

Fair Work Commission Amendment (2023 Measures No. 1) Rules

EXPLANATORY STATEMENT

(issued by the authority of the President of the Fair Work Commission)

Authority

Section 609 of the *Fair Work Act 2009* (the Act) authorises the making of procedural rules of the Fair Work Commission (Commission).

Under section 609(1) of the Act, after consulting with the other Commission Members, the President of the Commission may, by legislative instrument, make procedural rules in relation to:

- (a) the practice and procedure to be followed by the Commission; or
- (b) the conduct of business in relation to matters allowed or required to be dealt with by the Commission.

Section 609(2) of the Act provides that without limiting (a) and (b) above, the procedural rules may provide for:

- (a) the requirements for making an application to the Commission;
- (b) the circumstances in which a lawyer or paid agent may make an application or submission to the Commission on behalf of a person who is entitled to make the application or submission;
- (c) the form and manner in which, and the time within which, submissions may or must be made to the Commission;
- (d) the procedural requirements for making decisions of the Commission;
- (e) the form and manner in which the Commission gives directions and notifies persons of things;
- (ea) the requirements for making a notification to the Commission;
- (f) who is notified by the Commission of things;
- (g) the manner in which conferences are to be conducted in relation to applications made under Part 3-1, 3-2, 3-5A or Part 6-4 (which deal with general protections, unfair dismissal and unlawful termination).

Under subsection 33(3) of the *Acts Interpretation Act 1901* as in force on 25 June 2009, where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) the power shall, unless the contrary intention appears, be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Purpose of the Amendment Rules

The *Fair Work Commission Amendment (2023 Measures No. 1) Rules* (the Amendment Rules) amend the *Fair Work Commission Rules 2013* (the Rules).

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (the Amending Act) received royal assent on 6 December 2022. The Amendment Rules introduce new forms and procedural requirements to support changes made to the Act by the Amending Act that commenced operation between 6 December 2022 and 6 March 2023.

Sexual Harassment jurisdiction

From the 6 March 2023, Part 3-5A of the Act makes it unlawful for a person to sexually harass another person in connection with the workplace, and the Commission has expanded powers to deal with sexual harassment in connection with the workplace that occurred or commenced on or after 6 March 2023. Where alleged sexual harassment commenced or occurred prior to 6 March 2023, transitional provisions in the Amending Act provide for applications for orders to stop sexual harassment to continue to be made under Part 6-4B of the Act.

The President of the Commission has approved new forms for making and responding to applications made under Part 3-5A and the retained Part 6-4B of the Act. The President has also approved changes to forms for making and responding to an application for an order to stop bullying at work. Form F72, Form F73 and Form F74 have been amended to remove the reference to sexual harassment. The applications will now only refer to an order to stop bullying at work under s 789FC of the Act. The new Rules reflect these changes to forms, including service requirements.

Changes to existing Rules and new Rules are introduced in relation to applications under Part 3-5A including:

- to make provision for a joint sexual harassment dispute application by 2 or more aggrieved persons or an industrial association entitled to represent the industrial interest of 2 or more aggrieved persons in relation to the same alleged contraventions;
- that a person is not required to seek permission to be represented by a lawyer or paid agent for conference conducted by a member of the staff of the Commission but permission is required in relation to a conference before Commissioner member; and
- that the Commission may join and remove of parties to an application under Part 3-5A of the Act.

Equal remuneration

From 7 December 2022, s.302 of the Act provides that the Commission may make an order requiring equal remuneration for work of equal or comparable value.

The President of the Commission has approved a new form for making an application for an equal remuneration order, and the new Rules reflect this change to the Commission's forms.

Zombie agreements

From the 7 December 2022, Schedule 1 Part 13 of the Amending Act amended the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* so that certain workplace

agreements – collectively described in the Amending Act as ‘zombie agreements’ – terminate after a 12 month ‘default period’, unless that period is extended by the Commission

The President of the Commission has approved a new form for making an application to extend the default period for a zombie agreement, and the new Rules reflect this change to the Commission’s forms.

Terminating enterprise agreements after their nominal expiry date

From 7 December 2022, s.266 of the Act requires the Commission in deciding whether to terminate an enterprise agreement after its nominal expiry date to consider the views of each employer and any employees and employee organisations covered by the agreement.

The President of the Commission has approved a new form so that if an employee, employee organisation or employer covered by an agreement wants to advise the Commission they support or oppose termination, they can do so by lodging a declaration. The new Rules reflect this change to the Commission’s forms.

Service Rules

The Rules are amended to allow service of documents on a nominated representative.

Details

Details of the Amendment Rules are set out in **Attachment A**.

Consultation on the Amendment Rules

<to be included after end of consultation period>

Regulatory Impact Statement

<to be included after end of consultation period>

Statement of compatibility with human rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker in relation to a legislative instrument to which section 42 (disallowance) of the *Legislation Act 2003* applies to cause a statement of compatibility to be prepared in respect of that legislative instrument. A Statement of Compatibility has been prepared to meet that requirement and is at **Attachment B**.

Details of the *Fair Work Commission Amendment (2023 Measures No. 1) Rules*

Rule 1 Name

This rule provides that the name of the amending instrument is the *Fair Work Commission Amendment (2023 Measures No. 1) Rules*.

Rule 2 Commencement

This rule provides that the Amendment Rules commence on the day after the instrument is registered.

Rule 3 Authority

This rule notes that the Amendment Rules are made under the Act.

Rule 4 Schedules

This rule provides that the Rules are amended as set out in Schedule 1 to the Amendment Rules and that any other item in Schedule 1 has effect according to its terms.

Schedule 1 – Amendments to the *Fair Work Commission Rules 2013*

Item 1

Item 1 inserts a note after Rule 5 stating that the term ‘sexual harassment FWC application’ is defined in the Act.

Item 2

Item 2 inserts a new definition of ‘nominated representative’ to include any person that a party has nominated, by notice to the Commission, as a representative of the party in respect of the matter.

Item 3

Item 3 inserts new Rule 10A which allows the making of a joint sexual harassment FWC application by 2 or more persons or a single industrial association that is entitled to represent the industrial interests of 2 or more persons, but only if the application is made in relation to the same or related alleged contraventions.

Items 4 - 6

Items 4 - 6 amend Rule 12 to deal with when the permission of the Commission is required for representation by lawyer or paid agent in relation to an equal remuneration matter or sexual harassment FWC application.

Item 4 inserts subrule 12(2)(a)(iiia) so that the permission of the Commission is not required for a person to be represented by a lawyer or paid agent in a conference or a hearing in relation to a matter arising under Part 2-7 of the Act (equal remuneration).

Item 5 inserts subrule 12(2)(b)(i) so that the permission of the Commission is not required for a person to be represented by a lawyer or paid agent in a conference conducted by a member of the staff of the Commission for a sexual harassment FWC application.

Item 6 amends subrule 12(4) to insert a reference to a sexual harassment FWC application. This clarifies the position that for a person to be represented by a lawyer or a paid agent in a conference before a Commission member in relation to a sexual harassment FWC application, the permission of the Commission is required.

Item 7

Item 7 inserts new rule 21A which requires a response to a sexual harassment FWC application to be made within 7 calendar days after the person was served the application. The response must be provided by a person named in the application as a person allegedly engaging in sexual harassment. A response must also be provided by a person named as an employer or principal of an aggrieved person in respect of the application, or by a person named as the employer or principal of the person allegedly engaging in sexual harassment. New subrule 21A(2) allows a person to lodge a single response in the circumstance where 2 or more sexual harassment applications are lodged at the same time and relate to the same or related alleged contraventions of Division 2 of Part 3-5A.

Item 8

Item 8 inserts subrule 23A(4) to clarify that section 789FC of the Act continues to apply from 6 March 2023 to an application under s 789FC of the Act for an order to stop sexual harassment made in accordance with clause 60 of Schedule 1 to the Act, which are transitional provisions relating to the amendment of Part 6-4B.

Item 9

Item 9 inserts subrule 26(3) to provide that if an employee, employer or employee organisation that is covered by an enterprise agreement wants to advise the Commission it supports or opposes the termination of the agreement after its nominal expiry date, they must lodge a declaration to that effect before the Commission approves the application to terminate the agreement.

Items 10 – 12

Items 10 -12 amend rules 42 and 43 to allow the service of a document on an individual, a body corporate or an organisation or branch of an organisation to be effected by service on their nominated representative.

New subrule 42(2A) deals with service of documents by prepaid post under subrule 42(2)(c). It requires the person serving the document to retain the barcode of the prepaid envelope for production to the Commission if required.

New subrule 42(2B) deals with service by fax to a fax number under subrule 42(2)(d). The subrule requires the person serving the document to retain the transmission record for production to the Commission if required.

New subrule 42(2C) deals with service by email under subrules 42(2)(e) and (f). It requires the person serving the document to retain the document and produce the retained document if required by the Commission.

Amended subrules 43(a)-(g) set out how service is effected by the Commission. The amended subrules acknowledge that a person, organisation or body corporate may have a nominated

representative and provide for service by the Commission to be effected on the person, or their nominated representative.

Item 13

Item 13 amends subrule 45(2) by substituting a new subrule 45(2) which makes it clear that if a person is required to serve a sexual harassment FWC application or an application for an order to stop sexual harassment under section 789FC of the Act as it continues to apply under the transitional provisions, the Commission must serve a copy of the application excluding the part of the application that deals with the application fee.

Item 14

Item 14 inserts new rule 55A which allows a party to a dispute before the Commission commenced by a sexual harassment FWC application to apply for an order for one or more aggrieved persons, industrial associations, employees or agents to be joined as parties to the dispute.

Subrule 55A(1)(b) provides for a party to a dispute before the Commission commenced by a sexual harassment FWC application to apply for an order for the withdrawal of a person as a party to the dispute.

Item 15

Item 15 amends note 2 to clause 1 of Schedule 1 to note that service requirements in the schedule may be dispensed with, and that this is most likely to occur in relation to an application made for an order to stop bullying or a sexual harassment FWC application.

Item 16

Item 16 inserts in the table in clause 1 of Schedule 1 a requirement that new Form F24D – *Declaration in response to application for termination of an agreement after the expiry date* be lodged by the person making the declaration and served on each employer and each employee organisation covered by the enterprise agreement as soon as practicable after lodgement with the Commission.

Item 17

Item 18 inserts in the table in clause 1 of Schedule 1 a requirement that new Form F46A – *Application for an equal remuneration order* be lodged by the applicant and served on each person the Commission directs is to be served as soon as practicable after lodgement with the Commission.

Item 18

Item 19 repeals in clause 1 of Schedule 1 table items dealing with Forms F72, F73 and F74 and substitutes new table items for:

- Form F72 – *Application for an order to stop bullying*. This form is to be served by the Commission to the employer or principal of the applicant as soon as practical after lodgment with the Commission. This form is also to be served by the Commission to each person named in the application as engaging in bullying behaviour and their

employer or principal on the next business day after the service of the application on the employer or principal.

- Form F72A – *Application for an order to stop sexual harassment that occurred prior to 6 March 2023*. This form is to be served by the Commission to the employer or principal of the applicant as soon as practical after lodgment with the Commission. This form is also to be served by the Commission on each person named in the application as engaging in sexual harassment behaviour and their employer or principal on the next business day after the service of the application on the employer or principal.
- Form F73 – *Response from an employer/principal to an application for an order to stop bullying*. This form is to be served by the person responding to the application on the applicant, each person and their employer or principal named as engaging in bullying behaviour and each person named as employer or principal of the applicant within 7 calendar days after the person was served with the application for an order to stop bullying.
- Form F73A – *Response from an employer/principal to an application for an order to stop sexual harassment that occurred prior to 6 March 2023*. This form is to be served by the person responding to the application on the applicant, each person and their employer or principal named as engaging in sexual harassment behaviour and each person named as employer or principal of the applicant within 7 calendar days after the person was served with the application for an order to stop sexual harassment that occurred prior to 6 March 2023.
- Form F74 – *Response from a person against who bullying has been alleged to an application for an order to stop bullying*. This form is to be served by the person responding to the application on the applicant, each person and their employer or principal named as engaging in bullying behaviour, and each person named as employer or principal of the applicant within 7 calendar days after the person was served with the application for an order to stop bullying at work.
- Form F74A – *Response from a person named in application for an order to stop sexual harassment that commenced prior to 6 March 2023*. This form is to be served by the person responding to the application on the applicant, each person and their employer or principal named as engaging in sexual harassment behaviour, and each person named as employer or principal of the applicant within 7 calendar days after the person was served with the application for an order to stop sexual harassment that occurred prior to 6 March 2023.
- Form F75 – *Application for the Commission to deal with a sexual harassment dispute*. The application is to be served by the Commission on each person named in the application as allegedly engaging in sexual harassment and the employer or principal of both each person allegedly engaging in sexual harassment and any aggrieved person in respect of the application as soon as practicable after lodgment with the Commission.
- Form F76 – *Individual respondent's response to an application to deal with a sexual harassment dispute*. The response is to be served by the Commission on the applicant, each aggrieved person and their employer or principal and each person name in the application as allegedly engaging in sexual harassment and their employer or principal as soon as practicable after lodgment with the Commission.
- Form F77 – *Employer or principal response to an application to deal with a sexual harassment dispute*. The response is to be served by the Commission on the applicant, each aggrieved person and their employer or principal and each person name in the application as allegedly engaging in sexual harassment and their employer or principal as soon as practicable after lodgment with the Commission.

- Form F78 – *Notification of agreement to consent arbitration of a sexual harassment dispute*. The notification is to be served by the person making the notification to each of the parties to the dispute as soon as practicable after lodgement with the Commission.
- Form F81 – *Apply to extend the default period for a zombie agreement*. The application is to be served by the applicant as soon as practicable to:
 - if the application relates to an individual agreement based transitional instrument or an individual Division 2B State employment agreement – the other party to the instrument or agreement;
 - in any other case – each employer covered by the instrument or agreement and each industrial association that is entitled to represent the industrial interests of one or more of the employees covered by the instrument or agreement.

Statement of Compatibility with Human Rights

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

Fair Work Commission Amendment (2023 Measures No. 1) Rules

This 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* (Cth).

Overview of the Legislative Instrument

The *Fair Work Commission Amendment (2023 Measures No. 1) Rules* amends the procedural rules made by the President of the Fair Work Commission under section 609 of the *Fair Work Act 2009* (Rules). The Rules provide for practice and procedure that is to be followed by the Fair Work Commission and the conduct of business in relation to matters allowed or required to be dealt with by the Fair Work Commission.

Human Rights Implications

The Amendment Rules do not engage any of the applicable rights or freedoms.

Conclusion

The Amendment Rules are compatible with human rights as they do not raise any human rights issues.