

## EXPLANATORY STATEMENT

### Select Legislative Instrument No. 151, 2014

Issued by the authority of the Judges of the Federal Circuit Court of Australia

#### ***Federal Circuit Court Amendment (2014 Measures No.1) Rules 2014***

Section 81 of the *Federal Circuit Court of Australia Act 1999* permits the Judges or a majority of them, to make rules of Court not inconsistent with the Act. These rules may provide for the practice and procedure to be followed in the Court and may extend to all matters incidental to any such practice or procedure that are necessary or convenient to be prescribed for the conduct of any business of the Court.

Under sub-section 81(3) of the *Federal Circuit Court of Australia Act 1999*, the *Legislative Instruments Act 2003* (other than sections 5, 6, 7, 10, 11 and 16 of that Act) applies in relation to rules of court made by the Court under the *Federal Circuit Court of Australia Act 1999* or another Act:

- a) as if a reference to a legislative instrument were a reference to a rule of court; and
- b) as if a reference to a rule maker were a reference to the Chief Judge acting on behalf of the judges of the Court; and
- c) subject to such further modifications or adaptations as are provided for in regulations made under section 120 *Federal Circuit Court of Australia Act 1999*.

Section 9 of the *Legislative Instruments Act 2003* provides that Rules of Court made for the Federal Circuit Court are not legislative instruments for the purposes of that Act. As a result the *Human Rights (Parliamentary Scrutiny) Act 2011* does not apply to any such Rules of Court and no statement of compatibility for purposes of that latter Act is included in this Explanatory Statement.

The Judges have agreed to adopt the *Federal Circuit Court Amendment (2014 Measures No.1) Rules* ('the Amendment Rules').

The Amendment Rules include the following amendments to the *Federal Circuit Court Rules 2001* ('the Rules').

#### **PART 1 – Amendments commencing day after registration**

Miscellaneous amendments including:

- a new rule 1.07 about applications for orders about procedures;
- limiting the genuine steps statement requirement to no more than 2 pages in subrules 4.09(2) and 4.10(2);

- removal of reference to section 26 of the *Federal Circuit Court of Australia Act 1999* as the rule applies to all proceedings and section 26 only applies to general federal law proceedings
- inclusion in the note after rule 13.10 a reference to section 102QB in addition to the reference to section 118 of the *Family Law Act 1975* as both provisions now apply in relation to family law proceedings that are frivolous or vexatious;
- removing the note after rule 15.01 as there was an incorrect statutory reference and the other reference to statutory provisions was otherwise not seen to be necessary;
- removing the reference to *within a reasonable time* in subrule 15A.06(2) as it is inconsistent with the subpoena time limits in rule 15A.04;
- removing the term *de facto spouse* and replacing it with *de facto partner* in paragraph 24.03(d)(ii),(iii) and adding a new dictionary definition of the term *de facto partner*;
- removal of incorrect reference to rule 25B.10 in the note after subrule 25B.20(2) and replacing this with the correct reference to Division 25B.4;
- removal of all references to the repealed *Building and Construction Industry Improvement Act 2005* (where referred to in Chapter 7);
- removing references to sections 369 and 777 of the *Fair Work Act 2009*, as they are no longer the correct statutory reference in view of amendments made to the Act by way of the *Fair Work Amendment Act 2013*;
- application of rule 12.01 of the *Federal Court Rules 2011* in respect of a submitting notice, by way of Part 2 of Schedule 3.

In addition to these miscellaneous amendments Part 1 amendments include:

- Amendments to the family report rules to make it explicit that the Court can make orders allowing the disclosure of family reports to appropriate bodies in the child protection system and to legal aid bodies. Subrule 23.01A(5) implements this by permitting the Court (by order or otherwise) to give a copy of the report to any of the following (in addition to a party, a lawyer or an independent children's lawyer): a children's court; a prescribed welfare authority; a Legal Aid Commission; the convenor of any legal dispute resolution conference. These amendments are consistent with recommendations contained in a Report by Professor Richard Chisholm AM dated March 2014 – *The Sharing of Experts Reports Between the Child Protection System and the Family Law System*. In particular Recommendations 6 and 7 which recommends amendment to court rules to make it explicit that family courts can make orders allowing the disclosure of reports to appropriate bodies in the child protection system and to legal aid bodies.

- Three new subrules have been added to rule 44.15 in respect of cost when an applicant files a notice of discontinuance of an application for a show cause in migration proceedings. In *MZZKH v Minister for Immigration & Anor* [2013] FCCA 2287 the Court considered whether rule 44.15 provided for the automatic imposition of costs without the need to file an application. The new subrules are intended to facilitate a claim for costs in a show cause migration proceeding where a notice of discontinuance has been filed without the need to file a separate cost application. New subrule 44.15(3) provides that the respondent will be required to serve a sealed copy of a bill of costs in accordance with a new approved form of bill of costs that specifies the amount set out in Division 2 of Part3 of Schedule 1.
- Increasing the rates of costs in Schedule 1 to give effect to recommendations made in the Sixth Report of the Joint Costs Advisory Committee.

## **PART 2 – Amendments commencing 12 January 2015**

New Part 22A – which includes in Division 1 new rules requiring a person who files an application or response seeking parenting orders, to file a new form of *Notice of Risk*. The rules also prescribed this form when allegations of the purposes of subsections 67Z(2) or 67ZBA(2) of the *Family Law Act 1975* are raised. The *Notice of Risk* is also intended to be the method by which the Court fulfils its obligations under paragraph 69ZQ(1)(aa) of the *Family Law Act 1975*. The new form of *Notice of Risk* is prescribed in Schedule 2.

The Amendment Rules have been the subject of consultation (as relevant), with the Federal Court of Australia, the Family Court of Australia, the Family Law Section of the Law Council of Australia, National Legal Aid and prescribed child welfare authorities.

Details of the Amendment Rules are in the **Attachment**.

The Amendment Rules commence in two parts as follows

**PART 1** - on the day after they are registered

**PART 2** -on the 12 January 2015.

## ATTACHMENT

### ***Federal Circuit Court Amendment (2014 Measures No 1) Rules 2014***

#### **[1] Name**

Rule 1 provides that the Rules are to be cited as the ***Federal Circuit Court Amendment (2014 Measures No.1) Rules 2014***.

#### **[2] Commencement**

Rule 2 provides commencement of these Rules are as follows:

(a) on the day after they are registered — Sections 1 to 4 and Schedule 1, Part 1.

(b) on 12 January 2015 —Schedule 1 Part 2.

#### **[3] Authority**

Rule 3 provides that the amendments are made pursuant to the *Federal Circuit Court of Australia Act 1999*.

#### **[4] Schedules**

This Rule provides that each instrument specified in a Schedule to the Amendment Rules is amended or repealed as set out in the applicable items in the Schedule, and that any other item in a Schedule to these Rules have effect according to its terms.

## Schedule 1 Amendments

### Part 1 - commencing on the day after registration

#### [1] At the end of Part 1

A new rule in respect of Applications for orders about procedures has been included. This rule largely replicates rule 1.21 *Federal Court Rules 2011*. The utility of including such a rule being considered in *Thompson & Berg* [2014] FamCAFC 73.

#### [2] After subrule 4.09(2) before the notes

This amendment replicates an amendment made to the *genuine steps* mirror rule in the *Federal Court Rules 2011* and limits the length of an applicant's genuine steps to no more than 2 pages.

#### [3] After subrule 4.10(2) (before the notes)

This amendment replicates an amendment made to the *genuine steps* mirror rule in the *Federal Court Rules 2011* limiting the length of a respondent's genuine steps to no more than 2 pages.

#### [4] Subrule 10.05(1)

The effect of this amendment is to remove the reference to section 26 of the *Federal Circuit Court of Australia Act 1999* as the rule applies to all proceedings and section 26 only applies to general federal law proceedings.

#### [5] Rule 13.10 (note)

A reference to section 102QB in addition to section 118 of the *Family Law Act 1975* has been added to the Note after rule 13.10 as this is a new additional statutory source of power in relation to family law proceedings that are frivolous or vexatious.

#### [6] Rule 15.01 (note)

The note after rule 15.01 has been repealed as there was an incorrect statutory reference and the other reference to statutory provisions was otherwise not seen to be necessary.

#### [7] Subrule 15A.06(2)

This amendment deletes the words *within a reasonable time before attendance or production under the subpoena is required* from this rule which deals with service of a subpoena. The reference to *within a reasonable time* was not consistent with rule 15A.04 which set out the appropriate time limits for service of a subpoena.

#### [8] Subrule 23.01A(5)

The amendment to Subrule 23.01A(5) is consistent with recommendations contained in a Report by Professor Richard Chisholm AM dated March 2014 – *The Sharing of Experts Reports Between the Child Protection System and the Family Law System*. In particular Recommendations 6 and 7 which recommends amendment to court rules to make it explicit that family courts can make orders allowing the disclosure of reports to appropriate bodies in the child protection system and to legal aid bodies. Subrule 23.01A(5) implements this recommendation by permitting the Court (by order or otherwise) to give a copy of the report to any of the following (in addition to a party, a lawyer or an independent children’s lawyer): a children’s court; a prescribed welfare authority; a Legal Aid Commission; the convenor of any legal dispute resolution conference.

Consistent with the recommendations in this Report, new subrule 23.01A(6) provides that where a copy of a report is provided other than by order, a copy of the report must be accompanied by a notice that identifies the people to whom a copy of the report may be provided and the status of the report at the time of its preparation.

**[9] Subparagraphs 24.03(1)(d)(ii) and (iii)**

The amendment removes reference to *de facto spouse* and replaces it with a reference to *de facto partner*. The term *de facto partner* is now defined in the dictionary, see item [22].

**[10] Subrule 25B.20(2)(note)**

The amendment deletes an erroneous reference to rule 25B.10 in the Note following this subrule and replaces it with the correct reference to Division 25B.4

**[11] At the end of rule 44.15**

Three new subrules have been added to clarify the rules in respect of cost when an applicant files a notice of discontinuance of an application for a show cause in migration proceedings. In *MZZKH v Minister for Immigration & Anor* [2013] FCCA 2287 the Court considered whether rule 44.15 provided for the automatic imposition of costs without the need to file an application. The new subrules are intended to facilitate a claim for costs in a show cause migration proceeding where a notice of discontinuance has been filed without the need to file a separate cost application. New subrule 44.15(3) provides that the respondent will be required to serve a sealed copy of a bill of costs in accordance with a new approved form of bill of costs that specifies the amount set out in Division 2 of Part3 of Schedule 1.

**[12] Rule 45.01(definition of *Building and Construction Industry Improvement Act*)**

**[13] Rule 45.02 (heading)**

**[14] Paragraph 45.02(b)**

**[15] Paragraph 45.02(c)**

**[16] Rule 45.03**

These amendments remove references to the *Building and Construction Industry Improvement Act 2005* which has been repealed.

**[17] Subparagraph 45.06(b)(ii)**

**[18] Subparagraph 45.07(b)(ii)**

The references to sections 369 and 777 of the *Fair Work Act 2009* have been removed from these subparagraphs as they are no longer the correct statutory reference in view of amendments made to the Act by way of the *Fair Work Amendment Act 2013*.

**[19] Division 45.5**

The amendment repeals the Division as it refers to the *Building and Construction Industry Improvement Act 2005* which has been repealed.

**[20] Part 1 of Schedule 1**

The amendment increases the rates of costs in Schedule 1 for work done and services provided by lawyers to give effect to recommendations made in the Sixth Report of the Joint Costs Advisory Committee.

**[21] Part 2 of Schedule 3 (after table item 5)**

Rule 12.01 of the *Federal Court Rules 2011* in respect of a submitting notice now applies by way of Part 2 of Schedule 3 application.

**[22] Dictionary**

The term *de facto partner* has been added to the dictionary in view of item [9] amendment. The term has the meaning given by the *Acts Interpretation Act 1901*.

## **Part 2- Amendments commencing 12 January 2015**

### **[23] After subrule 2.04(1A)**

New subrule 2.04(1B) provides that a reference in the Rules to a notice of risk is a reference to the Form which is prescribed in Schedule 2.

### **[24] At the end of rule 4.01**

This amendment inserts a note at the end of the rule to refer to the requirement as set out in new rule 22A.02 for an application for a parenting order to be accompanied by a notice of risk.

### **[25] At the end of rule 4.03**

This amendment inserts a note at the end of the rule to refer to the requirement as set out in new rule 22A.02 for a response to an application for a parenting order, or a response seeking a parenting order, to be accompanied by a notice of risk.

### **[26] After Part 22**

This new part includes two divisions:

Division 1 – Notice of risk

Division 2 – Family violence orders

Division 1 includes rules requiring a person who files an application or response seeking parenting orders to file a *Notice of Risk*. This form is set out in Schedule 2. These rules also provide that the *Notice of Risk* is the prescribed form when allegations for the purposes of subsection 67Z(2) or 67ZBA(2) of the *Family Law Act 1975*. The form is also intended to be the method by which the Court fulfils its obligation under paragraph 69ZQ(1)(aa) of the *Family Law Act* and as a general risk identification notice to aid the early intervention case management pathway of the Court in parenting matters where risks are alleged.

As set out in Note 2 to new rule 22A.02 there are additional obligations in rule 13.04A when an application is made to the Court for a parenting order by consent.

Division 2 pertaining to family violence orders, is similar to Rule 2.05 of the *Family Law Rules 2004* which was previously applied by way of Schedule 3 Part 1 but now relocated in new Part 22.

### **[27] Part 1 of Schedule 3 (table item 3)**

This amendment removes Part 2.3 of the *Family Law Rules* from Schedule 3 Part 1 in light of new Part 22.

### **[28] Dictionary**



A definition of *family violence order* has been included in the dictionary to clarify that this term has the same meaning as in the Family Law Act.

**[29] After Schedule 1**

This amendment includes a new Schedule 2- Form 1 which sets out the prescribed form of *Notice of Risk*.