

# EXPOSURE DRAFT



EXPOSURE DRAFT (17 May 2023)

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

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I, Justice Adam Hatcher, President of the Fair Work Commission, make the following rules.

Dated 2023

Justice Adam Hatcher [**DRAFT ONLY—NOT FOR SIGNATURE**]  
President of the Fair Work Commission

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## 1 Name

This instrument is the *Fair Work Commission Amendment (2023 Measures No. 1) Rules 2023*.

## 2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	The day after this instrument is registered.	

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

## 3 Authority

This instrument is made under the *Fair Work Act 2009*.

## 4 Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

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## Schedule 1—Amendments

### *Fair Work Commission Rules 2013*

#### 1 Rule 5 (after the heading)

Insert:

Note: A number of expressions included in this instrument are defined in the Act, including sexual harassment FWC application.

#### 2 Rule 5

Insert:

*nominated representative*, of a party to a matter, means a person that the party has nominated, by notice to the Commission, as a representative of the party in respect of the matter.

#### 3 After rule 10

Insert:

#### 10A Making of sexual harassment FWC applications

- (1) This rule is made for the purposes of paragraph 527F(4)(a) of the Act.
- (2) A sexual harassment FWC application may be made by:
  - (a) 2 or more persons of the kind referred to in subrule (2) acting jointly; or
  - (b) a single industrial association that is entitled to represent the industrial interests of 2 or more persons who allege they have been sexually harassed in contravention of Division 2 of Part 3-5A of the Act;  
but only if the application is made in relation to the same alleged contravention, or related alleged contraventions, of that Division.
- (3) For paragraph (1)(a), the persons are as follows:
  - (a) a person (an *aggrieved person*) who alleges they have been sexually harassed in contravention of Division 2 of Part 3-5A of the Act;
  - (b) an industrial association that is entitled to represent the industrial interests of an aggrieved person.

#### 4 After subparagraph 12(2)(a)(iii)

Insert:

(iiia) a matter arising under Part 2-7 of the Act (equal remuneration);

#### 5 After subparagraph 12(2)(b)(i)

Insert:

(ia) a sexual harassment FWC application;

#### 6 Subrule 12(4)

After “in relation to”, insert “a sexual harassment FWC application or”.

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## 7 After rule 21

Insert:

### 21A Response to a sexual harassment FWC application

- (1) A person named in a sexual harassment FWC application as:
  - (a) a person allegedly engaging in sexual harassment; or
  - (b) an employer or principal of:
    - (i) an aggrieved person in respect of the application; or
    - (ii) a person mentioned in paragraph (a);must lodge a response to the application with the Commission within 7 calendar days after the day on which the person was served with the application.
- (2) However, the person may lodge one response in respect of 2 or more sexual harassment FWC applications if:
  - (a) the applications are lodged at the same time; and
  - (b) the applications are in respect of the same alleged contraventions, or related alleged contraventions, of Division 2 of Part 3-5A of the Act.

## 8 At the end of rule 23A

Add:

- (4) A reference in this rule to an application made under section 789FC of the Act includes a reference to an application for an order to stop sexual harassment made under that section as that section continues to apply on and after 6 March 2023 in accordance with clause 60 of Schedule 1 to the Act.

## 9 At the end of rule 26

Add:

- (3) If an employee, employer or employee organisation covered by an agreement mentioned in subregulation (2) wants to advise the Commission that it supports or opposes the termination of the agreement, the application under section 225 of the Act for the termination of the agreement must be accompanied by a declaration by the employee, employer or employee organisation to that effect.

Note: The declaration must be in the approved form—see subrule 8(2).

## 10 Subrule 42(2)

Repeal the subrule, substitute:

- (2) Service of the document on the other person must be effected:
  - (a) by leaving the document with, or tendering the document to:
    - (i) if the person, or the person's nominated representative, is an individual—the person or representative; or
    - (ii) if the person, or the person's nominated representative, is a body corporate, an organisation or a branch of an organisation—the secretary of the body corporate, the organisation or the branch; or
  - (b) by leaving the document:
    - (i) if the person, or the person's nominated representative, is an individual—with an individual, apparently over the age of 15 years, at

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- the residence, or usual place of business, of the person or representative; or
- (ii) if the person, or the person's nominated representative, is a body corporate, an organisation or a branch of an organisation—at the registered office of the body corporate or the office of the organisation or branch; or
  - (iii) if the person, or the person's nominated representative, has notified an address for service in the matter—at that address; or
- (c) subject to subrule (2A), by posting the document in a prepaid envelope sent by express post or registered post to:
- (i) if the person, or the person's nominated representative, is an individual—the residence, or usual place of business, of the person or representative; or
  - (ii) if the person, or the person's nominated representative, is a body corporate, an organisation or a branch of an organisation—the secretary, at the registered office of the body corporate or the office of the organisation or branch; or
  - (iii) if the person, or the person's nominated representative, has lodged an address for service in the matter—that address; or
- (d) subject to subrule (2B), by fax to a fax number:
- (i) currently published as the fax number of the person or of the person's nominated representative; or
  - (ii) advised by the person or the person's nominated representative, in response to a request for a fax number that was made immediately before the transmission of the document, as the person's or representative's fax number; or
  - (iii) appearing as the fax number of the person or the person's nominated representative on a document lodged with the Commission by the person or representative in the same matter; or
- (e) subject to subrule (2C), by emailing the document to an email address:
- (i) currently published as the email address of the person or the person's nominated representative; or
  - (ii) advised by the person or the person's nominated representative, in response to a request for an email address that was made immediately before the transmission of the document, as the person's or representative's email address; or
  - (iii) appearing as the email address of the person or the person's nominated representative on a document lodged with the Commission by the person or representative in the same matter; or
- (f) subject to subrule (2C), by emailing the document to the email address of an employee if:
- (i) the person to be served is an employee of the person who is serving the document; and
  - (ii) a common form of communication between the employer and the employee is by email to a particular email address; and
  - (iii) it is reasonable for the employer to expect that an email to that email address will be received by the employee.

(2A) For paragraph (2)(c), service of a document on a person may be effected by posting the document in a prepaid envelope sent by express post only if the

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person serving the document retains the barcode of the prepaid envelope and produces it if required by the Commission.

- (2B) For paragraph (2)(d), service of a document on a person may be effected by fax to a fax number only if the person serving the document retains the transmission record showing the successful transmission and produces it if required by the Commission.
- (2C) For paragraphs (2)(e) and (f), service of a document on a person may be effected by emailing the document to an email address only if the person serving the document retains the document and produces the retained document if required by the Commission.

## **11 Subrule 42(4)**

Omit “(2)(d)”, substitute “(2)(c)”.

## **12 Paragraphs 43(a) to (g)**

Repeal the paragraphs, substitute:

- (a) by posting the document in a prepaid envelope to the address specified in the document as the postal address of the person or the person’s nominated representative; or
- (b) by faxing the document to the fax number specified in the document as the fax number of the person or the person’s nominated representative; or
- (c) by emailing the document to the email address specified in the document as the email address of the person or the person’s nominated representative; or
- (d) by leaving the document with the person or the person’s nominated representative; or
- (e) by tendering the document to the person or the person’s nominated representative at the address specified in the document as the postal address of the person or representative; or
- (f) by leaving the document with an individual, apparently over the age of 15 years, at the address specified in the document as the postal address of the person or the person’s nominated representative; or
- (g) if the person has notified the Commission of the postal address, fax number or email address of the person or the person’s nominated representative—  
by:
  - (i) posting the document in a prepaid envelope to the postal address; or
  - (ii) faxing the document to the fax number; or
  - (iii) emailing the document to the email address; or
  - (iv) tendering the document to the person or the representative at the postal address; or
  - (v) leaving the document with an individual, apparently over the age of 15 years, at the postal address.

## **13 Subrule 45(2)**

Repeal the subrule, substitute:

*Sexual harassment and bullying applications*

- (2) If the Commission is required to serve on a person:

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- (a) a sexual harassment FWC application; or
- (b) an application for an order to stop bullying under subsection 789FC(1) of the Act; or
- (c) an application for an order to stop sexual harassment under subsection 789FC(1) of the Act, as that subsection continues to apply in accordance with clause 60 of Schedule 1 to the Act;

the Commission must serve on the person a copy of the application excluding that part of the application that deals with the application fee.

### 14 At the end of Part 9

Add:

#### 55A Order for joinder or withdrawal of parties to disputes commenced by sexual harassment FWC applications

- (1) Subject to subrule (3), a party (the *requesting party*) to a dispute before the Commission commenced by a sexual harassment FWC application may apply to the Commission for either of the following orders:
  - (a) an order that any of the following be joined as a party to the dispute:
    - (i) one or more aggrieved persons in relation to alleged contraventions of Division 2 of Part 3-5A of the Act;
    - (ii) one or more industrial associations each of which is entitled to represent the industrial interests of one or more aggrieved persons in relation to alleged contraventions of Division 2 of Part 3-5A of the Act;
    - (iii) if an aggrieved person in relation to the dispute alleges the aggrieved person has been sexually harassed in contravention of Division 2 of Part 3-5A of the Act, other than because of the operation of subsection 527E(1) of the Act, by a person who is an employee or agent of another person (the *principal*)—the principal;
    - (iv) if a party to the dispute alleges another party (the *principal*) has contravened Division 2 of Part 3-5A of the Act because of the operation of subsection 527E(1) of the Act—an employee or agent mentioned in that subsection in relation to the principal;
  - (b) an order for the withdrawal of a person as a party to the dispute.
- (2) If a person named in the application as a person to be joined or withdrawn as a party to the dispute is not the requesting party, the requesting party must:
  - (a) serve a copy of the application on the person as soon as practicable after making the application; and
  - (b) if an order is made in respect of the person—serve a copy of the order on the person as soon as practicable after the order is made.
- (3) Subrule (1) does not apply if subsection 527S(1) of the Act applies to the dispute.

### 15 Clause 1 of Schedule 1 (note 2)

Omit “an application made to the Commission”, insert “a sexual harassment FWC application or an application”.



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Amendments **Schedule 1**

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## 16 Clause 1 of Schedule 1 (after table item dealing with Form F24C)

Insert:

F24D	Enterprise agreement	Declaration in response to application for termination of an agreement after the expiry date	Section 225 of the Act and subrule 26(3)	The person making the declaration	Each employer and each employee organisation covered by the enterprise agreement	As soon as practicable after lodgment with the Commission
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## 17 Clause 1 of Schedule 1 (after table item dealing with Form F46)

Insert:

F46A	Equal remuneration	Application for an equal remuneration order	Section 302 of the Act	Applicant	Each person the Commission directs is to be served	As soon as practicable after lodgment with the Commission
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## 18 Clause 1 of Schedule 1 (table items dealing with Forms F72, F73 and F74)

Repeal the items, substitute:

F72	Stop bullying	Application for an order to stop bullying	Subsection 789FC(1) of the Act and subrule 45(2)	Commission	The person named in the application as an employer or principal of the applicant	As soon as practicable after lodgment with the Commission
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## Schedule 1 Amendments

F72	Stop bullying	Application for an order to stop bullying	Subsection 789FC(1) of the Act and subrule 45(2)	Commission	The following: (a) each person named in the application as engaging in bullying behaviour; (b) each person named in the application as an employer or principal of a person covered by paragraph (a)	On the next business day after service of the application upon the person named in the application as the employer or principal of the applicant
F72A	Stop sexual harassment	Application for an order to stop sexual harassment that commenced prior to 6 March 2023	Subsection 789FC(1) of the Act, as that subsection continues to apply in accordance with clause 60 of Schedule 1 to the Act, and subrule 45(2)	Commission	The person named in the application as an employer or principal of the applicant	As soon as practicable after lodgment with the Commission
F72A	Stop sexual harassment	Application for an order to stop sexual harassment that commenced prior to 6 March 2023	Subsection 789FC(1) of the Act, as that subsection continues to apply in accordance with clause 60 of Schedule 1 to the Act, and subrule 45(2)	Commission	The following: (a) each person named in the application as engaging in sexual harassment; (b) each person named in the application as an employer or principal of a person covered by paragraph (a)	On the next business day after service of the application upon the person named in the application as the employer or principal of the applicant

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F73	Stop bullying	Response from an employer/principal to an application for an order to stop bullying	Subrules 23A(1) and (2)	Person making the response	The following (other than the person making the response): (a) the applicant; (b) each person named in the application as engaging in bullying behaviour; (c) each person named in the application as an employer or principal of the applicant; (d) each person named in the application as an employer or principal of a person covered by paragraph (b)	Within 7 calendar days after the day the person was served with the application for an order to stop bullying
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F73A	Stop sexual harassment	Response from an employer/principal to an application for an order to stop sexual harassment that commenced prior to 6 March 2023	Subrules 23A(1) and (2)	Person making the response	The following (other than the person making the response): (a) the applicant; (b) each person named in the application as engaging in sexual harassment; (c) each person named in the application as an employer or principal of the applicant; (d) each person named in the application as an employer or principal of a person covered by paragraph (b)	Within 7 calendar days after the day the person was served with the application for an order to stop sexual harassment that occurred prior to 6 March 2023
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F74	Stop bullying	Response from a person against whom bullying has been alleged to an application for an order to stop bullying	Subrule 23A(3)	Person making the response	The following (other than the person making the response): (a) the applicant; (b) each person named in the application as engaging in bullying behaviour; (c) each person named in the application as an employer or principal of the applicant; (d) each person named in the application as an employer or principal of a person covered by paragraph (b)	Within 7 calendar days after the day the person was served with the application for an order to stop bullying
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F74A	Stop sexual harassment	Response from a person named in an application for an order to stop sexual harassment that commenced prior to 6 March 2023	Subrule 23A(3)	Person making the response	<p>The following (other than the person making the response):</p> <ul style="list-style-type: none"> <li>(a) the applicant;</li> <li>(b) each person named in the application as engaging in sexual harassment;</li> <li>(c) each person named in the application as an employer or principal of the applicant;</li> <li>(d) each person named in the application as an employer or principal of a person covered by paragraph (b)</li> </ul>	Within 7 calendar days after the day the person was served with the application for an order to stop sexual harassment that occurred prior to 6 March 2023
F75	Sexual harassment dispute	Application for the Fair Work Commission to deal with a sexual harassment dispute	Section 527F of the Act	Commission	<p>The following:</p> <ul style="list-style-type: none"> <li>(a) each person named in the application as allegedly engaging in sexual harassment;</li> <li>(b) each person named in the application as an employer or principal of: <ul style="list-style-type: none"> <li>(i) an aggrieved person in respect of the application;</li> <li>or</li> <li>(ii) a person covered by paragraph (a)</li> </ul> </li> </ul>	As soon as practicable after lodgment with the Commission

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F76	Sexual harassment dispute	Respond as an individual respondent to an application to deal with a sexual harassment dispute	Section 527F of the Act and rule 21A	Commission	The following (other than the person making the response): (a) the applicant; (b) each aggrieved person in respect of the application that is not the applicant; (c) each person named in the application as allegedly engaging in sexual harassment; (d) each person named in the application as an employer or principal of: (i) an aggrieved person in respect of the application; or (ii) a person covered by paragraph (c)	As soon as practicable after lodgment with the Commission
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F77	Sexual harassment dispute	Response from an employer/principal to an application to deal with a sexual harassment dispute	Section 527F of the Act and rule 21A	Commission	The following (other than the person making the response): (a) the applicant; (b) each aggrieved person in respect of the application that is not the applicant; (c) each person named in the application as allegedly engaging in sexual harassment; (d) each person named in the application as an employer or principal of: (i) an aggrieved person in respect of the application; or (ii) a person covered by paragraph (c)	As soon as practicable after lodgment with the Commission
F78	Sexual harassment dispute	Notification of agreement to consent arbitration of a sexual harassment dispute	Section 527S of the Act	Person making the notification	Each other party to the dispute	As soon as practicable after lodgment with the Commission

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Amendments **Schedule 1**

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F81	Transitional instrument	Application to extend the default period for a zombie agreement	Subitems 20A(4), 26A(4) and 30(4) of Schedule 3 to the Transitional Act	Applicant	(a) If the application relates to an individual agreement-based transitional instrument or an individual Division 2B State employment agreement—the other party to the instrument or agreement  (b) In any other case—each employer covered by the instrument or agreement and each industrial association that is entitled to represent the industrial interests of one or more of the employees covered by the instrument or agreement	As soon as practicable after lodgment with the Commission
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