

Fair Work Commission Amendment (Miscellaneous Measures) Rules 2020

EXPLANATORY STATEMENT

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

Authority

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

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

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

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

- (a) the requirements for making an application to the Commission;
- (b) the circumstances in which a lawyer or paid agent may make an application or submission to the Commission on behalf of a person who is entitled to make the application or submission;
- (c) the form and manner in which, and the time within which, submissions may or must be made to the Commission;
- (d) the procedural requirements for making decisions of the Commission;
- (e) the form and manner in which the Commission gives directions and notifies persons of things;
- (ea) the requirements for making a notification to the Commission;
- (f) who is notified by the Commission of things;
- (g) the manner in which conferences are to be conducted in relation to applications made under Part 3-1, 3-2 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 (Miscellaneous Measures) Rules 2020* (the Amendment Rules) amend the *Fair Work Commission Rules 2013* (the Rules).

Notice that a lawyer or paid agent acts or has ceased to act in a matter

New rules relating to representation by lawyers and paid agents in matters before the Commission, commenced on 1 August 2019. These rules provided greater clarity as to when the Commission's permission for representation by a lawyer or paid agent is or is not required (see rules 12 and 12A).

Rules 11 and 41 also required a lawyer or paid agent acting for a person in relation to a matter before the Commission to give notice that they act to the Commission and to the other parties, and also to give notice if they cease to act while the matter remains before the Commission. These notice requirements did not apply to lawyers and paid agents covered by s.596(4) of the Act (such as where the lawyer or paid agent is an employee of the party, or an employee of a union or employer association that is representing the party).

After these rules commenced, concerns were raised with the Commission that the rule requiring lawyers and paid agents to give notice that they act, may unnecessarily require separate notice to be given by every lawyer and paid agent working for a party. A concern was also raised that this rule, in its application to barristers, might conflict with prohibitions under professional conduct rules of barristers conducting correspondence in their own names or giving their own address as an address for service.

To address these concerns and to reduce regulatory burden more generally, rule 11(1) is amended to make the giving of notice that a lawyer or paid agent acts for a party voluntary and the responsibility of the party (rather than the lawyer or paid agent).

Under new rule 11(1), a party might choose to give notice that it has a lawyer or paid agent acting in a matter, so that the lawyer or paid agent will be copied into correspondence and other documents relating to the matter. A party might also choose to give notice so as to 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 made by the Commission.

While the previous notice requirements did not apply where a lawyer or paid agent is covered by s.596(4) of the Act, under new rule 11(1) a party might choose to give notice even though its lawyer or paid agent is covered by s.596(4).

While under new rule 11(1) it will be voluntary for a party to give notice that a lawyer or paid agent is acting in relation to a matter, if a party has given such notice then the party will be required to notify the Commission and the other parties if the lawyer or paid agent ceases to act while the matter remains before the Commission (rule 11(2)). This is to ensure that the Commission and other parties are made aware that the lawyer or paid agent should no longer be copied into correspondence and documents in the matter.

There is a separate requirement under rule 12A for a party to give notice to the Commission and to the other parties if it proposes to have its lawyer or paid agent participate in a conference or hearing in the Commission and that participation requires permission under rule 12 (that is, if the lawyer or paid agent is not covered by s.596(4) of the Act and none of the exemptions in rule 12(2) apply). This notice requirement is not affected by the Amendment Rules.

Information sought from bargaining agents in relation to applications for approval of enterprise agreements

Rule 24 relates to an application to the Commission for approval of an enterprise agreement. Under the previous rules 24(3), (4) and (5D) bargaining representatives were invited to advise the Commission about whether they support the approval of the agreement or agree with statements in an employer declaration lodged in relation to the agreement.

The Commission received some feedback to the effect that these rules were often misunderstood as requiring bargaining representatives to provide more information than was intended by the Commission, so that the bargaining representatives may be reluctant to respond.

The proposed rule changes clarify and narrow the information sought from bargaining representatives under these rules.

Amendments to require declarations rather than statutory declarations

Various rules previously required lodgment of a statutory declaration with the Commission.

Statutory declarations must be signed by the declarant before an authorised witness. Some parties reported that social distancing measures related to the COVID-19 pandemic have made it difficult to have statutory declarations witnessed. The Commission does not want people exposed to health risks in order to have statutory declarations witnessed.

To address this concern and to reduce regulatory burden more generally, Part 2 of Schedule 1 to the Amendment Rules replaces various requirements under the Rules to lodge statutory declarations with requirements to lodge signed declarations.

In addition to addressing concerns in relation to COVID-19, these changes will facilitate development of 'SmartForms' that can be lodged with the Commission electronically.

The changes do not affect applications for WHS entry permits, which must be accompanied by a Form F42B – Statutory declaration in support of an application for a WHS entry permit. Section 131 of the *Work Health and Safety Act 2011* requires that an application for a WHS entry permit be accompanied by a statutory declaration.

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 of the Commission consulted with the other Members of the Commission concerning the Amendment Rules.

On 14 January 2020, the President provided the Members with a copy of a draft of the Amendment Rules as they concerned amendments to rules 11 and 24, and sought their comments by 23 January 2020.

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 24 January 2020, the President published the Amendment Rules as they concerned rules 11 and 24 on the Commission's website for public comment, and advised subscribers to the Commission's general announcements subscription service of the publication. Interested persons were invited to provide comments by 7 February 2020.

The Amendment Rules were subsequently revised to include Part 3 of Schedule 1 to the Amendment Rules (which provides for lodgment of signed declarations rather than statutory declarations). On 3 April 2020, the President sought comments by 10 April 2020 on Part 3 of Schedule 1 by:

- providing Members of the Commission with a copy of Part 3 of Schedule 1;
- publishing Part 3 of Schedule 1 for public consultation on the Commission's website;
- advising the Commission's Enterprise Agreements User Group, comprised of employer and union stakeholders that are frequently involved in enterprise-agreement related matters before the Commission, of the public consultation; and
- advising subscribers to the Commission's general announcements subscription service of the public consultation.

Comments were received from various interested persons, and these were considered by the President.

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 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 13 March 2020 and 14 April 2020 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 the Amendment Rules do not have more than a minor regulatory impact on business, community organisations or individuals and, noting that the Amendment Rules are not being considered by Cabinet, indicated that a regulatory impact statement was not required (reference number OBPR ID 26378).

Statement of compatibility with human rights

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

Details of the *Fair Work Commission Amendment (Miscellaneous Measures) Rules 2020*

Rule 1 Name

This rule provides that the name of the amending instrument is the *Fair Work Commission Amendment (Miscellaneous Measures) Rules 2020*.

Rule 2 Commencement

This rule provides that the Amendment Rules commence on 1 May 2020.

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 replaces rule 11 of the Rules with a new rule 11.

New subrule 11(1) requires a person who wants to advise the Commission that a lawyer or paid agent acts for them in relation to a matter before the Commission, to lodge a notice with the Commission.

Under rule 41 of the Rules, a person who lodges a notice under subrule 11(1) (or under subrule 11(2)) must also serve a copy of the notice on other parties in accordance with Schedule 1 to the Rules (see further, Item 3 below).

Note 1 under the new subrule 11(1) observes that a person may want to lodge (and serve) a notice under this subrule so that their lawyer or paid agent is copied into information relating to the matter concerned, or to put other parties on notice that costs are being incurred for which a party (or their lawyer or paid agent) could be liable if an order for costs is made against them by the Commission.

Note 2 under new subrule 11(1) (and the note under new subrule 11(2)) observes that a notice given under the subrule must be in the approved form (see subrule 8(2)).

New subrule 11(2) requires a person who has lodged a notice under subrule 11(1) in relation to a matter that remains before the Commission, to lodge a notice with the Commission if the lawyer or paid agent has ceased to act for them in relation to the matter.

Item 2

Item 2 amends subrule 12(1) in consequence of item 1 (under which giving of notice under subrule 11(1) is voluntary).

Item 3

Item 3 amends Schedule 1 to the Rules in consequence of the replacement of rule 11 under item 1.

The amendments to Schedule 1 change details of the Commission approved forms used to give notice under subrules 11(1) and 11(2) for the purposes of the service requirements under the Rules.

Items 4 to 8

Items 4 and 5 amend subrule 24(3) to clarify and narrow the information that the Commission seeks to obtain from a bargaining representative for an enterprise agreement under the subrule.

Rather than subrule 24(3) inviting a bargaining representative to advise the Commission ‘about whether ... [it] supports approval of the agreement; or agrees with one or more statements in a declaration made by an employer’ under subrule 24(1), under new subrule 24(3) the bargaining representative is invited to advise the Commission ‘if... [it] supports or opposes approval of the agreement; or disagrees with one or more statements’ in a declaration made by an employer.

Items 6 and 7 make corresponding amendments to subrule 24(4) and item 8 makes a corresponding amendment to subrule 24(5D).

Item 9

Item 9 amends rules that require a statutory declaration to be made, to instead require a declaration to be made.

Previously:

- rules 24 to 27 required statutory declarations to be lodged in relation to applications for approval and variation of enterprise agreements, and applications for termination of enterprise agreements, collective agreement-based transitional instruments and individual agreement-based transitional instruments;
- rules 31, 35, 37 and 38 respectively required an application for a protected action ballot order, affected member certificate, take-home pay order and conscientious objection certificate to be accompanied by a statutory declaration;
- rule 17A(a) provided for how an employer that is a partnership could discharge its obligations to lodge a statutory declaration under rules 24, 25 and 26; and
- rule 40A (as applied under rule 63) provided that the Commission may, on application by any person, provide the person with access to statutory declarations lodged pursuant to rules 24, 25 and 26.

Item 9 replaces references to ‘statutory declaration’ or ‘statutory declarations’ in rules 17A, 24 to 27, 31, 35, 37, 38, 40A and 63, with ‘declaration’ or ‘declarations’.

Item 9 also makes consequential amendments to the titles of Commission approved forms in Schedule 1 to the Rules, replacing references to ‘statutory declaration’ with ‘declaration’.

Item 10

Item 10 corrects rule 40A(d) of the Rules, by replacing the reference to 'subrule 25(1)' with 'rule 25'.

Item 11

Item 11 introduces a new rule 64, which provides for when the amended rules apply.

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 (Miscellaneous Measures) Rules 2020

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 (Miscellaneous Measures) Rules 2020* (Amendment Rules) amends the procedural rules made by the President of the Fair Work Commission under section 609 of the *Fair Work Act 2009* (Rules). The Rules provide for practice and procedure that is to be followed by the Fair Work Commission and the conduct of business in relation to matters allowed or required to be dealt with by the Fair Work Commission.

Human Rights Implications

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

Conclusion

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

Justice Iain Ross AO
President
Fair Work Commission