

## Fair Work Commission Rules 2013

### 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 the rules of the Fair Work Commission (Commission).

Under section 609 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, including in relation to any functions conferred on the Commission by any other law of the Commonwealth.

Without limiting (a) and (b) above, the procedural rules may provide for the following:

- (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;
- (f) who is notified by Commission of things;
- (g) the manner in which conferences are to be conducted in relation to applications made under Part 3-1, 3-2 or Part 6-4 (which deal with general protections, unfair dismissal and unlawful termination).

#### Consultation on the Rules

As required by section 609 of the Act, the President consulted with all Members of the Commission in January and October 2013 concerning the *Fair Work Commission Rules 2013* (Rules).

In addition, pursuant to section 17 of the *Legislative Instruments Act 2003* (Cth), the President consulted with persons (or their representatives) who are likely to be affected by the instrument, as set out below.

*Process of consultation pursuant to the Legislative Instruments Act 2003*

On 10 January 2013 a draft of the Rules was published on the Commission's website for public consultation. Comments and suggestions were sought from interested persons by 25 January 2013.

Comments were received from the Law Society of New South Wales, the Master Builders Association of Australia, the Australian Chamber of Commerce and Industry, Lander & Rogers Lawyers, Clayton Utz Lawyers, Holding Redlich Lawyers, TressCox Lawyers, Guild Financial Services and WorkSafe Victoria.

Following consultation both with Members of the Commission and with the general public, the President is satisfied that the comments which have been received have been incorporated, where appropriate, in the Rules.

The President does not believe that the Rules will have a substantial direct, or substantial indirect, effect on business or restrict competition.

The President is satisfied that the consultation process was suitable, having drawn upon the knowledge of persons with expertise in fields that are relevant to the proposed instrument and having ensured that persons who are likely to be affected by the proposed instrument have had an opportunity to comment.

Subsequent to the consultation process, the President determined that it was most appropriate to remove the forms from the content of the Rules. Instead, the proposed Rules now define an "approved form" as meaning a form that has been approved by the President. Rule 8 permits the President to approve forms, which must be made publicly available.

This approach was adopted by the President due to the administrative burden associated with amending forms where they are part of the Rules. This is of particular significance in light of the Commission's ongoing commitment to enhancing access to the Commission's services through innovations such as smart forms, which enable web-based lodgment of forms. While this decision has necessitated the inclusion in the Rules of information that was previously contained in the forms regarding, in particular, service requirements and the lodgment of additional documents with the Commission, the substance of those requirements has not changed. As a result, the President formed the view that further public consultation concerning removal of the forms from the Rules, and the resultant migration of service and lodgment requirements from the forms to the Rules, was not necessary.

The approved forms will be published online on the Commission's website ([www.fwc.gov.au](http://www.fwc.gov.au)) together with the Rules in order to ensure access of users to the Rules and approved forms.

## **Purpose**

The *Fair Work Australia Rules 2010* required amendment to reflect the change in name of Fair Work Australia to the Fair Work Commission from 1 January 2013 and to facilitate removal of the forms from the Rules. Arising from the *Fair Work Act 2009* and after consulting Commission Members and the general public, the President has made the following procedural Rules.

### **Part 1—General**

Rule 1 states the name of the Rules.

Rule 2 provides the date on which the Rules commence.

Rule 3 states that the Rules are made under the Act.

Rule 4 is a formal provision, providing for the amendment and repeal of items set out in Schedule 2 to the Rules, namely the *Fair Work Australia Rules 2010*, the *Australian Industrial Relations Commission Rules 2007* and the *Australian Industrial Relations Commission Rules 1998*.

Rule 5 contains definitions used in the Rules for “Act”, “approved form”, “business day”, “Commission”, “Commission Member”, “FW(RO) Act”, “general protections application”, “Regulations”, “Transitional Act”, “unfair dismissal application” and “unlawful termination FWC application”.

Rule 6 allows the Commission to dispense with compliance with any of the requirements of the Rules, either before or after the occasion for compliance arises.

Rule 7 provides for the Commission to give directions on procedure.

Subrule 7(1) provides that a person may apply to the Commission for directions regarding the correct procedure where the person seeks to commence a proceeding or to take any step in a proceeding and the procedure is not prescribed by the Act, *Fair Work Regulations 2009* (Regulations) or Rules, or by or under any other Act or Regulations. Application may also be made if there is doubt regarding the correct procedure.

Subrule 7(2) provides that any act taken in accordance with a direction of the Commission in response to an application under Subrule 7(1) is regular and sufficient.

### **Part 2 - Forms and applications**

Rule 8 provides for the approval and use of forms.

Subrule 8(1) provides that the President may approve forms.

Subrule 8(2) provides that, if the President approves a form for a particular purpose, the approved form must (subject to the Rules) be used for the purpose.

Subrule 8(3) provides that, if there is no approved form, form F1 must be used.

Subrule 8(4) requires the President to make the forms publicly available.

Subrule 8(5) provides that, if the Rules require that an approved form be used, it is sufficient compliance if the document is substantially in accordance with the approved form.

Rule 9 provides for telephone applications to be made to the Commission.

Subrule 9(1) provides that Rule 9 applies to a person wanting to apply to the Commission under section 365 of the Act concerning a general protections dispute involving a dismissal or to make an unfair dismissal application. The capacity to make a telephone application is confined to these two matters since the Act prescribes time limits within which such applications must be made.

Subrule 9(2) enables an applicant to apply to the Commission by telephone as an alternative to lodging an application in the approved form. A legislative note provides that the telephone numbers which have been approved by the General Manager of the Commission for making a telephone application are available on the Commission's website.

Subrule 9(3) provides that the Commission must prepare a written application, based on the telephone application, and give the written application to the person.

Subrule 9(4) provides that the person must, within 14 calendar days after the day on which the Commission gives the written application to the person, complete, sign and lodge the written application with the Commission and either pay the relevant application fee or apply for a waiver of the fee.

Subrule 9(5) provides that, if the Commission refuses the fee waiver application, the person must pay the application fee within seven calendar days of being notified of the refusal by the Commission.

Subrule 9(6) provides that if the person completes, signs and lodges the written application and either pays the application fee or is granted a fee waiver, the application is taken to have been made on the day that the person telephones the Commission to make the application in accordance with Subrule 9(2).

Subrule 9(7) provides that the process of telephoning the Commission in accordance with Subrule 9(2) and lodging the completed and signed written application are taken to be the application. An application has not been made until the process is complete.

Rule 10 provides for discontinuance of applications before the Commission.

Subrule 10(1) provides that an applicant may discontinue an application at any time.

Subrule 10(2) provides that, to discontinue the application, the applicant must notify the Commission by lodging a notice of discontinuance, by advising the Commission by letter, email, fax or telephone that the applicant wishes to discontinue the application, has settled the application, wishes to withdraw the application or no longer wishes the Commission to deal with the application or by advising the Commission of the discontinuance during the course of a conference or hearing.

A legislative note provides that a notice of discontinuance must be in the approved form (F50).

A second legislative note provides that the Commission prefers applicants to advise it of the discontinuance of an application by lodging a notice of discontinuance in the approved form.

A third legislative note provides that subregulations 3.02(8), 3.03(8) and 3.07(8) of the Regulations deal with the refund of an application fee where an application is discontinued.

### **Part 3 - Representation**

Rule 11 prescribes the procedure for notification to the Commission that a representative is commencing or ceasing to act.

Subrule 11(1) provides that a person who commences to act as a lawyer or paid agent of a party to a matter that is already before the Commission must lodge a notice with the Commission. A legislative note provides that the notice must be in the approved form (F53).

Subrule 11(2) allows the Commission, without prejudice to its other powers, to permit a person to represent a party in a matter despite a person's failure to lodge a notice in accordance with Subrule 11(1).

Subrule 11(3) requires a person who ceases to act as a lawyer or paid agent of a party to a matter before the Commission to lodge a notice of discontinuance. A legislative note provides that the notice must be in the approved form (F54).

Rule 12 provides for circumstances in which a person may be represented in a matter before the Commission by a lawyer or paid agent.

Subrule 12(1) provides that a person may be represented in a matter before the Commission by a lawyer or paid agent for the purpose of preparing a written application or written submission in relation to the matter, lodging a written application, written submission or other document on behalf of the person in relation to the matter, or corresponding with the Commission on behalf of the person in relation to the matter.

A legislative note provides that section 596 of the Act sets out other circumstances in which a person may be represented by a lawyer or paid agent in a matter before the Commission.

Subrule 12(2) provides that subrule 12(1) is subject to a direction by the Commission to the contrary in relation to the matter.

Subrule 12(3) provides that, to remove doubt, nothing in Rule 12 is taken as permitting a lawyer or paid agent to represent a party in a conference or hearing before the Commission. A legislative note states that section 596 of the Act sets out when the Commission may grant permission for a person to be represented by a lawyer or paid agent, including at a conference or hearing.

### **Part 4 - Lodging documents: general requirements**

Rule 13 sets out general requirements for lodging documents with the Commission.

Subrule 13(1) regulates the size, colour and layout of lodged documents and requires that they be typed, clearly written or clearly reproduced.

Subrule 13(2) provides that documents can be lodged with the Commission by physical delivery to an office of the Commission between 9am and 5pm on a business day, by post, by email in accordance with Rule 14, by using the Commission's electronic lodgment facilities in accordance with rule 15 or by fax in accordance with Rule 16.

Rule 14 sets out general requirements for lodging documents by email.

Subrule 14(1) provides that a document that is required or permitted to be lodged under the Rules may be lodged by emailing the document to an email address approved by the General Manager for the lodgment of documents by email. A legislative note provides that the email addresses that have been approved for lodgment of documents by email are available on the Commission's website.

Subrule 14(2) provides that, if a matter has been allocated to a Commission Member, a document lodged by email in relation to the matter must be sent to the email address of the Commission Member's chambers. A legislative note provides that the approved email addresses for Commission Members' chambers are available on the Commission's website.

Subrule 14(3) provides the format and covering documentation necessary for statutory declarations and any other documents lodged by email. A legislative note specifies that a statutory declaration must be signed and witnessed.

Subrule 14(4) concerns the time at which an application that is lodged by email is taken, under the Rules, to have been lodged with the Commission. It provides that, if a document lodged in accordance with Rule 14 is an application commencing a matter, the General Manager must, by email, acknowledge receipt of the application. The application is not taken to have been lodged until the acknowledgment of lodgment has been sent. Once the acknowledgment of lodgment has been sent, however, the application is taken to have been lodged at the time it was received electronically by the Commission.

Subrule 14(5) requires a person who lodges a document by email to retain a paper copy of the document and to retain a paper copy of either the receipt indicating that the document was delivered or the "sent item" email showing the transmission details and to produce such paper copies if directed to do so by the Commission.

Rule 15 sets out the general requirements for lodging documents through the Commission's electronic lodgment facilities.

Subrule 15(1) provides that a document may be lodged through the Commission's electronic lodgment facilities by submission of the document in accordance with the instructions provided for the use of the particular electronic lodgment facility that is used. A legislative note states that web-based forms and eFiling facilities are available on the Commission's website.

Subrule 15(2) concerns the time at which an application that is lodged using the Commission's electronic lodgment facilities is taken, under the Rules, to have been lodged with the Commission. It provides that, if a document lodged under Rule 15 is an application commencing a matter, the General Manager must, by email, acknowledge receipt of the application. The application is not taken to have been lodged until the acknowledgment of lodgment has been sent. Once the acknowledgment of lodgment has been sent, however,

the application is taken to have been lodged at the time it was received electronically by the Commission.

Rule 16 sets out the general requirements for lodging documents by fax.

Subrule 16(1) provides that a document that is required or permitted to be lodged by the Rules may be lodged by fax sent to the fax number approved by the General Manager for the lodgment of documents by fax. A legislative note provides that the fax numbers that have been approved by the General Manager for lodgment of documents by fax are available on the Commission's website.

Subrule 16(2) provides the format and covering documentation necessary for documents that are lodged by fax.

Subrule 16(3) requires a person who lodges a document by fax to keep a copy of the original document and transmission report and to produce the documents as directed by the Commission or the General Manager.

Subrule 16(4) provides that, if the Commission or the General Manager directs that the original document be produced, the first page of the document must be endorsed with a statement that the document is the original of a document sent by fax and the date that the document was sent by fax.

Rule 17 provides that documents must be signed and dated.

Subrule 17(1) provides that a document (other than an affidavit, annexure or exhibit attached to another document) that is lodged by a party to a matter must be signed and dated by either the party or the party's lawyer or paid agent.

Subrule 17(2)(a) provides that, if a document (other than a statutory declaration) must be signed under the Rules, a facsimile of the signature may be affixed to the document by electronic means by, or at the direction of, the person who is required to sign the document.

Subrule 17(2)(b) provides that a document which is an approved form and which is lodged with the Commission by email or using the Commission's electronic lodgment facilities may be completed by typing the name of the person who is completing the form in the box marked "signature" on the form.

Rule 18 sets out information that is required for witness statements, submissions and certain statutory declarations.

Subrule 18(1) provides that the first page of a witness statement, submission or statutory declaration that is lodged with the Commission (other than a statutory declaration that is part of an approved form) must comply with subrules 18(2), (3) and (4).

Subrule 18(2) sets out the information that must be included at the top of the first page if there is a respondent to the matter.

Subrule 18(3) sets out the information that must be included at the top of the first page if there is no respondent to the matter.

Subrule 18(4) sets out the information that must be included at the foot of the first page in all cases.

### **Part 5 - Lodging documents: specific requirements**

Rule 19 requires that a respondent to an unfair dismissal application (F2) lodge a response to the application, together with any supporting documents, within 7 calendar days after the day on which the respondent was served with the application by the Commission. A legislative note states that the response must be in the approved form (F3).

Rule 20 sets out requirements concerning the lodging of an objection to an unfair dismissal application on jurisdictional or other grounds.

Subrule 20(1) provides that rule 20 applies to the respondent to an unfair dismissal application if the respondent wants to raise an objection under section 396 of the Act to the application and the objection may need to be considered and determined before a conference or hearing of the merits of the application. A legislative note explains that section 396 of the Act provides that the Commission must decide certain matters relating to an unfair dismissal application before considering whether the termination was harsh, unjust or unreasonable.

Subrule 20(2) provides that the respondent must give details of the objection either in the form F3 employer response that is lodged under rule 19 or, if the objection is taken after the response has already been lodged, in a form F4 objection to the unfair dismissal application. A legislative note states that information about the grounds upon which an objection can be made is available on the Commission's website.

Subrule 20(3) provides that a respondent who wishes to raise an objection to two or more applications in substantially the same terms for each application may lodge one form F4 objection where the unfair dismissal applications are lodged at the same time and they allege the same or substantially similar conduct.

Rule 21 provides that a respondent to a general protections application under section 365 or section 372 of the Act (F8) must lodge a response to the application within 7 calendar days of being served with the application by the Commission. A legislative note provides that the response must be in the approved form (F8A).

Rule 22 provides that a respondent to an unlawful termination application (F9) must lodge a response to the application within 7 calendar days of being served with the application by the Commission. A legislative note provides that the response must be in the approved form (F9A).

Rule 23 permits a respondent to lodge one response to two or more unfair dismissal, general protections or unlawful termination applications concerning the same or substantially similar conduct.

Subrule 23(1) provides that subrule 23(2) applies if two or more unfair dismissal, general protections or unlawful termination FWC applications are lodged with the Commission at the same time in respect of the same respondent.



Subrule 23(2) provides that, despite rules 19, 21 and 22, a respondent may lodge one response if the applications allege the same or substantially similar conduct and the substance of the respondent's response is substantially the same for each application.

Rule 24 concerns applications for approval of an enterprise agreement.

Subrule 24(1) provides that, within 14 calendar days after the enterprise agreement that is not a greenfields agreement is made, each employer that is to be covered by the agreement must lodge a statutory declaration in support of the application with the Commission. Application is made to the Commission for approval of an agreement that is not a greenfields agreement using form F16.

A legislative note provides that the statutory declaration must be in approved form (F17). A second legislative note advises that rule 40 also requires each employer that will be covered by the agreement to notify employees that the application for approval has been made.

Subrule 24(2) provides that the statutory declaration that is lodged under subrule (1) must be accompanied by a copy of the notice that was given to employees under section 173 of the Act concerning representation by a bargaining representative. A legislative note summarises the requirements of section 173 of the Act.

Subrule 24(3) provides that, if the agreement is not a greenfields agreement, each employee organisation that is a bargaining representative and wants to advise the Commission regarding whether it supports approval of the agreement or agrees with the statements set out in an employer's statutory declaration must also lodge a statutory declaration before the Commission approves the agreement. A legislative note provides that the statutory declaration must be in the approved form (F18). A second legislative note provides that an employee organisation that wants to be covered by an enterprise agreement that is not a greenfields agreement can also use form F18 to notify the Commission under section 183 of the Act.

Subrule 24(4) provides that, if the agreement is not a greenfields agreement, each bargaining representative who was appointed by one or more employees and who wants to advise the Commission about whether employees support approval of the agreement or agree with the statements set out in an employer's statutory declaration must also lodge a statutory declaration before the Commission approves the agreement. A legislative note provides that the statutory declaration must be in the approved form (F18A).

Subrule 24(5) provides that, if the agreement is a greenfields agreement, the application (F19) must be accompanied by a statutory declaration by an officer or authorised employee of each employer (F20) and each relevant employee organisation (F21) that is to be covered by the agreement. A legislative note provides that the statutory declarations must be in the approved form.

Subrule 24(6) provides that if the application is made, or a document is lodged, by a bargaining representative who has been appointed by an employer or employee, the application or document must be accompanied by a copy of the bargaining representative's written instrument of appointment.

Rule 25 concerns approval of an application for variation of an enterprise agreement.

Subrule 25(1) provides that an application (F23) must be accompanied by a statutory declaration from each employer covered by the agreement (F23A) and from each employee organisation that is a bargaining representative for the variation agreement (F23B). A legislative note provides that the statutory declarations must be in the approved form.

Subrule 25(2) provides that if the application is made, or a document is lodged, by a bargaining representative who has been appointed by an employer or employee, the application or document must be accompanied by a copy of the bargaining representative's written instrument of appointment.

Rule 26 provides for approval of the termination of an enterprise agreement or a collective agreement-based transitional instrument.

Subrule 26(1) provides that an application under section 222 of the Act for approval of the termination of an enterprise agreement (F24) or collective agreement based transitional instrument (F28) must be accompanied by a statutory declaration setting out the basis upon which the Commission can be satisfied that the requirements of section 223 of the Act have been met. A legislative note provides that the statutory declaration must be in the approved form (F24A). A second legislative note states that section 223 of the Act sets out the circumstances in which the Commission must approve the termination. A third legislative note explains that an application may be made under section 222 of the Act for termination of a collective agreement-based transitional instrument by virtue of the extended operation given to that section by transitional provisions.

Subrule 26(2) provides that an application under section 225 of the Act for termination of an enterprise agreement after its nominal expiry date (F24B) must be accompanied a statutory declaration by the applicant setting out the basis upon which the Commission can be satisfied that the requirements of section 226 of the Act have been met. A legislative note provides that the statutory declaration must be in the approved form (F24C). A second legislative note explains that section 226 of the Act sets out the circumstances in which the Commission must terminate the agreement.

Rule 27 provides for approval of the termination of individual agreement-based transitional instruments.

Subrule 27(1) provides that an application under item 17 of Schedule 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Transitional Act) for approval of the termination of an individual agreement-based transitional instrument (F29) must be accompanied by a copy of the written agreement that was made to terminate the agreement in accordance with subitem 17(1) of Schedule 3 to the Transitional Act. A legislative note summarises the requirements of subitem 17(1) of Schedule 3 to the Transitional Act.

Subrule 27(2) provides that an application under item 19 of Schedule 3 to the Transitional Act for approval of the termination of an individual agreement-based transitional instrument (F29) must be accompanied by a statutory declaration setting out the basis upon which the Commission can be satisfied that the requirements of subitems 19(2) and (3) of Schedule 3 of the Transitional Act concerning the making of a written declaration have been met. A copy

of the written declaration must also be lodged. Legislative notes summarise the requirements of subitems 19(2) and 19(3) of Schedule 3 to the Transitional Act.

Subrule 27(3) provides that, if an employer is seeking approval of the termination of more than one individual agreement-based transitional instrument, it is sufficient if the applicant lodges one application in the approved form with a schedule setting out specified information regarding each individual agreement-based transitional instrument.

A legislative note provides that a template for the schedule can be found on the Commission's website. A second legislative note provides that, if a schedule is lodged under subrule 27(3), a copy of each written agreement must be lodged. A third legislative note draws attention to the requirements of rule 47 concerning service of a schedule that is lodged under subrule 27(3).

Rule 28 provides that an application for a bargaining order under section 229 of the Act (F32) must be accompanied by a copy of the written notice that has been given to the relevant bargaining representatives under paragraph 229(4)(b) of the Act. A legislative note explains that the notice is a notice to the relevant bargaining representatives setting out the applicant's concerns under paragraph 229(4)(a) of the Act.

Rule 29 provides that an application for a scope order under section 238 of the Act (F31) must be accompanied by a copy of the written notice setting out concerns referred to in subsection 238(1) of the Act that has been given to relevant bargaining representatives for the agreement.

Rule 30 provides that an application for a serious breach declaration under section 234 of the Act (F33) must be accompanied by a copy of each of the bargaining orders in relation to the agreement which the applicant alleges have been contravened.

Rule 31 deals with an application for a protected action ballot order.

Subrule 31(1) provides that an application for a protected action ballot order under section 437 of the Act (F34) must be accompanied by a draft order in the terms sought by the applicant. A legislative note provides that, if the application seeks that the Australian Electoral Commission is the protected action ballot agent, the copy of the application that is served upon the Australian Electoral Commission should be accompanied by a completed form that is available on the website of the Australian Electoral Commission.

Subrule 31(2) provides that, unless it has been lodged with the Commission by fax, email or using the Commission's electronic lodgment facilities, an application for a protected action ballot order and the accompanying draft order must be emailed to the chambers of the Commission Member named in the notice of listing as soon as practicable after the applicant has received the notice of listing. A legislative note provides that the approved email addresses of Commission Members' chambers are available on the Commission website.

Subrule 31(3) provides that a copy of the protected action ballot order must be lodged with an application for variation of the order under section 447 (F35) or for termination of the order under section 448 of the Act (F36).

Rule 32 provides that application for an order extending a suspension of protected industrial action under section 428 of the Act (F38) must be accompanied by a copy of the order to

suspend the protected industrial action under section 423, 424, 425 or 426 (as the case may be) to which the application relates.

Rule 33 provides that an application for an order relating to partial work bans under section 472 of the Act (F39) must be accompanied by a written notice given by the employer to the employee under paragraph 471(1)(c) of the Act concerning the reduction in payments due to the partial work ban. A legislative note describes the notice given by the employer under paragraph 471(1)(c) of the Act.

Rule 34 deals with an application for orders in relation to the transfer of business.

Subrule 34(1) provides that an application for an order in relation to a transfer of business under section 318 or 319 of the Act (F40) must be accompanied by a copy of the transferrable instrument to which the application relates.

Subrule 34(2) provides that an application to vary a transferrable instrument under section 320 of the Act (F41) must be accompanied by a copy of the transferrable instrument to which the application relates.

Subrule 34(3) provides that an application to vary a copied State instrument under section 768AX of the Act (F41A) must be accompanied by a copy of the copied State instrument to which the application relates.

Subrule 34(4) provides that an application for an order in relation to transfer of business under sections 768BA, 768BD or 768BG of the Act (F40A) must be accompanied by a copy of the copied State instrument to which the application relates.

Rule 35 provides that an application for an affected member certificate under section 520 of the Act (F45) must be accompanied by a statutory declaration setting out the basis upon which the Commission can be satisfied that the requirements of subsection 520(1) of the Act have been met. A legislative note explains that subsection 520(1) of the Act sets out the matters of which the Commission must be satisfied before issuing an affected member certificate.

Rule 36 deals with applications for the Commission to deal with a dispute.

Subrule 36(1) provides that an application for the Commission to deal with a dispute (F10), which is permitted by Schedule 19 to the Transitional Act, must be accompanied by a copy of the dispute setting procedure under which the Commission is empowered to deal with the dispute in accordance with subitem 1(1) of Schedule 19 to the Transitional Act.

Subrule 36(2) provides that an application for the Commission to deal with a bargaining dispute under section 240 of the Act (F11) must be accompanied by a copy of each notice that has been issued by the applicant, respondent or a bargaining representative since bargaining commenced in the matter to which the application relates.

Subitem 36(3) provides that an application for the Commission to deal with a dispute under section 739 of the Act (F10) must be accompanied by a copy of the term that is referred to in section 738 of the Act under which the Commission is required to be permitted to deal with a dispute.

Subitem 36(4) provides that the respondent to an application for the Commission to deal with a dispute under section 739 of the Act must lodge a written response to the application with the Commission within 7 calendar days after being served with the application. A legislative note provides that rule 48 requires the respondent to serve a copy of the response upon the applicant.

Rule 37 deals with take-home pay orders.

Subrule 37(1) provides that an application for a take-home pay order with respect to multiple employees or outworkers (F47C) must be accompanied by a statutory declaration in support of the application. A legislative note provides that the statutory declaration must be in the approved form (F47E).

Subrule 37(2) provides that a respondent to an application for a take-home pay order (whether with respect to an individual employee or outworker, or multiple employees or outworkers) must lodge a response to the application with the Commission within 14 calendar days after the day on which the respondent was served with the application. A legislative note provides that the response must be in the approved form (Form F47B is the approved form for a response to an application for a take-home pay order for an individual employee/outworker. Form F47D is the approved form for a response to an application for a take-home pay order for multiple employees/outworkers).

Rule 38 provides that an application under section 180 of the *Fair Work (Registered Organisations) Act 2009* (FW(RO) Act) for a conscientious objection certificate must be accompanied by a statutory declaration verifying the information provided in the application. A legislative note provides that the application must be in the approved form (forms F69 and F70 respectively are the approved forms for application for, and renewal of, a conscientious objection certificate). A second legislative note provides information regarding section 180 of the FW(RO) Act.

Rule 39 provides that an application for registration of an organisation under section 18 of the FW(RO) Act must be signed by at least 2 persons who are authorised to sign the application. A legislative note provides that the application must be in the approved form (Forms F55, F56 and F57 are the approved forms for applications for registration by an association of employers, an association of employees (other than an enterprise association) and an enterprise association respectively). A second legislative note directs readers to regulation 12 of the *Fair Work (Registered Organisations) Regulations 2009* concerning authorisation to make, sign or lodge documents.

## **Part 6 - Enterprise agreements**

Rule 40 provides that each employer that will be covered by an enterprise agreement must notify employees who will be covered by the agreement, through the usual means that are adopted by the employer for communicating with employees, that an application has been made to the Commission for approval of the enterprise agreement. A legislative note provides that examples of the "usual means" for communicating with employees are posting notices on employee notice boards and by email.

## **Part 7 - Service of documents: general requirements**

Rule 41 deals with the requirement to serve documents lodged with the Commission.

Subrule 41(1) provides that a person who lodges a document with the Commission must serve a copy of the document in accordance with the instructions as to service (if any) set out in Schedule 1 to the Rules.

Subrule 41(2) provides that the Commission must serve a copy of a document in accordance with the instructions as to service (if any) set out in Schedule 1 to the Rules.

Subrule 41(3) provides that, if an application is made using form F1-Application (No specific form), the applicant may seek directions from the Commission as to the service that is required. A legislative note provides that the application to the Commission under rule 7 must be in the approved form (F48).

Rule 42 deals with how service is effected by parties to matters that are before the Commission.

Subrule 42(1) requires that, unless provided by the Rules or directed by the Commission, a party must serve a document on another party, or other parties, to a matter as soon as practicable.

Subrule 42(2) provides the procedure for service of a document on an individual, a body corporate or an organisation or branch of an organisation by describing the manner for leaving, tendering, posting, faxing or emailing a document.

Subrule 42(3) provides a definition of “registered office” and “secretary” in relation to a body corporate for the purpose of subrule 42(2).

Subrule 42(4) provides that a certificate from the Managing Director of the Australian Postal Corporation stating that a letter which has been posted would, in the normal course of post, have been delivered on a specified day is evidence of the facts stated.

Rule 43 deals with service of a document by the Commission by describing the manner for posting, faxing, emailing, leaving or tendering the document.

Rule 44 provides that, if a provision is made for personal, or other, service of a document in a matter, the Commission may, on application, make an order for substituted service or other service by letter, fax, email, public advertisement or another method for the purpose of bringing the document to the notice of the person to be served. A legislative note states that the application for substituted service must be in the approved form (F49).

## **Part 8 - Service of documents in specific circumstances**

Rule 45 provides that, if it is required to serve an unfair dismissal application (F2), a general protections application (F8) or an unlawful termination FWC application (F9) on a respondent, the Commission must serve a copy of the application (excluding that part of the application that deals with the application fee) and any documents that were lodged with the application.

Rule 46 provides that a respondent who is required to serve a response to an unfair dismissal application (F3), a general protections application (F8A), an unlawful termination FWC application (F9A) or an objection to an unfair dismissal application (F4) must also serve upon the applicant any supporting documents that were lodged with the Commission.

Rule 47 provides that, if an employer is serving an application for approval of the termination of an individual agreement-based transitional instrument (F29) and the application includes a schedule under subrule 27(3) listing more than one agreement, the employer must not serve a copy of the application and schedule in such a way as to reveal the identify of any persons mentioned in the schedule other than the person who is being served.

Rule 48 provides that a respondent to an application for the Commission to deal with a dispute under section 739 of the Act (F10) must serve a copy of the response upon the applicant as soon as practicable after lodgment of the response with the Commission.

Rule 49 provides that an applicant who has lodged an application to vary a modern award under division 5 of part 2-3 of chapter 2 of the Act (F46) must seek directions from the Commission as to the service that is required. A legislative note provides that the application seeking directions from the Commission under rule 7 must be in the approved form (F48).

Rule 50 provides that an applicant who has lodged an application for a representation order under section 137 of the FW(RO) Act must seek directions from the Commission as to the service that is required. A legislative note provides that the application seeking directions the Commission under rule 7 must be in the approved form (F48).

Rule 51 deals with applications for an entry permit or a work health and safety permit.

Subrule 51(1) provides that an application for an entry permit under section 512 of the Act (F42) must be accompanied by evidence of the completion of appropriate training by the proposed permit holder about the rights and responsibilities of a permit holder under the Act.

Subrule 51(2) provides that an application for a WHS entry permit under section 131 of the *Work Health and Safety Act 2011* (using form F42A for the application and F42B for the statutory declaration) must be accompanied by evidence of the satisfactory completion by the proposed permit holder of training prescribed under the *Work Health and Safety Act 2011*.

Rule 52 provides that an appellant must, as soon as practicable after lodgment of an appeal book with the Commission under subrule 56(3), serve a copy of the appeal book upon each other party to the matter from which the appeal is brought.

## **Part 9 - Procedures for certain orders**

Rule 53 provides for an order for a witness to attend before the Commission.

Subrule 53(1) provides that a party who is seeking an order requiring a person to attend before the Commission may submit a draft order to the Commission. A legislative note provides that the draft order must be in the approved form (F51).

Subrule 53(2) provides that, if the order is made, the party who requested the order must serve a signed copy of the order upon the person who is required to attend before the Commission as soon as practicable after the order is made.

A legislative note at the end of clause 1 of Schedule 1—Instructions as to Service also advises that subrule 53(2) provides for service of an order made following lodgment of draft orders using form F51.

Rule 54 provides for an order for the production of documents.

Subrule 54(1) provides that a party who is seeking an order for the production of documents or records or any other information may submit a draft order to the Commission. A legislative note provides that the draft order must be in the approved form (F52).

Subrule 54(2) provides that, if the order is made, the party who requested the order must serve a signed copy of the order upon the person who is required to attend before the Commission as soon as practicable after the order is made.

Subrule 54(3) provides that the order in subrule (2) may be satisfied by producing the documents, records or other information specified in the order to the Commission at the place specified in the order no later than 4 pm on the day before the day specified in the order for production of the documents, records or other information.

A legislative note at the end of clause 1 of Schedule 1—Instructions as to Service also advises that subrule 54(2) provides for service of an order made following lodgment of draft orders using form F52.

Rule 55 provides a procedure for seeking an order for security for payment of costs in an unfair dismissal matter.

Subrule 55(1) provides that an applicant or respondent in an unfair dismissal application may apply to the Commission for an order that a person provide security for the payment of costs in respect of the matter or part of the matter. A legislative note provides that the application for security for payment of costs must be in the approved form (F5). A second legislative note advises that the Commission will not ordinarily make such an order before the conclusion of conciliation.

Subrule 55(2) provides that the person against whom an order is made must pay the amount of security at the time, and in the manner and form, required by the order.

Subrule 55(3) provides that, if the Commission makes an order for security for payment of costs in respect of a matter or part of a matter, the applicant or respondent may apply to the Commission to vary the amount of security or the time at which, or the manner in which, the security is to be provided.

Subrule 55(4) allows the Commission, without prejudice to its other powers, to order that the unfair dismissal matter be adjourned until the security is provided or adjourned indefinitely.



## **Part 10 - Appeals and reviews**

Rule 56 sets out the process to be followed by a person seeking to institute an appeal against a decision.

Subrule 56(1) provides that a person seeking to institute an appeal under section 604 of the Act against a decision of a single member of the Commission, the General Manager or a person exercising a delegation from the President or the General Manager must do so by lodging a notice of appeal. A legislative note summarises section 604 of the Act. A second legislative note provides that the notice of appeal must be in the approved form (F7).

Subrule 56(2) requires a notice of appeal to be lodged within 21 calendar days after the date of the decision or order that is being appealed against or within such further time as is allowed by the Commission on application by the appellant. A legislative note advises that subsection 598(4) of the Act provides that a decision may be made as an order.

Subrule 56(3) provides that the appellant must, within 7 calendar days after lodging the notice of appeal, lodge three copies of the notice of appeal and three copies of a paginated appeal book with the Commission. The subrule sets out the documents that must be contained in the appeal book. A legislative note states that rule 52 requires the appellant to serve a copy of the appeal book upon each party to the matter from which the appeal is brought.

Rule 57 provides that an application by the Minister for a review under section 605 of the Act must, to the fullest extent possible, be in accordance with the procedure set out for appeals in Rule 56. A legislative note summarises section 605 of the Act.

Rule 58 deals with other reviews which may be conducted by the Commission.

Subrule 58(1) provides that rule 58 applies if legislation confers jurisdiction on the Commission to review a decision made by a decision maker other than the Commission or a person exercising a delegation from the President or General Manager and the legislation does not specify a time within which the review must be instituted.

Subrule 58(2) provides that a person who seeks a review of a decision must file an application for review in accordance with approved form F1 (No specific form), with such variation as the nature of the view requires, within 21 calendar days after the date of the decision or within such further time as is allowed (on application) by the Commission.

## **Part 11—Miscellaneous**

Rule 59 provides for the seal of the Commission.

Subrule 59(1) provides for the form of the seal of the Commission.

Subrule 59(2) provides for the affixing of the seal by electronic means.

Rule 60 provides for the recovery of costs for copies of documents.

Subrule 60(1) provides that rule 60 applies if a person requests the Commission to provide a copy of a document.

Subrule 60(2) provides that a person must pay to the Commission, in advance of being provided with the document, an amount that the Commission reasonably requires to be paid for obtaining and providing the copy.

## **Part 12—Transitional**

Rule 61 provides for transition from the *Fair Work Australia Rules 2010*.

Subrule 61(1) provides that the *Fair Work Commission Rules 2013* apply to a matter started in the Commission on or after their commencement.

Subrule 61(2) provides that the *Fair Work Commission Rules 2013* also apply to a step in a matter that was started before their commencement if the step is taken on or after their commencement.

Subrule 61(3) provides, however, that the Commission may order that a provision of the *Fair Work Australia Rules 2010*, as in force immediately before the commencement of the *Fair Work Commission Rules 2013*, is to apply, with or without modification, to a step mentioned in subrule (2).

## **Schedule 1—Instructions as to service**

Schedule 1 to the Rules provides instructions as to service of approved forms.

Clause 1 provides that an approved form of the kind mentioned in columns 2 and 3 of an item of the table which appears in Schedule 1 must be served by the person mentioned in column 5 upon the person, and in the manner (if any), mentioned in column 6 of the item, at the time, or within the period, mentioned in column 7 of the item.

An example illustrates the operation of the table in Schedule 1 in an unfair dismissal application.

A legislative note provides that subrules 53(2) and 54(2) provide for service of an order made following the lodgment of draft orders using form F51 (Order requiring a person to attend the Fair Work Commission) and form F52 (Order requiring production of documents etc. to the Fair Work Commission) respectively.

A table sets out requirements as to service for approved forms that are specified in the table.

## **Schedule 2—Repeals**

Clause 1 provides for the repeal of the *Australian Industrial Relations Commission Rules 1998*.

Clause 2 provides for the repeal of the *Australian Industrial Relations Commission Rules 2007*.

Clause 3 provides for the repeal of the *Fair Work Australia Rules 2010*.

## **Statement of Compatibility with Human Rights**

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

### ***Fair Work Commission Rules 2013***

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 Rules 2013* (Rules) are procedural rules made by the President of the Fair Work Commission under section 609 of the *Fair Work Act 2009*. The Rules are in relation to the practice and procedure that is to be followed by the Commission and the conduct of business in relation to matters allowed or required to be dealt with by the Commission.

#### **Human Rights Implications**

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

#### **Conclusion**

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