

EXPLANATORY STATEMENT

Select Legislative Instrument 2011 No. 144

(Issued by the authority of the Minister for Tertiary Education, Skills, Jobs and Workplace Relations)

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2011 (No. 1)

Section 4 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (T&C Act) provides that the Governor-General may make regulations prescribing matters either required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the T&C Act.

Item 43 of Schedule 3 to the T&C Act permits regulations to be made prescribing certain work value, pay equity or equal remuneration orders of state industrial tribunals as transitional pay equity orders, and prescribing the employers to whom those transitional pay equity orders will apply.

Subitem 8(1) of Schedule 2 to the T&C Act enables regulations to modify the transitional Schedules to that Act.

These Regulations amend the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (the Principal Regulations) to require a number of employers in the Queensland social and community services (SACS) sector to pay relevant employees in Queensland in accordance with a pay equity decision of the Queensland Industrial Relations Commission (QIRC), entitled *Queensland Services, Industrial Union of Employees AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others* (A/2008/5), made by the QIRC on 6 May 2009 (the QIRC decision).

The QIRC decision increased pay rates for Queensland SACS employees. The decision applied to SACS employers in the Queensland industrial relations system (employers not covered at that time by the federal workplace relations system) and their employees. Following the QIRC decision, the Queensland Government committed an additional \$414 million over four years to a range of employers across the Queensland SACS sector.

With effect from 1 January 2010 the Queensland Parliament referred to the Commonwealth power to extend the *Fair Work Act 2009* (the Fair Work Act) to all private sector employers and their employees otherwise outside its scope. This reference (as well as referrals from other States) is given effect by Division 2B of Part 1-3 of the Fair Work Act.

On 1 January 2010 Queensland SACS employers and their employees to whom the QIRC decision applied became covered by the Fair Work Act as a result of Queensland's reference. The effect of the QIRC decision for these employers and employees was preserved by item 30A of Schedule 3A to the T&C Act, which provides that employers who were subject to the QIRC decision prior to Queensland's reference must continue to pay affected

employees no less than the relevant base rate of pay that would be payable under the QIRC decision.

At the time of the QIRC decision, a number of Queensland SACS employers (who also received supplementary funding from the Queensland Government) were respondents to federal transitional awards made in reliance on the conciliation and arbitration power of the Constitution (the *Social and Community Services (Queensland) Award 2001* and the *Crisis Assistance Supported Housing (Queensland) Award 1999*). These employers would have been subject to the QIRC decision from 27 March 2011 (when transitional awards expired) had Queensland not referred workplace relations matters to the Commonwealth.

In October 2009 the Australian Government signed a Heads of Agreement with the Australian Services Union (ASU). Paragraph 13 of the Heads of Agreement committed the Commonwealth to extend obligations under the QIRC decision to these employers. This was also requested by the Queensland Government.

Item 43 of Schedule 3 to the T&C Act provided a framework to do this. Under item 43:

- a transitional pay equity order is taken to have been made by Fair Work Australia (FWA) on 1 January 2010 and applies to employers prescribed by the regulations (subitems 43(1) and (2));
- employers can be prescribed by the regulations if a source pay equity order would have applied to the employer but for a federal transitional award (subitem 43(3)), and a source pay equity order can be prescribed by the regulations if (among other things) it was made before 15 September 2009 (subitem 43(4));
- an employer to whom the transitional pay equity order applies must pay affected employees (those who perform work for which the source pay equity order determines a base rate of pay) no less than the base rate of pay in a source pay equity order (subitems 43(5) and (6)); and
- a modern award is of no effect to the extent that it specifies a lower base rate of pay than the source pay equity order (subitem 43(8)).

These Regulations prescribe 316 Queensland SACS sector employers, and prescribe the QIRC decision as the source pay equity order, for the purposes of paragraphs 43(2)(b) and 43(4)(d) of Schedule 3 to the T&C Act.

The effect of the Regulations, in the context of item 43 of Schedule 3 to the T&C Act, is that prescribed employers are required, from 1 October 2011, to pay affected employees no less than the relevant base rate of pay that would be payable under the QIRC decision. In the case of affected employees who were employed between 1 January 2010 and the commencement of the Regulations, prescribed employers are required to pay the difference between the ordinary pay actually received by these employees during this period, and the amount that would have been payable under the QIRC decision (the back pay amount). The back pay amount would be payable in annual instalments.

These regulations also make minor technical amendments to the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (the Principal Regulations).

Referring States and the Territories were consulted about the Regulations in accordance with the *Inter-Governmental Agreement for a National Workplace Relations System for the*

Private Sector. The ASU was also consulted. The list of employers prescribed in Schedule 1 to the Principal Regulations was provided to the Commonwealth by the Queensland Government.

Details of the Regulations are included in the Attachment.

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

The Regulations commence on 1 October 2011.

ATTACHMENT

Details of the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2011 (No. 1)*

Regulation 1 – Name of Regulations

This regulation sets out the name of the Regulations as the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2011 (No. 1)*.

Regulation 2 – Commencement

This regulation provides that the Regulations commence on 1 October 2011.

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

This regulation provides that Schedule 1 to the Regulations amends the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (the Principal Regulations).

Schedule 1 – Amendments

Item [1] – After regulation 3.03

This item inserts new regulations 3.03A, 3.03B and 3.03C into the Principal Regulations after regulation 3.03.

New regulation 3.03A – Prescribed employers

Regulation 3.03A prescribes the employers specified in Part 1 of Schedule 1 to the Principal Regulations for the purpose of paragraph 43(2)(b) of Schedule 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (T&C Act).

In the context of item 43 of Schedule 3 to the T&C Act, the effect of this regulation (together with regulation 3.03B, explained below) is that prescribed employers are required to pay affected employees no less than the rates of pay set out in the QIRC decision.

Under subitem 43(1) of Schedule 3 to the T&C Act, a transitional pay equity order is taken to have been made by FWA on the Division 2B referral commencement (that is, 1 January 2010).

A transitional pay equity order only applies to an employer that is prescribed by the Principal Regulations, to whom a transitional award applied before 1 January 2010 and to whom a modern award applies on or after 1 January 2010 (subitem 43(2) of Schedule 3).

An employer to whom a transitional pay equity order applies is required to pay affected employees a periodic base rate of pay that is not less than the rate set out in a source pay equity order (subitem 43(5) of Schedule 3). For the purpose of item 43 of Schedule 3 to the T&C Act, an affected employee is an employee who performs work of a kind and at a

classification level for which the source pay equity order determines a base rate of pay (subitem 43(5) of Schedule 3). Under subitem 43(8) of Schedule 3 to the T&C Act, a modern award is of no effect (in relation to prescribed employers) to the extent that it specifies a lower base rate of pay than the source pay equity order.

The prescribed employers are Queensland SACS sector employers that were bound by one of the following federal transitional awards immediately before 1 January 2010:

- the *Social and Community Services (Queensland) Award 2001*; or
- the *Crisis Assistance Supported Housing (Queensland) Award 1999*

These transitional awards were made under the *Workplace Relations Act 1996* (WR Act) in reliance on the Commonwealth's power to make laws for the prevention and settlement of interstate industrial disputes by conciliation and arbitration under s 51 (xxxv) of the Constitution. These instruments were given effect until 27 March 2011 by Schedule 6 to the WR Act (following amendments to that Act in 2006). Schedule 20 to the T&C Act continued the operation of these instruments following the repeal of the WR Act in 2009.

In the absence of the Queensland Parliament's referral of workplace relations matters to the Commonwealth, these employers would have become covered by the *Queensland Community Services and Crisis Assistance Award – State 2008* from 27 March 2011. The Queensland Government has advised that these employers received funding from the Queensland Government following the QIRC decision.

New regulation 3.03B – Prescribed source pay equity order

Regulation 3.03B prescribes the QIRC decision as a source pay equity order for the purpose of paragraph 43(4)(d) of Schedule 3 to the T&C Act.

Under subitems 43(3) and 43(4) of Schedule 3 to the T&C Act, an employer can be prescribed if the source pay equity order:

- would have applied to that employer but for the application of a transitional award;
- is an order, decision or determination of a State industrial body made before 15 September 2009 that provided for pay increases for classes of employees on the ground of work value, pay equity or equal remuneration; and
- is prescribed by the regulations.

New regulation 3.03C – Modification of Schedule 3 to Act – payment of back pay

Regulation 3.03C modifies Schedule 3 to the T&C Act by inserting new subitems 43(7A) and 43(7B). These provisions deal with the timing and quantum of payment of amounts due to affected employees for the period 1 January 2010 to the commencement of these Regulations.

An employer to whom a transitional pay equity order applies is required to pay affected employees a periodic base rate of pay that is not less than the periodic base rate of pay the employee would have been entitled to if the source pay equity order had applied to the employer (subitem 43(5) of Schedule 3).

New subitem 43(7A) provides that the amount payable by an employer to an affected employee for work performed relating to the period between 1 January 2010 and the commencement of regulation 3.03C is payable in accordance with the table of payments in Part 2 of Schedule 1 to the Principal Regulations.

An affected employee (within the meaning of subitem 43(6) of Schedule 3 to the T&C Act) who was employed by a prescribed employer between 1 January 2010 and the commencement of regulation 3.03C is entitled to be paid the difference (if any) between the employee's actual ordinary pay and the relevant base rate of pay that would have been payable if the QIRC decision applied. This 'back pay' amount is payable in accordance with the percentage amounts and dates set out in the table in Part 2 of Schedule 1 to the Principal Regulations.

A person who was an affected employee for only part of the period between 1 January 2010 and the commencement of the Regulations is only entitled to payment under item 43 of Schedule 3 to the Act in relation to that part of the period.

Under new subitem 43(7B):

- if a person is an affected employee of a prescribed employer on 1 January 2010 or becomes an affected employee between 1 January 2010 and the commencement of subitem 43(7B), and
- the person ceases to be employed by that employer at any time before 1 October 2014 (which is the end of the instalment period set by Part 2 of Schedule 1 to the Principal Regulations)

then the employee is entitled to payment of the full amount payable to them on the later of the date the employment ceases, and the date that new subitem 43(7B) of Schedule 3 to the T&C Act commences.

Item [2] – After Part 4

This item inserts new Part 4A including new regulation 4A.01 into the Principal Regulations.

New regulation 4A.01 – Modification of item 7A of Schedule 16 to Act – prescribed employers

Regulation 4A.01 modifies the T&C Act by inserting a note to subitem 7A(1) of Schedule 16 to the T&C Act.

Subitem 7A(1) of Schedule 16 to the T&C Act provides that a person must not contravene a term of a transitional pay equity order that applies to the person.

The existing note to subitem 7A(1) refers to item 16 of Schedule 16 and Part 4-1 of the *Fair Work Act 2009*. Item 48A of the table in item 16 of Schedule 16 to the T&C Act lists subitem 7A(1) as a civil remedy provision.

Regulation 4A.01 adds note 2, which refers to the fact that subitem 7A(1) of Schedule 16 to the T&C Act applies to an employer only from the date on which the employer is prescribed for paragraph 43(2)(b) of Schedule 3 to the T&C Act. This in turn reflects the fact that the

transitional pay equity order applies to prescribed employers from the date these Regulations commence.

Although a prescribed employer is required to pay relevant affected employees the difference between their actual ordinary pay and the base rate of pay under the QIRC decision from 1 January 2010, all payment obligations arise after the date on which an employer is prescribed. 'Back pay' amounts are payable in accordance with the table of payments in Part 2 of Schedule 1 to the Principal Regulations.

Item [3] – Regulation 5.12

This item amends regulation 5.12 of the Principal Regulations by omitting the words 'Schedule 1' and inserting 'Schedule 2'.

This item is a technical amendment consequential to item 4. The item is necessary to reflect the renumbering of current Schedule 1 to the Principal Regulations so that the Schedules to the Principal Regulations follow the order in which they are mentioned in the Act.

Item [4] – Schedule 1

This item omits the current Schedule 1 to the Principal Regulations and replaces it with new Schedule 1 and renumber it as Schedule 2.

New Schedule 1 – Prescribed employers and payment of back pay

Part 1- Prescribed employers

Part 1 of Schedule 1 lists the employers prescribed by regulation 3.03A. This list of employers was provided to the Commonwealth by the Queensland Government.

Part 2 – Table of payments

Part 2 of Schedule 1 sets out the timing and quantum of instalments due to affected employees for the period 1 January 2010 to the commencement of these regulations (see the explanation of new regulation 3.03C above).

Renumbered Schedule 2 – Modification of Act – redundancy or redeployment

Renumbered Schedule 2 was inserted as Schedule 1 into the Principal Regulations by the *Fair Work Legislation Amendment Regulations 2009 (No 1)* (SLI 2009 No. 337). It made a technical amendment to the Act to clarify that an entitlement to a retention or redeployment period counts as 'an entitlement to redundancy pay' for the purposes of sub-item 5(4) of Schedule 4 to the Act.