

Fair Work Commission Rules 2024

EXPLANATORY STATEMENT

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

Authority

The *Fair Work Commission Rules 2024* (the Rules) are the procedural rules of the Fair Work Commission (the Commission or the FWC).

Section 609 of the *Fair Work Act 2009* (Cth) (the Act) authorises the making of procedural rules of the FWC. Under subsection 609(1) of the Act, after consulting with the other FWC Members, the President of the FWC (the President) may, by legislative instrument, make procedural rules in relation to:

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

Subsection 609(2) of the Act provides that without limiting subsection 609(1), the procedural rules may provide for:

- (a) the requirements for making an application to the FWC
- (b) the circumstances in which a lawyer or paid agent may make an application or submission to the FWC 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 FWC
- (d) the procedural requirements for making decisions of the FWC
- (e) the form and manner in which the FWC gives directions and notifies persons of things
- (ea) the requirements for making a notification to the FWC
- (f) who is notified by the FWC 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).

In addition to the general power to make procedural rules under section 609 of the Act, the Act provides more specifically for some rules. For example, paragraph 185(2)(b) of the Act requires that an application to the FWC for approval of an enterprise agreement be accompanied by 'any declarations that are required by the procedural rules to accompany the application'. In the Rules, where a rule or subrule is made for the purposes of a specific provision of the Act, this is stated in a note under the rule or subrule.

Subsection 33(3) of the *Acts Interpretation Act 1901* (Cth) as in force on 25 June 2009, relevantly provides that where an Act confers a power to make an instrument, the power will, unless the

contrary intention appears, be construed as including a power exercisable in the like manner and subject to the like conditions to repeal or vary the instrument.

Purpose of the Rules

The FWC is Australia's national workplace relations tribunal. The FWC's functions are set out in section 576 of the Act.

The Rules replace the previous procedural rules of the FWC, the *Fair Work Commission Rules 2013* (the old Rules). The old Rules were due to sunset on 1 April 2024.

The Rules regulate the practice and procedure of the FWC. In doing so they assist the FWC to perform its functions and exercise its powers under the Act and other legislation, in accordance with section 577 of the Act. Section 577 requires the FWC to perform its functions and exercise its powers in a manner that is:

- fair and just
- quick, informal and avoids unnecessary technicalities
- open and transparent, and
- promotes harmonious and cooperative workplace relations.

Accordingly, while the Rules impose requirements on persons making applications to the FWC, parties to matters before the FWC and on the FWC itself, they operate to the overall benefit of applicants, parties and the public.

As the old Rules were operating efficiently and effectively, the Rules largely remake the old Rules, but with changes to update them and improve their usability. Some old rules have been amended and new rules introduced to accommodate changes made by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (the 2022 Amending Act) to the FWC's functions.

An overview of the Rules follows. A more detailed description of the Rules is in **Attachment A**.

Overview of the Rules

The Rules largely remake the old Rules, but with changes to update the old Rules and improve their usability. The old Rules have been rearranged and renumbered to assist users to identify all of the rules relating to their matter. Many old rules have also been updated in their form and wording, to improve clarity.

In addition, a number of old rules have been amended, and new rules have been introduced, to accommodate changes made by the 2022 Amending Act to the FWC's functions under the Act and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (the Transitional Act).

Also, a small number of old rules have been omitted as they are no longer required, and changes have been made to some old rules to improve their operation and to reduce regulatory burden.

Chapter 1 of the Rules contains rules about general procedures. This includes rules about:

- preliminary matters such as definitions, the FWC dispensing with compliance with a rule and FWC directions about the procedure to be followed in a particular matter
- use of approved FWC application forms and other approved FWC forms, and discontinuing a matter before the FWC
- representation in the FWC by a lawyer or paid agent
- how to lodge documents with the FWC
- requirements to serve documents on parties to a matter and other interested persons, and how to do so, and
- how to apply for orders from the FWC that require a person to attend before the FWC or that require documents or information to be provided to the FWC.

The use of approved FWC forms assists the FWC promptly and efficiently to gather the information it needs to inform itself and to deal with a matter in accordance with the legislation.

Chapter 2 of the Rules contains rules in relation to particular types of matters that may be brought to the FWC under the Act. These rules facilitate the FWC performing the functions and exercising the powers conferred on it by the Act, in relation to:

- the National Employment Standards
- modern awards
- approval, variation and termination of enterprise agreements
- bargaining for enterprise agreements
- transfer of business
- fixed term contracts
- general protections, unfair dismissal and unlawful termination
- industrial action
- right of entry
- sexual harassment and bullying, and
- disputes under dispute procedures in awards, enterprise agreements etc.

Generally, the rules in Chapter 2 are about:

- how to bring a particular type of matter under the Act to the FWC
- the documents that are to accompany a particular type of application lodged with the FWC
- the documents that parties or other interested persons are to lodge with the FWC in relation to or in response to an application, and
- requirements to serve documents lodged with the FWC that are not approved forms or documents of the same kind as approved forms.

Rules that require an applicant or party to a matter to serve approved forms and other documents on parties or other interested persons, assist the FWC to inform itself about the matter before it, assist in providing procedural fairness and assist in ensuring the FWC's processes are open and transparent.

Chapter 2 also contains some rules relating to specific issues arising in particular types of matters. For example:

- rule 35 requires an employer to notify its employees that it has applied to the FWC for approval of an enterprise agreement that covers the employees (to assist in making employees aware of the application, so that they can participate or be represented in the FWC proceedings if they wish)
- rule 81 provides that the FWC can require a person seeking an entry permit to provide a National Police Certificate to the FWC (to assist the FWC to determine whether the person is a fit and proper person to hold such a permit), and
- rule 85 provides for a party to a sexual harassment dispute before the FWC to seek orders joining or withdrawing persons as parties to the dispute (to assist in bringing the appropriate persons together to resolve the dispute).

Chapter 3 of the Rules contains rules of a similar kind to those in Chapter 2, but relating to matters that may be brought to the FWC respectively under the Transitional Act, the *Fair Work (Registered Organisations) Act 2009* (Cth) and the *Work Health and Safety Act 2011* (Cth). These rules facilitate the FWC performing the functions and exercising powers conferred on it in relation to:

- termination of transitional instruments
- disputes relating to the continued operation under transitional arrangements of the *Workplace Relations Act 1996* (Cth)
- registration of organisations, representation orders and conscientious objection certificates, and
- WHS entry permits.

Chapter 4 of the Rules contains rules relating to appeals of decisions of the FWC and certain other decision-makers, and applications by the Minister for review of decisions.

Chapter 5 of the Rules contains miscellaneous rules about:

- public access to certain applications made to the FWC and related documents
- recovery of the FWC's costs for providing copies of documents, and
- the seal of the FWC.

Chapter 6 of the Rules contains application, saving and transitional provisions relating to the transition from the old Rules to the Rules.

The table in Schedule 1 to the Rules lists the approved FWC forms that have service requirements, and specifies the service requirements for each such approved form and for documents of the same kind as an approved form.

Schedule 2 to the Rules repeals the old Rules.

Details of the Rules

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

Consultation on the Rules

As required by section 609 of the Act, the President of the FWC consulted with the other Members of the FWC concerning the Rules. Pursuant to section 17 of the *Legislation Act 2003* (Cth), the President also gave persons who were likely to be affected by the Rules an opportunity to comment.

In July 2023 the President sought suggestions from FWC Members as to possible changes and improvements to the Old Rules and those suggestions were considered in drafting the Rules.

On 9 February 2024, the President sent a draft of the Rules to the FWC's Rules and Benchbook Committee inviting comments by 23 February 2024. This Committee comprises 6 Members of the FWC and 5 representatives of FWC stakeholders (presently the Law Council of Australia, Job Watch, the Australian Council of Trade Unions, Australian Business Lawyers & Advisors and Ai Group).

On 9 February 2024, the President also published a draft of the Rules on the FWC's website and advised subscribers to the FWC's general announcements subscription service of the publication. Interested persons were invited to provide comments by 23 February 2024.

In finalising the Rules, consideration has been given to all comments received during the consultation.

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 Rules and having ensured that persons who were likely to be affected by the Rules had an adequate opportunity to comment.

Impact Analysis

As required by the Australian Government's best practice regulation requirements, the Office of Impact Analysis was consulted in February 2024 as to whether an Impact Analysis in respect of the Rules was required.

The Office of Impact Assessment advised that, based on the information provided, a detailed Impact Analysis was not required. This was informed by the understanding that the rules being remade are procedural rules that facilitate the performance of the FWC's statutory functions as the national workplace relations tribunal, and only affect people or entities that interact with the FWC (reference number OIA24-06811).

Statement of compatibility with human rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) 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 is at **Attachment B**.

Details of the Fair Work Commission Rules 2024

Omitted old rules

The following old rules (and any related FWC forms that were included in the table in Schedule 1 to the old Rules) have been omitted from the Rules, as they have been made redundant by legislative change or passage of time, or are otherwise no longer required:

- rule 16 ('Lodging documents by fax')
- rule 20 ('Objection to unfair dismissal application on jurisdictional or other grounds')
- rule 30 ('Application for a serious breach declaration')
- rule 37 ('Application for a take home pay order')
- rule 58 ('Other reviews'), and
- rules 61–64—comprising Part 12 of the old Rules ('Transitional arrangements').

Changes made throughout the old Rules

While the Rules are based on the old Rules, changes have been made to the form and wording of most of the rules in the old Rules to improve consistency in wording between rules and with the Act, for clarity and generally to improve readability.

The old Rules have also been rearranged into new chapters and parts and renumbered:

- rules that apply generally are in Chapter 1
- rules relating to matters that may be brought to the FWC under the Act are in Chapter 2
- rules relating to matters that may be brought to the FWC under other legislation are in Chapter 3
- rules relating to appeals and reviews of decisions are in Chapter 4
- miscellaneous rules are in Chapter 5
- application, saving and transitional provisions are in Chapter 6, and
- service requirements for approved FWC forms and documents of the same kind as an approved form are in Schedule 1.

In Chapter 2 the order of the rules generally follows the order in which the corresponding provisions appear in the Act (but with some exceptions to keep matters of a similar kind together).

The rearrangement of the old Rules makes it easier for users to find all rules relevant to their matter.

Throughout the Rules, the Fair Work Commission is referred to as the 'FWC' (rather than the 'Commission' as under the old Rules). This is done for consistency with the Act.

Throughout the Rules a note has been inserted below each rule that is made for the purposes of a specific provision of the Act. For example, paragraph 216AA(2)(c) of the Act requires an application to the FWC under subsection 216AA(1) to be 'accompanied by ... any declarations

that are required by the procedural rules to accompany the application'. Note 2 under subrule 38(2) (which requires such an application to be accompanied by a declaration), states that the subrule is made for the purposes of paragraph 216AA(2)(c) of the Act.

To assist users, various additional notes have been inserted into the Rules. This includes:

- notes alerting users to the requirement to use approved forms (see, for example, Note 2 under subrule 12(1))
- notes informing users that particular information or documents are available on the FWC's website (see, for example, the note under subrule 16(1))
- notes cross-referencing other relevant rules (see, for example, Notes 1–4 under rule 21), and
- notes alerting users to requirements under the Act to lodge particular documents (see, for example, Note 2 under subrule 37(1)).

Chapter 1—General procedures

Part 1—Preliminary

Rule 1—Name

Rule 1 provides that the name of the procedural rules is the *Fair Work Commission Rules 2024*.

Rule 2—Commencement

Rule 2 provides that the Rules commence on the day after they are registered.

Rule 3—Authority

Rule 3 provides that the Rules are made under section 609 of the Act.

Where a rule or subrule is made for the purposes of a specific provision of the Act, this is stated in a note under the rule or subrule.

Rule 4—Schedules

Rule 4 provides that each instrument specified in Schedule 2 to the Rules is amended or repealed as set out in the applicable items of that Schedule, and any other item in that Schedule has effect according to its terms.

Rule 4 gives effect to clause 1 of Schedule 2 to the Rules.

Rule 5—Definitions

Rule 5 defines terms for the purposes of the Rules.

The definitions do not include terms that are defined in the Act. A note at the start of rule 5 alerts users to some (but not all) of the terms used in the Rules that are defined in the Act.

Rule 6—Calculating number of days

Rule 6 provides guidance on the meaning of 'days' as used in the Rules (as an example, subrule 32(3) requires an employer to lodge a declaration with the FWC 'within 14 days after the day on which' an enterprise agreement is made).

The old Rules used both ‘day’ and ‘calendar day’ to mean any day of the week. For consistency, the Rules use ‘day’ throughout. Subrule 6(1) makes it clear that a ‘day’ in the Rules includes a weekend day, public holiday and bank holiday.

Subrule 6(2) makes it clear that subrule 6(1) does not affect the operation of section 36 of the *Acts Interpretation Act 1901* (Cth). To assist users, the note under the subrule outlines section 36 of that Act.

To improve clarity, standard wording has been adopted for periods of time: ‘within [number] days after [event]’.

Rule 7—Dispensing with rules and orders inconsistent with these Rules

Rule 7 is to the same effect as rule 6 of the old Rules.

Subrule 7(1) provides that the FWC may dispense with compliance with any provision of the Rules, either before or after the occasion for compliance arises.

The wording of subrule 7(2) has been amended for consistency with the Act (see, for example, subsection 796(2) of the Act). The subrule provides that an FWC order that is inconsistent with the Rules, prevails over the Rules to the extent of any inconsistency.

Rule 8—Application for directions on procedure

Rule 8 is to the same effect as rule 7 of the old Rules. It provides for the FWC to give directions about procedure.

Subrule 8(1) provides that a person may apply to the FWC for directions about the procedure to be followed in a matter, if the procedure is not already prescribed or the person is in doubt about the proper procedure to follow.

Subrule 8(2) provides that action taken in accordance with such directions is regular and sufficient for the purposes of the Rules.

Chapter 1—General procedures

Part 2—Forms and applications

Rule 9—Approved forms

Rule 9 is to the same effect as rule 8 of the old Rules.

Subrule 9(1) provides for the President to approve forms for the purposes of the Rules. Subrule 9(2) provides that if a form has been approved for a particular purpose then, subject to the Rules, the form must be used for that purpose. For example, the FWC’s approved form *F2—Unfair dismissal application*, is to be used to make an application to the FWC under section 394 of the Act (‘Application for unfair dismissal remedy’).

Each of the FWC’s approved forms is designed to gather particular information the FWC requires to deal with the matter to which the form relates in accordance with the applicable legislation. Approved forms are revised from time to time to reflect legislative changes and developments in case law, and to make them clearer to users.

The use and service of approved forms assists the FWC promptly and efficiently to gather the information it needs to inform itself about a matter and deal with the matter in accordance with the Act, assists in providing procedural fairness and assists in ensuring the FWC’s processes are open and transparent.

Subrule 9(3) provides that if there is no approved form for a particular type of application, the generic application form *F1—Application (no specific form provided)* is to be used.

Subrule 9(4) requires the President to ensure the approved forms are publicly available. To assist users, the note under this subrule observes that all of the FWC's approved forms are available on the FWC's website. There is no charge for using the forms. The Act and the *Fair Work Regulations 2009* (Regulations) require applicants to pay application fees for certain types of applications.

Subrule 9(5) provides that use of a document substantially in accordance with an approved form, is sufficient compliance with the Rules.

Rule 10—Discontinuance

Rule 10 is of similar effect to rule 10 of the old Rules, but has been simplified and made clearer in a number of respects.

The purpose of rule 10 is to facilitate an applicant discontinuing their application if they wish to do so. For example, an unfair dismissal applicant may wish to discontinue their application if they have resolved their claim with their former employer and so do not want the FWC further to deal with their application.

While for administrative efficiency the FWC prefers applicants to discontinue an application by lodging the approved notice of discontinuance (see paragraph 10(2)(a) and Note 2 under subrule 10(2)), rule 10 recognises that an applicant (and an unrepresented applicant in particular) may prefer to discontinue their application by quicker and more informal means.

Accordingly, paragraph 10(2)(b) provides for an applicant to discontinue their application by advising the FWC or a member of the staff of the FWC that they:

- want to discontinue the application
- want to withdraw the application, or
- no longer need or want the FWC to deal with the application.

Unlike old rule 10, rule 10 does not prescribe the manner in which an applicant may advise the FWC as above. For example, the applicant could advise the FWC by letter, email, SMS, voice call or voice message, or orally in person in the course of an FWC conference or hearing.

Also unlike old rule 10, rule 10 does not treat an applicant advising the FWC that they have 'settled the application' as sufficient to indicate that they wish to discontinue the application. This is because, for example, a settlement might be conditional on settlement money being paid or written terms of settlement being agreed within a prescribed period, with the applicant being free to continue with their application if that does not occur.

To assist users, Note 3 under subrule 10(2) draws attention to the subregulations that provide for the FWC to refund an application fee (as prescribed by the Regulations for certain types of applications) when the application is discontinued in specified circumstances.

Chapter 1—General procedures

Part 3—Representation

Rule 11—Notice of nominated representative

Rule 11 replaces the definition of ‘nominated representative’ in rule 5 of the old Rules. It provides for a person to nominate any of the following as their nominated representative in relation to an application to or matter before the FWC:

- the person’s guardian, or if the person is under 18 years of age, the person’s parent or guardian (paragraph 11(a))
- a lawyer or paid agent (paragraphs 11(b) and 11(c))
- an organisation (paragraph 11(d)), or
- a not-for-profit association or body, that provides support, advice or advocacy in relation to applications or matters of that kind (paragraph 11(e)).

The terms ‘lawyer’, ‘paid agent’ and ‘organisation’ are defined in the Act. An ‘organisation’ is defined as an organisation registered under the *Fair Work (Registered Organisations) Act 2009* (Cth).

The associations or bodies covered by paragraph 11(e) are intended to include, for example, the Northern Territory, Queensland and South Australian Working Women’s Centres insofar as they provide support, advice or advocacy services in relation to an application or matter before the FWC.

The previous definition of ‘nominated representative’ did not limit who might be nominated as a representative. The redrafting also addresses a technical point that the old definition may have been read as being confined to nominating a representative in a matter that is already before the FWC.

Typically, a person will notify the FWC they have a nominated representative simply by responding to the question about representatives in the FWC approved form they use to make or respond to an application to the FWC.

Rule 12—Notice of lawyer or paid agent acting, or ceasing to act, for a person

Rule 12 is to the same effect as rule 11 of the old Rules.

Subrule 12(1) provides for a person to lodge with the FWC a notice in the approved form notifying the FWC that the person has a nominated representative who is a lawyer or paid agent.

A person may choose to lodge such a notice, for example, if the person made an application to the FWC before they engaged a lawyer or paid agent (and so did not indicate in their application that they have a representative who is a lawyer or paid agent). If a person chooses to lodge such a notice they must also serve the notice on the other parties to the matter under rule 21.

To assist users, Note 1 under subrule 12(1) observes that a person may want to lodge and serve such a notice so that their lawyer or paid agent is copied into correspondence and also so that the other parties are put on notice that costs are being incurred (for which they could be liable if the FWC was to make an order under the Act for costs).

While giving notice under subrule 12(1) is voluntary, where a person has lodged such a notice and the lawyer or paid agent ceases to act for them in relation to a matter that remains before the FWC, subrule 12(2) requires the person to lodge a notice in the approved form advising the FWC

accordingly. This is to ensure the FWC and other parties are made aware that the lawyer or paid agent should no longer be sent correspondence and documents in the matter.

Rule 13—Representation by lawyers or paid agents

Rule 13 is to the same effect as rule 12 of the old Rules.

Rule 13 is made for the purposes of subsection 596(1) of the Act, which provides that, except as provided for in subsection 596(3) or the Rules, a person may be represented in a matter before the FWC by a lawyer or paid agent only with the permission of the FWC.

Under subsection 596(4) of the Act and for the purposes of the Rules, a person is not taken to be ‘represented’ by a lawyer or paid agent, if the lawyer or paid agent is an employee or officer of the person (for example, a lawyer employed by and acting for an employer party), an employee or officer of a relevant organisation, association or peak council (for example, a lawyer employed by a union that is acting for an employee), or a ‘bargaining representative’ under the Act. To assist users, Note 2 under subrule 13(1) draws attention to subsection 596(4).

The general approach under subrule 13(1) is that a person may be represented by a lawyer or paid agent in a matter without the permission of the FWC, except by way of the lawyer or paid agent participating in a conference or hearing relating to the matter. Under this general approach, for example, a former employee’s lawyer or paid agent could, without permission, complete and lodge an unfair dismissal application for the former employee, but the lawyer or paid agent would need the FWC’s permission to participate in a conference or hearing in relation to the application before a Member of the FWC.

Where permission is required, subsection 596(2) of the Act specifies when the FWC may grant permission.

Subrule 13(2) sets out exceptions to the general approach under subrule 13(1) outlined above. Under subrules 13(2) and 13(4), a person may, without permission of the FWC:

- be represented by a lawyer or paid agent participating in a conference or hearing (before a Member of the FWC) in relation to any of the types of matters listed in paragraphs 13(2)(a)(i)–(v), or
- be represented by lawyer or paid agent participating in a conference before a member of the staff of the FWC (but not a Member of the FWC) in relation to any of the matters listed in paragraphs 13(2)(b)(i)–(iii).

These exceptions are for matters where, typically, representation by a lawyer or paid agent will enable the matter to be dealt with more efficiently and not raise issues of fairness as between parties.

Subrule 13(3) provides the FWC with flexibility, where appropriate, to require permission for representation by a lawyer or paid agent despite the general approach and exceptions outlined above.

Rule 14—Notice—proposed representation in a conference or hearing

Rule 14 is to the same effect as rule 12A of the old Rules.

Subrule 14(1) requires a person to lodge a notice in the approved form with the FWC if the person proposes to be represented in a manner that requires the permission of the FWC under rule 13. To assist users, Note 2 under subrule 14(1) draws attention to section 596(4) of the Act.

This requirement to give notice is separate to the option under rule 12 for a person to give notice that a lawyer or paid agent acts for them. A lawyer or paid agent who acts for a person in relation to a matter before the FWC may or may not also be representing the person in the matter within the meaning of section 596 of the Act and rule 14. 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 subsection 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 FWC in relation to the matter (see *Fitzgerald v Woolworths Limited* [2017] FWCFCB 2797).

Under rule 21 the person must also serve the notice on the other parties.

The purpose of giving notice under rule 14 is to alert the FWC and the other parties that permission for representation will be sought and so to facilitate prompt determination of the issue by the FWC.

Subrule 14(2) provides that the FWC may permit a person to be represented by a lawyer or paid agent even if the person has failed to give notice under rule 14.

Chapter 1—General procedures

Part 4—Lodging documents

Rule 15—General requirements for lodging documents

Rule 15 is of similar effect to rule 13 of the old Rules.

Subrule 15(1) specifies general layout requirements for documents to be lodged with the FWC.

Subrule 15(2) specifies the various ways in which documents may be lodged with the FWC, these being:

- physical delivery to an office of the FWC during business hours
- post
- email, and
- using the FWC's online lodgment facilities.

Unlike the old Rules, the Rules do not provide for lodgment by facsimile (as facsimile is no longer used in practice).

To assist users, the note under subrule 15(2) observes that physical, post and email addresses for lodging documents with the FWC are available on the FWC's website.

Rule 16—Lodging documents by email

Rule 16 is of similar effect to rule 14 of the old Rules.

Subrules 16(1) and 16(2) set out general requirements for lodging documents with the FWC by email, including in relation to email addresses, document formats, content of covering emails and requirements to retain proof of an email being sent (and to produce that proof to the FWC if required).

To assist users, the note under subrule 16(1) observes that addresses for lodging documents with the FWC and with Members' chambers are available on the FWC's website.

Subrule 16(3) provides that an application lodged by email is not taken to have been lodged until an acknowledgement of lodgment is sent by the General Manager of the FWC (but the application is then taken to have been lodged at the time it was received electronically by the FWC).

Rule 17—Lodging documents using the FWC’s online lodgment facilities

Rule 17 is of similar effect to rule 15 of the old Rules.

Subrule 17(1) provides that a document may be lodged by using the FWC’s online lodgment facilities in accordance with the instructions provided by the FWC for use of those facilities.

To assist users, the note under subrule 17(1) observes that the FWC’s online lodgment facilities are available on the FWC’s website and that the facilities include instructions for their use. There is no charge for using the facilities.

Online lodgment facilities are presently available only for a few high volume types of applications to the FWC (for example, unfair dismissal applications and applications for approval of enterprise agreements), but the FWC anticipates extending these facilities to further types of matters in the future. The facilities minimise the need for users to input contact information more than once, and allow users to save drafts of applications, upload supporting documents and pay application fees prescribed by the Regulations. In the future, users may also be able to serve documents by email through the facilities.

Similarly to lodgment by email, subrule 17(2) provides that an application lodged using the online lodgment facilities is not taken to have been lodged until an acknowledgement of lodgment is sent by the General Manager of the FWC (but the application is then taken to have been lodged at the time it was received electronically by the FWC).

A note under subrule 17(3) observes that the subrule is an authorisation for the purposes of the Australian Privacy Principles. In particular, subrule 17(3) is directed to circumstances where a user of the online lodgment facilities saves a draft application through the facilities, but the user does not subsequently finalise the draft and lodge it with the FWC. Such a draft application may include personal (and possibly sensitive) information about the user and about third parties. While the facility to save a draft is provided to assist the user and the FWC would not usually access the information in the draft, saving a draft is likely to result in the FWC collecting the information in the draft for the purposes of the *Privacy Act 1988* (Cth). Where such a collection of information does occur, subrule 17(3) ensures the collection is authorised for the purposes of Australian Privacy Principles. These arrangements are considered reasonable, necessary and proportionate to the aim of assisting users to make applications to the FWC.

In the Rules the term ‘electronic lodgment’ includes lodgment by email and lodgment using the FWC’s online lodgment facilities.

Rule 18—Documents to be signed and dated

Rule 18 is of similar effect to rule 17 of the old Rules.

Subrule 18(1) requires that documents (other than affidavits and annexures and exhibits) lodged with the FWC by a party must be dated and signed either by the party or by their ‘nominated representative’ (rather than, under old rule 17(1), either by the party or their lawyer or paid agent).

Subrule 18(2) provides for electronic signing of documents.

Rule 19—Lodging documents and notifying under rule 35—employers that are partnerships

Rule 19 is of similar effect to rule 17A of the old Rules, but is slightly broader (as applying to lodgment of documents generally, rather than just lodgment of certain declarations).

Rule 19 provides that if an employer is a partnership, the employer can lodge a document or give notice to employees under rule 35, by way of any single partner, or an officer or employee of the partnership, doing so. This ensures that the Rules are not read as requiring each partner separately to lodge the document or give the notice.

Rule 20—Information required for witness statements, submissions and certain statutory declarations

Rule 20 is of similar effect to rule 18 of the old Rules.

Rule 20 specifies content requirements for the headers and footers of witness statements, submissions and certain statutory declarations lodged with the FWC.

Chapter 1—General proceduresPart 5—Serving documents—general requirements*Rule 21—Serving documents lodged with the FWC*

Rule 21 combines rule 41 of the old Rules and clause 1 of Schedule 1 to the old Rules. It requires service of certain documents lodged with the FWC.

Rule 21 requires that if a document of a kind mentioned in column 3 of an item in the table in Schedule 1 is lodged with the FWC, then the document must be served in accordance with the instructions in that item.

To assist users, after rule 21 there is an example of how the rule operates.

The reference to a ‘document of a kind mentioned in column 3’ of an item in the table is a reference to a document that fits the description in column 3 of the item. These descriptions are also the titles of the approved FWC forms listed in the table. As an example, a person might lodge an application under section 394 of the Act that is not strictly in the approved form *F2—Unfair dismissal application*, but is substantially in accordance with the approved form for the purposes of subrule 9(5). This application would be a document of the kind ‘unfair dismissal application’. In accordance with rule 21 and the instructions in the table, the FWC would be required to serve the document on the respondent as soon as practicable after it is lodged with the FWC.

Paragraph 21(b) makes clear that in the circumstances of a particular matter there may not in fact be persons falling under each category of persons specified in column 6 of a table item, and that a person is not required by rule 21 to serve a document on themselves (if they fall under such a category of persons).

The following notes after the rule also assist users:

- Note 1 observes that the instructions as to service in Schedule 1 may be dispensed with or varied under rule 7, and that this is most likely to occur in relation to a sexual harassment FWC application or an application for an order to stop bullying or sexual harassment at work.
- Note 2 identifies the rules that provide for how to serve documents.

- Note 3 observes that if an application is made using approved form *F1—Application (no specific form provided)* (for which there are no service requirements in the table in Schedule 1), the applicant may seek directions about service under rule 8.
- Note 4 alerts users to other rules that require service of documents (as Schedule 1 is confined to approved forms that have service requirements and documents of the same kinds as those approved forms). For example, rule 25 requires a person to serve a signed copy of an order made by the FWC that requires a person to attend before the FWC, on the person required to attend and (unless the order has been published on the FWC's website) on each other party in the matter concerned.

As noted earlier, requirements under the Rules to serve documents on other parties to a matter and interested persons, assist the FWC to inform itself about the matter, assist in providing procedural fairness and assist in ensuring the FWC's processes are open and transparent.

Rule 22—Serving by persons other than the FWC

Rule 22 is to the same effect as rule 42 of the old Rules, except that provision for service by fax has been omitted and provision for service using the FWC's online lodgment facilities has been added.

Subrule 22(1) requires, subject to the Rules and any direction of the FWC, that a person who is required to serve a document on another person do so as soon as practicable.

Subrule 22(2) sets out the different ways in which a person other than the FWC may serve a document on another person (including an individual, a body corporate, an organisation and a branch of an organisation) for the purposes of the Rules. The different ways the person may serve another person are:

- leaving the document with or tendering the document to certain prescribed persons
- posting the document by prepaid express post or registered post to a prescribed address (provided the proof of postage specified in subrule 22(3) is kept and produced if required)
- emailing the document to a prescribed email address (provided the proof of sending the email specified in subrule 22(4) is kept and produced if required), and
- using the FWC's online lodgment facilities to email the document to a prescribed email address.

In each case the other person may be served by service on their nominated representative.

Subrule 22(5) facilitates proof of delivery of a document sent by post.

Rule 23—Serving by the FWC

Rule 23 is to the same effect as rule 43 of the old Rules.

Rule 23 sets out the different ways in which the FWC may serve a document on a person for the purposes of the Rules. The different ways the FWC may serve are:

- posting the document by prepaid post to a specified postal address
- emailing the document to a specified email address, and
- leaving the document with or tendering the document to certain prescribed persons.

In each case the person may be served by service on their nominated representative.

Rule 24—Substituted service

Rule 24 is to the same effect as rule 44 of the old Rules.

Rule 24 provides for a person to apply to the FWC for an order for substituted or other service of a document.

Chapter 1—General proceduresPart 6—Procedures for certain orders*Rule 25—Order for person to attend*

Rule 25 is of similar effect to rule 53 of the old Rules. It provides for orders requiring a person to attend before the FWC for the purpose of the FWC informing itself about a matter before it.

Rule 25 reflects the present procedure of the FWC by providing that a party may seek such an order by making an application in the approved form accompanied by a draft order in the terms sought (rather than just by lodging a draft order as under rule 53 of the old Rules).

Unless the applicant is unable to lodge electronically, subrule 25(3) requires the applicant to lodge the draft order electronically in Word format. If the applicant is unable to lodge electronically, the draft order may be lodged in hard copy. Electronic lodgment assists the FWC promptly to finalise the terms of any order made. To assist users, a note under the subrule observes that a template for the draft order is attached to the approved application form.

If such an order is made by the FWC, subrule 25(4) requires the applicant to serve the signed order on the person required to attend and (unless the order has been published on the FWC's website) on each other party in the matter concerned. Service on the other parties (or publication) assists in ensuring the FWC's processes are open and transparent.

Rule 26—Order for production of documents

Rule 26 is of similar effect to rule 54 of the old Rules. It provides for orders to provide documents, records or other information to the FWC for the purpose of the FWC informing itself about a matter before it.

Similarly to rule 25, rule 26 reflects the present procedure of the FWC by providing that a party may seek such an order by making an application in the approved form accompanied by a draft order in the terms sought (rather than just by lodging a draft order as under rule 54 of the old Rules).

Unless the applicant is unable to lodge electronically, subrule 26(3) requires the applicant to lodge the draft order electronically in Word format. If the applicant is unable to lodge electronically, the draft order may be lodged in hard copy. Electronic lodgment assists the FWC promptly to finalise the terms of any order made. To assist users, a note under the subrule observes that a template for the draft order is attached to the approved application form.

If such an order is made by the FWC, subrule 26(4) requires the applicant to serve the signed order on the person required to produce the documents, records or other information and (unless the order has been published on the FWC's website) on each other party. Service on the other parties (or publication) assists in ensuring the FWC's processes are open and transparent.

Subrule 54(3) of the old Rules provided for how an order to provide documents, records or other information to the FWC could be satisfied. This is omitted from rule 26 as being unnecessary (as the order itself will specify what must be done to comply with the order).

Chapter 2—Matters under the ActPart 1—National Employment Standards*Rule 27—Application for the FWC to deal with a dispute about a change in working arrangements*

Rule 27 facilitates the FWC’s handling of disputes about the operation of Division 4 of Part 2-2 of the Act (‘Requests for flexible working arrangements’) under section 65B of the Act. Section 65B was introduced by the 2022 Amending Act.

Subrule 27(1) provides for the referral of a dispute to the FWC under section 65B(3) of the Act, to be made by application to the FWC. The reference to ‘referral’ of a dispute reflects the terms of subsection 65B(3) of the Act.

Subrule 27(2) specifies documents that must accompany the application. These documents inform the FWC about the dispute and so assist the FWC promptly to attempt to resolve the dispute.

Numbering gap between rules 27 and 30

There are presently no rules between rules 27 and 30. The gap in numbering has been left to accommodate possible future rules relating to Division 4A of Part 2-2 of the Act (‘Offers and requests for casual conversion’).

Rule 30—Application for the FWC to deal with a dispute about an extension of a period of unpaid parental leave

Rule 30 facilitates the FWC’s handling of disputes about extension of a period of unpaid parental leave under section 76B of the Act. Section 76B was introduced by the 2022 Amending Act.

Subrule 30(1) provides for the referral of a dispute to the FWC under subsection 76B(3) of the Act, to be made by application to the FWC. The reference to ‘referral’ of a dispute reflects the terms of subsection 76B(3) of the Act.

Subrule 30(2) specifies documents that must accompany the application. These documents inform the FWC about the dispute and so assist the FWC promptly to attempt to resolve the dispute.

Chapter 2—Matters under the ActPart 2—Modern awards*Rule 31—Application to make, vary or revoke a modern award*

Rule 31 is of similar effect to rule 49 of the old Rules, but applies more broadly to applications under Division 5 of Part 2-3 of the Act to make, vary or revoke a modern award (rather than just applications to vary a modern award as under old rule 49).

Rule 31 requires the applicant to apply to the FWC under rule 8 for directions about the procedure to be followed in relation to service of the application. The rule recognises that, depending upon the particular circumstances concerned, the application may potentially affect and be of interest to a broad range of employers, employees and others. Accordingly, consideration must be given to the appropriate service of the application so that interested persons are made aware of the application and may seek to participate in the FWC proceedings if they wish to do so.

Chapter 2—Matters under the Act

Part 3—Enterprise agreements

Division 1—Approval of enterprise agreements

Rule 32—Application for approval of an enterprise agreement—other than a greenfields agreement, rule 33—Application for approval of an enterprise agreement—greenfields agreement made under subsection 182(3) of the Act, rule 34—Application for approval of an enterprise agreement—greenfields agreement made under subsection 182(4) of the Act

Rules 32, 33 and 34 are of similar effect to rule 24 of the old Rules.

Rule 24 of the old Rules prescribed lodgment requirements in relation to applications under the Act for the FWC to approve non-greenfields enterprise agreements, greenfields enterprise agreements made under subsection 182(3) of the Act and greenfields enterprise agreements made under subsection 182(4) of the Act.

To improve readability, old rule 24 has been split into separate rules in relation to each type of agreement and restructured and reworded. To assist users, new notes have been added to:

- alert users to the documents that the Act and regulations require to be lodged with the application (see, for example, Note 1 under subrule 32(1))
- cross-reference other relevant rules (see, for example, Note 2 under subrule 32(3), and
- explain particular document requirements (see, for example, Note 1 under subrule 32(4)).

Subrule 32(2) requires an applicant who is a bargaining representative to lodge a copy of their instrument of appointment with their application. This assists the FWC to confirm that the applicant has standing to make the application.

Subrule 32(3) requires each employer covered by the enterprise agreement to lodge a declaration by the employer in the approved form in support of the application, within 14 days after the day on which the agreement is made. The 14 day period reflects the time period for lodging the application under subsection 185(3) of the Act. Note 2 under the subrule alerts users that rule 35 requires an employer to notify its employees that the application has been made.

Paragraph 32(4)(a) updates old subrule 24(2) to reflect legislative changes made by the 2022 Amending Act in relation to giving employees a notice under subsection 173(1) of the Act. To assist users, the requirement to give notice is outlined in Note 1 under subrule 32(4)).

Paragraph 32(4)(b) expands old subrule 24(2) to require an employer to lodge with its declaration copies of any documents used to explain the terms of the enterprise agreement to employees and to inform employees about the vote on the agreement. This assists the FWC to inform itself as to whether the employer has satisfied certain requirements for approval of the enterprise agreement under the Act. While these lodgment requirements have not previously been formalised in the procedural rules, under existing practices the parties have lodged these documents in accordance with instructions in the approved employer declaration form.

Subrule 32(5) updates old subrule 24(3) to better reflect the content of the approved declaration form that an employee organisation may lodge if it wants to inform the FWC in relation to the approval application. This includes additional content reflecting the legislative requirement introduced by the 2022 Amending Act, that the FWC have regard to the views of bargaining representatives as to whether the enterprise agreement passes the 'better off overall test' under the Act. Note 2 under the subrule alerts users that the approved form can also be used by an

employee organisation to give notice to the FWC under section 183 of the Act that the organisation wants the agreement to cover it.

Subrule 32(6) updates old subrule 24(4) (similarly to subrule 32(5)) to better reflect the content of the approved declaration form that an employee bargaining representative may lodge if it wants to inform the FWC in relation to the approval application.

If a person lodges a declaration under subrule 32(6), subrule 32(7) requires the person also to lodge a copy of their instrument of appointment. This assists the FWC to confirm the person has standing to lodge the declaration.

In the interests of brevity and readability, unlike old rule 24, rules 32, 33 and 34 specify who must make and lodge a particular declaration, but leave to the general law how the declaration is to be made. For example, subrule 32(3) requires an employer to lodge a declaration 'by the employer'. Pursuant to the general law, if the employer is an individual the declaration would be made by the individual and if the employer is a body corporate the declaration could be made by an authorised officer or employee of the employer.

Rule 33 makes similar provision to rule 32, but tailored to a greenfields agreement made under subsection 182(3) of the Act and the approval requirements under the Act for such an agreement. In particular, under subrules 33(3) and 33(4) respectively, each employer covered by the agreement and each employee organisation covered by the agreement is required to lodge a declaration as described, and there is no provision in relation to employee-appointed bargaining representatives.

Rule 34 makes similar provision to rule 32, but tailored to a greenfields agreement made under subsection 182(4) of the Act and the approval requirements under the Act for such an agreement. In particular:

- under paragraph 34(2)(b) the application must be accompanied by copies of the notice the Act requires to be given to an employee organisation that is a bargaining representative (and to assist users, this notice requirement is outlined in Note 3 under the subrule), and
- subrule 34(3) provides for an employee organisation that is a bargaining representative to lodge a declaration if it wants to inform the FWC in relation to the approval application.

The requirements under rules 32, 33 and 34 to lodge declarations in the approved form and other specified documents, assist in ensuring the FWC receives, in a timely manner, the information and documentation it requires to determine whether or not an enterprise agreement is to be approved in accordance with the Act.

Rule 35—Employer must notify employees of application for approval of an enterprise agreement

Rule 35 is of similar effect to rule 40 of the old Rules, but the old rule has been reworded for clarity, including to make clear that each employer is only required to notify its own employees that an application has been made to the FWC for approval of an enterprise agreement.

While old rule 40 did not specify when employees are to be notified, subrule 35(2) requires that employees be notified as soon as practicable after the application for approval is lodged with the FWC. This assists in providing employees and their representatives with an opportunity to participate in the FWC proceedings if they wish to do so.

Rule 36—Documents lodged with an application for approval of an enterprise agreement or a related declaration must be served with the application or declaration

As the various applications and declarations referred to in rules 32, 33 and 34 are approved forms, they must be served under rule 21 in accordance with the applicable service instructions in the table in Schedule 1.

In addition, rule 36 now formalises in the Rules the requirement that documents lodged with the FWC with such an application or declaration, must also be served with the application or declaration. This new rule reflects existing practices.

Rule 36 assists the FWC to inform itself about the matter before it, assists in providing procedural fairness and assists in ensuring the FWC's processes are open and transparent.

Chapter 2—Matters under the Act

Part 3—Enterprise agreements

Division 2—Variation of enterprise agreements

Rule 37—Application under section 210 of the Act for approval of a variation of an enterprise agreement

Rule 37 applies where an application is made under section 210 of the Act for approval of a variation of an enterprise agreement. It is of similar effect to rule 25 of the old Rules, but as with rules 32–34, it has been restructured and reworded to improve readability and additional content (including new notes, expanded descriptions of the content of declarations and newly formalised document lodgment requirements) has been added.

Subrule 37(2) requires each employer covered by the enterprise agreement to lodge with the FWC a declaration by the employer in the approved form in support of the application, within 14 days after the day on which the variation is made. In contrast, old rule 25 required the application to be accompanied by the employer and employee organisation declarations. This change was made because (as with an application for approval of a non-greenfields agreement under rule 32) the applicant may not be the employer and an employee organisation covered by the agreement might not have been involved in the process before the application is made.

Subrule 37(3) expands old rule 25 to require an employer to lodge with its declaration copies of any documents:

- provided to 'affected employees' (as defined in the Act) to inform them of the bargaining and the coverage of the agreement as proposed to be varied
- provided to those employees to inform them about their rights to representation
- used to explain to those employees the terms and effect of the variation, and
- provided to those employees to inform them about the vote on the variation.

While these lodgment requirements have not previously been formalised in the procedural rules, under existing practices parties have lodged these documents in accordance with instructions in the approved employer declaration form.

Subrule 37(4) updates old paragraph 25(b) by describing the content of the approved declaration form that an employee organisation may lodge if it wants to inform the FWC in relation to the approval application. This includes additional content reflecting the legislative requirement introduced by the 2022 Amending Act, that the FWC have regard to the views of bargaining

representatives as to whether the agreement as proposed to be varied passes the 'better off overall test' under the Act.

The requirements under rule 37 to lodge declarations in the approved form and other specified documents, assist in ensuring the FWC receives, in a timely manner, the information and documentation it requires to determine whether or not a variation of an enterprise agreement is to be approved in accordance with the Act.

Rule 38—Application by employer for approval of a variation of a supported bargaining agreement to add employer and employees, rule 39—Application by employee organisation for a variation of a supported bargaining agreement to add employer and employees, rule 40—Application by employer for approval of a variation of cooperative workplace agreement to add employer and employees, rule 41—Application by employer for approval of a variation of a single interest employer agreement to add employer and employees, rule 42—Application by employee organisation for approval of a variation of a single interest employer agreement to add employer and employees, rule 43—Application for approval of a variation of a multi-enterprise agreement to remove employer and employees

Rules 38–43 apply to applications for approval of, or applications for, particular variations of enterprise agreements that were introduced by the 2022 Amending Act. These particular variations are respectively:

- variation of a supported bargaining agreement to add employer and employees (employer application under section 216AA of the Act)
- variation of a supported bargaining agreement to add employer and employees (employee organisation application under section 216B of the Act)
- variation of a cooperative workplace agreement to add employer and employees (employer application under section 216CA of the Act)
- variation of a single interest employer agreement to add employer and employees (employer application under section 216DA of the Act)
- variation of a single interest employer agreement to add employer and employees (employee organisation application under section 216DB of the Act), and
- variation of a multi-enterprise agreement to remove employer and employees (application under section 216EA of the Act).

Rules 38–43 are drafted consistently with the redrafting of and additional content added to rules 32–34 and 37 (as outlined above).

As with the lodgment requirements under rules 32–34 and 37, the requirements under rules 38–43 to lodge declarations in the approved form and other specified documents, assist in ensuring the FWC receives, in a timely manner, the information and documentation it requires to determine whether or not a variation of an enterprise agreement is to be approved or made in accordance with the Act.

Rule 44—Documents lodged with an application about a variation of an enterprise agreement or a related declaration must be served with the application or declaration

As the various applications and declarations referred to in rules 37–43 are approved forms, they must be served under rule 21 in accordance with the applicable service instructions in the table in Schedule 1.

Rule 44 formalises in the Rules the existing requirement that documents lodged with the FWC with an application or declaration under section 210 of the Act, must also be served with the application or declaration. In addition, rule 44 extends that service requirement to documents lodged with applications or declarations relating to the particular variations of enterprise agreements introduced by the 2022 Amending Act.

Rule 44 assists the FWC to inform itself about the matter before it, assists in providing procedural fairness and assists in ensuring the FWC's processes are open and transparent.

Chapter 2—Matters under the Act

Part 3—Enterprise agreements

Division 3—Termination of enterprise agreements

Rule 45—Application for approval of the termination of an enterprise agreement, rule 46—Application for the termination of an enterprise agreement after its nominal expiry date

To facilitate the reorganisation of the procedural rules, rule 26 of the old Rules has been split into 3 separate rules—rules 45 and 46 (as below) and rule 120 (relating to an application for approval of the termination of a collective agreement-based transitional instrument). The old rule has also been reworded for clarity.

Rule 45 is based on subrule 26(1) of the old Rules. It is confined to an application under section 222 of the Act (for approval of the termination of an enterprise agreement). It requires the applicant to lodge a declaration by the applicant in the approved form setting out the basis on which the FWC can be satisfied the requirements for approval of the termination of the agreement under section 223 of the Act have been met.

Rule 46 is based on old subrules 26(2) and 26(3). It is confined to an application under section 225 of the Act (for the termination of an enterprise agreement after its nominal expiry date).

Subrule 46(1) requires the applicant to lodge a declaration by the applicant in the approved form, setting out the basis on which the FWC can be satisfied the requirements for termination of the agreement under section 226 of the Act have been met. The subrule also requires that the application be accompanied by any guarantee of termination entitlements given to the FWC in relation to the termination of the agreement. To assist users, Note 2 under the subrule observes that section 226 of the Act sets out circumstances in which the FWC must terminate the agreement, and Note 3 observes that section 226A of the Act requires an employer to comply with a guarantee of termination entitlements given by the employer to the FWC.

Subrule 46(2) provides for an employee, employer or employee organisation that is covered by the agreement and wants to advise the FWC of its views on the proposed termination, to lodge a declaration to that effect with the FWC. This subrule facilitates the FWC's compliance with subsection 226(4) of the Act (as introduced by the 2022 Amending Act), which requires the FWC to consider the views of such persons in deciding whether to terminate the agreement.

Similarly to the rules in Divisions 1 and 2 of Chapter 2, in the interests of brevity and readability the new rules specify who must make the relevant declaration, but leave to the general law how the declaration may be made.

Chapter 2—Matters under the ActPart 3—Enterprise agreementsDivision 4—Bargaining*Rule 47—Application for a bargaining order*

Rule 47 is to the same effect as rule 28 of the old Rules. It requires an application under section 229 of the Act (for a bargaining order) to be accompanied by a copy of the notice (setting out the applicant's concerns relating to the enterprise bargaining process) that paragraph 229(4)(b) of the Act requires the applicant to give to other bargaining representatives.

Rule 47 assists the FWC to determine whether the requirements under the Act for making a bargaining order have been met.

Rule 48—Application for a scope order

Rule 48 is to the same effect as rule 29 of the old Rules. It requires an application under section 238 of the Act (for a scope order) to be accompanied by a copy of the notice (setting out the applicant's concerns relating to the coverage of a proposed enterprise agreement) that subsection 238(3) of the Act requires the applicant to give to other bargaining representatives.

Rule 48 assists the FWC to determine whether the requirements under the Act for making a scope order have been met.

Rule 49—Application for the FWC to deal with a bargaining dispute

To facilitate the reorganisation of the procedural rules and to consolidate some rules, the content of rule 36 of the old Rules has been divided between rule 49 (see below), rule 119 (relating to disputes under dispute procedures) and rule 123 (relating to disputes arising under transitional arrangements).

Rule 49 is to the same effect as subrule 36(2) of the old Rules. It requires an application under section 240 of the Act (for the FWC to deal with a bargaining dispute) to be accompanied by a copy of each notice issued by the applicant, respondent or a bargaining representative since bargaining commenced.

Rule 49 assists the FWC to inform itself about the dispute and so assists the FWC promptly to deal with the dispute.

Rule 50—Application for a supported bargaining authorisation

Rule 50 facilitates the FWC's handling of applications under section 242 of the Act for supported bargaining authorisations. The provision for the FWC to make such authorisations was introduced by the 2022 Amending Act.

Subrule 50(1) requires such an application to be accompanied by a draft authorisation specifying the employers and employees to be covered by the agreement. Subrule 50(2) requires the applicant to serve the draft authorisation with the application.

Lodgment and service of the draft authorisation informs the FWC and the persons who may be affected by the application, of the scope and detail of the proposed authorisation. This assists the FWC to inform itself in relation to the application, assists in providing procedural fairness and assists in ensuring the FWC's processes are open and transparent.

Rule 51—Application for variation of a supported bargaining authorisation to remove or add an employer, rule 53—Application for variation of a single interest employer authorisation to remove or add an employer

Rules 51 and 53 facilitate the FWC’s handling of applications respectively under section 244 and section 251 of the Act for variation of certain authorisations. The provision for the FWC to make such variations was introduced by the 2022 Amending Act.

The rules require such an application to be accompanied by a copy of the authorisation to be varied. This assists the FWC promptly to deal with the application.

Rule 52—Application for a single interest employer authorisation

Rule 52 facilitates the FWC’s handling of applications under section 248 of the Act for single interest employer authorisations. The provision for the FWC to make such authorisations was introduced by the 2022 Amending Act.

Subrule 52(1) requires such an application to be accompanied by a draft authorisation specifying the employers and employees to be covered by the proposed enterprise agreement, and the person (if any) nominated by the employers to make applications under the Act if the authorisation is made. Subrule 52(2) requires the applicant to serve the draft authorisation with the application.

Lodgment and service of the draft authorisation informs the FWC and the persons who may be affected by the application, of the scope and detail of the proposed authorisation. This assists the FWC to inform itself in relation to the application, assists in providing procedural fairness and assists in ensuring the FWC’s processes are open and transparent.

Chapter 2—Matters under the Act

Part 4—Regulated labour hire arrangement orders

There are presently no rules in Chapter 2 Part 4 (between rules 53 and 63). Part 4 is reserved for possible future rules relating to Part 2-7A of the Act (‘Regulated labour hire arrangement orders’) which was introduced by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth).

Chapter 2—Matters under the Act

Part 5—Transfer of business

Rule 63—Application for orders in relation to transfer of business

Rule 63 is to the same effect as rule 34 of the old rules. It requires certain applications under the Act relating to transfer of an instrument in consequence of a transfer of business, to be accompanied by a copy of the instrument concerned.

Rule 63 assists the FWC promptly to deal with such an application. The instrument concerned may not otherwise be available to the FWC.

Chapter 2—Matters under the Act

Part 6—Fixed term contracts

Rule 64—Application for the FWC to deal with a dispute about fixed term contracts

Rule 64 facilitates the FWC’s handling of applications under section 333L of the Act for the FWC to deal with a dispute about the operation of Division 5 of Part 2-9 of the Act (‘Fixed term contracts’). The provision for the FWC to deal with such disputes was introduced by the 2022 Amending Act.

Rule 64 requires such an application to be accompanied by copies of the written employment contracts relating to the dispute (if any). These documents are required to inform the FWC about the dispute and so assist the FWC promptly to attempt to resolve the dispute.

Chapter 2—Matters under the Act

Part 7—General protections, unfair dismissal and unlawful termination

Division 1—General protections

Rule 65—Response to a general protections application

Subrule 65(1) is to the same effect as rule 21 of the old Rules. It requires a respondent to a general protections application (an application under either section 365 or section 372 of the Act) to lodge a response by the respondent to the application in the approved form, within 7 days after the day on which the respondent was served with the application.

The response informs the FWC about the dispute and so assists the FWC promptly to attempt to resolve the dispute through conciliation, or to exercise its other functions under the Act (if any) in relation to the application.

Subrule 65(2) requires the response to include details of any jurisdictional objection to the application. This assists in alerting the FWC to any jurisdictional issue that may preclude the FWC conciliating or otherwise dealing with the application (and so must be considered by the FWC at the outset).

Chapter 2—Matters under the Act

Part 7—General protections, unfair dismissal and unlawful termination

Division 2—Unfair dismissal

Rule 66—Employer response to an unfair dismissal application

Subrule 66(1) is to the same effect as rule 19 of the old Rules. Similarly to subrule 65(1), it requires a respondent to an unfair dismissal application (an application under section 394 of the Act) to lodge a response by the respondent to the application in the approved form (with any supporting documents) within 7 days after the day on which the respondent was served with the application.

The response informs the FWC about the matter and so assists the FWC promptly to resolve the matter through conciliation or by making orders.

Subrule 66(2) requires the response to include details of any objection to the application under section 396 of the Act or any jurisdictional objection to the application. This assists in alerting the FWC to any issue that it is required by section 396 of the Act to determine before considering the merits of the application, and to any jurisdictional issue that may preclude the FWC conciliating or otherwise dealing with the application (and so must be considered by the FWC at the outset).

The content of subrules 20(1)(b) and 20(1)(c) of the old Rules is omitted as being unnecessary. The option under subrule 20(2) of the old Rules for the respondent to raise objections by lodging an objection in the approved form (subsequently to lodging its response to the application) is also omitted as this can give rise to confusion by respondents as to when and how objections under section 396 and jurisdictional objections not covered by section 396 should be raised.

To assist users, Note 1 under subrule 66(2) outlines section 396 of the Act. Note 2 alerts users that information about the grounds on which a respondent can object to an unfair dismissal application is available on the FWC's website.

Rule 67—Order for security for payment of unfair dismissal matter costs

Rule 67 is to the same effect as rule 55 of the old Rules. It provides for a respondent or applicant in a matter arising under Part 3-2 of the Act ('Unfair dismissal') to lodge an application in the approved form for an order that a person provide security for the payment of costs, and for the effect of such an order if made.

To assist users, Note 3 under subrule 67(1) observes that the FWC will not ordinarily make such an order before the conclusion of conciliation.

Chapter 2—Matters under the ActPart 7—General protections, unfair dismissal and unlawful terminationDivision 3—Unlawful termination*Rule 68—Employer response to an unlawful termination FWC application*

Rule 68 is to the same effect as rule 22 of the old Rules. It requires the respondent to an unlawful termination FWC application (an application under section 773 of the Act) to lodge a response to the application in the approved form within 7 days after the day on which the respondent was served with the application.

The response informs the FWC about the dispute and so assists the FWC promptly to attempt to resolve the dispute through conciliation or to exercise its other functions under the Act in relation to the application.

Chapter 2—Matters under the ActPart 7—General protections, unfair dismissal and unlawful terminationDivision 4—General rules

Division 4 of Part 7 of Chapter 2 of the Rules contains rules that apply to general protections, unfair dismissal and unlawful termination applications.

Rule 69—Telephone applications—application under section 365 of the Act, unfair dismissal application or unlawful termination FWC application

Rule 69 provides for certain types of applications to be made to the FWC by telephone. Rule 69 is of similar effect to rule 9 of the old Rules. However, under subrule 69(1) the rule has been extended to cover unlawful termination FWC applications in addition to applications under section 365 of the Act (general protections disputes involving termination of employment) and unfair dismissal applications. This is because, like the latter applications, an unlawful termination FWC application must generally be made within 21 days after dismissal. The rule has also been redrafted for clarity.

Subrule 69(2) enables a person to apply to the FWC by telephone as an alternative to lodging an application under section 365 of the Act, an unfair dismissal application or an unlawful termination FWC application, in writing in the approved form. To assist users, the note under the subrule observes that the telephone numbers for making telephone applications are available on the FWC's website.

Rule 69 assists individuals who, for various reasons, are unable to lodge a written application in the approved form (as otherwise required by the Rules), within the time limit for lodging an application that is prescribed by the Act.

Under subrule 69(3) the FWC will prepare a written application based on the telephone application and send it to the person. Subrule 69(4) requires the person, within 14 days after the day on which the FWC gives them the written application, to complete, sign and lodge the written

application, and either pay the application fee that is prescribed by the Regulations, or apply for a waiver of the fee.

Subrule 69(6) provides that if the person does complete, sign and lodge the written application within 14 days, and either pays the application fee within the prescribed period or is granted a fee waiver, the application is taken to be made on the day the person telephoned the FWC to make the application.

The redrafting of the rule makes clear that the applicant must comply with the time limits under the rule for lodging a written application and paying the application fee (if the fee is not waived) for the application to be taken to be made on the day the person telephoned the FWC. This assists the FWC promptly to deal with the application.

Rule 70—Two or more applications concerning the same or substantially similar conduct

Rule 70 is to the same effect as rule 23 of the old Rules. It provides for a respondent to lodge one response to multiple general protections, unfair dismissal or unlawful termination FWC applications, if the applications and responses to each application are sufficiently similar.

Rule 70 reduces the administrative burden for respondents responding to sufficiently similar multiple applications.

Rule 71—Service of applications by the FWC

To facilitate the reorganisation of the procedural rules, rule 45 of the old Rules has been split into 2 separate rules—rule 71 (see below) and rule 88 (relating to sexual harassment and bullying applications). The old rule has also been reworded for clarity.

Rule 71 is to the same effect as subrule 45(1) of the old Rules. Under rule 21 and the service requirements for a general protections application, unfair dismissal application and unlawful termination FWC application in the table in Schedule 1 to the Rules, the FWC must generally serve such an application on the respondent. This is done because such applications are commonly made by unrepresented individuals who may not appreciate the importance of promptly serving their application on the respondent.

Under subrule 71(2) the FWC must serve the application on the respondent without the part of the application that deals with payment or waiver of the application fee. This protects the privacy of the applicant.

Under subrule 71(3) the FWC must also serve on the respondent any documents that were lodged with the application. This assists the FWC to inform itself about the application, assists in providing procedural fairness and assists in ensuring the FWC's processes are open and transparent.

Rule 72—Accompanying documents must be served with response to application

Rule 72 is to the same effect as rule 46 of the old Rules, but has been reworded for clarity. (Reference to 'an objection to an unfair dismissal application' has also been omitted in consequence of the omission from the Rules of provision for such an objection, as outlined in relation to rule 66 above.)

Rule 72 requires a respondent who is required to serve on the applicant a response to a general protections application, unfair dismissal application or unlawful termination FWC application (as required under rule 21 and the applicable service rules in the table in Schedule 1) also to serve with the response any documents lodged with the response.

Rule 72 assists the FWC to inform itself about the application, assists in providing procedural fairness and assists in ensuring the FWC's processes are open and transparent.

Chapter 2—Matters under the Act

Part 8—Industrial action

Rule 73—Application for an order to stop etc. unprotected industrial action

Rule 73 requires an application under section 418 or 419 of the Act (for an order that industrial action stop, not occur or not be organised) to be accompanied by a draft order in the terms sought by the applicant. Unless the applicant is unable to lodge electronically, the applicant is to lodge the draft order electronically in Word or PDF format. If the applicant is unable to lodge electronically, the draft order may be lodged in hard copy.

Lodgment and service of a draft order informs the FWC and the parties against whom orders are sought of the precise terms of the orders sought by the applicant, and assists the FWC promptly to finalise the terms of any order made. Subsection 420(1) of the Act requires the FWC, as far as practicable, to determine such an application within 2 days.

While the requirement to lodge a draft order has not previously been formalised in the procedural rules, it is common practice for applicants to provide the FWC with electronic copies of draft orders in the terms sought.

Rule 74—Application for an order suspending or terminating protected industrial action

Similarly to rule 73, rule 74 requires an application under section 423, 424, 425 or 426 of the Act (for an order suspending or terminating protected industrial action) to be accompanied by a draft order in the terms sought by the applicant. Unless the applicant is unable to lodge electronically, the applicant is to lodge the draft order electronically in Word or PDF format. If the applicant is unable to lodge electronically, the draft order may be lodged in hard copy.

As with rule 73, lodgment and service of a draft order informs the FWC and the parties against whom orders are sought of the precise terms of the orders sought by the applicant, and assists the FWC promptly to finalise the terms of any order made. Subsection 424(3) of the Act requires the FWC, as far as practicable, to determine an application under section 424 of the Act within 5 days.

Again, while the requirement to lodge a draft order has not previously been formalised in the procedural rules, it is common practice for applicants to be asked to provide the FWC with draft orders in the terms sought.

Rule 75—Application for an order extending a suspension of protected industrial action

Rule 75 is to the same effect as rule 32 of the old Rules, but has been reworded for clarity. It requires an application under section 428 of the Act (for an order extending a suspension of protected industrial action), to be accompanied by a copy of the existing suspension order.

Lodgment of the suspension order assists the FWC promptly to inform itself about the matter and to finalise the terms of any further order that is to be made.

Rule 76—Application for a protected action ballot order

Rule 76 is based on rule 31 of the old Rules, but has been redrafted for clarity and to facilitate new FWC functions and processes introduced by the 2022 Amending Act. Also for clarity, subrule 31(3) of the old Rules has been redrafted as separate new rule 77.

As with old subrule 31(1), paragraphs 76(1)(a) and 76(1)(b) require that an application under section 437 of the Act (for a protected action ballot order) be accompanied by a draft order in the terms sought and a declaration by the applicant in the approved form. This declaration is directed to the statutory requirements for the FWC to issue the order. In contrast to old subrule 31(1), subrule 76(1) expressly recognises that joint applications may be made and that there may be multiple employers of the employees to be balloted. Consequently, the subrule makes clear that each applicant is to lodge a separate declaration in respect of each employer. To assist users, this is also explained by the example in Note 2 under subrule 76(1).

Paragraph 76(1)(b) also better describes the content of the required declaration, by referring to the requirements of section 437 of the Act in addition to the requirements of paragraph 443(1)(b) of the Act.

Paragraph 76(1)(c) requires a further declaration in the approved form to be lodged with the application, if the application proposes as the protected action ballot agent a person who is not an 'eligible protected action ballot agent' for the purposes of the Act. This declaration is directed to the statutory requirements that must be met for the FWC to specify the person as the protected action ballot agent.

The requirements under rule 76 to lodge declarations in the approved form assist in ensuring the FWC receives, in a timely manner, the information and documentation it requires to determine whether or not the statutory requirements for issuing an order are met.

Unless the applicant is unable to lodge electronically, subrule 76(2) requires the applicant to lodge the draft order electronically in Word or PDF format. If the applicant is unable to lodge electronically, the draft order may be lodged in hard copy. Electronic lodgment assists the FWC promptly to finalise the terms of any order made. To assist users, a note under the subrule observes that a template for the draft order is attached to the approved application form.

Lodgment of a draft order informs the FWC of the precise terms of the order sought by the applicant and (particularly if the draft order is in electronic form) assists the FWC promptly to finalise the terms of any order that is to be made. Subsection 441(1) of the Act requires the FWC, as far as practicable, to determine an application for a protected action ballot order within 2 working days.

Under rule 21 and the table in Schedule 1 to Rules, the application and the declaration referred to in paragraph 76(1)(b) must be served by the applicant on the employer or employers of the employees to be balloted, the proposed protected action ballot agent and any proposed independent advisor for the ballot. As, strictly, rule 21 does not provide for service on the Australian Electoral Commission (as it is not a person within the meaning of the Rules), this is dealt with in subrules 76(4) and 76(5).

Service of the application, declaration and draft order assists the FWC to inform itself about the application, assists in providing procedural fairness and assists in ensuring the FWC's processes are open and transparent. It also provides the proposed protected action ballot agent and any proposed independent advisor for the ballot with information they require.

Rule 77—Application to vary or revoke a protected action ballot order

Rule 77 is to the same effect as subrule 31(3) of the old Rules. It requires an application under section 447 or section 448 of the Act (respectively to vary and to revoke a protected action ballot order) to be accompanied by a copy of the existing order.

Lodgment of the protected action ballot order assists the FWC promptly to inform itself about the application and to finalise the terms of any further order that is to be made.

Rule 78—Application to extend the 30-day period for protected action

Rule 78 requires an application under subsection 459(3) of the Act (to extend the 30-day period in which industrial action must commence if it is to be authorised by a protected action ballot order) to be accompanied by copies of the order and the declaration of the results of the ballot.

Lodgment of the order and declaration of the results of the ballot assists the FWC promptly to inform itself about the application and to determine the application.

While these lodgment requirements have not previously been formalised in the procedural rules, under existing practices applicants have lodged these documents in accordance with instructions in the approved application form.

Rule 79—Application for an order in relation to partial work bans

Rule 79 is to the same effect as rule 33 of the old Rules. It requires an application under subsection 472(4) of the Act (for an order varying the proportion by which an employee's payments are to be reduced due to partial work bans) to be accompanied by a copy of the notice given to the employee under paragraph 471(1)(c) of the Act. To assist users, Note 2 describes the content of such a notice.

Lodgment of the notice assists the FWC promptly to inform itself about the matter and to determine the application.

Chapter 2—Matters under the Act

Part 9—Right of entry

Rule 80—Application for an order for access to non-member records

Rule 80 is to the same effect as rule 34A of the old Rules. It relates to an application under section 483AA of the Act by a holder of an entry permit, for an order for access to non-member records or documents held by an occupier of particular premises or an affected employer. 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 organisation and does not substantially relate to the employment of a person who is a member.

Under rule 21 and the applicable table item in Schedule 1, the requirement for the applicant to serve the application on the occupier or employer concerned, is expressed to be 'subject to order of the FWC'. This recognises that in some circumstances, it may be appropriate for an order to be made without the occupier or employer being informed of the application.

If the applicant for an order under section 483AA of the Act is required to serve the application on the occupier or employer concerned, subrule 80(2) requires the applicant to serve with the application a notice that sets out the requirements of subrule 80(3). Subrule 80(3) in turn requires the occupier or employer to display a copy of the application at their premises or otherwise make it available to employees.

Where the circumstances do not justify orders being made without the occupier or employer being informed, the purpose of rule 80 is, first, to ensure the occupier or employer is aware of its obligation under subrule 80(3) and, second, by the occupier or employer complying with that obligation, to assist in making employees whose records may be accessed aware of the application so that they are able to participate in the FWC proceedings if they wish to do so.

Rule 81—Application for an entry permit

To facilitate the reorganisation of the procedural rules, rule 51 of the old Rules has been split into 2 separate rules—rule 81 (see below) and rule 127 (in relation to an application for a WHS entry permit). The rule has also been reworded for clarity. Other than paragraph 81(2)(a), rule 81 is to the same effect as subrules 51(1)–(1B) of the old Rules.

Section 512 of the Act provides for the FWC, on application by an organisation, to issue an entry permit to an official of the organisation if the FWC is satisfied the official is a fit and proper person to hold the entry permit.

Subrule 81(1) requires an application under section 512 of the Act to be accompanied by evidence of completion by the official concerned of appropriate training about the rights and responsibilities under the Act of a permit holder. Whether the official has received such training is one of the matters the Act requires the FWC to take into account in deciding whether the official is a fit and proper person to hold the entry permit.

Paragraph 81(2)(a) provides that the FWC may require the official concerned to provide to the FWC a National Police Certificate issued not more than 30 days earlier, and paragraph 81(2)(b) provides that the FWC may require the official to provide the FWC with an authorisation and such information as required for the FWC to obtain such a certificate. In contrast to paragraph 81(2)(a), paragraph 51(1A)(a) of the old Rules provided for the FWC to require the official to provide the FWC with a ‘current’ certificate. This has been changed because such certificates have no period of currency.

Whether the official concerned has been convicted of certain offences is one of the matters the Act requires the FWC to take into account in deciding whether the official is a fit and proper person to hold the entry permit.

Subrule 81(3) provides that the FWC may publish on its website the name of the organisation applying for an entry permit and the name of the official concerned, that the organisation has applied for an entry permit to be issued to the official, and that submissions may be made to the FWC within a specified time about whether the official is a fit and proper person to be issued with the entry permit.

The requirements under subrules 81(1) and 81(2) to provide documents to the FWC, together with the FWC publicising the application and inviting submissions from the public, assist the FWC to inform itself about the application and determine whether or not the official is a fit and proper person to hold an entry permit for the purposes of the Act. The arrangements for the FWC to collect personal and potentially sensitive information under rule 81 are considered reasonable, necessary and proportionate to the aim of ensuring a person to whom an entry permit is issued is a fit and proper person to hold the permit.

Rule 81 draws attention to, and does not alter, the discretion of a Member of the FWC (with or without any rule) to inform themselves in a manner they consider appropriate about a proposed permit holder’s fitness to hold an entry permit (including by requiring the proposed permit holder to provide a National Police Certificate and inviting submissions from third parties).

Rule 82—Application for an affected member certificate

Rule 82 is to the same effect as rule 35 of the old Rules. It requires an application under section 520 of the Act (for an affected member certificate) to be accompanied by a declaration setting out the basis on which the FWC can be satisfied that the statutory requirements for the issuing of the certificate are met.

Lodgment of the declaration assists the FWC promptly to inform itself about the application and to determine the application.

Chapter 2—Matters under the Act

Part 10—Sexual harassment and bullying

Division 1—Sexual harassment in connection with work

Rule 83—Making a sexual harassment FWC application

Rule 83 provides for joint sexual harassment FWC applications to be made. It is to the same effect as rule 10A of the old Rules, with some rewording for clarity and consistency.

Subrule 83(1) provides for a sexual harassment FWC application (an application under section 527F of the Act) to be made jointly by certain persons, provided the application is made in relation to the same alleged contravention or contraventions of Division 2 of Part 3-5A of the Act. That Division prohibits sexual harassment in connection with work.

Under subrule 83(2), the persons who can make such a joint application are ‘aggrieved persons’ (persons who allege they have been sexually harassed in contravention of Division 2 of Part 3-5A) or industrial associations entitled to represent the industrial interests of aggrieved persons. To assist users, Note 2 under subrule 83(1) identifies the subsection in the Act where ‘aggrieved person’ is defined.

Rule 84—Response to a sexual harassment FWC application

Rule 84 is to the same effect as rule 21A of the old Rules.

Subrule 84(1) requires a person named in a sexual harassment FWC application as either a person alleged to have engaged in sexual harassment, or the employer or principal of an aggrieved person or a person alleged to have engaged in sexual harassment, to lodge a response to the application within the prescribed period.

Subrule 84(1) assists the FWC to inform itself about the sexual harassment dispute, and promptly to deal with the dispute by making orders or exercising its other functions under the Act in relation to the dispute.

Subrule 84(2) permits a person to lodge one response to multiple sexual harassment FWC applications if the applications are lodged at the same time and are sufficiently similar. This subrule reduces the administrative burden for persons responding to sufficiently similar multiple applications.

Rule 85—Order for joinder or withdrawal of parties to disputes commenced by a sexual harassment FWC application

Rule 85 is to the same effect as rule 55A of the old Rules.

Subrule 85(1) provides for a party to a sexual harassment dispute to apply for orders to join persons as parties to the dispute or to withdraw persons as parties to the dispute. Subrule 85(3) is to the effect that such an application cannot be made if the FWC is arbitrating the dispute pursuant to section 527S of the Act.

Under paragraph 85(1)(a), the persons who might be joined to the dispute by such an order of the FWC are:

- 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, or
- an employee or agent of a principal that is alleged to be vicariously liable for the employee's or agent's alleged sexual harassment.

To assist users, Note 2 under subrule 85(1) identifies the subsection in the Act where 'aggrieved person' is defined.

Joinder or withdrawal of persons as parties to the dispute, may assist in resolving the dispute by ensuring the appropriate persons participate in the FWC proceedings.

Paragraph 85(2)(a) requires the applicant to serve a copy of the application on any person named in the application as a person to be joined or withdrawn as a party to the dispute (if that person is not the applicant). This assists the FWC to inform itself about the application and assists in providing procedural fairness. Paragraph 85(2)(b) requires the applicant to serve a copy of any order made on any person joined or withdrawn as a party by the order (if that person is not the applicant). This ensures the person to whom an order is directed is aware of the order.

Chapter 2—Matters under the Act

Part 10—Sexual harassment and bullying

Division 2—Bullying at work

Rule 86—Response to an application for an order to stop bullying at work

For clarity, rule 23A of the old Rules has been split into 2 separate rules—rule 86 (see below) and rule 87 (relating to an application to stop sexual harassment at work). The old rule has also been partly reworded for clarity and consistency.

Rule 23A of the old Rules provided for responses to applications under section 789FC of the Act for orders to stop bullying at work or to stop sexual harassment at work (or both). Under changes to the Act made by the 2022 Amending Act, section 789FC is now expressed as being confined to applications for orders to stop bullying. However, under transitional provisions, section 789FC as it previously was continues to apply to sexual harassment of a worker that occurred before commencement of the amendments or that is part of a course of conduct that began before commencement (see clause 60 of Schedule 1 to the Act).

To reduce the scope for confusion by users of the Rules, rule 86 is confined to responses to applications under section 789FC for orders to stop bullying at work and a separate rule, rule 87, deals with responses to applications under section 789FC (as it applies pursuant to the transitional provisions) for orders to stop sexual harassment at work.

Subrule 86(1) requires the person named as an employer or principal in an application under section 789FC to lodge a response by the person to the application in the approved form, within the prescribed period. To assist users, Note 2 under the subrule observes that a person can be named in such an application as the employer or principal of the applicant, the employer or principal of a person alleged to have engaged in bullying, or both.

Lodgment of the response assists the FWC to inform itself about the alleged bullying and promptly to deal with the application by making orders or exercising other powers under the Act.

Subrule 86(2) permits a person to lodge one response to multiple applications under section 789FC if the applications are lodged at the same time and are sufficiently similar. This subrule

reduces the administrative burden for persons responding to sufficiently similar multiple applications.

Subrule 86(3) provides for (but does not require) a person named in an application under section 789FC as a person alleged to have engaged in bullying, to lodge a response to the application within the prescribed period.

Chapter 2—Matters under the Act

Part 10—Sexual harassment and bullying

Division 3—Sexual harassment at work (continued application of section 789FC of the Act)

Rule 87—Response to an application for an order to stop sexual harassment at work

As discussed in relation to rule 86 above, rule 87 deals with responses to applications under section 789FC—as section 789FC applies pursuant to transitional provisions—for orders to stop sexual harassment at work.

To assist users, Note 3 under subrule 87(1) outlines the transitional provisions under clause 60 of Schedule 1 to the Act.

Consistent with rule 23A of the old Rules, rule 87 otherwise mirrors the terms of rule 86 (as outlined above).

Chapter 2—Matters under the Act

Part 10—Sexual harassment and bullying

Division 4—General rules

Division 4 of Part 10 of Chapter 2 of the Rules contains rules that apply to sexual harassment FWC applications, applications under section 789FC for orders to stop bullying and applications under section 789FC for orders to stop sexual harassment.

Rule 88—Service by the FWC of sexual harassment and bullying applications

Rule 88 is of similar effect to subrule 45(2) of the old rules.

Under rule 21 and the applicable table items in Schedule 1 to the Rules, the FWC must generally serve a sexual harassment FWC application or an application under section 789FC of the Act. This is to minimise the need for direct contact between the aggrieved person/applicant and a person alleged to have engaged in sexual harassment or bullying.

Rule 88 requires the FWC to serve the application on the relevant persons without the part of the application that deals with payment or waiver of the application fee. This is to protect the privacy of the applicant.

Rule 88 also permits the FWC to remove some or all of the contact details of a person identified in the application from the copy of the application it serves. In practice, the FWC removes the aggrieved person's/applicant's postal address from the served copy of a sexual harassment FWC application or an application under section 789FC of the Act for orders to stop sexual harassment. The FWC may remove other contact details from sexual harassment applications, and may also remove contact details from stop bullying applications.

Chapter 2—Matters under the Act

Part 11—Regulated workers

There are presently no rules in Chapter 2 Part 11 (between rules 88 and 119). Part 11 is reserved for possible future rules relating to amendments to the Act in relation to regulated workers that

are to be introduced by the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth).

Chapter 2—Matters under the Act

Part 12—Disputes under disputes procedures in awards, enterprise agreements etc.

Rule 119—Application for the FWC to deal with a dispute

Rule 119 combines the content of subrules 36(3)–(4) and rule 48 of the old Rules, with some rewording for clarity and consistency.

Subrule 119(1) requires an application under section 739 of the Act (for the FWC to deal with a dispute pursuant to a dispute resolution term in a modern award, enterprise agreement, contract of employment or other written agreement, or a public service determination) to be accompanied by a copy of the dispute resolution term under which the FWC is required or allowed to deal with the dispute.

Lodgment of the copy of the dispute resolution term provides the FWC with information it requires to determine whether it may deal with the dispute and, if so, how it may deal with the dispute. The dispute resolution term may not otherwise be available to the FWC.

As under subrule 36(4) and rule 48 of the old Rules, paragraph 119(2)(a) provides that the respondent may lodge a response to the application if it wishes to do so.

Under paragraph 119(2)(b) if the respondent does lodge a response, it must serve the response on the applicant. This assists the FWC to inform itself about the dispute, assists in providing procedural fairness and assists in ensuring the FWC's processes are open and transparent.

Chapter 3—Matters under other Acts

Part 1—Matters under the Transitional Act

Division 1—Termination of transitional instruments

Rule 120—Application for approval of the termination of a collective agreement-based transitional instrument

As discussed earlier, to facilitate the reorganisation of the procedural rules, rule 26 of the old Rules has been split into 3 separate rules—rules 45, 46 and 120. The old rule has also been reworded for clarity.

Rule 120 is based on subrule 26(1) of the old Rules. It is confined to an application under section 222 of the Act for approval of the termination of a collective agreement-based transitional instrument. To assist users, Note 3 under subrule 120(1) outlines the provisions of the Transitional Act that provide for such an application.

Subrule 120(1) requires the applicant to lodge a declaration by the applicant setting out the basis on which the FWC can be satisfied the requirements for approval of the termination under section 223 of the Act have been met.

As with the rules in Divisions 1 and 2 of Part 3 of Chapter 2 of the Rules, in the interests of brevity and readability subrule 120(1) specifies who must make the declaration, but leaves to the general law how the declaration may be made.

Subrule 120(2) requires the applicant to serve the declaration with the application. This subrule is included as there is no approved form for the declaration and so no requirement to serve the declaration under rule 21 and Schedule 1. Service of the declaration assists the FWC to inform

itself about the application, assists in providing procedural fairness and assists in ensuring the FWC's processes are open and transparent.

Rule 121—Application for the termination of a collective agreement-based transitional instrument after its nominal expiry date

Rule 121 facilitates the FWC dealing with an application under section 225 of the Act for termination of a collective agreement-based transitional instrument after its nominal expiry date. To assist users, Note 3 under subrule 121(1) outlines the provisions of the Transitional Act that provide for such an application.

Subrule 121(1) requires the applicant to lodge a declaration by the applicant setting out the basis on which the FWC can be satisfied the requirements for termination under section 226 of the Act have been met.

Subrule 121(2) requires the applicant to serve the declaration with the application. This subrule is included as there is no approved form for the declaration and so no requirement to serve the declaration under rule 21 and Schedule 1. Service of the declaration assists the FWC to inform itself about the matter before it, assists in providing procedural fairness and assists in ensuring the FWC's processes are open and transparent.

Rule 122—Application for approval of the termination of an individual agreement-based transitional instrument

Rule 122 is based on rule 27 of the old Rules, but with rewording for clarity, to better align the rule with the relevant provisions of the Transitional Act and to reduce the administrative burden for an employer seeking approval of the termination of multiple instruments.

Subrule 122(1)(b) is to the same effect as subrule 27(1) of the old Rules. It requires that an application under item 17 of Schedule 3 to the Transitional Act (for approval of the termination of an individual agreement-based transitional instrument) be accompanied by a copy of the written termination agreement required under item 17. Lodgment of the copy provides the FWC with information it requires to determine whether the requirements under the Transitional Act for approval of the termination have been met.

In contrast to subrule 27(2) of the old Rules, subrule 122(2)(b) requires an application under item 19 of Schedule 3 to the Transitional Act (for approval of the termination of an individual agreement-based transitional instrument after its nominal expiry date) to be accompanied by just one declaration that addresses the statutory requirements for approval of the termination under items 19(2) and 19(3) of Schedule 3 (rather than by 2 separate declarations). In addition, subrule 122(2)(c) requires lodgment of a copy of the notice required under item 19(3) of Schedule 3. Lodgment of the declaration and a copy of the notice provides the FWC with information it requires to determine whether the requirements under the Transitional Act for approval of the termination have been met.

Subrules 122(1)(a) and 122(2)(a) require that a copy of the individual agreement-based transitional instrument also be lodged with an application under item 17 or item 19 of Schedule 3 to the Transitional Act.

Subrule 122(3) is intended to lessen the administrative burden for an employer seeking approval of the termination of multiple individual agreement-based transitional instruments. In contrast to subrule 27(3) of the old Rules, subrule 122(3) makes it clear that the employer is only required to lodge:

- one application, and
- a schedule with the prescribed content, and
- a copy of each individual agreement-based transitional instrument, and
- if the application is made under item 17 of Schedule 3 to the Transitional Act—copies of the required termination agreements, or
- if the application is made under item 19 of Schedule 3 to the Transitional Act—just one declaration in relation to all of the instruments and a copy of the required notice.

Subject to subrule 122(5), subrule 122(4) requires the applicant to serve with the application copies of any documents lodged with the application. This assists the FWC to inform itself about the application, assists in providing procedural fairness and assists in ensuring the FWC's processes are open and transparent.

Paragraph 122(5)(a) is to the same effect as rule 47 of the old Rules. Where an employer lodges an application seeking approval of the termination of multiple individual agreement-based transitional instruments and the required accompanying documents, the subrule is to the effect that the employer must exclude from the copies of the documents it serves on an employee party to one the instruments, any parts of the documents that would reveal the identity of any employee party to another of the instruments. This protects the privacy of the employee parties to the instruments.

Chapter 3—Matters under other Acts

Part 1—Matters under the Transitional Act

Division 2—Disputes relating to the continued operation of the Workplace Relations Act 1996

Rule 123—Application for the FWC to deal with a dispute

Rule 123 is to the same effect as subrule 36(1) of the old Rules. It relates to applications pursuant to Schedule 19 to the Transitional Act. Schedule 19 provides for the FWC to deal with disputes arising under certain transitional instruments or relating to the continued operation of the *Workplace Relations Act 1996* (Cth) pursuant to certain transitional provisions.

Rule 123 requires that an application under Schedule 19 be accompanied by a copy of the dispute settling procedure under which the FWC is empowered to deal with the dispute.

Lodgment of a copy of the dispute settling procedure provides the FWC with information it requires to determine whether it may deal with the dispute and, if so, how it may deal with the dispute. The dispute settling procedure may not otherwise be available to the FWC.

Chapter 3—Matters under other Acts

Part 2—Matters under the Registered Organisations Act

Rule 124—Application for registration of an organisation

Rule 124 is to the same effect as rule 39 of the old Rules. It facilitates the FWC dealing with an application under section 18 of the *Fair Work (Registered Organisations) Act 2009* (Cth) (the Registered Organisations Act).

Rule 124 requires an application under section 18 of the Registered Organisations Act (for registration of an organisation) to be signed by at least 2 persons who are authorised to sign such a document under the *Fair Work (Registered Organisations) Regulations 2009* (Cth). To assist users, Note 2 under the rule identifies the relevant regulation.

Rule 124 may assist the FWC to confirm that the application is made with appropriate authority.

Rule 125—Application for a representation order

Rule 125 is to the same effect as rule 50 of the old Rules. It requires an applicant under section 137A of the Registered Organisations Act (for a representation order) to apply to the FWC under rule 8 for directions about the procedure for service of the application.

Rule 125 recognises that, depending upon the particular circumstances concerned, the application may potentially affect or be of interest to a range of organisations and other persons. Accordingly, consideration must be given to the appropriate service of the application to assist in making those organisations and other persons aware of the application, so that they may seek to participate in the proceedings if they wish to do so.

Rule 126—Application for a conscientious objection certificate

Rule 126 is to the same effect as rule 38 of the old Rules. It relates to an application under section 180 of the Registered Organisations Act, for a certificate from the General Manager of the FWC as to conscientious objection to membership of an organisation of employers or employees.

Rule 126 requires that such an application be accompanied by a declaration by the applicant verifying the information provided in the application. To assist users, Note 2 under the rule describes the nature of a certificate under section 180.

Rule 126 assists the General Manager to determine whether the statutory requirements for the issue of a certificate have been met.

Chapter 3—Matters under other Acts

Part 3—Matters under the Work Health and Safety Act 2011

Rule 127—Application for a WHS entry permit

Rule 127 is to the same effect as subrule 51(2) of the old Rules. It requires that an application under section 131 of the *Work Health and Safety Act 2011* (Cth) (for a WHS entry permit) be accompanied by evidence the proposed permit holder has satisfactorily completed the training prescribed under that Act.

Rule 127 ensures the FWC receives, in a timely manner, information it requires to determine whether or not the statutory requirements for issuing a permit are met.

Chapter 4—Appeals and Reviews

Rule 128—Appeals

Rule 128 sets out the process to be followed by a person seeking to institute an appeal of a decision. It combines rules 56 and 52 of the old Rules, with changes for clarity and to:

- remove or qualify requirements under the old Rules to lodge multiple copies of documents
- provide for the FWC to exempt an appellant from the requirement to include transcript in the appeal book, and
- formalise existing FWC practices as to the formatting and pagination of appeal books.

Subrules 128(1) and 128(2) are to the same effect as subrules 56(1) and 56(2) of the old Rules. They provide for a person, by lodging a notice of appeal in the approved form within the prescribed period, to seek to institute an appeal under section 604 of the Act of a decision made by:

- the FWC (other than a Full Bench or Expert Panel), or

- the General Manager of the FWC (or delegate), under the Registered Organisations Act.

To assist users, Note 2 under subrule 128(1) outlines section 604, and the note under subrule 128(2) observes that subsection 598(4) of the Act provides that a decision of the FWC may be made as an order.

Prescription of the time period for lodging a notice of appeal (with provision under paragraph 128(2)(c) for that period to be extended where appropriate) assists in providing finality in outcomes for parties to matters before the FWC.

Subrule 128(3) requires the appellant to lodge an appeal book within 7 days after the day on which the appellant lodged the notice of appeal. In contrast to old subrule 56(3), the subrule:

- drops the requirement to lodge 3 copies of the notice of appeal
- requires the appeal book to be lodged electronically in PDF format, unless the applicant is unable to lodge electronically, and
- requires only one copy of the appeal book to be lodged if it is lodged electronically (but continues to require 3 copies to be lodged if the appeal book is lodged in hard copy).

Electronic lodgment avoids the costs involved in producing and handling multiple hard copies of the appeal book. Removing or qualifying requirements to lodge multiple copies of documents, reduces the regulatory burden associated with the old rule 56.

Subrule 128(4) sets out the documents the appeal book must contain. It is to the same effect as paragraphs 56(3)(b)(i)–(iv) of the old Rules, except that paragraph 128(4)(c) expressly recognises that transcript will not always be available and also provides for the FWC to exempt an appellant from the requirement to include transcript in the appeal book.

Under subrule 128(7), the FWC may, at its discretion, exempt an appellant from the requirement to include transcript in the appeal book if:

- the FWC has not given the appellant a copy of the transcript
- the appellant has not purchased a copy of the transcript
- the FWC has given the appellant access to the audio recording of the evidence and argument in the matter, and
- the FWC is satisfied it is appropriate to do so, taking into account the subject matter of the appeal.

If the FWC exempts the appellant from including transcript in the appeal book, the appellant may utilise the FWC's audio recording of the proceedings for the purposes of the appeal, as an alternative to transcript. This will save the appellant the cost of purchasing transcript.

In relation to obtaining transcript, where FWC proceedings have been audio recorded by the FWC, transcript will generally be available from the FWC's transcription service provider. If the proceedings have not been audio recorded, transcript will not be available. To assist users, Note 1 under subrule 128(7) observes that if the FWC orders transcript for the matter from which the appeal is brought, it will usually give a copy of the transcript to the parties to the matter free of charge. If the FWC does not order transcript, a party may purchase transcript from the FWC's transcription service provider. The arrangements for purchasing transcript are explained on the FWC's website.

The arrangements for access to FWC’s audio recordings are also explained on the FWC’s website. There is no charge for accessing an audio recording. To assist users, Note 2 under subrule 128(7) alerts parties that they may apply for access to the FWC’s audio recording of their proceeding by submitting an audio request form, which is available on the FWC’s website. The FWC will usually give a party access to the audio recording if the party agrees to the terms of use. The terms of use are published at the end of the audio request form and include not copying or modifying the recording, and not broadcasting, publishing or distributing the recording. However, the FWC will not usually give a party access to an audio recording if the transcript is already readily available to the party, the recording is subject to a confidentiality order or the party (or their representative) has previously broken the terms of use of an audio recording.

Subrule 128(5) formalises requirements for the pagination of appeal books that are contained in standard FWC appeal directions. This addresses a common problem of inconsistency in the page numbering of appeal books, that can cause difficulties for the FWC and the parties to the appeal in following references to materials in the appeal book.

Subrule 128(6) is to the same effect as rule 52 of the old Rules. It requires the appellant to serve the appeal book on the other parties to the appeal. Service of the appeal book assists the FWC to inform itself about the appeal, assists in providing procedural fairness and assists in ensuring the FWC’s processes are open and transparent.

Rule 129—Application for review by Minister

Rule 129 is to the same effect as rule 57 of the old Rules. It provides that an application under section 605 of the Act (an application by the Minister for review of a decision of the FWC, other than a decision of a Full Bench or Expert Panel) is to the fullest extent possible to be made in accordance with the prescribed procedure in relation to an appeal under rule 128.

To assist users, a legislative note outlines section 605 of the Act.

Chapter 5—Miscellaneous

Rule 130—Access to certain applications and declarations

Rule 130 provides for public access to certain documents relating to enterprise agreements that have been lodged with the FWC. The documents concerned are:

- an application for approval of an enterprise agreement and the declarations that under the Rules must accompany the application or be lodged with the FWC in relation to the application (see rules 32–34)
- an application for approval of a variation of, or for a variation of, an enterprise agreement and the declarations that under the Rules must accompany the application or be lodged with the FWC in relation to the application (see rules 37–43)
- an application for approval of the termination of, or for the termination of, an enterprise agreement or a collective agreement-based transitional instrument and the declarations that under the Rules must accompany the application (see rules 45, 46, 120 and 121), and
- an application under section 227A of the Act (for reconsideration of the better off overall test).

Rule 130 provides that if a person applies to the FWC for access to such a document, the FWC, at its discretion, may provide the person with access to the document. Access to documents

under the rule is subject to any confidentiality or non-publication orders made by the FWC under subsection 593(3) or 594(1) of the Act.

Subrule 130(1) is of similar effect to rule 40A of the old Rules, except that the rule has been expanded to include some additional documents of a similar nature to those covered by the old rule. The reworded subrule also expressly permits the FWC to exclude personal information from the documents it provides access to under the rule. This is to protect the privacy of individuals. In practice, if a person requests a document from a matter that is no longer (or not yet) before the FWC, the FWC will generally send the person a copy of the document from which personal information has been removed. This may include an individual's signature and personal contact details, details of employee votes (where the details may enable identification of how an individual voted), and demographic information about employees (where this may enable identification of personal information about the employees).

Subrule 130(2) makes it clear that subrule 130(1) does not apply to declarations that under the Rules must only be lodged with the FWC if the declarant wants to advise the FWC of certain matters—that is, the declarations referred to in subrules 32(5), 32(6), 34(3), 37(4), 38(4), 40(4), 41(4) and 46(2).

Subrule 130(3) makes it clear that the rule does not limit any other power the FWC may exercise to provide access to documents. In particular, rule 130 does not alter the discretion of a Member of the FWC in the course of dealing with a matter, to provide a person with access to documents in the matter.

Rule 130 promotes openness and transparency in the performance by the FWC of its statutory functions and may assist the FWC to inform itself about a matter by facilitating non-party submissions in relation to the matter. A Full Bench of the FWC in *Construction, Forestry, Mining and Energy Union v Ron Southon Pty Ltd* [2015] FWCFCB 8413 observed that, in the interests of open justice, applications for approval of enterprise agreements and the related employer declarations should be freely available to the public, unless there are exceptional circumstances that would justify a confidentiality or non-publication order.

The FWC's *Access to case file document policy* provides for public access to documents from matters that are no longer (or not yet) before the FWC. This policy is published on the FWC's website.

Members of the public may also request access to documents under the *Freedom of Information Act 1982* (Cth).

Rule 131—Recovery of the FWC's costs for copies of documents

Rule 131 is to the same effect as rule 60 of the old Rules. It provides that, before providing a requested copy of a document to a person, the FWC may require the person to pay the FWC an amount the FWC reasonably requires for obtaining and providing the copy to the person.

The amount of such a payment is in the nature of a fee for service, reflecting the reasonable costs to the FWC of obtaining and providing the requested document.

Rule 132—Seal of the FWC

Rule 132 is to the same effect as rule 59 of the old Rules. It provides for the form of the seal of the FWC and for affixing the seal electronically.

Chapter 6—Application, saving and transitional provisionsPart 1—Transition from the Fair Work Commission Rules 2013*Rule 133—Transition from the Fair Work Commission Rules 2013*

Rule 133 provides for the transition from the old Rules to the Rules. It provides that:

- the Rules apply to an application made or matter started in the FWC on or after commencement of the Rules
- subject to the following point, where a matter was started in the FWC before commencement of the Rules, the Rules apply to a step in the matter that is taken on or after commencement
- the FWC may order that the old Rules are to apply, with or without modification to such a step, and
- except in respect of a step taken in a matter to which the second point above applies, the old Rules continue to apply in relation to a matter started in the FWC before commencement.

Schedule 1—Serving documents lodged with the FWC*Clause 1—Instructions for serving documents lodged with the FWC*

Each item in the table in Schedule 1 to the Rules specifies the service requirements for an approved FWC form or a document of the same kind as the approved form. The columns for each item in the table respectively specify:

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

As noted earlier, rules that require a party to serve approved forms and other documents on other parties and interested persons, assist the FWC to inform itself about the matter before it, assist in providing procedural fairness and assist in ensuring the FWC's processes are open and transparent.

The table in Schedule 1 is based on the table in Schedule 1 to the old Rules, with minor changes to table items for clarity and consistency, and to correct or update some form titles and other details.

Around 35 new forms have been added to the table. Almost all of these new forms have been introduced by the FWC to facilitate its handling of new functions given to it by the 2022 Amending Act.

Around 9 former approved forms have been omitted from the table in Schedule 1. These are forms made redundant by legislative change or passage of time, or that are otherwise no longer required.

Schedule 2—Repeals

Clause 1—The whole of the instrument

Clause 1 of Schedule 2 is given effect by rule 4. It repeals the old Rules.

Statement of Compatibility with Human Rights

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

Fair Work Commission Rules 2024

This legislative 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) (the HR(PS) Act).

Overview of the Legislative Instrument

The *Fair Work Commission Rules 2024* (Cth) (the Rules) are made by the President of the Fair Work Commission (the FWC) under section 609 of the *Fair Work Act 2009* (Cth) (the Act). The purpose of the Rules is to provide for practice and procedure that is to be followed by the FWC and the conduct of business in relation to matters allowed or required to be dealt with by the FWC.

The Rules replace the *Fair Work Commission Rules 2013* (Cth) (the old Rules) which were due to sunset on 1 April 2024. As the old Rules have been operating efficiently and effectively, the Rules largely remake them but with some updates to improve clarity and some new or amended rules to accommodate changes to the FWC's functions made by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (the 2022 Amending Act).

In brief, Chapter 1 of the Rules contains rules about general procedures, including the use of approved FWC application forms and other approved FWC forms, representation by lawyers and paid agents, and lodgment and service requirements.

Chapter 2 of the Rules contains rules in relation to particular types of matters that may be brought to the FWC under the Act, such as in relation to modern awards and enterprise agreements. Chapter 3 contains similar kinds of rules to those in Chapter 2, but relating to matters that may be brought to the FWC under other legislation.

Chapter 4 of the Rules contains rules relating to appeals of FWC decisions and certain other decision-makers, and applications for review of decisions by the Minister. Chapter 5 contains some miscellaneous rules and Chapter 6 contains application, saving and transitional provisions.

The table in Schedule 1 to the Rules lists the approved FWC forms that have service requirements and specifies the service requirements for each form.

Human Rights Implications

The definition of 'human rights' in the HR(PS) Act relates to the core 7 United Nations human rights treaties. The measures in these Rules engage the following rights:

- the right to the enjoyment of just and favourable conditions of work under Articles 6 and 7 of the International Covenant on Economic Social and Cultural Rights (the ICESCR)
- the right to an effective remedy under Article 2(3) of the International Covenant on Civil and Political Rights (the ICCPR) and the right to a fair hearing under Article 14(1) of the ICCPR

- the right to equality and non-discrimination in employment under Article 2 of the ICCPR and Article 2 of the ICESCR and Article 26 of the ICCPR
- the right to privacy and reputation under Article 17 of the ICCPR, and
- the right to freedom of association, including the right to form and join trade unions under Article 22 of the ICCPR and Article 8 of the ICESCR and the right to strike under Article 8(1) of the ICESCR.

The content of the right to work, the right to just and favourable conditions of work and the right to freedom of association in the ICESCR and ICCPR can be informed by specific obligations in treaties of the International Labour Organisation (the ILO), such as the *Right to Organise and Collective Bargaining Convention 1949* (No. 98) (ILO Convention 98) and the *Freedom of Association and Protection of the Right to Organise Convention 1948* (No. 87) (ILO Convention 87).

Rights to work and rights in work

Article 6 of the ICESCR requires the State Parties to the Covenant to recognise the right to work and to take appropriate steps to safeguard this right. Article 7 of the ICESCR requires the State Parties to the Covenant to recognise the right of everyone to the enjoyment of just and favourable conditions of work which in particular, ensure certain matters such as safe and healthy working conditions.

These rights encompass the right not to be unjustly deprived of work.

The FWC, as the national workplace relations tribunal, has a range of functions and powers under the Act including in relation to unfair dismissal, unlawful termination, workplace bullying, workplace sexual harassment and general protections (adverse action).

In addition, the FWC is responsible for making and varying modern awards, setting the national minimum wage and award minimum wages, assisting the bargaining process for enterprise agreements and approving, varying and terminating enterprise agreements.

The Rules set out procedural requirements in relation to these (and other) types of matters. The Rules are consistent with the rights to work, the rights in work and safe and healthy working conditions, as they facilitate the FWC dealing with such matters promptly and efficiently in accordance with the Act.

Right to a fair hearing

Right to equality and non-discrimination

Right to an effective remedy

Article 14(1) of the ICCPR provides that, in the determination of rights and obligations in a suit at law, all persons have a right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law.

Both the ICCPR (Article 2(1)) and the ICESCR (Article 2(2)) require the State Parties to the Covenants to guarantee that the rights set out in these Covenants are exercised without discrimination of any kind, including on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 of the

ICCPR further provides that the State Parties must ensure that all persons are equal before the law and are entitled, without any discrimination, to the equal protection of the law.

Article 2(3) of the ICCPR guarantees the right to an effective remedy for any violation of rights or freedoms recognised by the ICCPR, including the right to have such a remedy determined by competent judicial, administrative or legislative authorities.

The Rules do not substantively change existing FWC procedures, but update some of these to take into account changes to FWC functions made by the 2022 Amending Act. Subject to the observations in relation to rule 67 below, the Rules positively engage these rights (to a fair hearing, effective remedy and equal protection of the law) by assisting in ensuring the accountability, efficiency and effectiveness of FWC operations.

For example, rule 9 provides for the President to approve forms for the purposes of the Rules, and if a form has been approved for a particular purpose then, subject to the Rules, the form must be used for that purpose. This is to the same effect as rule 8 of the old Rules.

Each of the FWC's approved forms is designed to gather particular information that the FWC needs to deal with the matter to which the form relates in accordance with the Act, the *Fair Work Regulations 2009* (Cth) (the Regulations), the Rules and any other applicable legislation. The use and service of approved forms assists the FWC to deal with the matter promptly and efficiently and, where relevant, determine the matter and decide on any appropriate remedy. It also assists in ensuring that procedural fairness is afforded to the parties and that FWC processes are open, impartial and transparent.

The Rules also include specific arrangements for certain matter types, to assist in their resolution. For example, rule 85 provides for a party to a sexual harassment dispute before the FWC to seek orders joining or withdrawing persons as parties to the dispute, to assist in bringing the appropriate persons together to resolve the dispute.

Rule 67 is to the same effect as rule 55 of the old Rules. Section 404 of the Act provides that the procedural rules may provide for the furnishing of security for the payment of costs in relation to matters arising under Part 3-2 ('Unfair dismissal') of the Act. Rule 67 (and old rule 55) provides for a respondent or applicant in a matter arising under Part 3-2 to lodge an application in the approved form for an order that a person provide security for the payment of costs, and for the effect of such an order if made.

A Full Bench of the FWC in *Zornada v St John Ambulance Australia (Western Australia) Inc.* [2013] FWCFB 8255 observed that:

costs orders in this jurisdiction are extraordinary, and security for costs orders even more so. This is because the Act reflects the longstanding principle that costs will not be awarded against parties in industrial proceedings, other than in exceptional circumstances ...

Accordingly, the Commission should award security for costs only in the rarest of circumstances, once the Commission has balanced the merits of the application, the financial position of the parties, and what is just in the circumstances. (At paragraphs [35]-[36], references omitted.)

To the extent rule 67 may limit a person's right to a fair hearing and right to an effective remedy under the ICCPR, this limitation is a reasonable and proportionate means of achieving the legitimate objectives of the Fair Work legislation. Subrule 67(3) provides that if the FWC makes a security for the payment of costs order, a respondent or applicant in the matter may apply to

the FWC to reduce or increase the amount of security to be provided or vary the time at which, or manner or form in which, the security is to be provided. To assist users, Note 3 under subrule 67(1) observes that the FWC will not ordinarily make such an order before the conclusion of conciliation—at which point the content of the application and response will be known to the FWC and the parties.

Rule 67 promotes the efficiency and effectiveness of the FWC's processes by discouraging unmeritorious unfair dismissal applications or responses. Such matters may unreasonably divert the FWC's resources from its other operations and affect the FWC's ability to allocate resources so that all parties before the FWC have a fair opportunity to be heard. Such matters may also result in the other party to the proceeding incurring unnecessary time and financial costs in pursuing or responding to a claim.

Accordingly, the Rules are considered compatible with the right to a fair hearing, the right to equality and non-discrimination and the right to an effective remedy.

Right to privacy

Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. The United Nations Human Rights Committee (the Committee) has interpreted the right to privacy as comprising freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy.

The right to privacy may be limited where the limitation is lawful and not arbitrary. The use of the term 'arbitrary' means that any interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. The Committee has interpreted 'reasonableness' to imply that any limitation must be proportionate and necessary to achieve a legitimate objective.

The *Privacy Act 1988* (Cth) (the Privacy Act) and the Australian Privacy Principles (the APPs) regulate how the FWC collects, holds, uses and discloses personal information.

A number of measures in the Rules engage the right to privacy.

To place the Rules in their legislative framework, under sections 589 to 593 of the Act, FWC Members have a broad discretion as to how they conduct proceedings and inform themselves in relation to a matter before them. The FWC is authorised by section 590 of the Act to inform itself in relation to any matter before it in such a manner as it considers appropriate, and the FWC may make decisions as to how, when and where a matter is to be dealt with (section 589). Section 577 of the Act requires the FWC to perform its functions and exercise its powers in a manner that is fair, just, open and transparent. This is subject to any confidentiality or non-publication orders made by the FWC under subsection 593(3) or 594(1) of the Act, and other specific provisions in the Act in relation to particular matter types.

The Rules maintain longstanding arrangements for the FWC, as the national workplace relations tribunal, to collect personal (and potentially sensitive) information in FWC forms and other documents provided to the FWC, and provide for the handling of such information. As noted above, the FWC forms approved by the President are designed to gather the information that the FWC needs to deal with matters pursuant to the Act in a way that affords procedural fairness to the parties.

Accordingly, to the extent the Rules may limit the right to privacy, these limitations represent a reasonable and proportionate means of achieving the legitimate objectives of the Fair Work legislation and are necessary for the performance the FWC's statutory functions.

The Rules have also been drafted having regard to privacy obligations under the Privacy Act and APPs. For example, the Rules modify the service arrangements for particular types of application to expressly provide that service is not required of that part of the application that deals with payment or waiver of the application fee (see, for example, rule 88 in relation to sexual harassment and bullying applications). Rule 88 also permits the FWC, where appropriate, to remove some or all of the contact details of a person identified in the application from the copy of the application it serves, to protect the privacy of that individual.

Some specific rules are discussed in more detail below:

Rule 17—Lodging documents using the FWC's online lodgment facilities

Rule 17 is of similar effect to rule 15 of the old Rules and provides that a document may be lodged by using the FWC's online lodgment facilities in accordance with the instructions provided by the FWC for use of those facilities. The FWC's online lodgment facilities are presently only available for a few high volume types of applications, but the FWC anticipates extending these facilities to further types of matters in the future. The facilities minimise the need for users to input contact information more than once, and allow users to save drafts of applications, upload supporting documents and pay application fees prescribed by the Act.

New subrule 17(3) is directed to circumstances where a user of the online lodgment facilities saves a draft application through the facilities, but the user does not subsequently finalise the draft and lodge it with the FWC. Such a draft application may include personal (and possibly sensitive) information about the user and about third parties, such as in an unfair dismissal application. While the facility to save a draft is provided to assist the user and the FWC would not usually access the information in the draft, saving a draft is likely to result in the FWC collecting the information in the draft for the purposes of the Privacy Act. Where such a collection of information does occur, subrule 17(3) ensures the collection is authorised for the purposes of the APPs.

The FWC's online lodgement facilities are hosted by the FWC and information collected through the online lodgement facilities is securely stored in the FWC's cloud-based infrastructure. The limited circumstances in which the FWC or its contractors may access saved draft applications are set out in the FWC's Privacy Policy and the privacy collection notice for the online lodgment facilities. Draft applications are managed, as with other records before the FWC, in accordance with the relevant records authorities and the FWC's normal administrative practice policy. Users will also be notified that a draft will be deleted within a particular timeframe.

These arrangements are considered reasonable, necessary and proportionate to the aim of enhancing access to effective remedies, by facilitating users making applications using the FWC's online lodgment facilities.

Rule 81—application for an entry permit

Section 512 of the Act provides for the FWC, on application by an organisation, to issue an entry permit to an official of the organisation if the FWC is satisfied the official is a fit and proper person to hold the entry permit. In broad terms, an entry permit gives an official the right to enter work

premises for a purpose set out in the Act (subject to certain statutory requirements) without the consent of the occupier, where this may otherwise constitute trespass.

Section 482 of the Act enables a permit holder to exercise a number of rights upon entry when investigating a suspected breach of the Act or a fair work instrument (such as a right to inspect work, processes or documents) and so it is important that the holders of such permits are fit and proper persons.

One of the matters the FWC must take into account in deciding whether the official concerned is a fit and proper person to hold the entry permit is whether the official has been convicted of certain offences (paragraphs 513(1)(b) and (c) of the Act). A person's criminal record is sensitive personal information. In making an application for an entry permit, both the applicant organisation and the official concerned are on notice that this information must be taken into account by the FWC in considering whether the official concerned is a fit and proper person to hold the entry permit.

Subrule 51(1A) of the old Rules provided that the FWC may require the official concerned to provide to the FWC 'a current national police certificate' (paragraph 51(1A)(a)), or may require the official to provide the FWC with an authorisation and such information as needed to obtain such a certificate (paragraph 51(1A)(b)).

Subrule 81(2) is based on subrule 51(1A) of the old Rules, but with the wording of paragraph 51(1A)(a) changed to provide that the FWC may require the official concerned to provide to the FWC a national police certificate that was issued not more than 30 days earlier (see paragraph 81(2)(a) of the Rules). This is because national police certificates do not have a period of currency as they reflect the results of a search at a point in time.

The requirements in rule 81 to provide documents or information to the FWC relating to the permit qualification matters, and the FWC publicising the application and inviting submissions from the public, assist the FWC to inform itself about the application and determine whether or not the official is a fit and proper person to hold an entry permit for the purposes of the Act. Rule 81 also draws attention to, and does not alter, the discretion of a Member of the FWC (with or without any rule) to inform themselves in a manner they consider appropriate about a proposed permit holder's fitness to hold an entry permit (including by requiring the proposed permit holder to provide a national police certificate and inviting submissions from third parties).

Accordingly, the arrangements for the FWC to collect personal information under rule 81 (and potentially sensitive information under subrule 81(2)) are considered reasonable, necessary and proportionate to the aim of ensuring an official to whom an entry permit is issued is a fit and proper person to hold the permit under the Act.

Rule 130—access to certain applications and declarations

Rule 130 (which is of similar effect to rule 40A of the old Rules) provides that if a person applies to the FWC for access to certain documents relating to enterprise agreements and other collective agreements that have been lodged with the FWC, the FWC may, at its discretion, provide the person with access to the documents. Access to documents under the rule is subject to any confidentiality or non-publication orders made by the FWC under subsection 593(3) or 594(1) of the Act.

A Full Bench of the FWC in *Construction, Forestry, Mining and Energy Union v Ron Southon Pty Ltd* [2015] FWCFB 8413 observed that, in the interests of open justice, applications for approval of enterprise agreements and the related employer declarations should be freely available to the public, unless there are exceptional circumstances that would justify a confidentiality or non-publication order. The FWC's Access to case file document policy provides for public access to documents from matters that are no longer (or not yet) before the FWC. This policy is published on the FWC's website. Members of the public may also request access to documents under the *Freedom of Information Act 1982* (Cth).

Rule 130 expressly permits the FWC to exclude personal information from the documents to which it provides access under the rule. This is to protect the privacy of individuals. In practice, if a person requests a document from a matter that is no longer (or not yet) before the FWC, the FWC will generally send the person a copy of the document from which personal information has been removed. This may include an individual's signature and personal contact details, details of employee votes (where the details may enable identification of how an individual voted), and demographic information about employees (where this may enable identification of personal information).

These arrangements may assist the FWC to inform itself about a matter by facilitating non-party submissions in relation to the matter. These arrangements are considered reasonable, necessary and proportionate to the aim of promoting openness and transparency in the FWC's performance of its statutory functions.

Right to freedom of association

Right to collective bargaining

Article 22 of the ICCPR protects the right to freedom of association, including the right to form and join trade unions. Articles 8(1)(c) and (d) of the ICESCR also support the right to freedom of association by providing that the State Parties undertake to ensure the right to form and join trade unions and the right to strike, including picketing activities. There are also specific obligations relating to freedom of association in ILO Convention 98 and ILO Convention 87.

ILO Convention 98 protects the right of employees to collectively bargain for terms and conditions of employment. It requires the State Parties (among other things) to take measures appropriate to national conditions to encourage and promote machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Part 2-4 of the Act provides a legislative framework for the making and variation of enterprise agreements through a process of collective bargaining. Employees are entitled to be represented in bargaining for a proposed enterprise agreement by a bargaining representative of their choice, including an employee organisation of which they are a member. Part 3-3 of the Act permits employers and employees to engage in protected industrial action in support of claims for an enterprise agreement, provided that certain requirements are satisfied.

The Rules support the right to freedom of association and the right to collective bargaining by setting out procedural matters relevant to Parts 2-4 and 3-3 of the Act, to ensure that the FWC can satisfy itself as to whether the statutory requirements relating to bargaining, industrial action and enterprise agreements are met. Some examples of relevant rules are described below:

Rule 35 requires an employer to notify its employees that it has applied to the FWC for approval of an enterprise agreement that covers the employees as soon as practicable after the application for approval is lodged with the FWC. This is to assist in making employees aware of the application so that they can participate or be represented in the FWC proceedings if they wish.

Rule 32 relates to applications made under section 185 of the Act for the approval of an enterprise agreement that is not a greenfields agreement. Rule 32 sets out various requirements to ensure the FWC receives, in a timely manner, the information and documentation it requires to determine whether or not an enterprise agreement is to be approved in accordance with the Act.

Subrule 32(5) (which updates subrule 24(3) of the old Rules) reflects the role of employee organisations in the approval process, as changed by the 2022 Amending Act. Subrule 32(5) provides that each employee organisation that is a bargaining representative and wants to advise the FWC:

- that the organisation supports or opposes approval of the agreement
 - that the organisation disagrees with one or more statements in an employer's declaration, or
 - of the organisation's views on whether the agreement passes the better off overall test
- must lodge a declaration by the organisation to that effect with the FWC before the FWC approves the agreement.

Note 2 to this subrule also makes clear that an employee organisation that was a bargaining representative for a proposed enterprise agreement that is not a greenfields agreement, may also use the approved declaration form to give the FWC written notice under section 183 of the Act that the organisation wants the enterprise agreement to cover it.

Section 437 of the Act provides for a bargaining representative of an employee who will be covered by a proposed enterprise agreement, or 2 or more such bargaining representatives (acting jointly), to apply to the FWC for a protected action ballot order to be conducted to determine whether employees wish to engage in particular protected industrial action for the agreement.

Rule 76 (based on rule 31 of the old Rules) requires that an application under section 437 for a protected action ballot order must be accompanied by a draft order in the terms sought and a declaration by the applicant in the approved form. This declaration is directed to the statutory requirements for the FWC to issue the order. Subrule 76(1) expressly recognises that joint applications may be made and that there may be multiple employers of the employees to be balloted.

Accordingly, the Rules are considered to be compatible with and to promote the right to freedom of association and the right to collective bargaining in Article 22 of the ICCPR, Article 8 of the ICESCR, and ILO Convention 87 and ILO Convention 98, by facilitating bargaining, the taking of protected industrial action and the making of enterprise agreements, and the FWC's statutory role in these processes.

Conclusion

The Rules are compatible with human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the HR(PS) Act.

To the extent that measures in the Rules limit those rights and freedoms, such limitations are reasonable, necessary and proportionate to the legitimate objectives of the Fair Work legislation.