

# Fair Work Commission Amendment (Entry Permits and Other Measures) Rules 2019

## 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.

## Purpose of the Amendment Rules

The *Fair Work Commission Amendment (Entry Permits and Other Measures) Rules 2019* (the Amendment Rules) amend the *Fair Work Commission Rules 2013* (the Rules).

### *Lawyers and paid agents*

Item 2 of Schedule 1 to the Amendment Rules replaced the previous rules 11 and 12 of the Rules with new rules 11, 12 and 12A. These rules relate to the representation of a person in a matter before the Commission by a lawyer or paid agent, and the circumstances in which a lawyer or paid agent must inform the Commission that they act or have ceased to act for a person.

New rule 11 deals with when a lawyer or paid agent must notify the Commission that they act or have ceased acting for a person in relation to a matter before the Commission. Notice that a lawyer or paid agent acts for a person can serve to inform the Commission and the other parties to the matter that the lawyer or paid agent is to be copied into correspondence and documents lodged in the matter. It will also put the other parties on notice that costs are being incurred for which the other parties (or their lawyers or paid agents) could become liable if a cost order was to be made by the Commission.

Section 596 of the Act prohibits a person being represented by a lawyer or paid agent in a matter before the Commission without the permission of the Commission, subject to certain exceptions. The exceptions include the exceptions provided for in the Rules.

The circumstances in which permission is and is not required for a person to be represented by a lawyer or paid agent in a matter before the Commission have been the subject of a number of recent Commission decisions (see, for example, *Fitzgerald v Woolworths Limited* [2017] FWCFB 2797 (*Fitzgerald*) and *Stringfellow v CSIRO* [2018] FWC 1136).

New rule 12 deals with the circumstances in which, for the purposes of section 596 of the Act, a person may have a lawyer or paid agent represent them without the permission of the Commission. The new rule provides greater clarity as to when a person requires the Commission's permission for representation by a lawyer or paid agent.

New rule 12A requires a person who wishes to be represented in a way that requires permission under rule 12, to lodge a notice informing the Commission that they will be seeking the Commission's permission. This will put the Commission and the other parties on notice that permission will be sought.

The requirement for a person to give notice under rule 12A is separate to the requirement under rule 11(1) for a lawyer or paid agent to notify the Commission that they act for a party. A lawyer or paid agent who is acting for a person in relation to a matter before the Commission may or may not also be representing the person in that matter within the meaning of section 596 of the Act. For example, the lawyer or paid agent will not be representing the person in this sense if the lawyer or paid agent is an employee or officer of the person (see section 596(4) of the Act). Further, the lawyer or paid agent will not be representing the person in this sense if the lawyer or paid agent is not relevantly involved in any interaction with the Commission in relation to the matter (see *Fitzgerald*).

### *Statutory declarations and notifications by employers that are partnerships*

Item 3 of Schedule 1 to the Rules Amendment inserts new rule 17A providing for the manner in which a partnership may discharge the obligations of employers under the Rules to lodge certain statutory declarations relating to applications for approval, variation and termination of enterprise agreements and to notify employees of applications for approval of enterprise agreements.

New rule 17A permits any one of the partners or an officer or authorised employee of the partnership to discharge the obligations of the partnership. Absent such a rule, each of the partners in the partnership may be required to lodge the declarations and notify employees.

### *Applications for orders for access to non-member records*

Section 483AA of the Act provides for holders of entry permits issued under section 512 of the Act to apply for an order allowing the permit holder access to non-member records or documents held by an occupier or affected employer on certain premises. A ‘non-member’ record or document is a record or document that relates to the employment of a person who is not a member of the permit holder’s employee organisation (and does not substantially relate to the employment of a person who is a member).

The Commission must perform its functions in a way that is fair and just and open and transparent, but neither the Act nor the Rules previously made provision for affected non-member employees to be informed that such an application has been made or for them to make submissions.

Item 15 of Schedule 1 to the Rules Amendment introduces a new rule 34A that provides employees whose records are being sought through the application with an opportunity to make submissions to the Commission.

### *Access to certain applications and statutory declarations*

From time to time the Commission receives requests from non-parties for access to documents pertaining to enterprise agreement approval, variation and termination applications. In the interests of open justice and to assist the Commission to inform itself about such applications, the Commission may provide non-parties with access to the documents. A Full Bench of the Commission in *Construction, Forestry, Mining and Energy Union v Ron Southon Pty Ltd* [2016] FWCFB 8413 (*Ron Southon*), observed that applications for the approval of enterprise agreements and the related employer statutory declarations should be freely available to any member of the public who wishes to see them, unless there are exceptional circumstances that would justify an order for confidentiality.

Item 17 of Schedule 1 to the Rules Amendment introduces a new rule 40A reflecting the position expressed in *Ron Southon*. The new rule draws attention to the pre-existing discretion of a Member of the Commission in the course of dealing with a matter, to provide any person with access to documents lodged in the matter.

### *Applications for entry permits*

Section 512 of the Act allows the Commission, upon application by an organisation, to issue an entry permit to an official of the organisation if the Commission is satisfied that the official is a fit and proper person to hold the entry permit.

Item 20 of Schedule 1 to the Rules Amendment introduces new subrules 51(1A) and 51(1B) to assist the Commission to gather information relevant to whether the proposed entry permit holder is such a fit and proper person.

New subrule 51(1B) establishes a process to publish details of entry permit applications on the Commission's website and invite public submissions on the applications.

New subrule 51(1A) provides for the Commission to request or obtain a national police certificate for a proposed entry permit holder. A police certificate may establish whether the proposed entry permit holder has been convicted of an offence of the type listed in subsections 513(1)(b) or (c) of the Act.

The new subrules draw attention to, and do not alter, the pre-existing discretion of a Member of the Commission to seek a police certificate or invite submissions from third parties for the purpose of informing himself or herself in relation to an entry permit application.

### *Other amendments*

In addition to the Rules amendments outlined above, the Amendment Rules make a number of minor technical corrections and improvements to the wording of various rules.

### **Details**

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

### **Consultation on the Amendment Rules**

As required by section 609 of the Act, the President consulted with the other Members of the Commission concerning the Amendment Rules. On 7 December 2018, the President provided the Members with a copy of a draft of the Amendment Rules and sought their comments by 20 December 2018.

Pursuant to section 17 of the *Legislation Act 2003*, the President also gave persons who were likely to be affected by the Amendment Rules an opportunity to comment. On 7 December 2018, the President published a draft of the Amendment Rules on the Commission's website and advised subscribers to the Commission's general announcements subscription service of the publication. Interested persons were invited to provide comments by 20 December 2018.

Some amendments were made to the Amendment Rules in response to comments received through the consultation process. These are outlined in Attachment A. In addition, some technical changes were made in finalising the Amendment Rules.

The President of the Commission 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 Rules and having ensured that persons who were likely to be affected by the Amendment Rules had an opportunity to comment.

### **Regulatory Impact Statement**

As required by the Australian Government's best practice regulation requirements, the Office of Best Practice Regulation was consulted on 12 March 2019 regarding the requirement for a regulatory impact statement to be prepared in relation to the Amendment Rules.

The Office of Best Practice Regulation advised the Commission that a regulatory impact statement was not required because the Amendment Rules do not have more than a minor regulatory impact on business, community organisations or individuals (reference number OBPR ID 25097).

### **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. The Statement of Compatibility has been prepared to meet that requirement and is at **Attachment B**.

**Details of the *Fair Work Commission Amendment (Entry Permits and Other Measures) Rules 2019***

**Rule 1 Name**

This rule provides that the name of the amending instrument is the *Fair Work Commission Amendment (Entry Permits and Other Measures) Rules 2019*.

**Rule 2 Commencement**

This rule provides that the Amendment Rules commence on 1 August 2019.

**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 definition of ‘Workplace Advice Service’ into rule 5 of the Rules.

Item 2 and items 69 to 73

Item 2 replaces rules 11 and 12 of the Rules with new rules 11, 12 and 12A.

New subrules 11(1) and 11(2) respectively require each lawyer or paid agent that acts for, and ceases to act for, a person in relation to a matter before the Commission, to lodge a notice with the Commission. The Rules require notices lodged under rule 11 to be in the approved form and to be served upon all parties to the matter other than the person for whom the lawyer or paid agent acts or previously acted. The names of the approved forms and service requirements are amended by items 69, 70, 72 and 73 of the Amendment Rules.

New subrule 11(3)(a), which provides that subrules 11(1) and (2) do not apply to lawyers or paid agents acting for a person if the person is taken not to be represented by a lawyer or paid agent because of section 596(4) of the Act, was added to the Amendment Rules in response to feedback received in the consultation process. New subrule 11(3)(b) provides that subrules 11(1) and (2) do not apply to lawyers providing assistance through the Commission’s Workplace Advice Service.

New rule 12 deals with when, for the purposes of section 596(1) of the Act, a person may be represented in a matter by a lawyer or paid agent without the permission of the Commission.

The previous subrule 12(1) listed various acts of representation for which the Commission’s permission is not required. New subrules 12(1) and (2) extend the circumstances in which permission is not required.

The effect of new subrule 12(1) is that a person does not require the permission of the Commission for any representation by a lawyer or paid agent in a matter before the Commission, other than the lawyer or paid agent participating in a conference or hearing. The further effect of new subrule 12(2) is that permission is not required for a person to be represented by a lawyer or paid agent:

- participating in a conference or hearing relating to:
  - a matter arising under Part 2-3 of the Fair Work Act (modern awards);
  - a matter arising under Part 2-5 of the Act (workplace determinations);
  - a matter arising under Part 2-6 of the Act (minimum wages);
  - a matter arising under sections 510 or 512 of the Act (entry permits); and
- participating in a conference conducted by a member of Commission staff in relation to an application under section 394 of the Act (for an unfair dismissal remedy) or an application under section 789FC of the Act (for an order to stop bullying).

A proposal to exempt some appeal proceedings from the requirement for permission was omitted in response to feedback received in the consultation process.

New subrule 12(3) provides that despite anything in rule 12, the Commission may direct that a person is not to be represented by a lawyer or paid agent in a matter except with the permission of the Commission.

New subrule 12(4) clarifies that a person will require permission to be represented by a lawyer or paid agent participating in a conference conducted by a Commission Member (rather than a staff member) in relation to an application under section 394 of the Act (for an unfair dismissal remedy) or section 789FC of the Act (for an order to stop bullying).

New subrule 12A(1) requires that, where a person proposes to be represented in a matter before the Commission in a manner that requires permission under rule 12, the person must lodge a notice with the Commission informing the Commission that the person will seek permission for the lawyer or paid agent to represent them. New Form F53A can be used to give such notice, and must be served upon all parties to the matter other than the person seeking permission. Item 71 inserts instructions as to service of new Form F53A into Schedule 1 to the Rules.

New subrule 12A(2) provides that the Commission may permit a person to be represented by a lawyer or paid agent even if the person fails to comply with subrule 12A(1).

### Item 3

Item 3 inserts new rule 17A into the Rules, which provides that if an employer is a partnership, the obligations of the employer under rules 24, 25, 26 and 40 are imposed on each partner but may be discharged by any of the partners or by an officer or authorised employee of the partnership.

### Items 4, 6, 7, 16, 27, 29, 31, 34, 35 and 43

Items 4, 6, 7, 16, 27, 29, 31, 34, 35 and 43 make a technical correction to certain rules and instructions as to service of forms (in Schedule 1 to the Rules), relating to applications for

approval of enterprise agreements and notice to employees of applications to approve enterprise agreements.

At present these rules and instructions as to service refer variously to employers, employees and employee organisations that are ‘to be’, or ‘will be’, covered by an enterprise agreement for which an application for approval has been made to the Commission. However, pursuant to the Act, such persons are covered by the enterprise agreement when the agreement is made. The amendments correct the relevant wording accordingly.

#### Items 5, 7, 8, 10, 13, 14

Items 5, 7, 8, 10, 13 and 14 make technical corrections to certain rules requiring statutory declarations to be lodged by or on behalf of employers, employee organisations and applicants, in support of applications for approval, variation and termination of enterprise agreements and applications for protected action ballot orders.

At present these requirements are not expressed appropriately so as to apply to employers and applicants that may be individuals or bodies corporate and to employee organisations as bodies corporate. The amendments correct the relevant wording so that the requirements are expressed appropriately for individuals and bodies corporate as applicable.

#### Items 9, 11, 12 and 43

Items 9, 11 and 12 make corrections to rule 25 of the Rules, which requires statutory declarations to be lodged by or on behalf of employers and employee organisations in support of an application to the Commission for approval of a variation of an enterprise agreement.

At present rule 25(1) requires a statutory declaration to be lodged by an officer or authorised employee of each employee organisation that is a ‘bargaining representative’ for the variation. However, the Act does not define bargaining representatives for this purpose. The rule as amended requires a statutory declaration to be lodged by an officer or authorised employee of each employee organisation that is ‘covered by’ the enterprise agreement for which the application has been made.

In consequence of this amendment, rule 25(2) is otiose and is omitted, and rule 25(1) is renumbered as rule 25.

Item 43 makes consequential changes to the service requirements for an application to vary an enterprise agreement in Schedule 1 to the Rules.

#### Item 15

Item 15 introduces a new rule 34A relating to an application under section 483AA of the Act for an order of the Commission allowing the holder of an entry permit to have access to non-member records or documents held by an occupier or affected employer on certain premises.

New subrules 34A(3)(a) and (b) require that, within 24 hours of being served with a section 483AA application, the occupier or affected employer must either display the application at the premises at a location where notices to employees are usually displayed (rule

34A(3)(a)), or make a copy of the application available to employees through the usual means of the occupier or affected employer for communicating with employees (rule 34A(3)(b)). New subrule 34A(3)(b) was added to the Amendment Rules in response to feedback received in the consultation process.

To make the occupier or affected employer aware of the obligation under subrule 34A(3) to display the application, subrule 34A(2) requires the applicant to serve a notice that sets out the effect of the subrule on the occupier or affected employer.

#### Item 17

Item 17 introduces a new rule 40A dealing with non-party and public access to certain applications made to the Commission and the statutory declarations lodged in support of those applications. It provides that the Commission may, on application by any person, provide the person with access to these applications and statutory declarations.

The applications concerned are applications to the Commission for approval of an enterprise agreement (greenfields or non-greenfields), approval of a variation of an enterprise agreement, and approval of the termination of an enterprise agreement. The statutory declarations concerned are those required by the Rules to be lodged by or on behalf of employers, employee organisations and others in support of such applications.

The new rule draws attention to, and does not alter, the existing discretion of a Member of the Commission in the course of dealing with such an application, to provide any person with access to the application and statutory declarations.

Providing such access may assist the Member properly to inform himself or herself in relation to the application and promote open justice.

#### Items 18 to 20

Item 20 introduces new subrules 51(1A) and 51(1B) relating to applications for an entry permit to be issued to an official of an organisation under section 512 of the Act. The new subrules concern the requirement in section 512 of the Act that the Commission be satisfied that the official is a fit and proper person to hold an entry permit.

New subrule 51(1A) provides that the Commission may require the official concerned to provide, or authorise the Commission to apply for, a current national police certificate in respect of the official.

New subrule 51(1B) provides that the Commission may, before considering an entry permit application, publish certain information about the application on the Commission's website, including that submissions may be made to the Commission about whether the proposed permit holder is a fit and proper person to hold the entry permit.

The new subrules draw attention to, and do not alter, the existing discretion of a Member of the Commission to inform himself or herself as to a proposed permit holder's fitness to hold an entry permit, by requiring the proposed permit holder to provide a national police certificate or inviting submissions from third parties.

For clarity, Item 18 has the effect of grouping subrules 51(1), 51(1A) and 51(1B) under the heading “*entry permits*”, and Item 20 gives subrule 51(2) the heading “*WHS entry permits*”.

Previously, subrule 51(1) referred to the ‘person’ who is to hold an entry permit, whereas the Act refers to the ‘official’ who is to hold it. Item 19 corrects the wording of the subrule for consistency with the Act.

#### Item 21

Item 21 amends subrules 53(2) and 54(2) which concern, respectively, orders requiring a person to attend before the Commission and orders requiring a person to provide copies of documents, records or other information to the Commission.

At present subrule 53(2) requires that where an order requiring a person to attend before the Commission is made, the requesting party must serve a signed copy of the order on the person required to attend. Subrule 54(2) makes the same provision with respect to orders to provide copies of documents, records or other information. Amended subrules 53(2) and 54(2) require that copies of the order also be served upon the other parties to the matter, unless the order has been published on the Commission’s website.

Requiring service of such orders upon the other parties to the matter ensures parties are informed about how the Commission is dealing with their matter and is consistent with the requirement in section 577(c) of the Act that the Commission perform its functions in a manner that is open and transparent.

#### Item 22

Item 22 introduces a new rule 63 which provides for when new rules 11, 12, 12A, 34A, 40A, subrules 51(1A) and (1B) and the amendments to Schedule 1 to the Rules will apply.

#### Items 23 to 26, 32, 37, 40, 42, 44, 46, 48, 49, 51, 52, 54 to 60, and 63 to 66

Items 23 to 26, 32, 37, 40, 42, 44, 46, 48, 49, 51, 52, 54 to 60, and 63 to 66 make minor corrections to the titles of various Commission approved forms in Schedule 1 to the Rules.

#### Items 28, 30, 33 and 41

Items 28, 30, 33 and 41 address who is required to serve various statutory declarations in relation to applications for the approval of enterprise agreements.

Previously Schedule 1 to the Rules required the Form F17, F18, F18A and F21C statutory declarations to be served by the declarant. Items 28, 30, 33 and 41 amend Schedule 1 so that these forms must be served by the employer, employee organisation, employee bargaining representative or employee organisation that is required to lodge the statutory declaration.

#### Items 36, 38, 39, 45, 47, 50, 53, 62 and 67

Items 36, 38, 39, 45, 47, 50, 53, 62 and 67 amend with the period within which various Commission approved forms must be served.

Previously under Schedule 1 to the Rules, the period within which Forms F20, F21, F21B, F23A, F23B, F24A, F24C, F46 and F47E were to be served was contingent on the service of another Commission approved form (for example, the Form F20 was to be served at the same time as the Form F19).

The amendments provide that the relevant forms must instead be served as soon as practicable after lodgment with the Commission. This simplifies the service requirements.

#### Item 61

Item 61 inserts into Schedule 1 to the Rules a requirement for applications under section 483AA of the Act for access to non-member records to be served.

Previously, the Rules did not require service of such applications. The amendment to Schedule 1 provides that, subject to an order of the Commission, the applicant must serve the application under section 483AA on each occupier and affected employer in relation to which orders are sought, as soon as practicable after the application has been lodged with the Commission.

The amendment complements new rule 34A, which applies where an occupier or affected employer is served with an application for access to non-member records (Item 15, discussed above).

The amendment to Schedule 1 provides that the requirement to serve an application for access to non-member records is subject to an order of the Commission. This recognises that in some cases, it may be appropriate for orders to be made *ex parte*.

#### Item 68

Item 68 complements Item 21, which introduces a requirement to serve orders to attend or to produce information upon the other parties to a matter. Item 68 inserts into Schedule 1 to the Rules a requirement to serve the Form F51 and Form F52 applications for such orders on all parties to the matter, unless the application has been published on the Commission's website.

The new service requirement assists to ensure that parties are fully informed about how the Commission is dealing with their matter, and is consistent with the requirement in section 577(c) of the Act that the Commission perform its functions in a way which is open and transparent.

## 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 (Entry Permits and Other Measures) Rules 2019

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 (Entry Permits and Other Measures) Rules 2019* (Amendment Rules) are procedural rules made by the President of the Fair Work Commission under section 609 of the *Fair Work Act 2009* (Act). The Amendment 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.

Justice Iain Ross AO  
President  
Fair Work Commission