



## 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 2017*

#### **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 **Schedule 1 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 9th Report.

The amendments in **Schedule 1 Part 2** comprise other miscellaneous amendments to the Rules including:

- An amendment to empower the Court to apply the *Federal Court (Criminal Proceedings) Rules 2016* in a particular case where the Rules are insufficient or inappropriate. This will be in addition to the power already conferred on the Court to apply *Family Law Rules 2004* (“Family Law Rules”) or the *Federal Court Rules 2011* (“Federal Court Rules”) in such instances;
- An amendment to subrule 2.06 (a) to adopt terminology used in paragraph 2.26(b) of the Federal Court Rules which provides that a Registrar, when considering whether to exercise the power to refuse to accept a document, need not only be satisfied by reference to the document itself but also *by reference to any other documents filed or submitted for filing with the document*;

- New rule 2.08B is prescribed for the inspection of documents in general federal law proceedings. This new rule mirrors (with necessary modifications) Rule 2.32 of the Federal Court Rules to ensure that the Courts have like processes for the inspection of documents in general federal law proceedings. While the Federal Court Rule was previously applied by way of subrule 2.08(4), it is considered preferable to set out the rule in full rather than by reference to the comparable Federal Court Rule;
- Amendments to ensure that the powers conferred on the Court pursuant to rules 13.03C and 13.10 are powers that can be exercised by a registrar;
- Amendments to rule 16.05 by the addition of new paragraphs (2)(g) and (h) to better resemble the common law principles referred to as the 'slip rule';
- In view of new jurisdiction conferred on the Court by the *Building and Construction Industry (Improving Productivity) Act 2016* and the *Fair Work Registered Organisations Act 2009* new rules have been prescribed setting out the requirements in respect of Applications made under these Act.

The amendments in **Schedule 2** extend the time a response must be filed and served from 14 days to 28 days of service of the application to which it relates. This amendment commences 3 months after registration to ensure parties and practitioners have time to prepare for the change to the timeline. Transitional provisions clarify that these amendments apply to applications made after the commencement of that Schedule.

### **Consultation**

In respect of the amendments in Schedule 1 Part 1 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 9<sup>th</sup> Report. That Committee consults as part of its annual review of costs.

In respect of the amendments in Schedule 1 Part 2 as these amendments introduce no substantive changes to the practices and procedures, detailed consultation was unnecessary.

In respect of the amendments in Schedule 2 which extends the time for the filing and service of a response from 14 days to 28 days, there has been consultation with the professional associations including the Family Law Section and the Law Council of Australia. This amendment does not commence until 3 months after registration to ensure litigants and practitioners have sufficient time to be aware of the changed timeline for filing a response.

### **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 amendments in Schedule 1 commence the day after registration. The amendments in Schedule 2 commence three months after registration.

## ATTACHMENT

### Schedule 1 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 9<sup>th</sup> Report (which recommended a 1.7% increase). These increases are to apply to work done or services performed after the commencement of the Schedule.

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

### Schedule 1 Part 2 - Other amendments

#### [2] Subrule 1.05(2)

The effect of the amendment is to empower the Court if the Rules are insufficient or inappropriate in a particular case, to apply the *Federal Court (Criminal Proceedings) Rules 2016*. In addition to being empowered to apply the Family Law Rules or the Federal Court Rules, the amendment will allow the Court to apply rules contained in the *Federal Court (Criminal Proceedings) Rules 2016* in a particular case where the Rules are insufficient or inappropriate.

#### [3] Paragraph 2.06(a)

Rule 2.06 sets out the circumstances in which a Registrar may refuse to accept a document. A similar rule is found in Rule 2.26 of the Federal Court Rules 2011. The amendment to subrule 2.06 (a) adopts terminology used in paragraph 2.26(b) of the *Federal Court Rules 2011* which provides that a Registrar, when considering whether to exercise the power to refuse to accept a document, need not only be satisfied by reference to the document itself but also *by reference to any other documents filed or submitted for filing with the document*.

#### [4] Paragraph 2.07A(4)(a)

The amendment is merely to include the correct website details for the Court following the change of name of the Court from Federal Magistrates Court to Federal Circuit Court.

#### [5] Division 2.3 (heading)

An amendment to the heading has been made as it now encompasses rules in relation to the custody of documents as well as the inspection of documents.

#### [6] Rule 2.08 (heading)

The amendment to the heading of rule 2.08 clarifies that the rule is only in relation to the searching of records in family law proceedings or child support proceedings.

#### [7] Paragraphs 2.08(1)(c) and (d) and (2)(b)

#### [8] Subrule 2.08(3)

These amendments confirm that the power is one that the Court or a Registrar can exercise.

**[9] Subrule 2.08(4)**

Subrule 2.08(4) has been repealed in view of new rule 2.08B.

**[10] At the end of Division 2.3**

The amendment prescribes a new rule 2.08B for the inspection of documents in general federal law proceedings. This new rule mirrors (with necessary modifications) Rule 2.32 of the Federal Court Rules to ensure that the Courts have like processes for the inspection of documents in general federal law proceedings. While the comparable Federal Court rule was previously applied by way of subrule 2.08(4), it is considered preferable to set out the rule in full rather than by reference.

**[11] Paragraph 4.05(2)(c)**

This is a consequential amendment in light of new rule 45.09A to clarify that an affidavit is not required to be filed with an Application or Response filed in such proceedings as rule 45.09A sets out specific requirements in relation to the documents which must be filed in respect of proceedings commenced under the new rule.

**[12] Subrule 13.03C(1)**

**[13] Subparagraph 13.03C(1)(b)(ii)**

**[14] Subrule 13.03C(2)**

**[15] Subrule 13.03C(2)**

These amendments ensure that the powers conferred on the Court pursuant to rule 13.03C when a party to a proceedings is absent from a hearing, are powers that can be exercised by a Registrar.

**[16] Rule 13.10**

**[17] Rule 13.10**

These amendments ensure that the powers conferred on the Court pursuant to rule 13.10 to dispose by summary dismissal, are powers that can be exercised by a Registrar.

**[18] Rule 16.05 (heading)**

**[19] Subrule 16.05(1)**

**[20] Subrule 16.05(2)**

**[21] Subrule 16.05(3)**

The amendment to rule 16.05 by the addition of new paragraphs (2)(g) and (h) is to ensure that the Court or a Registrar may vary or set aside a judgment or order after it has been entered if there is a clerical mistake in the judgment or order; or there is an error arising in the judgment or order from an accidental slip or omission. The amendments are intended to more clearly mirror the common law principles referred to as the 'slip rule' in light of the observations made in the following decisions: *Heywood v Sharpe* [2014] FCCA 2999; (2014) 291 FLR 217, *Gilbert + Tobin v Stolyar & Anor* [2016] FCCA 743.

**[22] Subrules 25.05(1) and 25.06(1)**

**[23] Subrule 25.11(5)**

**[24] Paragraph 25.11(5)(a)**

**[25] Subrule 25.11(6)**

**[26] Paragraph 25.12(a)**

These amendments ensure that the powers conferred on the Court are powers that can be exercised by a Registrar.

**[27] Rule 25.18**

This amendment removes a reference to 'Registry Manager' and substitutes this with 'Court or a Registrar' to more reflect the statutory framework of the *Federal Circuit Court of Australia Act 1999*.

**[28] Rule 25B.01 (note 2)**

This amendment removes a reference to Form 18 from the note as the approved form is no longer referred to as Form 18.

**[29] At the end of rule 44.05**

A note has been included at the end of rule 44.05 as a consequence of the repeal of rule 44.06. The note is to clarify that rules in relation to the filing of a response in migration proceedings are contained in rules 4.03 and 4.05.

**[30] Rule 44.06**

This amendment repeals rule 44.06 as a specific rule in relation to a response to an Application for an order to show cause is not necessary in view of the general rules relating to response found in rules 4.03 and 4.05.

**[31] Rule 45.01**

New jurisdiction has been conferred on the Court by the *Building and Construction Industry (Improving Productivity) Act 2016* and the *Fair Work Registered Organisations Act 2009* ('these Acts'). The amendment incorporates these Acts as falling within the definition of proceedings which fall under Part 45 being proceedings in the Fair Work Division of the Court.

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

This is a consequential amendment to the heading in light of these Acts falling within the scope of Part 45.

**[33] At the end of rule 45.02**

This is a consequential amendment to the expressions used in Part 45 when reference is made to these Acts.

**[34] Subrules 45.03(1) and (2)**

The amendment clarifies that Part 45 applies to proceedings under these Acts.

**[35] After Division 45.3**

This amendment introduces a new Division 45.3A – Contraventions of the Registered Organisations Act. New rule 45.09A sets out the requirements in respect of Applications which fall under this Division.

**[36] Division 45.4A**

**[37] Rule 45.13B (heading)**

These consequential amendments to Division 45.4A clarify that the Division applies to not only Fair Work Act proceedings but also proceedings under the Registered Organisations Act.

**[38] At the end of Part 45**

This amendment introduces a new Division 45.5 – Proceedings under the Building and Construction Industry Act. New rule 45.14 sets out the requirements in respect of Applications which fall under the Division.

**[39] Part 2 of Schedule 3 (table item 18, column headed "Provision")**

The amendment removes a reference to Division 34.2 from the Schedule as Division 34.2 of the Federal Court Rules was repealed upon commencement of the *Federal Court (Criminal Proceedings) Rules 2016*.

**[40] Dictionary**

A definition of 'prescribed property' has been included in the dictionary to clarify that in respect of family law and child support proceedings, the term has the same meaning as in the Family Law Rules.

**Schedule 2 – Amendments commencing 3 months after registration**

**[1] Subrule 4.03(3)**

The amendment extends the time a response must be filed and served from 14 to 28 days of service of the application to which it relates.

This amendment commences 3 months after registration to ensure parties and practitioners have time to prepare for the change to the timeline.

**[2] After Chapter 8**

This amendment incorporates transitional provisions to clarify that the amendment to rule 4.03 applies in relation to applications made after the commencement of that Schedule.