

EXPLANATORY STATEMENT

Select Legislative Instrument 2011 No. 245

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

Fair Work (Registered Organisations) Act 2009

Fair Work (Registered Organisations) Amendment Regulations 2011 (No. 1)

As part of the move to a national workplace relations system, the *Fair Work (Registered Organisations) Act 2009* (the Act) provides for the transition of certain membership coverage from state associations to federal counterpart organisations. The Act also provides for the transitional recognition of state associations and for the ongoing recognition of state associations with no federal counterpart in situations where the state law under which the association is registered has been prescribed.

Subsection 359(1) of the Act provides that the Governor-General may make regulations 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.

The Regulations amend the *Fair Work (Registered Organisations) (Regulations 2009* (the Principal Regulations) to :

- prescribe federal counterparts of specified state registered associations;
- provide a process for dealing with applications by federal organisations to extend their eligibility rules to pick up membership coverage of counterpart state associations; and
- address the position of state associations without a federal counterpart by prescribing specified state laws to enable their recognition in the national workplace relations system.

An overview of the Regulations is included in Attachment A and details of the Regulations are in Attachment B.

The Act does not specify any conditions that need to be satisfied before the power to make Regulations may be exercised.

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

The Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

The Australian Chamber of Commerce and Industry, The Australian Industry Group, the Australian Council of Trade Unions and state and territory government officials were consulted about the making of these Regulations.

Authority: Subsection 359(1) of the *Fair Work (Registered Organisations) Act 2009*

Overview of Fair Work (Registered Organisations) Amendment Regulations 2011 (No. 1)

Amendments made by the *Workplace Relations Amendment (Work Choices) Act 2005* meant that many state system employees and employers became covered by the federal workplace relations system. A system of transitional recognition was established to allow the state registered industrial associations that represented those employees and employers to represent them in the federal system.

The *Fair Work (Registered Organisations) Act 2009* (the Act) inserted section 158A as a mechanism to facilitate the transfer of membership coverage from state registered industrial associations to their counterpart federal organisation, as part of the move to a national workplace relations system. Section 158A allows federal organisations that are considered to be the federal counterpart of a state association to extend their membership eligibility rules to pick up broader coverage of the state association.

Under section 9A of the Act, a state registered association will have a federal counterpart if it is prescribed by the regulations (subsection 9A(1)) or, if there are no regulations, where the federal body has substantially the same eligibility rules as a state association and a history of integrated operations with the association, or where the state association has purported to function as a branch of the federal body (subsection 9A(2)).

Under subsection 158A(1) of the Act, the General Manager of Fair Work Australia (FWA) must consent to an alteration of the eligibility rules of a registered organisation to extend its rules to persons within the eligibility rules of a counterpart association of employers or employees that is registered under a state or territory industrial law, if the General Manager is satisfied:

- that the alteration has been made under the rules of the organisation;
- that the organisation is a federal counterpart of the association;
- that the alteration will not extend the eligibility rules of the organisation beyond those of the association;
- that the alteration will not apply outside the limits of the state or territory for which the association is registered; and
- as to other matters (if any) that are prescribed by *the Fair Work (Registered Organisations) Regulations 2009* (the Regulations).

Under subsection 158A(2) of the Act, such an application must not be made before 1 January 2011, or such later day as the Minister declares in writing. The *Fair Work (Registered Organisations) Declaration 2010* was made to extend this date to 1 January 2012.

Where a state association does not have a federal counterpart, Schedule 2 to Act provides that the association may apply to become a Recognised State Registered Association (RSRA) if a law of a state under which it is registered is prescribed. Becoming an RSRA would allow a state union or employer association to represent its members in the federal system. Registration and regulation of the association would continue to be dealt with by the applicable state law.

The Regulations establish a framework to allow applications to be made by federal counterpart organisations under subsection 158A(1) of the Act to extend their eligibility rules to pick up

areas of active representation of counterpart state registered associations. The Regulations also provide an additional criterion of which the General Manager must be satisfied before approving an application under subsection 158A(1) of the Act and establish a framework for objections to be lodged to such applications.

In addition, the Regulations prescribe federal counterparts of a significant number of state employee associations. Where no federal counterpart is prescribed, subsection 9A(2) of the Act operates to determine whether an association has a federal counterpart.

To address the position of those state registered associations with no federal counterpart, these Regulations prescribe certain state laws for the purposes of Schedule 2 to the Act.

The Regulations are intended to enable an orderly transition of membership coverage to federal counterpart organisations, as part of the move to a national workplace relations system. The Regulations will not impact upon the registration or operation of state associations in the relevant state jurisdictions and, where an association has transitional recognition in the federal system, will not affect that recognition. (Transitional recognition generally expires five years from 1 January 2012, unless an association voluntarily seeks cancellation of its registration before then.)

Details of the *Fair Work (Registered Organisations) Amendment Regulations 2011 (No. 1)*

Regulation 1 – Name of Regulations

This regulation provides that the Regulations are the *Fair Work (Registered Organisations) Amendment Regulations 2011 (No. 1)*.

Regulation 2 – Commencement

This regulation provides that the Regulations commence on the day after they are registered.

Regulation 3 – Amendment of *Fair Work (Registered Organisations) Regulations 2009*

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

Schedule 1 – Amendments

Item [1] – After regulation 8

This item inserts new regulation 8A into the Principal Regulations.

New regulation 8A, together with new Schedule 1A (see Item 3), prescribes each organisation listed in column 3 of the Schedule as the federal counterpart of the state registered association of employees or employers listed against that organisation in column 2 of the Schedule, for the purposes of subsection 9A(1) of the Act.

A note to new regulation 8A reminds readers that where no federal counterpart is prescribed, subsection 9A(2) of the Act operates to determine whether an association has a federal counterpart.

New subregulation 8A(2) makes clear that an item in Schedule 1A is not be invalid merely because:

- the name of a prescribed association or organisation changes, in circumstances where that name change is not also associated with a change in the organisation or association's eligibility rules or coverage; or
- there is an error or misdescription in the name of an organisation or association.

Item [2] – After regulation 125

This item inserts new regulations 125A-125H into the Principal Regulations.

New regulation 125A – Matter prescribed for alteration of eligibility rules (s158A)

New regulation 125A adds an additional criterion of which the General Manager of FWA must be satisfied before he or she consents to an alteration of the eligibility rules of a registered organisation under section 158A of the Act.

New regulation 125A requires that the General Manager be satisfied that the relevant state registered association actively represents the class or classes of employees or employers to which the extension of eligibility rules would apply.

The regulation sets out the circumstances in which an association is to be considered to actively represent a class or classes of employees or employers (respectively).

In the case of an association of employers, subregulation 125A(2) provides that active representation is demonstrated only if:

- the association is engaged in one or more of the following:
 - recruitment activity;
 - representing employers in negotiations with employees;
 - representing employers in industrial bodies; and
- the class of employers is covered by the association's eligibility rules.

In the case of an association of employees, subregulation 125A(3) provides that active representation is demonstrated only if:

- the association is engaged in one or more of the following:
 - organising and recruitment activity;
 - representing employees in negotiations with employers;
 - representing employees in industrial bodies;
 - obtaining and maintaining award conditions;
 - collective bargaining; and
- the class of employees is covered by the association's eligibility rules.

However, in the case of an association of employees, subregulation 125A(4) provides that even if it meets the requirement in subregulation (3), an employee association is taken to not actively represent a class of employees where a representation or demarcation order or agreement (however described) exists granting representation rights to another association or organisation. This is designed to limit the likelihood of demarcation disputes arising as a result of a change to eligibility rules under section 158A of the Act.

When considering an application under section 158A of the Act, the General Manager must only consider the criteria mentioned in section 158A and the matter prescribed under new regulation 125A. The considerations contained in section 158 of the Act are not relevant to section 158A applications.

New regulation 125B – Manner of application to alter eligibility rules (s158A)

New regulation 125B establishes the procedural framework for how applications under section 158A of the Act are to be lodged and processed, including:

- the form of applications;

- identifying the matters that must be addressed in an application and the accompanying declaration;
- the manner in which an alteration may be presented in an application;
- the ability of the General Manager to advise if an application is defective, and seek further information relating to the application; and
- requirements for publishing that an application has been lodged.

New regulation 125C – Notice of application to alter eligibility rules (s158A)

Once an application has been lodged under section 158A of the Act, new regulation 125C requires the General Manager to publish a notice in the *Gazette* stating that an application has been received.

New regulation 125D – Withdrawal of application to alter eligibility rules (s158A)

New regulation 125D provides for the manner in which an applicant organisation may withdraw its section 158A application prior to the application being determined.

New regulation 125E – Notice of withdrawal of application to alter eligibility rules (s158A)

If a notice of withdrawal of an application is lodged under new regulation 125D, new regulation 125E requires the General Manager to publish a notice in the *Gazette* stating that the application has been withdrawn.

New regulation 125F – Objection to application to alter eligibility rules (s158A)

New regulation 125F establishes the procedural framework for how objections to applications made under section 158A of the Act are to be lodged and processed including:

- the grounds for objection;
- who has standing to lodge an objection;
- the time frames for lodging an objection;
- the ability to amend an objection in certain circumstances; and
- requirements for the service of and responses to objections;

Specifically, new subregulation 125F(1) provides that an objection may be lodged only on the grounds contained in paragraphs 158A(1)(a) to (d) of the Act and regulation 125A; namely:

- that the alteration has been made under the rules of the organisation;
- that the organisation is the federal counterpart of the association;
- that the alteration will not extend the eligibility rules of the organisation beyond those of the association;
- that the alteration will not apply outside the limits of the state or territory for which the association is registered; and
- that the association actively represents the class or classes of employers or employees to which the extension of eligibility rules will apply.

Objections may be lodged by:

- where an application is made by an employer organisation, a national peak council of employers;
- where an application is made by an employee organisation, the Australian Council of Trade Unions.

New subregulation 125F(2) provides for an objecting party to lodge an objection to an application made under section 158A of the Act within 28 days of the General Manager

publishing a notice of the application under new regulation 125C. This new subregulation requires the notice of objection to be made in accordance with regulation 14 of the Principal Regulations. New subregulation 125F(4) requires the objecting party to serve a copy of this notice on the organisation who lodge the application under section 158A of the Act within 7 days of lodging the notice with FWA.

New subregulation 125F(3) provides that an objecting party may amend its notice of objection where the organisation who has made an application under section 158A of the Act amends its application, and the General Manager is satisfied that the amended application gives rise to further grounds for objection.

New subregulations 125F(5) and (6) provide that the applicant organisation may lodge a written statement in answer to an objection notice that has been served on it under subregulation 125F(4). If a written statement is lodged, it must be signed by an authorised officer and lodged within 14 days of the organisation being served with the objection notice. A copy of the statement must also be served upon the objecting party within 7 days of it being lodged with FWA.

This new regulation does not affect the ability of a person who is aggrieved by a decision of the General Manager to seek FWA's permission to appeal the decision under section 604 of the *Fair Work Act 2009*.

New regulation 125G – Hearing about application to alter eligibility rules (s158A)

New regulation 125G provides for how the General Manager is to deal with an application made under section 158A of the Act where an objection to the application is lodged.

Where the General Manager is able to deal with the application on the basis of the material already before him or her, it is open for the General Manager to decide 'on the papers' without it being necessary to seek any further information or hold a hearing. Where the General Manager considers it necessary, the regulation provides that he or she may seek further information from the applicant and/or the objecting party to allow the General Manager to deal appropriately with the application.

New regulation 125G provides that the General Manager should only hold a hearing about the application in circumstances where the General Manager considers it appropriate to do so, taking into account the views of the applicant organisation and objecting party as well as whether a hearing would be the most effective and efficient way to resolve the objection. This restriction is consistent with the intention that an application under section 158A of the Act be dealt with on a largely administrative basis wherever possible.

New regulation 125H – Correction of eligibility rules – typographical, clerical or formal error

New regulation 125H enables the General Manager, with the consent of the organisation, to correct a typographical, clerical or formal error that appears in the eligibility rules of the organisation. Where the General Manager makes a correction, he or she must record the correction and the date from which it will take effect in the register required to be kept by FWA under paragraph 13(1)(a) of the Act. The General Manager must also amend the organisation's certificate of registration as soon as practicable after the organisation produces it.

Item [3] – Before Schedule 1

This item inserts new Schedule 1A.

New Schedule 1A lists federal counterparts for 177 specified state employee associations.

Item [4] – After Schedule 1

This item inserts new Schedule 1AA.

New Schedule 1AA lists the four state laws that are prescribed for the purposes of Schedule 2 to the Act. Schedule 2 to the Act provides for the ongoing federal recognition of state registered associations that do not have a federal counterpart and are registered under one of the prescribed laws.