised by shipping industry stakeholders about the application of the FW Act to certain ships operating in Australian waters; and
- make a technical amendment to clarify that certain State or Territory laws relating to training are not excluded by the operation of the FW Act.

Schedule 3 amends the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (Transitional Regulations) to provide a three month period (commencing on 1 January 2010) within which Fair Work Australia (FWA) may deal with any application made to the Australian Industrial Relations Commission (AIRC) to vary an award to give effect to the award modernisation request. This amendment reflects the fact that, at 1 December 2009, there had been 92 applications to vary an award made during the award modernisation process before the AIRC (which ceases to operate on 31 December 2009), including applications to vary awards to give effect to changes made to the original award modernisation request. The amendments in Schedule 3 also enable FWA to act on its own initiative (i.e. without an application) if it considers it necessary.

The Attorney-General's Department, the Department of Defence and the Department of Veterans' Affairs were consulted on the development of the amendments contained in Schedule 1.

The Queensland Government was consulted on the development of the amendment contained in item [1] of Schedule 2. The Department of Infrastructure, Transport, Regional Development and Local Government was consulted on the development of the amendments contained in items [2] to [4] of Schedule 2 and the following stakeholders were also advised on the nature of the Government's intention to make those amendments:

- Australian Mines and Minerals Association;
- Australian Shipowners Association;
- CSL Australia Limited;
- Maritime Union of Australia;
- Shipping Australia Limited.

Given the technical nature of the amendment contained in Schedule 3 and the number of applications to vary a modern award, no separate consultation was required.

Details of the Regulations are in the Attachment.

A Regulation Impact Statement (RIS) was prepared for the *Fair Work Act 2009*. Therefore the Office of Best Practice Regulation advised that a separate RIS was not required for these regulations. The Office of Best Practice Regulation has also confirmed that a Business Cost Calculator report was not required for these regulations.

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

Regulations 1 to 3 and Schedule 1 are taken to have commenced on 1 July 2009. The regulations in Schedule 1 are made under the Consequential Act. The remainder of the regulations commence on 1 January 2010 with the full commencement of the Fair Work reforms.

ATTACHMENT

Details of the *Fair Work Legislation Amendment Regulations 2009 (No. 2)*

Regulation 1 – Name of Regulations

This regulation sets out the name of the Regulations as the *Fair Work Legislation Amendment Regulations 2009 (No. 2).*

Regulation 2 – Commencement

This regulation provides that regulations 1 to 3 and Schedule 1 are taken to commence on 1 July 2009 and the remainder of the regulations commence on 1 January 2010.

Regulation 3 – Amendment of *Fair Work (State Referral and Consequential and Other Amendments) Regulations 2009*

This regulation provides that the *Fair Work (State Referral and Consequential and Other Amendments) Regulations 2009* (Consequential Regulations), as amended by the *Fair Work Legislation Amendment Regulations 2009 (No. 1),* are amended in accordance with Schedule 1.

Regulation 4 – Amendment of *Fair Work Regulations 2009*

This regulation provides that the *Fair Work Regulations 2009* (FW Regulations), as amended by the *Fair Work Amendment Regulations 2009 (No. 1),* are amended in accordance with Schedule 2.

Regulation 5 – Amendment of *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*

This regulation provides that the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (Transitional Regulations), as amended by the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009 (No. 1)* and the *Fair Work Legislation Amendment Regulations 2009 (No. 1),* are amended in accordance with Schedule 3.

Schedule 1 – Amendments of *Fair Work (State Referral and Consequential and Other Amendments) Regulations 2009*

Item [1] – Regulation 3, heading
Item [2] – Before subregulation 3(2)
Item [3] – After subregulation 3(2)
Item [4] – Schedule 1, title

These items make amendments to headings and formal provisions in the Consequential Regulations. The amendments in item [5] of Schedule 1 to the Regulations, which insert a new Schedule 2 containing amendments to the Consequential Act, necessitates changes to headings and formal provisions to reflect the new structure of the Consequential Regulations.

Item [5] – After Schedule 1

This item inserts new Schedule 2 into the Consequential Regulations which deals with amendments of the Consequential Act as provided in items [1] – [9] of that Schedule.

Item [1], Schedule 2 – Schedule 5, after item 87

This item prescribes the *Sex Discrimination Act 1984* (SD Act) for the purposes of section 116 of the *Workplace Relations Act 1996* (WR Act), to the extent that section 116 continues to operate because of item 5 of Schedule 2 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Transitional Act).

Prior to the repeal of the WR Act on 1 July 2009, the combined effect of section 109 of the SD Act and section 116 of the WR Act was to prohibit the Australian Industrial Relations Commission (AIRC) making a public sector-related award or order that did not comply with the SD Act.

Following the commencement of much of the *Fair Work Act 2009* (FW Act) on 1 July 2009, the AIRC's ability to make awards (other than modern awards) was removed, and the AIRC's power to make orders was limited.

The AIRC is scheduled to cease on 31 December 2009, or such other date determined by the Minister in accordance with subclause 7(3) of Schedule 18 to the Transitional Act.

This item ensures that during the period 1 July 2009 to 31 December 2009 (or such other date determined by the Minister), the AIRC would continue to be prohibited from making public sector-related orders that fail to comply with the SD Act. These changes operate retrospectively. This is necessary to ensure that no legislative gap is created by the inadvertent repeal of section 109 with effect from 1 July 2009, when the majority of the FW Act commenced, rather than 1 January 2010, when the award related provisions of the FW Act commence. The amendments are not intended to create new or different rights and obligations on employers and employees.

Item [2], Schedule 2 – Schedule 7, after the heading
Item [8], Schedule 2 – Schedule 19, after the heading

These items make amendments to the headings of Parts of the Consequential Act. The amendments in items [3] and [9] necessitate changes to headings in the Consequential Act to reflect the insertion of new provisions.

Item [3], Schedule 2 – Schedule 7, after item 5
Item [5], Schedule 2 – Schedule 8, Part 2, after Division 1
Item [6], Schedule 2 – Schedule 8, Part 2, after Division 2
Item [7], Schedule 2 – Schedule 8, Part 2, after Division 3
Item [9], Schedule 2– Schedule 19, after item 8

The Consequential Act made consequential amendments to various Commonwealth Acts which referred to parts of the WR Act and WR Act concepts to replace those references with their FW Act equivalents.

In some cases, these changes were made with effect from 1 July 2009 (when the majority of the FW Act commenced) when the new FW Act concepts do not commence until 1 January 2010. These amendments fill this gap by providing transitional arrangements.
These changes operate retrospectively to ensure that any unintended legislative gap is effectively filled. The amendments are not intended to create new or different rights and obligations on employers and employees.

Item [4], Schedule 2 – Schedule 8, item 63, substituted paragraph 64(1)(d)

This item corrects a typographical error to remove an incorrect double negative.

These changes operate retrospectively to ensure that the correction operates from 1 July 2009, when the original, but erroneous, amendment commenced. This change does not create new or different rights and obligations on employers and employees.

Schedule 2 – Amendments of *Fair Work Regulations 2009*

Item [1] - Paragraph 1.13(a)

This item amends paragraph 1.13(a) of the FW Regulations to ensure that certain state or territory laws relating to training apply to national system employees and national system employers.

Section 26 of the FW Act generally excludes state or territory industrial laws so far as they would otherwise operate in relation to national system employees and national system employers. Section 27 of the FW Act 'saves' certain state or territory laws from the effect of section 26 so that these laws can continue to operate in relation to national system employees and national system employers. Paragraph 27(1)(b) of the FW Act enables the regulations to prescribe state or territory laws for this purpose.

Paragraph 27(2)(f) of the FW Act generally preserves state and territory laws dealing with training arrangements except to the extent that they deal with terms and conditions of employment that are provided for by the National Employment Standards or may be included in a modern award. Paragraph 1.13(a) of the FW Regulations, made under paragraph 27(1)(b) of the FW Act, specifically saves state or territory laws dealing with the suspension, cancellation or termination of a training contract that is entered into as part of a training arrangement.

The intention of paragraph 1.13(a) of the FW Regulations is to save sections 139 and 391 of the *Industrial Relations Act 1999* (Qld) (the Queensland IR Act). Respectively, these provide for:

- an apprentice or trainee's employment not to be terminated unless the apprenticeship or traineeship is completed or is cancelled under the *Vocational Education, Training and Employment Act 2000* (Qld) (the VETE Act); and
- an apprentice or trainee whose contract of employment is terminated before the completion or valid cancellation of his or her training contract to recover unpaid wages for the period until the training contract is validly cancelled in accordance with the VETE Act.

However, currently there is a question about whether paragraph 1.13(a) of the FW Regulations operates in relation to state or territory laws dealing with contracts of employment entered into in association with training contracts. This item rectifies this by amending paragraph 1.13(a) to make clear that it saves the operation of state or territory laws dealing with:

- the suspension, cancellation or termination of a training contract; and
- the suspension, cancellation or termination of a contract of employment that is associated with a training contract and entered into as part of a training arrangement.

Item [2] – Regulation 1.15B, definition of *licensed ship*, paragraph (c)
Item [3] – Regulation 1.15B, definition of *permit ship*, paragraph (c)

These items amend the definitions of *licensed ship* and *permit ship* to align them more closely with the terminology of the *Navigation Act 1912*.

These items are consequential on item [4] as that item deals with licences and permits issued under the *Navigation Act 1912*.

Item [4] – Regulations 1.15D and 1.15E

This item substitutes existing regulations 1.15D (Modification of application of Act – ships engaged in innocent passage) and 1.15E (Extension of Act to the exclusive economic zone and the continental shelf – ships).

Section 32 of the FW Act enables regulations to modify the application of the FW Act in certain parts of Australia.

Regulation 1.15D formerly provided that for section 32 of the FW Act, the FW Act did not apply in relation to the waters of the territorial sea of Australia to the extent that this would be inconsistent with a right of innocent passage or transit passage exercised by a foreign ship. This gives effect to Australia's obligations 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.

Regulation 1.15D now clarifies that this modification of the FW Act does not apply in relation to a foreign ship in the territorial sea if that ship is:

- operating under a licence issued under the *Navigation Act 1912* that is in force on 1 January 2010 or issued on or after 1 January 2010;
- operating under a continuing voyage permit issued under section 286 of the *Navigation Act 1912* on or after 1 January 2010;
- operating under a single voyage permit where the ship has been issued with three or more single voyage permits over a 12 month period or where the ship was issued with a continuing voyage permit in the proceeding 15 months; or
- a majority Australian-crewed ship.

This limitation on the right of innocent passage or transit passage is consistent with Australia's international obligations. In international law, coastal states have the exclusive right to transport goods and passengers from one part of the coastal state to another (cabotage). A coastal state may reserve this cabotage exclusively for its own ships by denying foreign-flagged ships the right to unload or collect cargo. Equally, a coastal state may impose conditions on foreign-flagged ships which are given permission under domestic laws (e.g. a licence or permit issued under the *Navigation Act 1912*) to engage in cabotage.

Subsection 33(3) of the FW Act enables regulations to extend the FW Act in relation to the exclusive economic zone (EEZ) or to the waters above the continental shelf.

Regulation 1.15E formerly provided that, for subsection 33(3) of the FW Act, the FW Act will apply to all licensed ships, permit ships and majority Australian-crewed ship in the EEZ and the waters above the continental shelf from 1 January 2010. The effect of the regulation was to extend the FW Act to regulate employment relationships on these vessels, whether or not crew members and their employers are Australian.

This amendment to regulation 1.15E ensures that the FW Act applies only to licensed ships and permit ships regularly carrying passengers and cargo in Australian waters. Foreign ships that only intermittently carry passengers and cargo in Australian waters would be excluded from coverage by the FW Act. Regulation 1.15E now extends the application of the FW Act to the following types of ships in the exclusive economic zone and the continental shelf:

- licensed ships, where the licence is in force or is issued on or after 1 January 2010;
- permit ships that have been issued with a continuing voyage permit that is in force or is issued on or after 1 January 2010;
- permit ships that have been issued with a single voyage permit on or after 1 January 2010 and:
  - the ship has previously been issued with at least two single voyage permits over the previous 12-month period; or
  - the ship was issued with a continuing voyage permit in the 15-month period immediately preceding the date the current single voyage permit was issued;
- Australian majority-crewed ships.

A note at the end of regulation 1.15E sets out the application of the FW Act in the exclusive economic zone 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.

Schedule 3 – Amendments of *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*

Item [1] – Regulation 2.06 (headed "Award-based transitional instruments including notional agreement preserving State award")

This item renumbers regulation 2.06 as regulation 2.05A. This is necessary as Schedule 1 to the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2009 (No. 1)* inserts new Division 3 which contains a new regulation 2.06.

Item [2] – After Part 3

This item modifies Schedule 5 to the Transitional Act. The modification made by this item involves inserting a new Part 4. Part 4 contains new item 14 (Variation of modern award).

FWA will have specified powers to vary modern awards once they commence on 1 January 2010. These are primarily set out in Part 2-3 of the FW Act. Some limited transitional powers are also included in Schedule 5 to the Transitional Act.

In addition to its existing powers, there may be circumstances where it will be appropriate for FWA to vary a modern award after its commencement to ensure consistency with the Minister's award modernisation request. For example, where an application has been made to vary an award to give effect to a variation made by the Minister to her request and the application is not able to be dealt with by the AIRC, which is undertaking the award modernisation process, prior to 1 January 2010.

- At 19 November 2009, there had been 67 applications to vary an award made during the award modernisation process before the AIRC (which ceases to operate on 31 December 2009), including applications to vary awards to give effect to changes made to the original award modernisation request.

This regulation provides FWA with a temporary power to vary modern awards after their commencement where this is necessary to give effect to the award modernisation request.

This power is available only for a three month period from 1 January 2010 (the commencement date of modern awards) until 31 March 2010, and only be able to be exercised:

- where an application for variation of a modern award has been made to the AIRC before 31 December 2009 and the application has not been dealt with; or
- on FWA's own initiative.

In exercising this transitional power, FWA is required to have regard to the terms of the award modernisation request and the matters to which the Commission was required to have regard to in conducting the award modernisation process. The criteria and limitations governing the existing powers to vary modern awards in the FW Act does not apply to this transitional power.

To avoid unnecessary complexity and delay, FWA is able to have regard to submissions made to the Commission during the award modernisation process, where this is appropriate. This does not limit FWA's ability to inform itself as it sees fit, including through new submissions.