

**Fair Work Commission Amendment (Greenfields Agreements and Other Measures)
Rule 2016**

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 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.

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;
- (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 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.

Consultation on the Amendment Rule

As required by section 609 of the Act, the President consulted with the other Members of the Commission concerning the *Fair Work Commission Amendment (Greenfields Agreements and Other Measures) Rule 2016* (the Amendment Rule). Pursuant to section 17 of the *Legislation Act 2003*, the President also gave persons who were likely to be affected by the Amendment Rule an opportunity to comment.

On 22 May 2016, the President provided the Members with a copy of a draft of the Amendment Rule and sought their comments by 25 May 2016. On 7 June 2016, following receipt of feedback from Members, the President published a draft of the Amendment Rule on the Commission's website and invited interested persons to provide comments by 29 June 2016. No comments were received as a result of this consultation.

Clause 8 of the Amendment Rule was inserted after the above consultation had taken place. Additional consultation was not undertaken in relation to clause 8 because it is a minor rule change which formalises the existing practices of parties serving the form in accordance with the instructions on the form.

The President is satisfied that the consultation undertaken was appropriate, having drawn upon the knowledge of persons with expertise in fields that are relevant to the Amendment Rule and having ensured that persons who were likely to be affected by the Amendment Rule had an opportunity to comment.

Regulatory Impact Statement

As is required by the Australian Government's best practice regulation requirements, the Office of Best Practice Regulation was consulted on 29 July 2016 regarding the requirement for a regulatory impact statement to be prepared in relation to the Amendment Rule. The Amendment Rule gives effect to Part 5 of the *Fair Work Amendment Act 2015*. A regulatory impact statement (see Regulation Impact Statement, '2.Greenfields Agreements' in the [Explanatory Memorandum](#) to the *Fair Work Amendment Bill 2014*) was prepared by the Department of Employment, which addresses the impact of the new provisions relating to greenfields agreements.

The Office of Best Practice Regulation advised the Commission that a regulatory impact statement was not required because the Amendment Rule is considered to have a minor regulatory impact on business, community organisations or individuals or is machinery in nature (reference number OBPR ID 21051).

Purpose

Previously, when an applicant to a matter before the Commission wished to discontinue their application, rule 10 of the *Fair Work Commission Rules 2013* (the Rules), required the applicant to notify the Commission by lodging a notice of discontinuance, advising the Commission by letter, email, fax or telephone or by advising the Commission during the course of a conference or hearing. Rule 5 defines the Commission as "the Fair Work Commission". The Fair Work Commission is established under section 575 of the Act and

comprises the President, Vice Presidents, Deputy Presidents, Commissioners and Expert Panel Members. Rule 10 has been amended to provide that Commission staff can receive notifications of discontinuance.

The *Fair Work Amendment Act 2015* (the Amendment Act) established an additional process for the making and approval of single-enterprise greenfields agreements. An employer that is a bargaining representative for such an agreement may give written notice of a 'notified negotiation period' to the relevant employee organisation in accordance with section 178B of the Act. At the end of the notified negotiation period, if no agreement has been made and the employee organisation has been provided with a reasonable opportunity to sign the agreement, the agreement is taken to have been made when the employer applies to the Commission for approval of the agreement (subsection 182(4)). Section 185A provides that an application for approval of an agreement under subsection 182(4) must be accompanied by a copy of the agreement and any declarations that are required by the Rules.

To facilitate the new greenfields agreement approval process, the President has approved 3 new Commission forms pursuant to rule 8. These new forms comprise a form to be used to apply to the Commission for approval of an agreement made under subsection 182(4), an employer declaration form and a declaration form for employee organisations. The Rules are amended to provide for the use and service of these new forms and for the documents that must accompany them.

General

Rule 1 states that the name of the amending instrument is the *Fair Work Commission Amendment (Greenfields Agreements and Other Measures) Rule 2016*.

Rule 2 provides that the Amendment Rule commences the day after it is registered.

Rule 3 states that the Amendment Rule is made under the Act.

Rule 4 provides that the Rules are amended as set out in Schedule 1 and Schedule 2 to the Amendment Rule.

Schedule 1

Item 1 amends rule 10(2)(b) to provide that staff of the Commission can receive notifications of the discontinuance of applications made to the Commission. The amendment also allows applicants to discontinue applications orally in person.

Item 2 inserts a new heading before subrule 24(1) to clarify that subrules 24(1)-24(4) relate to applications for approval of enterprise agreements other than greenfields agreements.

Item 3 inserts a new heading after subrule 24(4) to clarify that subrule 24(5) relates to applications for approval of greenfields agreements other than agreements made under subsection 182(4) of the Act.

Item 4 inserts the following in relation to applications to the Commission for approval of agreements made under subsection 182(4) of the Act:

- a new heading after subrule 24(5) to clarify that subrules 24(5A)-24(5D) relate to such an application;

- a new subrule 24(5A) stating that subrules 25(5B)-25(5D) apply in relation to such an application. The application form is the new form F21A referred to below;
- a new subrule 24(5B) requiring that an application be accompanied by a statutory declaration made by an officer or authorised employee of each employer that is a bargaining representative for the agreement. This statutory declaration is the new form F21B referred to below;
- a new subrule 24(5C) requiring that an employer statutory declaration be accompanied by a copy of each notice of a notified negotiation period given under section 178B of the Act; and
- a new subrule 24(5D) requiring an employee organisation that is a bargaining representative for the agreement to lodge a statutory declaration if it wants to advise the Commission about whether it agrees with one or more of the statements made in an employer's declaration. This statutory declaration is the new form F21C referred to below.

Item 5 updates the titles of the existing Commission forms F16, F17, F18 and F18A as referred to in column 3 of the table in Schedule 1 to the Rules. The text "(other than a greenfields agreement)" has been added to the titles of these forms to distinguish them from the forms to be used in relation to greenfields agreements.

Item 6 updates the titles of the existing Commission forms F19, F20 and F21 as referred to in column 3 of the table in Schedule 1 to the Rules. The text "made under subsection 182(3) of the Act" has been added to the titles of these forms to distinguish them from the new forms to be used in relation to greenfields agreements made under section 182(4) of the Act.

Item 7 inserts instructions as to service of the following 3 new forms into the table in Schedule 1 to the Rules:

- F21A– Application for Approval of Greenfields Agreement taken to have been made under subsection 182(4) of the Act;
- F21B– Employer's Statutory Declaration in Support of Application for Approval of Greenfields Agreement taken to have been made under subsection 182(4) of the Act; and
- F21C– Statutory Declaration of Employee Organisation in relation to Application for Approval of Greenfields Agreement taken to have been made under subsection 182(4) of the Act.

Item 8 inserts the service requirements for the F34A–Application to extend the 30-day period for protected action. This form was approved by the President on 25 May 2016 but was not included in Schedule 1 to the Rules at that time.

Schedule 2

Clause 1 inserts a new rule 62(1) which provides that the amendments to the Rules in relation to greenfields agreements apply in relation to an application for approval of an agreement made on or after the day the Amendment Rule commences. The clause also

inserts a new rule 62(1) which provides that the amendment to schedule 1 made by item 8 applies in relation to an application made on or after the day the amendment commenced.

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 (Greenfields Agreements and Other Measures) Rule 2016

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 (Greenfields Agreements and Other Measures) Rule 2016* (Amendment Rule) is a procedural rule made by the President of the Fair Work Commission under section 609 of the *Fair Work Act 2009*. The Amendment Rule provides 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 Commission.

Human Rights Implications

The Amendment Rule does not engage any of the applicable rights or freedoms.

Conclusion

The Amendment Rule is compatible with human rights as it does not raise any human rights issues.

Justice Iain Ross AO
President
Fair Work Commission