

Fair Work Commission Amendment (Stop Sexual Harassment) Rules 2021

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 (Stop Sexual Harassment) Rules 2021* (the Amendment Rules) amend the *Fair Work Commission Rules 2013* (the Rules).

The *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* commenced on 11 September 2021. It extends the Commission's stop bullying jurisdiction (Part 6-4B of the Act) so that the Commission can also make orders to stop sexual harassment in the workplace. Applications for orders to stop sexual harassment can be made from 11 November 2021.

The President of the Commission will approve changes to the Commission forms relating to applications for orders to stop bullying—the Form F72, Form F73 and Form F74—so that from 11 November 2021 they also deal with applications for orders to stop sexual harassment (and applications for orders to stop both bullying and sexual harassment).

The new Rules reflect the changes to the Commission forms. The rules relating to applications for orders to stop bullying now also deal with applications for orders to stop sexual harassment (and applications for orders to stop both bullying and sexual harassment).

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 8 October 2021, the President provided the Members with a copy of a draft of the Amendment Rules and sought their comments by 25 October 2021.

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 8 October 2021, 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 25 October 2021.

The comments received from interested persons were positive and no concerns were raised.

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 29 October 2021 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 are unlikely to have more than a minor regulatory impact. (reference number OBPR21-01045).

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**.

ATTACHMENT A

Details of the *Fair Work Commission Amendment (Stop Sexual Harassment) Rules 2021*

Rule 1 – Name

This rule provides that the name of the amending instrument is the *Fair Work Commission Amendment (Stop Sexual Harassment) Rules 2021*.

Rule 2 – Commencement

This rule provides that the Amendment Rules commence on 11 November 2021.

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*

Items 1–7

Items 1–7 amend Rules 12(2)(b)(ii), 23A, 45(2) and clause 1 of Schedule 1 to the Rules.

Previously:

- Rule 12(2)(b)(ii) provided that permission was not required for a person to be represented by a lawyer or paid agent in a conference conducted by a Commission staff member in relation to an application for an order to stop bullying.
- Rule 23A dealt with requirements for lodging responses to applications for orders to stop bullying.
- Rule 45(2) required that if the Commission is to serve a copy of an application for orders to stop bullying, it must omit the part of the application dealing with the application fee.
- Schedule 1 included requirements for service of the Commission forms relating to applications for orders to stop bullying.

Items 1–7 insert 'or sexual harassment' after 'bullying' or 'bullying behaviour' in rules 12(2)(b)(ii), 23A (heading), 23A(1) (note 2), 23A(3), 23A(3) (note 2), 45(2) (heading) and

clause 1 of Schedule 1 (note 2), so that those rules deal with applications for orders to stop sexual harassment (and applications for orders to stop both bullying and sexual harassment) in the same way that they deal with applications for orders to stop bullying.

Item 8

Item 8 amends details of the Commission approved forms F72, F73 and F74 in the table in clause 1 of Schedule 1 to the Rules, including the form titles and the service requirements for those forms:

- in column 2, references to 'anti-bullying' are replaced with 'stop bullying or sexual harassment';
- in column 3, the titles of Commission approved forms F72 and F73 are updated by inserting 'or sexual harassment (or both)' after 'bullying';
- in column 3 the title of form F74 is updated to 'Response from a person named as having engaged in bullying or sexual harassment (or both)';
- in column 5, in relation to forms F73 and F74, the description of the person serving the form is amended for clarity to 'Person making the response';
- in column 6, 'or sexual harassment (or both)' is inserted after 'bullying behaviour';
- in column 6, the service requirements for form F74 are corrected to require that the application be served on each person named in the application as having engaged in bullying behaviour or sexual harassment (or both), other than the person making the response;
- in column 6, the service requirements in relation to forms F72, F73 and F74 are amended for clarity;
- in column 7, in relation to forms F73 and F74, in column 7 'or sexual harassment (or both)' is inserted after 'bullying'.

ATTACHMENT B

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 (Stop Sexual Harassment) Rules 2021

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 (Stop Sexual Harassment) Rules 2021* (the Amendment Rules) amends the procedural rules made by the President of the Fair Work Commission under section 609 of the *Fair Work Act 2009* (the 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.

A handwritten signature in black ink, appearing to read 'Iain Ross', written in a cursive style.

Justice Iain Ross AO
President
Fair Work Commission