

Fair Work Commission Amendment (2023 Measures No. 1) Rules 2023

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 (the Commission or the FWC).

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, 3-5A or Part 6-4 (which deal with general protections, unfair dismissal, prohibiting sexual harassment in connection with work 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 (2023 Measures No. 1) Rules 2023* (the Amendment Rules) amend the *Fair Work Commission Rules 2013* (the Rules).

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (the Amending Act) received Royal Assent on 6 December 2022. The Amending Act made changes to the Act and to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Act).

The Amendment Rules introduce new Commission procedural requirements, to reflect changes made to the Act and the Transitional Act that commenced operation on 7 December 2022 and 6 March 2023.

Sexual harassment disputes

From 6 March 2023, Part 3-5A of the Act makes it unlawful for a person to sexually harass another person in connection with work, and the Commission has expanded powers to deal with sexual harassment in connection with work that occurred or commenced on or after 6 March 2023. A 'sexual harassment FWC application' is an application for the Commission to deal with a dispute that relates to a contravention of the prohibition of sexual harassment in connection with work in Part 3-5A.

With the introduction of new Part 3-5A of the Act, Part 6-4B of the Act, which provided for the Commission to make orders to stop bullying or sexual harassment at work, was amended to deal only with bullying at work. However, under transitional provisions, where alleged sexual harassment at work occurred or commenced prior to 6 March 2023, applications for orders to stop the sexual harassment can continue to be made under Part 6-4B as it was immediately before 6 March 2023.

The President of the Commission has approved new forms for making and responding to applications relating to sexual harassment under Part 3-5A of the Act and under Part 6-4B of the Act as it was immediately before 6 March 2023. The President has also approved changes to the forms for making and responding to applications for stop orders under Part 6-4B as amended, to confine them to applications for orders to stop bullying at work. The Amendment Rules introduce new service requirements for these forms.

The Amendment Rules also make provision:

- for sexual harassment FWC applications under Part 3-5A of the Act to be made by 2 or more persons jointly, or by an industrial association entitled to represent the industrial interests of 2 or more aggrieved persons, if the application is made in relation to the same or related alleged contraventions
- requiring a person named in a sexual harassment FWC application as a person allegedly engaging in sexual harassment, or an employer or principal of a person named as allegedly engaging in sexual harassment, to lodge a response to the application. A person named as an employer or principal of an aggrieved person must also lodge a response to the application

- that a person does not require permission to be represented by a lawyer or paid agent in a conference that is conducted by a member of the staff of the Commission in relation to a sexual harassment FWC application, and
- for the Commission, on application, to join and withdraw persons as parties to a dispute before the Commission commenced by a sexual harassment FWC application.

Equal remuneration

Section 302 of the Act provides that the Commission may make an order requiring equal remuneration for work of equal or comparable value. The Amending Act made a number of changes to section 302 that commenced operation on 7 December 2022.

The President of the Commission has approved a new form for applying for an equal remuneration order. The Amendment Rules introduce service requirements for the form.

The Amendment Rules also provide that a person does not require the permission of the Commission to be represented by a lawyer or paid agent in a conference or hearing in relation to an equal remuneration matter.

Termination of ‘zombie’ agreements

From 7 December 2022, amendments to the Transitional Act provide that certain registered agreements—collectively described in the heading to Part 13 of the Amending Act as ‘zombie agreements’—terminate after a 12 month ‘default period’, unless that period is extended by the Commission.

The President of the Commission has approved a new form for applying to extend the default period for a ‘zombie agreement’. The Amendment Rules introduce service requirements for the form.

Terminating enterprise agreements after their nominal expiry date

From 7 December 2022, section 226 of the Act requires the Commission, in deciding whether to terminate an enterprise agreement after its nominal expiry date, to consider the views of each employer and any employees and employee organisations covered by the agreement.

The Amendment Rules provide that each employee, employer or employee organisation covered by the agreement that wants to advise the Commission of its view in relation to termination of the agreement, must lodge a declaration before the Commission approves the termination of the agreement.

The President of the Commission has approved a new declaration form for that purpose. The Amendment Rules introduce service requirements for the form.

Service of documents

The Rules are amended to allow service of documents on a person, by service on the person’s nominated representative.

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 5 June 2023, the President provided the Members with a draft of the Amendment Rules and sought their comments by 19 June 2023.

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 June 2023, 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 19 June 2023. One submission was received.

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 adequate opportunity to comment.

Impact Analysis

As required by the Australian Government's best practice regulation requirements, the Office of Impact Assessment was consulted on 27 June 2023 as to whether an Impact Analysis in respect of the Amendment Rules was required.

The Office of Impact Assessment advised that an Impact Analysis was not required as the Amendment Rules are unlikely to have more than minor impact, as they only affect certain procedural requirements that apply to participants in proceedings before the Commission, and overall the changes will represent a small reduction in regulatory burden (reference number OIA23-05173).

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 (2023 Measures No. 1) Rules 2023*

Rule 1 — Name

Rule 1 provides that the name of the amending instrument is the *Fair Work Commission Amendment (2023 Measures No. 1) Rules 2023*.

Rule 2 — Commencement

Rule 2 provides that the Amendment Rules commence on the day after the instrument is registered.

Rule 3 — Authority

Rule 3 notes that the Amendment Rules are made under the Act.

Rule 4 — Schedules

Rule 4 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 note after the heading in rule 5 stating that a number of expressions in the Rules, including ‘sexual harassment FWC application’, are defined in the Act.

Item 2

Item 2 inserts a definition of ‘nominated representative’ into rule 5 of the Rules.

Item 3

Item 3 inserts new rule 10A, which allows a sexual harassment FWC application to be made by 2 or more persons jointly or by a single industrial association that is entitled to represent the industrial interests of 2 or more persons, but only if the application is made in relation to the same or related alleged contraventions.

For the purposes of the new rule 10A, a ‘person’ is either a person who alleges they have been sexually harassed (an ‘aggrieved person’) or an industrial association that is entitled to represent the industrial interests of an aggrieved person.

Items 4–6

Items 4–6 amend rule 12, which deals with when the permission of the Commission is required for representation by a lawyer or paid agent.

Item 4 inserts subrule 12(2)(a)(iia) so that the permission of the Commission is not required for a person to be represented by a lawyer or paid agent in a conference or hearing in relation to a matter arising under Part 2-7 of the Act (equal remuneration).

Item 5 inserts subrule 12(2)(b)(ia), so that the permission of the Commission is not required for a person to be represented by a lawyer or paid agent in a conference conducted by a member of the staff of the Commission in relation to a sexual harassment FWC application.

Item 6 amends subrule 12(4), to clarify that a person will require the permission of the Commission to be represented by a lawyer or paid agent in a conference before a Commission Member in relation to a sexual harassment FWC application.

Item 7

Item 7 inserts new rule 21A, which requires certain persons to lodge a response to a sexual harassment FWC application within 7 calendar days after they have been served with the application.

A response must be lodged by a person named in the application as a person allegedly engaging in sexual harassment. A response must also be lodged by a person named in the application as an employer or principal of an aggrieved person in respect of the application, or of the person allegedly engaging in sexual harassment.

New subrule 21A(2) allows a person to lodge a single response in respect of 2 or more sexual harassment FWC applications, if the applications are lodged at the same time and relate to the same or related alleged contraventions of Division 2 of Part 3-5A of the Act.

Item 8

Item 8 inserts subrule 23A(4), to clarify that a reference in rule 23A to section 789FC of the Act includes a reference to an application for an order to stop sexual harassment made under that section as it continues to apply under the transitional arrangements in clause 60 of Schedule 1 to the Act. Under these transitional arrangements, the stop sexual harassment provisions formerly in Part 6-4B of the Act continue to apply after 6 March 2023 to sexual harassment of a worker at work that occurred before that date, or that is part of a course of conduct that commenced before that date.

Item 9

Subrule 26(2) of the Rules relates to an application to the Commission to terminate an enterprise agreement after its nominal expiry date.

Item 9 inserts subrule 26(3) to provide that if an employee, employer or employee organisation that is covered by an enterprise agreement wants to advise the Commission of their views in relation to such a proposed termination of an enterprise agreement, they must lodge a declaration to that effect before the Commission approves the termination of the agreement.

Items 10–12

Items 10–12 amend rules 42 and 43 to allow a document to be served on an individual, a body corporate, or an organisation or branch of an organisation, by serving it on them or on their nominated representative.

Item 10 replaces subrule 42(2) (which specifies the different ways that service can be effected) with a new subrule 42(2). New subrule 42(2) provides that a person that is required to serve a

document on another person, may do so by serving the document on the other person or on the other person's nominated representative, in one of the ways set out in the subrule.

New subrule 42(2A) deals with service of documents by prepaid post under subrule 42(2)(c). Service may be effected in this manner only if the person serving the document retains the barcode of the prepaid envelope and produces it to the Commission if required.

New subrule 42(2B) deals with service by fax under subrule 42(2)(d). Service may be effected in this manner only if the person serving the document retains the transmission record and produces it to the Commission if required.

New subrule 42(2C) deals with service by email under subrules 42(2)(e) and (f). Service may be effected in this manner only if the person serving the document either retains the email as a 'sent item' showing the address to which the email was sent and the date and time it was sent, or retains a 'delivered' statement or 'read receipt' showing the address to which the email was sent and the date and time it was sent, and produces the retained document to the Commission if required.

Item 11 makes a consequential amendment to subrule 42(4).

Item 12 replaces subrules 43(a)–(g) (which specify the ways in which service can be effected by the Commission) with new subrules 43(a)–(g) that allow the Commission to serve a document on a person by serving it on the person or on the person's nominated representative.

Item 13

Item 13 replaces subrule 45(2) with a new subrule 45(2) providing that if the Commission is required to serve a sexual harassment FWC application, an application for an order to stop bullying under section 789FC(1) or an application for an order to stop sexual harassment under section 789FC(1) of the Act (as it continues to apply to alleged sexual harassment at work that occurred or commenced before 6 March 2023), the Commission must serve a copy of the application excluding that part of the application that deals with the application fee.

Item 14

Item 14 inserts new rule 55A. Subrule 55A(1)(a) allows a party to a dispute before the Commission commenced by a sexual harassment FWC application, to apply for an order for one or more of the following persons to be joined as a party to the dispute (other than where the dispute is to be dealt with by arbitration by the Commission):

- one or more aggrieved persons
- one or more industrial associations each of which is entitled to represent the industrial interests of one or more aggrieved persons
- the principal of an employee or agent who is alleged to have sexually harassed an aggrieved person, and
- an employee or agent of a principal that is alleged to be vicariously liable for the employee's or agent's alleged sexual harassment.

Subrule 55A(1)(b) provides for a party to a dispute before the Commission commenced by a sexual harassment FWC application, to apply for an order for the withdrawal of a person as a party to the dispute.

Subrule 55A(2) specifies service requirements for an application for an order under subrules 55A(1)(a) and 55A(1)(b).

Item 15

Schedule 1 to the Rules specifies service requirements for approved Commission forms.

Item 15 amends Note 2 under clause 1 of Schedule 1, so that it notes the service requirements in Schedule 1 may be dispensed with or varied by the Commission, and that this is most likely to occur in relation to a sexual harassment FWC application or an application made under section 789FC(1) for an order to stop bullying or sexual harassment.

Item 16

Item 16 inserts a new Note 3 under clause 1 of Schedule 1 to the Rules, to make clear that service on a person as required under Schedule 1 can be effected by service on the person or on the person's nominated representative in the manner provided for in rule 42.

Items 17–19

Each item in the table in Schedule 1 to the Rules, describes the service requirements for an approved Commission form. The columns for each item respectively specify the:

1. form number
2. type of document
3. form title
4. relevant provisions of the legislation and Rules
5. person required to serve the form
6. person or persons on which the form is to be served, and
7. period in which service must be effected.

Item 17 inserts service requirements for new form number F24D, titled 'Declaration in response to application for termination of an enterprise agreement after the expiry date' into the table in Schedule 1 to the Rules. The form must be served by the person making the declaration on each employer and each employee organisation covered by the enterprise agreement, and service is to be effected as soon as practicable after the declaration is lodged with the Commission.

Item 18 inserts service requirements for new form number F46A, titled 'Application for an equal remuneration order' into the table in Schedule 1 to the Rules. The form must be served by the applicant on each person the Commission directs is to be served, and the period in which service is to be effected is as directed by the Commission.

Item 19 repeals the service requirements in Schedule 1 to the Rules for Commission forms F72, F73 and F74, and inserts service requirements for the following new or amended approved forms:

- F72 – Application for an order to stop bullying at work
- F72A – Application for an order to stop sexual harassment that commenced prior to 6 March 2023
- F73 – Response from an employer/principal to an application for an order to stop bullying at work
- F73A – Response from an employer/principal to an application for an order to stop sexual harassment that commenced prior to 6 March 2023
- F74 – Response from a person named as having engaged in bullying at work
- F74A – Response from a person named in an application for an order to stop sexual harassment that commenced prior to 6 March 2023
- F75 – Application for the Fair Work Commission to deal with a sexual harassment dispute
- F76 – Individual Respondent’s response to an application to deal with a sexual harassment dispute
- F77 – Response from an employer/principal to an application to deal with a sexual harassment dispute
- F78 – Notice of agreement to consent arbitration of a sexual harassment dispute, and
- F81 – Application to extend the default period for a zombie agreement.

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 (2023 Measures No. 1) Rules 2023

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 (2023 Measures No. 1) Rules 2023* (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.