

**Fair Work Commission Amendment (Applications for Protected Action Ballot Orders)  
Rules 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 (Applications for Protected Action Ballot Orders) Rules 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 9 December 2016, the President provided the Members with a copy of a draft of the Amendment Rule and sought their comments by 16 December 2016. On 12 December 2016, the President published a draft of the Amendment Rule on the Commission's website and advised clients who subscribe to a general announcements subscription service and invited interested persons to provide comments by 16 December 2016.

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 20 December 2016 regarding the requirement for a regulatory impact statement to be prepared in relation to the Amendment Rule. 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 (reference number OBPR ID 21683).

### **Purpose**

Section 437 of the Act sets out who may apply to the Commission for a protected action ballot order and the matters to be specified in an application. Section 443 states when the Commission must make a protected action ballot order. Section 441 provides that an application for a protected action ballot order must be determined within 2 days after it is made. Rule 31 of the *Fair Work Commission Rules 2013* provides for the documents that must accompany a protected action ballot order application.

The President has approved amendments to the current protected action ballot order application form and approved a new statutory declaration form pursuant to rule 8. The provision of a statutory declaration to be filed by the applicant in support of a protected action ballot order application will enable the Commission to place greater reliance on the information provided in determining uncontested applications and allow matters to be determined largely 'on the papers' rather than holding a formal hearing to determine the matter. The new process will assist the Commission in determining applications as efficiently

as possible within the required legislative timeframe and formalise the practice already adopted by some Commission Members.

Rule 31 has been amended to provide that an application under section 437 must be accompanied by a draft order and a statutory declaration. The amended Rule 31 states that the applicant must set out the basis on which the Commission can be satisfied that the requirements of section 443(1)(b) have been met, being that the Commission is satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted. A second note has also been inserted under subrule 31(1) which requires that the statutory declaration be in the approved form, as is with the requirements of subrule 8(2).

## **General**

Rule 1 states that the name of the amending instrument is the *Fair Work Amendment (Applications for Protected Action Ballot Orders) Rules 2016*.

Rule 2 provides that the Amendment Rule commences on 1 January 2017.

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

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

## **Schedule 1**

Item 1 amends subrule 31(1) to provide that an application under section 437 must be accompanied by a statutory declaration by the applicant setting out the basis on which the Commission can be satisfied that the requirements of paragraph 443(1)(b) have been met, in addition to the draft order. A second note has been inserted under subrule 31(1) requiring that the statutory declaration be in the approved form. Subrule 31(2) has been deleted as rules 13 to 16 make provision for the lodgment documents.

Item 2 inserts the service requirements for the F34B–Statutory Declaration in Support of an Application for a Protected Action Ballot Order.

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

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

### **Fair Work Amendment (Applications for Protected Action Ballot Orders) Rules 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 Amendment (Applications for Protected Action Ballot Orders) Rules 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