

FAIR WORK AND OTHER LEGISLATION AMENDMENT REGULATIONS 2021

EXPLANATORY STATEMENT

Issued by the authority of the Attorney-General and Minister for Industrial Relations

under subsection 796(1) of the *Fair Work Act 2009*, subsection 120(1) of the *Federal Circuit Court of Australia Act 1999* and subsection 60(1) of the *Federal Court of Australia Act 1976*

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Fair Work and Other Legislation Amendment Regulations 2021* (Amending Regulations) support recent amendments to the *Fair Work Act 2009* (the Fair Work Act) that provide for the Casual Employment Information Statement (the Statement) and extend the existing small claims jurisdiction to include certain disputes about casual conversion.

The *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (the Amending Act) made amendments to the Fair Work Act that require the Fair Work Ombudsman to prepare and publish the Statement. Employers must provide the Statement to casual employees.

The Amending Act also introduced a casual conversion entitlement into the National Employment Standards in the Fair Work Act. This entitlement requires employers (other than small business employers) to offer an eligible casual employee conversion to part-time or full-time employment after 12 months of employment, unless there are reasonable grounds not to make the offer. It also provides a right for eligible casual employees to request that their employment be converted to part-time or full-time employment in certain circumstances, which an employer may only refuse on reasonable grounds.

Section 548 of the Fair Work Act provides a process by which a person may choose to have the small claims procedure apply to certain applications for orders from a magistrates court or the Federal Circuit Court of Australia (FCCA). The small claims procedure is a more informal and lower cost alternative to a general law court matter. The Amending Act extended this existing small claims jurisdiction to include applications for an order from a magistrates court or the FCCA in connection with a dispute relating to eligibility to receive an offer of conversion, to make a request for conversion, or whether an employer has reasonable grounds to not make an offer or to refuse a request.

To have a matter dealt with as small claims proceedings, a person must indicate, in a manner prescribed by the *Fair Work Regulations 2009* (Fair Work Regulations) or by the rules of the court, that he or she wants the small claims procedure to apply to the proceedings.

Subsection 796(1) of the Fair Work Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Fair Work Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Fair Work Act.

Subsection 125A(4) of the Fair Work Act provides that the regulations may prescribe other matters relating to the content or form of the Statement, or the manner in which employers may give the Statement to employees.

The Amending Regulations amend the Fair Work Regulations to:

- specify the manner in which an employer may give an employee the Statement, aligned with the manner in which an employer may currently give an employee the Fair Work Information Statement; and
- extend the existing manner in which a person may indicate that he or she wants the small claims procedure to apply to proceedings to include the specified types of casual conversion disputes.

Subsection 120(1) of the *Federal Circuit Court of Australia Act 1999* (FCCA Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the FCCA Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the FCCA Act. Specifically, subsection 120(3) of the FCCA Act provides that regulations may make provision for fees to be paid in respect of proceedings in the FCCA.

Subsection 60(1) of the *Federal Court of Australia Act 1976* (FCA Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the FCA Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the FCA Act.

The Amending Regulations amend the *Federal Court and Circuit Court Regulation 2012* to specify a filing fee of \$245 for small claims applications relating to casual conversion disputes. This fee aligns with the existing filing fee payable for small claims matters in which the applicant is seeking an order for an amount less than \$10,000. The new fee for casual conversion small claims disputes is subject to existing Division 2.3, which sets out circumstances in which reduced fees and exemptions from liability to pay fees apply.

The Amending Regulations commence the day after registration on the Federal Register of Legislation.

Details of the Amending Regulations are set out in [Attachment A](#).

CONSULTATION

The Government consulted with state and territory government officials under the *Inter-governmental Agreement for a National Workplace Relations System for the Private Sector* and the Committee on Industrial Legislation on an exposure draft of the Regulations.

The Government also consulted with the Fair Work Ombudsman and the FCCA on an exposure draft of the Regulations.

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation (OBPR) has advised that a Regulation Impact Statement is not required. The OBPR reference number is 42818.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

The *Fair Work and Other Legislation Amendment Regulations 2021* (Amending Regulations) are 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

The Amending Regulations support recent amendments to the *Fair Work Act 2009* (Fair Work Act) introduced by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* that provide for the Casual Employment Information Statement (Statement) and extend the existing small claims jurisdiction to include certain disputes about casual conversion.

The Amending Regulations amend the *Fair Work Regulations 2009* to:

- specify the manner in which an employer may give an employee the Statement, aligned with the manner in which an employer may currently give an employee the Fair Work Information Statement; and
- extend the existing manner in which a person may indicate that he or she wants the small claims procedure to apply to proceedings to include the types of casual conversion disputes specified in paragraph 548(1B)(a) of the Fair Work Act.

The Amending Regulations also amend the *Federal Court and Federal Circuit Court Regulation 2012* to specify that a filing fee of \$245 applies to small claims applications relating to the specified types of casual conversion disputes.

Human rights implications

The Amending Regulations engage:

- the right to work under Article 6 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR); and
- the right to the enjoyment of just and favourable conditions of work under Article 7 of the ICESCR.

Article 6 of the ICESCR recognises the right for all people to have the opportunity to gain their living by work, and requires signatories to take appropriate steps to safeguard this right. Article 7 of the ICESCR recognises the right of everyone to the enjoyment of just and favourable conditions of work, including the right to rest, leisure, reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Casual Employment Information Statement

The Amending Regulations positively engage with rights in work and the right to the enjoyment of just and favourable conditions of work, by supporting the provision of the Statement, which sets out important information about the rights of casual employees.

The Amending Regulations align the manner in which an employer may provide the Statement with the existing permitted methods for providing the Fair Work Information Statement (FWIS) to employees. This makes clear that employers may provide both the Statement and FWIS to a new casual employee by the same method such that they can be provided together. This regulation promotes and supports the ability of casual employees to understand their employer's obligations, as well as the terms and conditions applying to their employment.

Small claims procedure

The Amending Regulations also positively engage the right to work and the rights in work by supporting access to the small claims process to enforce the new casual conversion entitlements. The small claims procedure is a more informal and lower cost alternative to a general law court matter. Access to the small claims process is available in addition to existing dispute resolution procedures available at the workplace level, as well as the usual court enforcement mechanisms. The amendments therefore increase access to enforcement of the right to just and favourable conditions of work for up to 1.3 million casual employees who have been with their employer for 12 months or more, making available to them, if they choose to convert, entitlements such as annual leave and personal leave as permanent employees.

Additionally, the filing fee set for casual conversion small claims applications set by the Amending Regulations aligns with the current filing fee for small claims proceedings in which the claim is less than \$10,000. Existing Division 2.3 of the *Federal Court and Federal Circuit Court Regulation 2012* sets out a range of circumstances in which reduced fees and exemptions from liability to pay fees apply, including where payment of the fees would cause financial hardship to the applicant. Division 2.3 applies to the new filing fee table item for casual conversion small claims applications.

Together, these amendments will support casual employees seeking to enforce their rights.

Conclusion

The Amending Regulations are compatible with human rights.

NOTES ON SECTIONS

Section 1 – Name

This section provides that the title of the instrument is the *Fair Work and Other Legislation Amendment Regulations 2021*.

Section 2 – Commencement

This section provides for the whole of the instrument to commence the day after it is registered.

Section 3 – Authority

This section provides that the instrument is made under the *Fair Work Act 2009* (the Fair Work Act), *Federal Circuit Court of Australia Act 1999*, and the *Federal Court of Australia Act 1976*.

Section 4 – Schedules

This section provides that each instrument specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Fair Work Regulations 2009

Item 1 – Division 12 of Part 2-2 (heading)

This item is consequential to item 2, and repeals and replaces the heading of Division 12 of Part 2-2. The new heading reflects that the division contains regulations relevant to the two statements prepared and published by the Fair Work Ombudsman (FWO), being the Fair Work Information Statement (FWIS) and the new regulation in item 2 concerning the Casual Employment Information Statement (the Statement).

Item 2 – At the end of Division 12 of Part 2-2

This item inserts new subregulation 2.02A, which specifies the manner in which an employer may give the Statement to an employee.

New regulation 2.02A mirrors current regulation 2.02, which provides the manner in which an employer may give an employee the FWIS, and allows employers to give the Statement to employees:

1. personally (subregulation 2.02A(2));
2. by pre-paid post to the employee's residential address (paragraph 2.02A(3)(a)) or a postal address nominated by the employee (paragraph 2.02A(3)(b));

3. to the employee's email address at work (paragraph 2.02A(4)(a)) or another email address nominated by the employee (paragraph 2.02A(4)(b));
4. by sending an electronic link to the page on the FWO's website on which the Statement is located (paragraph 2.02A(5)(a)), or that takes the employee directly to a copy of the Statement on the employer's intranet (paragraph 2.02A(5)(b)) to the employee's email address (either at work, or another email address nominated by the employee); or
5. by fax to the employee's fax number at work (paragraph 2.02A(6)(a)), or at home (paragraph 2.02A(6)(b)), or another fax number nominated by the employee (paragraph 2.02A(6)(c)).

New subregulation 2.02A(7) provides that subregulations 2.02A(2) to (6) do not prevent the employer from using another manner of giving the Statement to the employee.

Item 3 – subregulation 4.01(1)

Paragraph 548(1B)(b) of the Fair Work Act relevantly provides that the small claims procedure will apply to actions for the types of casual conversion disputes specified in paragraph 548(1B)(a) if the person who has applied for the order indicates in a manner prescribed by the *Fair Work Regulations 2009* (Fair Work Regulations) that they want the small claims procedure to apply. This is the same requirement that applies to persons seeking orders for monetary amounts under paragraph 548(1)(c) of the Fair Work Act.

Subregulation 4.01(1) sets out the existing manner in which a person must indicate that they want a small claims procedure to apply to an action for a monetary amount that they have commenced for the purposes of paragraph 548(1)(c) of the Fair Work Act.

This item extends subregulation 4.01(1) to apply to the specified types of casual conversion disputes for the purposes of paragraph 548(1B)(b) of the Fair Work Act. This ensures that the Fair Work Regulations provide for the same manner in which a person indicates that they want the small claims procedure to apply for all small claims matters, whether the person is seeking orders for a monetary amount or they are seeking orders in relation to the specified types of casual conversion disputes.

Existing subregulation 4.01(2) provides that the process set out in subregulation 4.01(1) is only relevant where the rules of the court in which the action is commenced do not prescribe the manner in which a person indicates that he or she wants to have his or her matter dealt with under the small claims procedure in that court.

Federal Court and Federal Circuit Court Regulation 2012

Item 4 – Part 2 of Schedule 1 (after table item 212)

Existing table item 211 in the table of fees for proceedings in the Federal Circuit Court of Australia (FCCA) provides the fee for the filing of an application under section 539 of the Fair Work Act if the applicant indicates that they want the small claims procedure under section 548 of the Fair Work Act to apply, and the claim is less than \$10,000. Existing table item 212 provides the fee for the filing of such an application where the claim is between \$10,000 and \$20,000. Existing regulation 2.20 provides for an annual increase in fees, which takes effect on 1 July each year.

This item inserts new table item 212A in the table of fees for proceedings in the FCCA that sets the filing fee for a casual conversion small claims application at \$245 on commencement. The annual increase according to existing regulation 2.20 applies to this fee, as it does to the other small claims filing fees. The fee set for casual conversion small claims applications is consistent with the current fee for small claims proceedings where the claim is less than \$10,000 (as has been annually increased by operation of regulation 2.20).

The new fee in table item 212A applies in relation to a casual conversion dispute unless the dispute also involves a monetary claim between \$10,000 and \$20,000, in which case the fee set by table item 212 applies.

Existing Division 2.3 of the *Federal Court and Federal Circuit Court Regulation 2012* sets out a range of circumstances in which reduced fees and exemptions from liability to pay fees apply. Division 2.3 applies to the new fee in table item 212A as it currently does for small claims filing fees set by existing table items 211 and 212.