



FEDERAL CIRCUIT COURT OF AUSTRALIA

EXPLANATORY STATEMENT

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

Federal Circuit Court Amendment (Costs and Other Measures) Rules 2016

Authority for Federal Circuit Court Rules

Section 81 of the *Federal Circuit Court of Australia Act 1999* permits the Judges of the Federal Circuit Court of Australia (Federal Circuit Court) 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 *Legislation Act 2003* (other than sections 8, 9, 10 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 of the *Federal Circuit Court of Australia Act 1999*.

General outline of amendments

The *Federal Circuit Court Rules 2001* (“the Rules”) are reviewed regularly. The judges have agreed to a number of miscellaneous amendments which are comprised in these Amendment Rules.

The amendments in Part 1 increase the itemised amounts of costs comprised in Schedule 1 of the Rules. These increases follow recommendations made by the Joint Costs Advisory Committee in their 7th and 8th report.

The amendments in Part 2 comprise other miscellaneous amendments to the Rules including:

- An amendment which inserts a new paragraph (ba) to subrule 2.08(1)(b) extending the list of person who, in family law/child support proceedings, can search the court records to a child welfare officer of a State or Territory, if the case affects or may affect the welfare of a child. This amendment is consistent with a recent amendment to section 121(9) of the

Family Law Act 1975 which now specifically exempts from the general restriction on publication of family law proceedings the communication of certain documents to prescribed welfare authorities. The amendment to subrule 2.08 is intended to facilitate the sharing of relevant court records with child welfare officers and is consistent with amendments previously made to paragraph 23.01A(5)(a)(iii) of the *Rules* to facilitate the sharing of family reports.

- An amendment to the response rules. The amendment makes no substantive change to the rules but better clarifies the procedural requirements by combining the requirements previously set out in repealed rules 4.03 and 4.04 into a consolidated rule 4.03.
- Rules 13.11 and 13.11A set out procedural requirements in respect of certificate of vexatious proceedings orders and applications for leave to institute proceedings in respect of such orders. The amendment made by these items is the inclusion of a reference to the relevant *Family Law Act* provisions whenever reference is made to the relevant *Federal Circuit Court of Australia Act* provision. This ensures the application of these rules to family law proceedings as well as general federal law proceedings.
- Rule 22.01 applies the prescribed rate of interest for certain *Family Law Act* provisions as the rate prescribed by the *Family Law Rules* for those provisions. The amendment to this rule reflects a recent amendment to rule 17.03 of the *Family Law Rules* by referring to paragraphs 87(11)(b), 90KA(b) and 90UN(b) as well as subsection 117B(1) of the Act.
- Amendments to Part 25A (rules in respect of child support and child maintenance) as a consequence of the amendments made by the *Tribunals Amalgamation Act 2015*. This Act merged a number of Tribunals under the Administrative Appeals Tribunal. The merger established the Social Services and Child Support Division of the AAT which took over the jurisdiction of the Social Security Appeals Tribunal (SSAT). The SSAT was abolished at the commencement of the *Tribunals Amalgamation Act 2015*. The source of jurisdiction of the Federal Circuit Court in relation to judicial review of child support matters is now found in section 44AAA of the AAT Act. New paragraph 25A.01(1)(aa) now makes specific reference to section 44AAA to clarify the application of rules in respect of judicial review of child support matters within Part 25A. References in rules 25A.03, 25A.05, 25A.06 and 25A.07 to the SSAT have been replaced with reference to the *Tribunal* which is defined in the dictionary to mean the AAT. Paragraph 25A.07(1)(d) has been amended to remove reference to the Executive Director of the SSAT. The position of Executive Director of the SSAT has been abolished and accordingly paragraph 25A.07(1)(d) now prescribes the *Registrar of the Tribunal* as the person on whom a notice should be served.
- Rule 43.01 has also been amended to reflect the structural changes to the AAT following the merger of the Tribunals. Previously the term *Registrar of the Tribunal* for the purposes of Part 42 was defined to include the District Registrar or Deputy Registrar of the AAT or an officer for the time being performing the duties of such. The amendments made to the structure of the AAT removed references to District and Deputy Registrars. Accordingly it has been necessary to make amendments to rule 43.01 and insert a new definition of *Registrar of the Tribunal* within the dictionary to the *Rules* to preserve consistency with the new legal framework of the AAT following the merger of the Tribunals.

- Rule 44.15 which provides for costs in relation to migration proceedings has been repealed and replaced to better clarify the processes when a notice of discontinuance is filed in a proceeding in which a respondent has sought costs in the response. The amendment is intended to facilitate the current procedures by providing for orders for costs in accordance with Division 2 of Part 3 of Schedule 1 to be made in chambers without hearing the parties.

Consultation

The Federal Circuit Court consulted with the Federal Court and relevant officers from the AAT in relation to the changes as a consequence of the merger of the Tribunals. In respect of the amendments to increase the amount of itemised costs set out in Schedule 1 of the Rules, there was no consultation as the increases were consistent with the recommendations of the Joint Costs Advisory Committee as set out in their 7th and 8th Reports. That Committee consults as part of its annual review of costs. The amendment to rule 44.15 which provides for costs in relation to migration proceedings followed consultation with members of the profession and registrars of the Federal Court who had been experiencing difficulties with the practical implementation of the previously prescribed rule. As the other amendments introduce no substantive changes to the practices and procedures, detailed consultation was unnecessary.

Human Rights Scrutiny

Subsection 8(8) of the *Legislation Act* 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 the purposes of that latter Act is included in this Explanatory Statement.

Explanation and Commencement of the Rules

Details of the Rules are in the Attachment.

The Rules commence on the day after registration.

Federal Circuit Court Amendment (Costs and Other Measures) Rules 2016

ATTACHMENT

Part 1 - Costs

[1] Repeal the Schedule

Schedule 1 is repealed and a new costs schedule which increases the itemised amounts of costs as recommended by the Joint Costs Advisory Committee in their 7th report (which recommended a 2.7% increase) and their 8th report (which recommended a 2.8% increase).

Part 1A provides that these increases apply to work done or services performed after the commencement of the Schedule.

Part 2 - Other Amendments

[2] After paragraph 2.08(1)(b)

An amendment which inserts a new paragraph (ba) to subrule 2.08(1)(b) extending the list of person who, in family law/child support proceedings, can search the court records to a child welfare officer of a State or Territory, if the case affects or may affect the welfare of a child. This amendment is consistent with a recent amendment to section 121(9) of the *Family Law Act 1975* which now specifically exempts from the general restriction on publication of family law proceedings the communication of certain documents to prescribed welfare authorities. The amendment to subrule 2.08 is intended to facilitate the sharing of relevant court records with child welfare officers and is consistent with amendments previously made to paragraph 23.01A(5)(a)(iii) of the *Rules* to facilitate the sharing of family reports.

[3] Rules 4.03 and 4.04

An amendment to the response rules. The amendment makes no substantive change to the rules but better clarifies the procedural requirements by combining the requirements previously set out in repealed rules 4.03 and 4.04 into a consolidated rule 4.03.

[4] Subrule 13.11(1)

[5] Rule 13.11A

[6] Rule 13.11A (note 1)

[7] Rule 13.11A (note 2)

Rules 13.11 and 13.11A set out procedural requirements in respect of certificate of vexatious proceedings orders and applications for leave to institute proceedings in respect of such orders. The amendment made by these items is the inclusion of a reference to the relevant Family Law Act provisions whenever reference is made to the relevant *Federal Circuit Court of Australia Act* provision. This ensures the application of these rules to family law proceedings as well as general federal law proceedings.

[8] Rule 22.01

Rule 22.01 applies the prescribed rate of interest for certain Family Law Act provisions as the rate prescribed by the *Family Law Rules* for those provisions. The amendment to this rule reflects a recent amendment to rule 17.03 of the *Family Law Rules* by referring to paragraphs 87(11)(b), 90KA(b) and 90UN(b) as well as subsection 117B(1) of the Act.

[9] After paragraph 25A.01(1)(a)

[10] Subparagraph 25A.03(1)(a)(ii)

[11] Paragraph 25A.03(2)(a)

[12] Rule 25A.05 (heading)

[13] Subrule 25A.05(1)

[14] Paragraph 25A.05(1)(a)

[15] Subrule 25A.05(3)

[16] Subrule 25A.06(1)

[17] Subrule 25A.06(2)

[18] At the end of rule 25A.06

[19] Paragraph 25A.07(1)(d)

[20] Subrule 25A.07(3)

[21] Rule 25A.07 (note 3)

[22] At the end of paragraph 25B.10(d)

[23] Rule 25B.10 (at the end of the note)

The amendments contained in items [9-23] are to Part 25A (rules in respect of child support and child maintenance) as a consequence of the *Tribunals Amalgamation Act 2015* which merged a number of Tribunals under the Administrative Appeals Tribunal. The merger established the Social Services and Child Support Division of the AAT which took over the jurisdiction of the Social Security Appeals Tribunal (SSAT). The SSAT was abolished at the commencement of the Act. The source of jurisdiction of the Federal Circuit Court in relation to judicial review of child support matters is now found in new section 44AAA of the AAT Act. Accordingly new paragraph 25A.01(1)(aa) now makes specific reference to section 44AAA to clarify the application of rules in respect of judicial review of child support matters within Part 25A. References in rules 25A.03, 25A.05, 25A.06 and 25A.07 to the SSAT have been replaced with reference to the *Tribunal* which is defined in the dictionary to the rules to mean the AAT.

Paragraph 25A.07(1)(d) has been amended to remove reference to the Executive Director of the SSAT. The position of Executive Director of the SSAT has been abolished and accordingly paragraph 25A.07(1)(d) now prescribes the *Registrar of the Tribunal* as the person on whom a notice should be served. This items should be read in conjunction with item [30] which introduces a new dictionary definition of *Registrar of the Tribunal*.

[24] Part 43 (before the note to Part heading)

The amendment inserts a new note under the heading of part 43 to clarify that part 25A applies to appeals under section 44AAA of the AAT Act.

[25] Part 43 (note to Part heading)

This is a minor drafting amendment in light of the additional note referred to in the above item.

[26] Rule 43.01

Rule 43.01 has also been amended to reflect the structural changes to the AAT following the merger of the Tribunals. Previously the term *Registrar of the Tribunal* for the purposes of Part 42 was defined to include the District Registrar or Deputy Registrar of the AAT or an officer for the time being performing the duties of such. The amendments made to the structure of the AAT removed references to District and Deputy Registrars. Accordingly it has been necessary to make amendments to rule 43.01 and insert a new definition of *Registrar of the Tribunal* which is now defined in the dictionary to the Rules. This preserves consistency with the new legal framework of the AAT following the merger of the Tribunals.

[27] Subrule 44.06(2) (note)

This amendment to the Note is as a consequence of the consolidation of the rules in relation to the response in item [3].

[28] Rule 44.15

Rule 44.15 which provides for costs in relation to migration proceedings has been repealed and replaced to better clarify the processes when a notice of discontinuance is filed in a proceeding in which a respondent has sought costs in the response. The amendment is intended to facilitate the current procedures by providing for orders for costs in accordance with Division 2 of Part 3 of Schedule 1 to be made in chambers without hearing the parties.

[29] Dictionary (definition of *child support proceeding*)

[30] Dictionary (definition of *Registrar of the Tribunal*)

[31] Dictionary (definition of *SSAT*)

Items [29-31] amend the dictionary to redefine *child support proceeding*, include a new definition of *Registrar of the Tribunal*, and repeal the definition of the SSAT as a consequence of the merger of the Tribunals.