

**28 February 2024**

The Hon. Justice Adam Hatcher  
President  
Fair Work Commission  
Level 11, Terrace Tower  
80 William Street  
EAST SYDNEY NSW 2011

By email: [consultation@fwc.gov.au](mailto:consultation@fwc.gov.au)

Dear President Hatcher

### **Exposure draft of the Fair Work Commission Rules 2024**

The Law Council welcomes the opportunity to comment on the exposure draft of the Fair Work Commission Rules 2024 (**Draft Rules**). This submission has been prepared with the assistance of the Law Society of New South Wales and the Industrial Law Committee of the Law Council's Federal Dispute Resolution Section.

The Law Council considers that, generally, the Draft Rules are structured in a logical and useful way. Overall, we support the changes proposed through the Draft Rules, including the proposals to remove rules and forms that have been rendered obsolete by changes to legislation or practice. Our specific suggestions are set out below.

#### *Rule 6- Calculating number of days*

Draft Rule 6 provides guidance on the meaning of 'days' as used in the Draft Rules. While clarification and consistency in the use of 'days' is welcome in the Draft Rules, we suggest that the Draft Rules should state that timeframes do not run during the period from 12.01 am on 24 December until a set timeframe in January (say, 3 January).

This approach would be more consistent with the *Federal Court Rules 2011*, which state that, if a time fixed includes a day in the period starting on 24 December in a year and ending on 14 January in the next year, the day is not to be counted.<sup>1</sup>

#### *Rule 10—Discontinuance*

Draft Rule 10 sets out the process for discontinuing an application. While provision is made for an applicant to notify the Fair Work Commission (**FWC**) of the discontinuance, there is no provision for notifying the other party or parties to the matter. Draft Rule 10 should either require the discontinuing applicant to inform the other party or parties to the matter, or require the FWC to do so, as soon as reasonably practicable, after the FWC has been notified.

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<sup>1</sup> *Federal Court Rules 2011*, section 1.6(5).

*Rule 13—Representation by lawyers and paid agents*

Under Draft Rule 13(1)(a), a lawyer or paid agent must not represent a person in an FWC conference or hearing without the permission of the FWC, unless the conference or hearing relates to a matter set out in Draft Rule 13(2).

It would assist the conduct of all matters where permission is required if that issue could be determined before the date and time allocated for the conference or hearing to occur. While in practice this can occur in some matters through prior directions hearings, there is no formal process in place for a pre-determination of permission to be represented. As a result, in many matters it is necessary for representatives to prepare not only on the basis that permission will be granted for them to appear and advocate on behalf of their client, but also on the basis that no permission will be granted, and that the client will need to represent themselves.

This can cause unnecessary cost and anxiety for clients until the issue of permission is determined, possibly as late as at the commencement of the conference or hearing. The Law Council suggests that Draft Rule 13 should require the FWC, wherever possible, to determine the question of representation on the papers as soon as practicable after the relevant application, response and/or Form F53 (Notice that lawyer or paid agent acts for a person) is lodged.

Further, the Law Council submits that the list of matters where participation without permission is allowable at Draft Rule 13(2) should be extended to include general protection applications in Part 3.1 of the *Fair Work Act 2009* (Cth).

*Rule 16—Lodging documents by email*

The Law Council supports the provision for multiple ways of lodging documents at the FWC under Draft Rule 15(2), including by physically delivering the document, emailing the document, posting the document, or creating and lodging the document electronically. However, as a general principle, we suggest that it would help to avoid confusion if the layout and appearance of the filed documents were materially identical or as consistent as possible, regardless of the method of lodgement.

The Law Council also supports processes that provide certainty as to the date and time on which a document is taken to have been filed. Draft Rules 16(2) and (3) set out methods for establishing the lodging date of documents lodged by email and electronically, respectively. We suggest that it would facilitate the smoother conduct of matters if the FWC could return a document that resembles the relevant physical form, and which features an electronic 'stamp' indicating the date and time on which the document is taken to have been lodged.

This would assist practitioners and their clients, particularly where the practitioner is asked to assist the client after an application is lodged, in circumstances where it can be unclear as to which document was filed by the client and when. However, it is appreciated that implementing this process may have resourcing implications for the FWC.

*Rule 35—Notification of application for approval of an enterprise agreement*

Draft Rule 35 is of similar effect to current Rule 40. However, it has been reworded for clarity, including to clarify 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 we agree that this reflects the current Rules, in practice this process is rarely observed and seems unnecessary. Employees will have voted on an Agreement and will have likely been informed of the result. They will also have been informed that the Agreement will be lodged with the FWC for approval and are typically notified once approved. There does not

appear to be a need for an additional notification when it is lodged. Bargaining representatives must be notified, however it is cumbersome to have to inform all employees.

*Contact*

Thank you again for the opportunity to comment on the Draft Rules. Please contact [REDACTED] in the first instance, if you require further information or clarification.

Yours sincerely

A handwritten signature in grey ink, appearing to be 'G. McIntyre', written in a cursive style.

**Greg McIntyre SC**  
**President**