

Fair Work Commission Amendment (Anti-bullying) Rules 2013

EXPLANATORY STATEMENT

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

Authority

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

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

- (a) the practice and procedure to be followed by the Commission; or
- (b) the conduct of business in relation to matters allowed or required to be dealt with by the Commission, including in relation to any functions conferred on the Commission by any other law of the Commonwealth.

Without limiting (a) and (b) above, the procedural rules may provide for the following:

- (a) the requirements for making an application to the Commission;
- (b) the circumstances in which a lawyer or paid agent may make an application or submission to the Commission on behalf of a person who is entitled to make the application or submission;
- (c) the form and manner in which, and the time within which, submissions may or must be made to the Commission;
- (d) the procedural requirements for making decisions of the Commission;
- (e) the form and manner in which the Commission gives directions and notifies persons of things;
- (f) who is notified by Commission of things;
- (g) the manner in which conferences are to be conducted in relation to applications made under Part 3-1, 3-2 or Part 6-4 (which deal with general protections, unfair dismissal and unlawful termination).

Consultation on the Rules

As required by section 609 of the Act, the President consulted with all Members of the Commission concerning the *Fair Work Commission Amendment (Anti-Bullying and Other Measures) Rules 2013* (Rules). On 4 December 2013 the President provided all Members

of the Commission with the draft Rules and sought comment from Members by 12 December 2013.

In addition, pursuant to section 17 of the *Legislative Instruments Act 2003* (Cth), the President consulted with persons (or their representatives) who are likely to be affected by the instrument, as set out below. On 5 December 2013 a draft of the Rules was published on the Commission's website for public consultation. Comments and suggestions were sought from interested persons by 12 December 2013.

Comments were received from the Australian Council of Trade Unions and from the Law Society of New South Wales.

Following consultation both with Members of the Commission and with the general public, the President is satisfied that the comments which have been received have been incorporated, where appropriate, in the Rules.

The President does not believe that the Rules will have a substantial direct, or substantial indirect, effect on business or restrict competition.

The President is satisfied that the consultation process was suitable, having drawn upon the knowledge of persons with expertise in fields that are relevant to the proposed instrument and having ensured that persons who are likely to be affected by the proposed instrument have had an opportunity to comment.

Purpose

Amendments have been made to the *Fair Work Commission Rules 2013* arising from amendments that were made to the Act by the *Fair Work Amendment Act 2013*.

Amendments to the *Fair Work Commission Rules 2013* principally concern commencement of the Commission's anti-bullying jurisdiction on 1 January 2014, although amendments also reflect other provisions of the *Fair Work Amendment Act 2013*, such as the capacity of the Commission to order costs under sections 375B and 779A of the Act from 1 January 2014.

After consulting with Commission Members and the general public, the President has made the following procedural Rules.

Part 1—General

Rule 1 is a formal provision stating the name of the Rules.

Rule 2 provides the date the Rules will commence, being 1 January 2014.

Rule 3 provides that the Rules are made under the Act.

Rule 4 is a formal provision, providing that the *Fair Work Commission Rules* are amended as set out in Schedule 1 to the Rules.

Schedule 1

Clause 1 provides for the substitution of a new heading in rule 6.

Clause 2 is a clerical provision which re-numbers rule 6 to become subrule 6(1).

Clause 3 inserts a new subrule 6(2) which provides that the Commission may make an order that is inconsistent with the Rules and, in that event, the order will prevail. A legislative note states that an order of the Commission can be given in the form of a direction.

Clause 4 provides for the inclusion of a reference to subregulation 6.07A(8) of the *Fair Work Regulations 2009* in note 3 to subrule 10(2). Arising from amendments contained in the *Fair Work Amendment (Anti-Bullying) Regulation 2013*, from 1 January 2014 regulation 6.07A will provide for the payment of application fees when making an application to the Commission for an order to stop bullying. Subregulation 6.07A(8) will provide for the circumstances in which a refund of that application fee is payable.

Clause 5 provides for the substitution of a new heading in rule 12.

Clause 6 provides for the insertion of a new subrule 12(1)(d) which permits a person to be represented by a lawyer or paid agent when participating in a conciliation or mediation process that is conducted by a member of staff of the Commission concerning an application for an order to stop bullying. Participation in such a conciliation or mediation process includes not only the conciliation or mediation meeting but also, for example, telephone conversations between a lawyer or paid agent and a member of staff of the Commission concerning the conciliation or mediation. The subrule applies whether or not the member of staff is acting under a delegation from the President of the Commission which has been made under section 625 of the Act.

Clause 7 is a clerical provision for the renumbering of the note at the end of subrule 12(1) to become “Note 1”.

Clause 8 provides for the insertion of a second legislative note at the end of subrule 12(1) stating that subrule 12(3) deals with representation of parties in a conference or hearing before a Member of the Commission.

Clause 9 provides for the amendment of subrule 12(3) so that it provides that nothing in rule 12 is taken as permitting a lawyer or paid agent to represent a party in a conference or hearing before a Commission Member. The amendment ensures that subrule 12(3) is not inconsistent with subrule 12(1)(d) in the event that a member of staff of the Commission is acting under a delegation from the President under section 625 of the Act.

Clause 10 provides for the insertion of a new rule 23A concerning the lodgment of a response to an application for an order to stop bullying.

Subrule 23A(1) provides that a person named as an employer or principal in an application for an order to stop bullying (Form F72) must lodge with the Commission a response to the application within 7 calendar days after the day on which the person is served with the application. A legislative note provides that the response must be in the approved form (Form F73). A second legislative note advises that a person can be named in an application as an employer or principal of both the applicant and the person(s) who are alleged to have engaged in bullying behaviour. The subrule requires the employer or respondent to lodge a response in either case.

Subrule 23A(2) provides that, if two or more applications which name the same employer or principal are made at the same time for an order to stop bullying and those applications concern the same or substantially similar conduct, and if the substance of the employer or principal's response is the same for each application, subrule 23A(1) is satisfied if only one response is lodged with the Commission.

Subrule 23A(3) provides that a person who is named in an application for an order to stop bullying (Form F72) as allegedly engaging in bullying behaviour may lodge a response to the application. Any response must be lodged within 7 calendar days after the day on which the person was served with the application. A legislative note provides that the response must be in the approved form (Form F74). A second legislative note states that a person who is named as allegedly engaging in bullying behaviour is not required to lodge a response. If the person chooses to lodge a response with the Commission, however, the person must also serve a copy of the response in accordance with the requirements that are set out in Schedule 1 to the *Fair Work Commission Rules 2013*.

Clause 11 provides for the insertion of a new sub-heading before (newly numbered) subrule 45(1).

Clause 12 is a clerical provision which re-numbers rule 45 to become subrule 45(1).

Clause 13 adds a new subrule 45(2) which provides that, if the Commission is required to serve an application for an order to stop bullying, the Commission must serve a copy of the application excluding that part of the application that deals with the application fee.

Clause 14 is a clerical provision which re-numbers the note at the end of clause 1 of Schedule 1 to the *Fair Work Commission Rules 2013* to “Note 1”.

Clause 15 inserts a second legislative note at the end of clause 1 of Schedule 1 to the *Fair Work Commission Rules 2013* which advises that, under subrules 6(1) and (2), the instructions as to service that are set out in Schedule 1 to the *Fair Work Commission Rules 2013* may be dispensed with or varied by an order or direction of the Commission in a matter. The note also advises that the issuing of an order dispensing with or varying instructions as to service is most likely to occur in relation to applications for an order to stop bullying.

Clause 16 provides for the inclusion of references to sections 375B and 779A in column 4 (headed “Provision”) of the table row in Schedule 1 to the *Fair Work Commission Rules 2013* concerning Form F6—Application for Costs.

Clause 17 inserts new rows at the end of the table in Schedule 1 to the *Fair Work Commission Rules 2013* which set out the requirements as to service for three new forms, namely Form F72—Application for an Order to Stop Bullying, Form F73—Response from an Employer/Principal to an Application for an Order to Stop Bullying and Form F74—Response from a person against whom Bullying has been Alleged to an Application for an Order to Stop Bullying.

Statement of Compatibility with Human Rights

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

Fair Work Commission Amendment (Anti-bullying and Other Measures) Rules 2013

This instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

Overview of the Legislative Instrument

The *Fair Work Commission Amendment (Anti-bullying and Other Measures) Rules 2013* (Rules) are procedural rules made by the President of the Fair Work Commission under section 609 of the *Fair Work Act 2009*. The Rules are in relation to the practice and procedure that is to be followed by the Commission and the conduct of business in relation to matters allowed or required to be dealt with by the Commission.

Human Rights Implications

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

Conclusion

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

Justice Iain Ross AO
President
Fair Work Commission