

EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 321

Subject - *Fair Work Act 2009*
Fair Work (Registered Organisations) Act 2009
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009
Occupational Health and Safety (Maritime Industry) Act 1993

Fair Work Legislation Amendment Regulation 2012 (No. 1)

Section 796 of the *Fair Work Act 2009* (the FW Act), section 359 of the *Fair Work (Registered Organisations) Act 2009*, and section 121 of the *Occupational Health and Safety (Maritime Industry) Act 1993* provide, in part, that the Governor-General may make regulations prescribing matters required or permitted by these Acts, or necessary or convenient for carrying out or giving effect to these Acts.

Section 469 of the FW Act provides, in part, that the regulations may provide for the procedures to be followed for a protected action ballot and the form and content of the ballot paper. Section 455(1)(b) of the FW Act provides that a ballot paper for the protected action ballot must include any information prescribed by the regulations. A protected action ballot is a vote by employees, conducted under Part 3-3 of the FW Act. It is one of the requirements that must be satisfied to authorise protected industrial action.

Item 32 of Schedule 3 of the FW Act provides that the Governor-General may make regulations of an application, transitional or saving nature relating to the amendments and repeals made by the *Fair Work Amendment Act 2012* (the FW Amendment Act).

Item 7 of Schedule 2 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* provides, in part, that the Governor-General may make regulations of a transitional, application or saving nature in relation to the transition from the regime provided for by the *Workplace Relations Act 1996* (WR Act) to the regime provided for by the FW Act.

The *Fair Work Legislation Amendment Regulation 2012 (No. 1)* (the Regulation) amends the *Fair Work Regulations 2009* to:

- Reflect amendments made by the FW Amendment Act to allow electronic voting for protected action ballots;
- Require the President of the Fair Work Commission to provide the Minister and Fair Work Ombudsman with information about the number of orders for costs made against a party in an unfair dismissal matter, and the number of applications dismissed under new provisions included in the FW Act by the FW Amendment Act. The President is currently required to provide quarterly information under the Fair Work Regulations. This Regulation complements these requirements and will provide useful data for monitoring the new sections included by the FW Amendment Act;
- Preserve the judicial status of a former Presidential Member of the Australian Industrial Relation Commission (AIRC), if the Member is appointed to one of the new Vice President positions created by the FW Amendment Act. This will ensure members who were Presidential Members of the AIRC continue to accrue

entitlements under the *Judges Pension Act 1968* and the *Judges (Long Leave Payments) Act 1979*. These entitlements do not attach to the two new Vice President positions created by the FW Amendment Act; and

- Reflect the name change of ‘Fair Work Australia’ to the ‘Fair Work Commission’.

The Regulations also make consequential amendments to the *Fair Work (Registered Organisations) Regulations 2009*, the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* and the *Occupational Health and Safety (Maritime Industry) Regulations 1995*, to reflect the change of the name of ‘Fair Work Australia’ to the ‘Fair Work Commission’

A detailed description of the Regulation is included in the [Attachment](#).

In accordance with the requirements of the *Multilateral Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector*, referring states and the territories were consulted on the Regulation. Members of the National Workplace Relations Consultative Committee were also provided with an opportunity to provide comments on the draft Regulations.

The Australian Electoral Commission was consulted on the amendments relating to protected action ballots.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Office of Best Practice Regulation advised that a Regulation Impact Statement was not required.

The Regulation commences at the same time as Schedules 3 to 8 of the FW Amendment Act which is a day to be fixed by Proclamation.

<u>Authority:</u>	Section 796 and item 32 of Schedule 3 to the <i>Fair Work Act 2009</i>
	Section 359 of the <i>Fair Work (Registered Organisations Act 2009)</i>
	Item 7 of Schedule 2 to the <i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i>
	Section 121 of the <i>Occupational Health and Safety (Maritime Industry) Act 1993</i>

ATTACHMENT**Details of the *Fair Work Legislation Amendment Regulation 2012 (No. 1)***

Section 1 – Name of Regulation

This is a formal provision specifying the title of the regulation as the *Fair Work Legislation Amendment Regulation 2012 (No. 1)*.

Section 2 – Commencement

This Regulation commences at the same time as Schedules 3-8 of the *Fair Work Amendment Act 2012* (FW Amendment Act).

Sections 3-6

These sections set out the Regulations that are amended by the Schedules.

SCHEDULE 1 – *Fair Work Regulations 2009*

Part 1 of Schedule 1 amends the *Fair Work Regulations 2009* to:

- Reflect amendments made by the FW Amendment Act to allow electronic voting for protected action ballots;
- Require the President of the Fair Work Commission to provide information about the number of costs orders made against parties to an unfair dismissal matter and the number of applications dismissed under new sections included in the FW Act by the FW Amendment Act;
- Preserve the judicial status of a former Presidential Member of the Australian Industrial Relation Commission (AIRC), if the Member is appointed to one of the new Vice President positions created by the FW Amendment Act. This will ensure that the Member continues to receive the judicial pension, and entitlements under the *Judges (Long Leave Payments) Act 1979* if they accept the appointment. These entitlements will not otherwise attach to the new Vice President positions.

Part 2 of Schedule 1 amends the *Fair Work Regulations 2009* to reflect the change of name of 'Fair Work Australia' to the 'Fair Work Commission'.

PART 1 - Amendments relating to changes made by *Fair Work Amendment Act 2012* (other than change of name of Fair Work Australia)**Item [1] – Regulation 3.16**

Regulation 3.16 provides that the form of a ballot paper for a protected action ballot must be as set out in Form 1 of Schedule 3.2. This item amends regulation 3.16 to require that the form of a protected action ballot paper for a protected action ballot that is to be conducted by attendance voting or postal voting is set out in Form 1 of Schedule 3.2.

This item also amends regulation 3.16 to require that the form of a protected action ballot paper for a ballot that is to be conducted by electronic ballot must include the information and the content set out in Form 1 of Schedule 3.2.

This item inserts a new regulation 3.16A that provides that where a protected action ballot is conducted by electronic voting, the protected action ballot agent must ensure the following:

- only employees on the roll of voters are provided with access to the electronic voting system;
- each employee can only vote once in that ballot;
- there is a record of who has voted;
- there is no way to identify how an employee has voted; and
- the number of votes cast for and against each proposition is the same as the total votes cast.

Item [2] – Subregulation 3.18(2)

Subregulation 3.18(2) currently provides that a protected action ballot agent for the ballot must issue to each employee who is to be balloted a ballot paper that bears the agent's initials or a facsimile of the agent's initials. This item amends subregulation 3.18(2) to provide that for attendance voting and postal voting the protected action ballot agent for the ballot must issue to each employee who is to be balloted a ballot paper that bears the agent's initials or a facsimile of the agent's initials.

Paragraph 3.18(2)(b) provides that for electronic voting, the protected action ballot agent must ensure that the protected action ballot identifies the protected action ballot agent who is authorised to conduct the ballot.

This item inserts a new subregulation 3.18(2A). The proposed subregulation will clarify that a ballot paper may be issued to an employee by post, email or electronically.

Item [3] – After subregulation 3.18(4)

This item requires protected action ballot agents conducting protected action ballots to issue as soon as practicable to each employee who is to be balloted:

- instructions that allow the employee to access the electronic voting program including a unique identifier;
- information about the closing date and time for the ballot, by which the employees' vote must be received by the ballot agent; and
- any other material that the protected action ballot agent considers relevant to the ballot.

A note to subregulation 3.18(4A) clarifies that the examples of a unique identifier include a username and password or a username and personal identification number that allows the employee to access the relevant electronic voting program.

Item [4] – After subregulation 3.18(7)

Subregulations 3.18(5)-(7) set out how an employee who is to be balloted by postal voting can request a replacement ballot paper. Subregulation 3.18(8) sets out how an employee who is to be balloted by attendance voting can receive a replacement ballot paper.

This item inserts three new subregulations, 3.18(7A), 3.18(7B) and 3.18(7C), that set out how an employee who is to be balloted by electronic voting could receive replacement information about how to access electronic voting.

Subregulation 3.18(7A) provides that an employee may ask the protected action ballot agent to replace the information provided under subregulation 3.18(4A) above if the employee did not receive information about how to access the electronic voting system; or the information provided under subregulation 3.18(4A) has been lost or destroyed; or the unique identifier provided under subregulation 3.18(4A) did not allow the employee to access the electronic voting system.

Subregulation 3.18(7B) provides that a request made under subregulation 3.18(7A) must be made on or before the closing day for the ballot, include the reason for the request, be accompanied by any information that verifies or tends to verify the reason for the request and include a declaration by the employee that they have not voted in the ballot.

Subregulation 3.18(7C) provides that the protected action ballot agent must give an employee replacement information if the protected action ballot agent is satisfied that the reason for the request is a reason mentioned in subregulation (7A), the request is in accordance with the requirements mentioned in subregulation (7B) and the employee has not voted in the ballot.

Item [5] – Subregulation 3.18(8), heading

This item amends the heading of subregulation 3.18(8) ‘Replacement ballot paper – other voting’ to clarify that the subregulation operates only in respect of attendance voting.

Item [6] – Paragraph 3.18(8)(a)

This item clarifies that subregulation 3.18(8) applies where an employee is to be balloted by attendance voting.

Item [7] – Paragraph 3.18(8)(b)

This item replaces ‘ballot box’ with ‘repository that serves to receive or hold ballot papers’ to provide consistency with the amended definition in Schedule 7, Part 1 item 12 of the FW Amendment Act.

Item [8] – Paragraph 3.19(4)(a)

This item clarifies that a ballot paper is informal if it does not bear the initials of the protected action ballot agent or a facsimile of the protected action ballot agent’s initials in the case of attendance voting or postal voting but not electronic voting.

Item [9] – Paragraph 3.19(6)(b)

Regulation 3.19 deals with the scrutiny of ballots. Paragraph 3.19(6)(b) provides that a protected action ballot agent must endorse a decision as to whether a ballot paper is formal or informal on the ballot paper and initial the endorsement. This item amends paragraph 3.19(6)(b) to clarify that it refers to an attendance or postal vote, not an electronic vote.

Item [10] – Subregulation 3.19(8)

Subregulation 3.19(8) is entitled ‘Replacement ballot paper – other voting’. This item amends the heading to subregulation 3.19(8) to include by postal voting or by electronic voting.

Item [11] – Paragraph 3.20(6)(a)

Subregulation 3.20(6) deals with functions of scrutineers. Paragraph 3.20(6)(a) provides that if the ballot is conducted by postal vote, the scrutineer may be present after the protected action ballot agent has acted to remove evidence of an employee’s identity. Item 11 amends paragraph 3.20(6)(a) to also apply to electronic voting, allowing the scrutineer to be present after the protected action ballot agent has acted under subregulation 3.19(8) to remove evidence of an employee’s identity.

Item 11 amends subregulation 3.20(6)(a) to correctly refer to subregulation 3.19(8)

Item [12] – Paragraph 3.20(6)(b)

This item amends paragraph 3.20(6)(b) to include electronic voting.

Item [13] – After subregulation 5.01A

This item inserts a new regulation 5.01B to preserve the judicial status of a former Presidential Member of the Australian Industrial Relations Commission (AIRC), if the member is appointed to one of the new Vice President positions created by the FW Amendment Act.

Fair Work Australia (FWA) was established in 2009 and replaced the AIRC. All members of the AIRC were appointed to FWA, and the terms and conditions that attached to their appointment to the AIRC were preserved by items 1 and 2 of Schedule 18 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

Members of the AIRC who were taken to be appointed to FWA upon its establishment, continue to receive the salary that was payable to them under sections 79 and 81 of the *Workplace Relations Act 1996* (WR Act).

Members who were Presidential Members of the AIRC also have the same status as a Judge of the Federal Court (by virtue of section 63(2) of the WR Act), and continue to accrue entitlements under the *Judges Pension Act 1968* and the *Judges (Long Leave Payments) Act 1979*. These entitlements do not attach to the two new Vice President positions created by the FW Amendment Act.

The amendment will preserve a member’s entitlement to these arrangements if they accepted an appointment to one of the new Vice President positions of the Fair Work Commission (FWC).

If the salary payable to the member under WR Act immediately prior to the appointment was more than the salary determined for the position by the Remuneration Tribunal under

section 637 of the FW Act, the member will also be entitled to continue to receive the same salary as they were entitled to under the WR Act; meaning that they will not receive a reduction in salary.

As the *Judges (Long Leave Payments) Act 1979* will apply to the member, section 639 of the FW Act will not apply, and the member will not be entitled to the recreational leave entitlements determined by the Remuneration Tribunal.

Item [14] - Schedule 5.2, Part 1, table, after item 10.2 after paragraph (c)

Item 14 will insert a new paragraph in item 10.2 of Part 1 of the table in Schedule 5.2, and requires the President to provide information to the Minister about the number of applications dismissed under section 399A of the FW Act. Section 399A is a new provision included in the FW Act by the FW Amendment Act, and permits the FWC to dismiss unfair dismissal applications where it is satisfied that an applicant has unreasonably failed to attend an FWC conference or hearing, comply with an FWC order, or discontinue an application after a settlement agreement has been concluded.

Item [15] - Schedule 5.2, Part 1, table, after item 10.4

Item 15 inserts a new item in the table in Schedule 5.2 and requires the President to provide information to the Minister about the number of costs orders made against a party to an unfair dismissal matter under section 400A of the FW Act. Section 400A is a new provision included in the FW Act by the FW Amendment Act, and permits the FWC to order costs against a party (the first party) to an unfair dismissal matter if satisfied the first party caused the other party to incur costs by an unreasonable act or omission in connection with the conduct or continuation of the matter.

Item [16] – Schedule 5.2, Part 2, table, item 2.2, after paragraph (c)

Item 16 inserts a new paragraph in item 2.2 of Part 2 of the table in Schedule 5.2, and requires the President to provide information to the Fair Work Ombudsman about the number of applications dismissed under section 399A of the FW Act. Section 399A is a new provision included in the FW Act by the FW Amendment Act, and permits the FWC to dismiss unfair dismissal applications where it is satisfied that an applicant has unreasonably failed to attend an FWC conference or hearing, comply with an FWC order, or discontinue an application after a settlement agreement has been concluded.

PART 2 - Amendments relating to the change of name of Fair Work Australia to the Fair Work Commission

Items 17 to 26 of this Part make consequential amendments to the *Fair Work Regulations 2009* to reflect the renaming of 'Fair Work Australia' to the 'Fair Work Commission'.

SCHEDULES 2, 3 and 4

These Schedules make consequential amendments to reflect the change of name of 'Fair Work Australia' to the 'Fair Work Commission'.

- Schedule 2 amends the *Fair Work (Registered Organisations) Regulations 2009*
- Schedule 3 amends the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*
- Schedule 4 amends the *Occupational Health and Safety (Maritime Industry) Regulations 1995*

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Fair Work Legislation Amendment Regulation 2012 (No. 1)

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Fair Work Legislation Amendment Regulation 2012 (No. 1)* (the Regulation) amends the *Fair Work Regulations 2009* to:

- Reflect amendments made by the FW Amendment Act to allow electronic voting for protected action ballots.
- Require the President of the Fair Work Commission to provide the Minister with information about the number of costs orders made against a party in an unfair dismissal matter, and the number of applications dismissed.
- Preserve the judicial status of a former Presidential Member of the Australian Industrial Relation Commission (AIRC), if the Member is appointed to one of the new Vice President positions created by the FW Amendment Act. This will ensure that the Member continues to receive the judicial pension, and entitlements under the *Judges (Long Leave Payments) Act 1979* if they accept the appointment. These entitlements will not otherwise attach to the new Vice President positions.
- Reflect the name change of 'Fair Work Australia' to the 'Fair Work Commission'.

The Regulation also makes consequential amendments to the *Fair Work (Registered Organisations) Regulations 2009*, the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* and the *Occupational Health and Safety (Maritime Industry Regulations 1995*, to reflect the change of the name of 'Fair Work Australia' to 'Fair Work Commission'.

Human rights implications

This legislative instrument engages rights to freedom of association (etc) under Article 8(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 22 of the International Covenant on Civil and Political Rights (ICCPR). The proposed amendments ensure that protected action ballots are conducted efficiently and do not unnecessarily delay an employees' right to engage in protected industrial action. The instrument also enhances the ability of employees to participate in a protected action ballot process.

The regulation to preserve the judicial status of a former Presidential Member of the AIRC promotes the right to work in articles 6 and 7 of the ICESCR by removing a disincentive for a person to apply for one of the new Vice President positions in the Fair Work Commission. The instrument ensures that a person will not be disadvantaged (and lose their entitlement to the judicial pension or long leave arrangements) if they accept the appointment.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

William Richard Shorten, Minister for Employment and Workplace Relations