

EXPLANATORY STATEMENT

Select Legislative Instrument No. 263, 2013

(Issued by the authority of the Minister for Employment)

Fair Work Act 2009

Fair Work Amendment (Anti-Bullying) Regulation 2013

Section 796 of the *Fair Work Act 2009* (the Act) provides, in part, that the Governor-General may make regulations prescribing matters required or permitted by the Act, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Schedule 3 of the *Fair Work Amendment Act 2013* amended the Act to include a new Part 6-4B. This part enables a worker who is bullied at work to apply to the Fair Work Commission (FWC) for an order to stop the bullying. Part 6-4B commences on 1 January 2014.

New subsection 789FC(1) of the Act will allow a worker who reasonably believes that they have been bullied at work to apply to the FWC for an order under section 789FF to stop the bullying. If the FWC is satisfied that the worker has been bullied, and there is a risk that the worker will continue to be bullied, it may make an order to prevent the worker from being bullied at work. Subsection 789FC(3) provides that such an application to the FWC must be accompanied by any fee prescribed by the regulations.

Subsection 789FC(4) provides that the regulations may prescribe a fee for making an application to the FWC under this section, a method for indexing the fee and the circumstances in which all or part of the fee may be waived or refunded.

The *Fair Work (Anti-Bullying) Regulation 2013* (the Regulation) inserts a new Part 6-4B into the Principal Regulations to prescribe a fee for applications made under subsection 789FC(1) of the Act. Subregulation 6.07A(2) provides that the fee would be \$65.50 for applications made on or after 1 January 2014, but before 1 July 2014. This fee is identical to the other application fees provided for by the Principal Regulations (see regulations 3.02, 3.03, 3.07 and 6.05). The method for indexing the fee annually is set out in subregulations 6.07A(3) – (6) and is similar to the indexation method that is applied to the other fees set out in the Principal Regulations. Like other FWC application fees, this application fee would be indexed with respect to applications made from the start of each financial year.

Subregulation 6.07A(7) provides that if FWC is satisfied that the person making an application will suffer serious hardship if the person is required to pay the fee, no fee is payable for making the application. This is identical to comparable regulations in the Principal Regulations.

Subregulation 6.07A(8) sets out the circumstances in which the application fee can be refunded. The fee can be refunded where the application is subsequently discontinued in accordance with section 588 and the application has not yet been listed for conducting a

conference or hearing. This is broadly similar to the comparable regulations in the Principal Regulation except that those regulations also provide for the refund of fees where the matter is discontinued at least two days before the date on it has been listed for a conference. It would not be appropriate to provide for refunds in this situation in the anti-bullying jurisdiction as these matters will result in a comparably greater pre-hearing workload for the FWC. By this stage of an anti-bullying matter, it is envisaged that the FWC would have already completed significant pre-hearing work.

Details of the Regulation are provided at Attachment A.

A Statement of Compatibility with Human Rights has been completed for the Regulation, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's assessment is that the measures in the Regulation are compatible with human rights. A copy of the Statement is at Attachment B.

The Act specifies no conditions that need to be satisfied before the power to make the Regulation may be exercised.

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

Consistent with the requirements of the *Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector*, State and Territory jurisdictions were consulted in relation to the Regulation. The FWC was also consulted.

The Office of Best Practice Regulation advised that a Regulation Impact Statement is not required (reference 15353).

The Regulation commences on 1 January 2014.

ATTACHMENT A**Details of the *Fair Work Amendment (Anti-Bullying) Regulation 2013*****Section 1 – Name of Regulation**

This section sets out the name of the regulation as the *Fair Work Amendment (Anti-Bullying) Regulation 2013*.

Section 2 – Commencement

This section provides that the regulation commences on 1 January 2014.

Section 3 – Authority

This section provides that the regulation is made under the *Fair Work Act 2009* (FW Act).

Section 4 – Amendment of *Fair Work Regulations 2009*

This section provides that Schedule 1 to the Regulation amends the *Fair Work Regulations 2009* (the Principal Regulations).

*Schedule 1 – Amendments**Fair Work Regulations 2009***Item [1] – After Part 6-4**

This item inserts a new Part 6-4B into the Principal Regulations.

Subsection 789FC(4) of the FW Act provides that the regulations may prescribe a fee for making an application to the FWC under this section, a method for indexing the fee and the circumstances in which all or part of the fee may be waived or refunded.

Subregulation 6.07A(2) prescribes a fee of \$65.50 for applications made under subsection 789FC(1) in the year starting on 1 January 2014. This fee would be indexed annually at the start of each financial year.

Subregulations 6.07A(3)-(6) sets out the method for indexing fees if an application is made in a financial year starting on 1 January 2014 or in a later year. The indexation method is identical to that of other applications to the FWC.

Subregulation 6.07A(7) provides that there is no fee payable for making an application where the applicant would suffer serious hardship if required to pay the fee.

Subregulation 6.07A(8) would provide for circumstances in which the FWC must refund a fee. The FWC must refund a fee that has been paid where the application is then discontinued in accordance with any procedural rules, provided the application has not yet been listed for a conference or hearing.

ATTACHMENT B**Statement of Compatibility with Human Rights**

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

Fair Work Amendment (Anti-Bullying) Regulation 2013

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 Amendment Act 2013* amended the *Fair Work Act 2009* to include a new Part 6-4B to enable a worker who reasonably believes that they have been bullied at work to apply to the Fair Work Commission (FWC) for an order to stop the bullying. If the FWC is satisfied that the worker has been bullied, and there is a risk that the worker will continue to be bullied, it may make an order to prevent the worker from being bullied at work. This jurisdiction will commence on 1 January 2014.

The purpose of this Legislative Instrument is to amend the *Fair Work Regulations 2009* to prescribe a fee for applications made to the FWC made under section 789FF.

The Legislative Instrument:

- prescribes a fee of \$65.50 for applications made in the year starting on 1 January 2014 until indexation on 1 July 2014;
- sets out the method for indexing fees if an application is made in a financial year starting on 1 July 2014 or in a later year;
- prescribes circumstances in which the fee may be waived; and
- prescribes circumstances in which the fee may be refunded.

Human rights implications

The imposition of a fee for applications engages the right to access to justice under Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR).

The Human Rights Committee, in General Comment 32 (*Right to equality before courts and tribunals and to a fair trial*) noted at paragraph 11 that:

The imposition of fees on the parties to proceedings that would de facto prevent their access to justice might give rise to issues under Article 14, paragraph 1 [of the ICCPR].¹

¹ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007).

It is submitted that a fee of \$65.50 is reasonable in the circumstances and is not high enough to negatively affect or prevent access to the remedies contained in the new Part 6-4B of the Fair Work Act.

Conclusion

The Legislative Instrument is compatible with human rights.

Senator The Hon. Eric Abetz

Minister for Employment