

***FAMILY LAW AMENDMENT (2016 MEASURES NO. 1)***  
***RULES 2016***

**EXPLANATORY STATEMENT**

## FAMILY LAW AMENDMENT (2016 MEASURES NO. 1) RULES 2016

### EXPLANATORY STATEMENT

#### Issued by the authority of the Judges of the Family Court of Australia

Section 123 of the *Family Law Act 1975* (the Act) provides that the Judges of the Family Court of Australia, or a majority of them, may make Rules of Court providing for the practice and procedure to be followed in the Family Court and some other courts exercising jurisdiction under the Act. The Judges of the Court made the *Family Law Rules 2004* (the Rules) which commenced on 29 March 2004. These amending Rules, the *Family Law Amendment (2016 Measures No. 1) Rules 2016* (the amendments), have now been made by the Judges to amend the *Family Law Rules 2004*.

Section 123(2) of the Act provides that the *Legislation Act 2003* (other than sections 8, 9, 10 and 16) applies to Rules of Court. In this application, references to a legislative instrument in the Act are to be read as references to Rules and references to a Rule maker as references to the Chief Justice.

Section 8(8)(d) of the *Legislation Act 2003* provides that the Rules of Court made for the Family Court of Australia 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.

# **1. GENERAL OUTLINE**

## **Schedule 1 — Main amendments**

### **Part 1 — Amendments relating to subpoenas**

The *Family Law Amendment (Arbitration and Other Measures) Rules 2015* (FLAR) introduced the process of administrative release of subpoenaed documents in certain circumstances in relation to subpoenas (generally) and subpoenas (in arbitration). The amendments provide for further consequential changes to the process of administrative release of subpoenaed documents.

The amendments provide for subpoenas to produce documents (generally) and subpoenas to produce documents (in arbitration) to be served upon the named person by ordinary service or by a manner of service agreed between the issuing party and the named person.

The amendments also provide that the issuing party, each other party and each interested person may agree upon the manner of service of subpoenas to produce documents (generally) and subpoenas to produce documents (in arbitration).

The amendments remove the requirement to file an affidavit of service as a precondition to filing a Notice of Request to Inspect in relation to subpoenas to produce documents (generally) and subpoenas to produce documents (in arbitration) while retaining the requirement to comply with the Rules about service as a precondition.

The transitional provisions provide that the amendments apply in relation to subpoenas issued on or after the commencement date.

The general rule making power conferred on the Judges of the Court (or the majority of them) by s 123(1) of the Act provides the source of the power for the amendments. In addition to the general rule making power the Judges are conferred with specific rule making power by s 123(1) in relation to arbitration.

### **Part 2 — Amendments relating to Judge managed court events**

The amendments distinguish the first day event before the Trial Judge in parenting cases from the subsequent conventional trial by change of terminology while preserving the same procedures. The amendments provide for greater uniformity of terminology with the Rules in relation to the first day event before the Judge in financial cases.

The general rule making power conferred on the Judges of the Court (or the majority of them) by s 123(1)(ba) of the Act provides the source of the power for the amendments.

## **Schedule 2 — Amendments relating to the Courts Administration Legislation Amendment Act 2016**

As a consequence of the *Courts Administration Legislation Amendment Act 2016* (CALAA), which changes the governance structures of the Federal Court of Australia (the Federal Court), the Family Court of Australia (the Family Court) and the Federal Circuit Court of Australia (the Federal Circuit Court), references in the Rules to ‘Principal Registrar’ are to be replaced by ‘Chief Executive Officer’ to reflect the new combined positions of Chief Executive Officer and Principal Registrar of the Family Court.

The general rule making power conferred on the Judges of the Court (or the majority of them) by s 123(1) of the Act provides the source of the power for the amendments.

### **Schedule 3 — Amendments relating to cases to which the Trans-Tasman Proceedings Act 2010 applies**

The amendments remove the current general delegation of powers to Deputy Registrars by reference to powers under ch 26A of the Rules in relation to subpoenas in Trans-Tasman proceedings. The amendments specify the particular powers to be delegated to Deputy Registrars by reference to particular provisions in the *Trans-Tasman Proceedings Act 2010* (TTPA) and further align with the approach of the *Federal Court Rules 2011*(FCR). The amendments also include amendments of a minor technical nature.

The general rule making power conferred on the Judge of the Court (or the majority of them) by s 123(1) of the Act provides the source of the power for the amendments.

### **Schedule 4 — Costs**

The Joint Costs Advisory Committee (JCAC) was established in 2007 to undertake an annual review of the quantum of costs contained in the Rules made by the High Court of Australia (the High Court), the Federal Court, the Family Court and the Federal Circuit Court and to recommend any variations. It comprises representatives of those courts. In conducting its reviews, the JCAC applies a formula which has regard to movements in wages and salaries and other costs of solicitors' practices.

Following its annual review, the JCAC provided a report in September 2016 to the High Court of Australia, the Federal Court of Australia, the Family Court of Australia and the Federal Circuit of Australia recommending an increase of one point seven per cent (1.7%) to the current scale of costs specified in the Rules of each Court. Issues raised in consultation were addressed in the report.

The Judges are conferred with specific powers in relation to costs by s 123(1)(g) of the Act.

## **2. CONSULTATION**

The *Legislation Act 2003* provides for certain consultation obligations when Rules are made. The Chief Justice has authorised the Court's Rules Committee to undertake consultation on Rules matters on her behalf. The consultation undertaken in relation to the amendments was as set out below in relation to the schedules.

### **Schedule 1 — Main amendments**

#### **Part 1 — Amendments relating to subpoenas**

The court consulted extensively prior to the *Family Law Amendment (Arbitration and Other Measures) Rules 2015* and the commencement of the process of administrative release of subpoenaed documents in certain circumstances in relation to subpoenas (generally) and subpoenas (in arbitration).

The court has engaged in additional consultation with various peak bodies of the legal profession since the start-up time about consequential amendments in relation to the requirements of service and proof of service of subpoenas to produce documents to streamline the process and align further with the *Federal Circuit Court Rules 2001*.

## **Part 2 — Amendments relating to Judge managed court events**

The sole purpose of the amendments is to change terminology to better distinguish the first day event before the Trial Judge (the trial management hearing) in parenting cases from the subsequent conventional trial, in line with financial cases, while preserving the same procedures. The concept, purpose and procedures in relation to ‘the first day before the Judge’ remain unchanged. The changes in terminology align the terminology in relation to the first day before the Judge in parenting and financial cases and are technical. There was consultation with various peak bodies of the legal profession.

## **Schedule 2 — Amendments relating to the Courts Administration Legislation Amendment Act 2016 (CALAA)**

Significant consultation preceded the CALAA. The Explanatory Memorandum in relation to the Courts Administration Legislation Amendment Bill 2015 (the Bill) states that ‘[t]he performance, funding and operation of the federal courts has been considered in many reviews and reports ...’<sup>1</sup> that were summarised.<sup>2</sup> The Explanatory Memorandum states that ‘[t]he approach taken in the Bill to the amalgamation of the courts’ corporate services functions preserves the judicial and functional independence of each court, while generating ongoing efficiencies through the creation of a single administrative entity .’<sup>3</sup> The management structure provides for each head of jurisdiction to be supported by a Chief Executive Officer (CEO) in the management of administrative affairs.<sup>4</sup> The CALAA provides that the CEO also holds the position of Principal Registrar and amends the Act to update references to the position of CEO and Principal Registrar accordingly when the combined role takes effect. The amendments reflect the technical change in terminology required as a consequence of the CALAA.

## **Schedule 3 — Amendments relating to cases to which the *Trans-Tasman Proceedings Act 2010* applies**

The amendments change the delegation of powers to Deputy Registrars in relation to subpoenas in Trans-Tasman proceedings from a general delegation to a delegation that specifies the particular powers delegated. The amendments are of a machinery nature and include minor technical amendments. No further consultation was undertaken.

## **Schedule 4 — Costs**

In its 2016 annual review (as in previous reviews) the JCAC wrote to the Commonwealth Attorney-General’s Department, the Law Council of Australia, the National Association of Community Legal Centres and National Legal Aid inviting them and their respective

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<sup>1</sup> Explanatory Memorandum, Courts Administration Legislation Amendment Bill 2015 (Cth) 7 [28].

<sup>2</sup> Ibid [29].

<sup>3</sup> Ibid [31].

<sup>4</sup> Ibid [34].

constituent bodies to make submissions. A notice of review was also placed on the website of each court.

### **3. SUMMARY OF MAJOR CHANGES**

The major changes introduced by the amendments to the Rules are set out below in relation to each of the Schedules.

#### **Schedule 1 — Main amendments**

##### **Part 1 — Amendments relating to subpoenas**

###### **Subpoenas generally:**

1. To limit the requirement of service of subpoenas by hand to subpoenas to give evidence and subpoenas for production and to give evidence.
2. To provide that subpoenas for production be served by ordinary service.
3. To enable the issuing party and the named person to agree about an alternative method of service of subpoenas for production.
4. To enable the issuing party and each other party, any interested person and the independent children’s lawyer (if any) to be served by an agreed manner of service.
5. To remove the requirement of filing an affidavit of service as a precondition to filing a Notice of Request to Inspect.

###### **Subpoenas in arbitrations:**

6. To limit the requirement of service of subpoenas by hand to subpoenas to give evidence and subpoenas for production and to give evidence.
7. To provide that subpoenas for production be served by ordinary service.
8. To enable the issuing party and the named person to agree about an alternative method of service of subpoenas for production.
9. To enable the issuing party and each other party and any interested person to be served by an agreed manner of service.
10. To remove the requirement of filing an affidavit of service as a precondition to filing a Notice of Request to Inspect.

##### **Part 2 — Amendments relating to Judge managed court events**

1. To amend the terminology in Chapter 16 and elsewhere (where relevant) to distinguish the first day before the Judge (“the trial management hearing”) from the subsequent conventional trial in parenting matters.
2. To amend the terminology in Chapter 16 in relation to the first day before the Judge in financial matters from “the procedural hearing” to “the trial management hearing”.

#### **Schedule 2 — Amendments relating to the Courts Administration Legislation Amendment Act 2016**

1. To substitute “Chief Executive Officer” for “Principal Registrar” in the Rules.

### **Schedule 3 — Amendments relating to cases to which the Trans-Tasman Proceedings Act 2010 applies**

1. To remove the current general delegation of powers to Deputy Registrars in relation to subpoenas in Trans-Tasman proceedings.
2. To specify the particular powers to be delegated to Deputy Registrars by reference to particular provisions in the *Trans-Tasman Proceedings Act 2010* in relation to subpoenas in Trans-Tasman proceedings

### **Schedule 4 — Costs**

1. To increase by one point seven per cent (1.7%) the costs allowable for work done and services rendered by lawyers and itemised in the scale of costs in sch 3 of the Rules.

## **1. DETAILS OF AMENDMENTS**

### **Rule 1 Name of Rules**

The name of the rules is the *Family Law Amendment (2016 Measures No. 1) Rules 2016*.

### **Rule 2 Commencement**

Sections 1 to 4 and anything else in the Rules not elsewhere covered by the table commence the day after the Rules are registered. Schedules 1, 3 and 4 commence on the 1 January 2017. Schedule 2 commences at the same time as Part 2 of Schedule 2 to the *Courts Administration Legislation Amendment Act 2016* commences.

### **Rule 3 Authority**

The Rules are made under the *Family Law Act 1975*.

### **Rule 4 Schedules**

Schedules 1–4 amend the *Family Law Rules 2004*.

## **Schedule 1 — Main amendments**

### **Part 1 — Amendments relating to subpoenas**

#### **[1] Rule 7.03 (table 7.1, item 5)**

The amendment repeals item 5 of table 7.1 which provides for service of a subpoena by special service by hand and substitutes a provision that refers to rule 15.22 in relation to service of subpoenas (general) and rule 26B.17 in relation to service of subpoenas (in arbitration) about manner of service.

#### **[2] Rule 7.03 (table 7.1, item 9, column headed “Document”)**

The amendment provides that the brochure required by rule 26B.17(1) to be served with a subpoena in an arbitration be served by the same manner of service as the subpoena.

#### **[3] Subrule 15.22(1)**

The amendment omits the reference to service “by hand” and substitutes “in accordance with subrule (1A)”. Subrule (1) provides that the issuing party must serve the named person with the subpoena and the approved brochure and also picks up the requirements of the manner service in subrule (1A).

**[4] After subrule 15.22(1) insert subrule 15.22(1A)**

The new subrule provides that a subpoena for production must be served either by ordinary service or by a manner of service agreed between the issuing party and the named person. It also provides that a subpoena to give evidence or a subpoena for production and to give evidence must be served by hand.

**[5] Subrule 15.22(2)**

The amendment omits the reference to service by “ordinary service” and substitutes “in accordance with subrule (2A)”. Subrule (2) provides that the issuing party must serve a copy of the subpoena on each other party, each interested person and any independent children’s lawyer and also picks up the requirements of the manner of service in subrule (2A).

**[6] After subrule 15.22(2) insert subrule 15.22(2A)**

The new subrule provides that a copy of a subpoena required to be served by the issuing party upon each other party, each interested person and any independent children’s lawyer must be served by ordinary service or by a manner of service agreed between the issuing party and the person to be served.

**[7] Subrule 15.22(4) (note)**

The amendment repeals the note that refers to Chapter 7 for service generally and replaces it with a note that refers to Chapter 7 for other requirements relating to service.

**[8] Paragraph 15.30(1)(e)**

The amendment removes the requirement of filing an Affidavit of Service of a subpoena for production (while retaining the obligation to serve in accordance with the Rules) prior to issuing a notice of request to inspect.

**[9] Subrule 26B.17(1)**

The amendment omits the reference to service “by hand” and substitutes “in accordance with subrule (1A)”. Subrule (1) provides that the issuing party must serve the named person with the subpoena in an arbitration and the approved brochure and also picks up the requirements of the manner of service in subrule (1A).

**[10] After 26B.17(1) insert subrule 26B.17(1)(1A)**

The new subrule provides that a subpoena for production in an arbitration must be served either by ordinary service or by a manner of service agreed between the issuing party and the named person. It also provides that a subpoena to give evidence or a subpoena for production and to give evidence must be served by hand.

**[11] Subrule 26B.17(2)**



The amendment omits the reference to service by “ordinary service” and substitutes “in accordance with (2A)”. Subrule (2) provides that the issuing party must serve a copy of the subpoena in an arbitration on each other party and each interested person and also picks up the requirements of the manner of service in subrule (2A).

**[12] After subrule 26B.17(2) insert subrule 26B.17(2A)**

The new subrule provides that a copy of a subpoena in an arbitration required to be served by the issuing party upon each other party and each interested person lawyer must be served by ordinary service or by a manner of service agreed between the issuing party and the person to be served.

**[13] Subrule 26B.17(4) (note)**

The amendment repeals the note that refers to Chapter 7 for service generally and replaces it with a note that refers to Chapter 7 for other requirements relating to service.

**[14] Paragraph 26B.24(1)(e)**

The amendment removes the requirement of filing an Affidavit of Service setting out the details of service of a subpoena for production in an arbitration (while retaining the obligation to serve in accordance with the Rules) prior to issuing a notice of request to inspect.

**[15] In the appropriate position in Chapter 27 insert Part 27.2 — Transitional provisions relating to the Family Law Amendment (2016 Measures No. 1) Rules 2016**

The transitional provisions in Part 27.2 provide that the amendments made by Part 1 of Schedule 1 to the *Family Law Amendment (2016 Measures No. 1) Rules 2016* apply in relation to subpoenas issued on or after the commencement of the Schedule. Part 27.2 is repealed after one month from the day of commencement.

**Part 2 — Amendments relating to Judge managed court events**

**[16] Paragraph 5.06(3)(c)**

The amendment is a technical amendment correcting a reference in paragraph 5.06(3)(c) from rule 16.08(3) to rule 16.05(3) in relation to the requirements for attendance by electronic communication.

**[17] Rule 8.01(note 2)**

The amendment is a technical amendment correcting a reference in rule 8.01 (note 2) from rule 16.08 to rule 16.05 in relation to the requirements for attendance by electronic communication.

**[18] Rule 15.01 (paragraph (a) of the definition of *relevant date*)**

The amendment amends a reference to “the first day of the final stage of the trial” to “the first day of the trial” in the definition of “*relevant date*” to distinguish the trial management hearing from the subsequent conventional trial.

**[19] Rule 15.35 (note)**

The amendment is a technical amendment correcting a reference in rule 15.35(note) from rule 16.10(4) to rule 24.14(4) in relation to the return of exhibits.

**[20] Rule 15.73 (note)**

The amendment is a technical amendment correcting a reference in rule 15.73 (note) from rule 16.08 to r 16.05 in relation to the requirements for attendance by electronic communication.

**[21] Rule 16.04(1)**

The amendment is a consequential technical amendment omitting the reference in rule 16.04(1) to “For rules 16.08 to 16.13” and substituting “For Part 16.3”.

**[22] Paragraph 16.04(1)(c)**

This amendment amends paragraph 16.04(1)(c) by omitting the reference to “continuation of” from “continuation of trial” to distinguish the trial management hearing from the subsequent conventional trial.

**[23] Subrule 16.04(2)**

The amendment repeals subrule 16.04(2), which states that if the parties consent to a financial case being dealt with under Division 12A of Part VII of the Act then rules 16.08, 16.09 and 16.10 apply to the financial case. Rules 16.08, 16.09 and 16.10 are repealed and replaced by the amendments.

**[24] Parts 16.3 to 16.5**

The amendments repeal Parts 16.3 to 16.5 and substitute Part 16.3 — Proceedings before the Judge — parenting and financial cases. The amendments distinguish the first day before the Judge from the subsequent conventional trial in parenting matters by reference to the concept of “the trial management hearing”. Also the amendments amend the terminology in Chapter 16 in relation to the procedural hearing in financial matters by change of terminology to “the trial management hearing”. While the amendments replace Parts 16.3 to 16.5 with a single Part (Part 16.3) and replace references to “the first day of trial” and “the first procedural hearing” with references to “the trial management hearing”, the concept, purpose and procedures in relation to “the first day before the Judge” remain the same.

**[25] Paragraph 19.04(1)(b)**

The amendment is a consequential technical amendment to delete the reference to rule 16.13 in rule 19.04(1)(b) ( notification of costs) which is repealed by the amendments.

**[26] Subrule 19.04(4)**

The amendment omits from subrule 19.04(4) “the final stage of” in “the first day of the final stage of the trial” to distinguish the trial management hearing from the subsequent conventional trial.

**[27] Paragraph 6.04(1)(b) of Schedule 6**

The amendment is a consequential technical amendment of paragraph 6.04(1)(b) (notification of costs) in Schedule 6, deleting a reference to rule 16.13 which is repealed by the amendments.

**[28] Subclause 6.04(4) of Schedule 6**

The amendment omits from subclause 6.04(4) of Schedule 6 “the final stage of” from “the first day of the final stage of the trial” to distinguish the trial management hearing from the subsequent conventional trial.

**[29] Dictionary (note at the end of the definition of *attend*)**

The amendment is a consequential technical amendment to correct a reference in the Dictionary definition of *attend* (note) from rule 16.08 to r 16.05 in relation to the requirements for attendance by electronic communication.

**[30] Dictionary (definition of *first day before the Judge*)**

The amendment repeals the definition of *first day before the Judge* in the Dictionary and substitutes a definition stating that the *first day before the Judge* means the trial management hearing.

**[31] Dictionary (definition of *trial*)**

The amendment amends the definition of *trial* to clarify that *trial* means the conventional trial and does not include a trial management hearing.

**Schedule 2 — Amendments relating to the Courts Administration Legislation Amendment Act 2016**

**[1] Rule 18.01A (definition of *Registrar*)**

**[2] Dictionary (definition of *Registrar*)**

The amendments replace “Principal Registrar” with “Chief Executive Officer” consistent with the combined roles of the Chief Executive Officer and the Principal Registrar.

**[3] Explanatory Guide (definition of *Principal Registrar*)**

The amendment repeals the definition of “Principal Registrar” consistent with the combined roles of the Chief Executive Officer and the Principal Registrar.

**[4] Amendments of listed provisions — Chief Executive Officer**

The amendments replace “Principal Registrar” with “Chief Executive Officer” consistent with the combined roles of the Chief Executive Officer and the Principal Registrar.

**Schedule 3 — Amendments relating to cases to which the Trans-Tasman Proceedings Act 2010 applies**

**[1] Subrule 18.06(1) (table 18.4, at the end of the table)**

The amendment adds to the table of powers delegated to Deputy Registrars powers in relation to subpoenas in Trans-Tasman proceedings by reference to specific provisions of the TTPA.

**[2] Subrule 18.06(2) (table 18.5, item 44)**

The amendment repeals item 44 which provides for a general delegation of powers to Deputy Registrars in relation to subpoenas in Trans-Tasman proceedings by reference to ch 26A of the Rules.

**[3] Paragraph 26A.02(1)(a)**

The amendment omits “Initiating Application” and substitutes “Initiating Application (Family Law)”.

**[4] Paragraph 26A.02(1)(c)**

The amendment omits “application or” and substitutes “application, a certificate of non-compliance or a”. Chapter 26A of the Rules applies div 34.4 of the FCR with modifications. Rule 26A.02(1)(c) provides that references in div 34.4 to certain Forms are to be disregarded for the purpose of ch 26A and the amendment adds “a certificate of non-compliance” to the Forms to be disregarded

**[5] Subrule 26A.02(2) (table 26A.1, before item 1)**

The amendment provides that parties to Trans-Tasman proceedings must comply with any other relevant Rules rather than any other relevant provisions of the FCR.

**[6] Subrule 26A.02(2) (table 26A.1, item 1, column headed “Substitute”)**

**[7] Subrule 26A.02(2) (table 26A.1, item 2, column headed “Substitute”)**

The amendments add “*Family Law Rules 2004*” after the references to rules 2.01 and 5.01 in the column headed “Substitute” by way of clarification.

**Schedule 4 — Costs**

**[1] Schedule 3**

The amendments state the amount of each item of costs in sch 3 — itemised scale of costs after the increase of 1.7% in relation to each item.

**[2] In the appropriate position in Part 27.1**

The amendment inserts 27.02 and provides that sch 3, as amended, applies to work done on or after 1 January 2017.