**EXPLANATORY STATEMENT**

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

**Federal Court Amendment (Court Administration and Other Measures) Rules 2019**

**Authority for Federal Court Rules**

Section 59 of the *Federal Court of Australia Act 1976* permits the Judges of the 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 in Registries of the Court. They 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 subsection 59(4) of the Federal Court of Australia Act, the *Legislation Act 2003* (other than sections 8, 9, 10 and 16 and Part 4 of Chapter 3 of that Act) applies in relation to Rules of Court made by the Court under the Federal Court of Australia Actor another Act:

1. as if a reference to a legislative instrument (other than in subparagraph 14(1)(a)(ii) and subsection 14(3) of the Legislation Act) was a reference to a rule of court; and
2. as if a reference to a rule-maker were a reference to the Chief Justice acting on behalf of the Judges of the Court; and
3. subject to such further modifications or adaptations as are provided for in regulations made under section 59A of the Federal Court of Australia Act.

**Background to the Federal Court Rules 2011**

The *Federal Court Rules 2011* (**FCR 2011**) came into operation on 1 August 2011 and are reviewed regularly.

**Outline of Amendments**

The Judges have agreed to amend the FCR 2011 by:

1. updating references to the Court’s Chief Executive Officer and Principal Registrar and other Court Registrars consequential to changes in the titles of these offices made by the *Courts Administration Legislation Act 2016;*
2. updating references to the Registrar of the Administrative Appeals Tribunal consequential to changes made by the *Tribunals Amalgamation Act 2015;*
3. updating the note to rule 2.32(5) consequential to the making of the *Federal Court and Federal Circuit Court Regulation 2012* which repealed and replaced the former regulations prescribing fees for proceedings in the Court;
4. amending rules 8.05 and 8.06 consistent with the implementation in the Court of the National Court Framework for the more effective, orderly and expeditious discharge of the business of the Court;
5. amending rule 8.07 to clarify the appropriate practice for changing the return date of an application which has been filed by electronic communication;
6. amending rule 15.17 to include requirements for the amendment of a notice of cross-claim which has been filed by electronic communication equivalent to those for an originating application which has been similarly filed;
7. amending Division 33.3, consequential to changes made by the *Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Act 2018,* in replacing the Superannuation Complaints Tribunal with the Australian Financial Complaints Authority;
8. amending rules 34.03, 34.04 and 34.05 consequential to the renumbering of various sections referred to in those rules of the *Fair Work Act 2009;*
9. amending rule 36.03 to extend the time for filing and serving a notice of appeal to 28 days to standardise this with other superior courts in Australia;
10. correcting and clarifying the operation of rules 40.43 and 40.44 and item 15 of Schedule 3 in regard to short form bills of cost in migration appeals; and
11. increasing the rates of costs in Schedule 3 for work done and services provided by lawyers to give effect to recommendations made in the Seventh, Eighth, Ninth, Tenth and Eleventh Reports of the Joint Costs Advisory Committee.

**Consultation**

The Court consults regularly with the legal profession, both nationally and locally, about practice and procedure generally and in its different practice areas. Most recently, the focus of that consultation has included issues of practice and procedure flowing from the operation of the electronic court file and the implementation of the National Court Framework. The latter included extensive consultation on the Practice Notes issued by the Chief Justice on behalf of the Judges of the Court, which provide information to litigants and their legal representatives on particular aspects of the Court's practice and procedure, relevant under the National Court Framework.

The Federal Court consulted with the Federal Court Liaison Committee of the Law Council of Australia in relation to these amendment rules.

As the amendment rules involve only technical changes, primarily consequential to structural reforms which have been the subject of community consultation, further consultation is unnecessary.

**Human Rights Scrutiny**

Subsection 8(8) of the *Legislation Act 2003* provides, as relevant, that Rules of Court made for the Federal 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.

**Explanation and Commencement of the Rules**

Details of the Rules are in Attachment 1.

All of the amendments will commence on the day after the Rules are registered on the Federal Register of Legislation (FRoL).

**ATTACHMENT 1**

**Federal Court Amendment (Court Administration and Other Measures) Rules 2019**

**RULE 1 Name of Rules**

This rule provides that the Rules are to be cited as the *Federal Court Amendment (Court Administration and Other Measures) Rules 2019*.

**RULE 2 Commencement**

This rule provides that the Rules commence on the day after they are registered.

**RULE 3 Authority**

This rule notes that the Rules are made under the *Federal Court of Australia Act 1976* (the Act).

**RULE 4 Schedules(s)**

This rule provided that each instrument specified in a Schedule to the Rules is amended or repealed as set out in the applicable items in the Schedule concerned, and that any other item in a Schedule to the Rule has effect according to its terms.

**SCHEDULE 1 - Amendments Relating to the *Courts Administration Legislation Amendment Act 2016***

[1] Overview

The *Courts Administration Legislation Amendment Act 2016* amended a number of Acts, including the *Federal Court of Australia Act 1976,* to bring the Federal Court of Australia (Federal Court), Family Court of Australia and the Federal Circuit Court of Australia into a single administrative entity and for the three courts to share corporate services.

The amendments made to the Federal Court of Australia Act included retitling the office of the “Registrar” of the Federal Court to “Chief Executive Officer and Principal Registrar”. The amendments also made consequential changes to the titles of other Registrars of the Federal Court.

The amendments made in this Schedule update the references throughout the FCR 2011 to the Court’s Chief Executive Officer and Principal Registrar and other Registrars of the Court consequential to the changes in the titles of the relevant offices.

[2] Items 1 to 119, 121 and 123 to 124]

The amendments update titles in headings, rules, subrules, paragraphs and notes in the FCR 2011, which are identified in each item in the Schedule, as appropriate, consequential to the changes referred to in the overview above.

[3] Item 120 – Schedule 1 to FCR 2011 (Dictionary)

For the assistance of court users, a new definition of “Chief Executive Officer” is inserted into the Dictionary to the FCR 2011 (Schedule 1) referring to the definition of that term being set out in section 4 of the Federal Court of Australia Act.

[4] Item 122 – Definition of “Registrar” in Schedule 1 to FCR 2011 (Dictionary)

The existing definition of “Registrar” in the Dictionary to the FCR 2011 (Schedule 1) is also updated, appropriately, consequential to the changes referred to in the overview above.

**SCHEDULE 2 - Amendments Relating to Accompanying Documents for Originating Applications**

[5] Overview

A proceeding is started in the Federal Court by filing an originating application and other documents that are specified in the FCR 2011. Generally, this is either a statement of claim or an affidavit (Part 8 of the FCR 2011) but in some special classes of proceedings this may be, or include, other documents (Chapter 3 of the FCR 2011).

Following a comprehensive review and extensive internal and external consultation, the Court adopted a National Court Framework to foster a consistent national practice; make best use of its specialised judicial and registrar skills; and for the effective, orderly and expeditions discharge of the business of the Court. Under this framework, the work of the Court is managed in national practice areas and (in some of these) sub-areas. Information on the principles that are adopted under this framework and the practices applied generally, in individual practice areas (or sub-areas) and for some specific procedures (for example expert evidence or class actions) is provided in Practice Notes issued by the Chief Justice.

The National Court Framework and the Practice Notes that have been issued in support of it encourage parties to proceedings in the Court to adopt, where appropriate, an expedited or truncated hearing process and a tailored or concise pleading process. The Court’s focus, under the framework, is to ensure that the most appropriate and efficient mechanisms are adopted for case management in all proceedings, taking into account the nature of each case and the needs of the parties.

Consistent with the requirements for the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible, set out in sections 37M and 37N of the Federal Court of Australia Act (the overarching purpose of civil practice and procedure), the National Court Framework also encourages parties to co-operate with the Court and amongst themselves. The framework, in particular, encourages parties to identify, at the earliest possible time, the real issues in dispute and the best way to deal with these and run their cases in conformity with that overarching purpose.

Consequently, changes to the FCR 2011 allow procedural flexibility in starting a proceeding by filing tailored pleading material as an alternative to a statement of claim or an affidavit where this is permitted in a Practice Note and appropriate. The changes also require that the initiating documents be served as soon as possible after commencement.

[6] Items 1, 3 and 4 – Paragraphs 5.21(b) and 5.23(2)(c)

Rules 5.21 and 5.23 deal with default. Rule 5.21 allows a party to seek an order striking out a proceeding or a pleading or to have judgment, if another party is in default and the Court has ordered that that party remedy that default within a specified time. Rule 5.23 allows, amongst other things, an applicant to seek judgment against a defaulting respondent if the proceedings was started with a statement of claim.

These amendments are consequential to the amendments discussed in [8] below and extend references to a statement of claim in the relevant paragraphs to include an alternative pleading process if a Practice Note requires or permits the use of such a document.

[7] Item 2 – Paragraph 5.21(c)

This amendment, consistent with the need for procedural flexibility discussed in the outline above, removes the reference in the paragraph to “the respondent’s defence” and substitutes “a pleading of the respondent”.

[8] Item 5 – Rule 8.05

Rule 8.05 requires that an originating application filed to start a proceeding under rule 8.01 must, if the relief sought by the Applicant includes damages, be accompanied by a statement of claim or, if the relief sought does not include damages, either a statement of claim or an affidavit.

The existing rule and heading is repealed and replaced with a new rule and heading. The new heading refers only to “Accompanying document for originating application”. The new rule provides, first, that an originating application seeking relief that includes damages must be accompanied by:

* an alternative pleading process if a Practice Note requires this;
* either a statement of claim or an alternative pleading process if a Practice Note permits that an alternative pleading process may be used; or
* otherwise a statement of claim.

Second, the new rule provides that an originating application which does not include damages must be accompanied by:

* an alternative pleading process if a Practice Note requires this;
* a statement of claim, an affidavit or an alternative pleading process if a Practice Note permits that an alternative pleading process may be used; or
* otherwise a statement of claim or an affidavit.

The rule provides, next, that any statement of claim must be in Form 17 and that an affidavit in support of an originating application must state the material facts relied upon necessary to give the respondent fair notice of the case to be made against the respondent at trial.

Finally the rule makes it clear that it is subject to other rules of the Court.

Practice Notes are issued to provide information to parties in proceedings in the Court, and their lawyers, about particular aspects of the Court's practice and procedure. Practice Notes are issued by the Chief Justice on the advice of the Judges of the Court under the Court's implied or inherent power to control its own processes. In general, Practice Notes are issued to:

* complement particular legislative provisions or rules of court;
* set out procedures for particular types of proceedings; and
* notify parties and their lawyers of particular matters which may require their attention.

Practice Notes assist users and their lawyers in understanding case management principles applied in the Court both generally and in specific types of cases. In particular, these aim to ensure that case management is not process-driven or prescriptive, but flexible - with parties and their lawyers being encouraged and expected to take a common-sense and co-operative approach to litigation to reduce its time and cost. The case specific principles can allow for expedited or truncated hearing processes and tailored or concise pleading and other processes, such as tailored discovery and evidence procedures.

Some Practice Notes apply to all or many cases generally and provide guidance on administrative matters or set out particular arrangements or information concerning key procedural or practice areas, such as appeals and related applications; class actions; expert evidence; survey evidence; costs; subpoenas; and accessing Court documents.

[9] Item 6 – Rule 8.06

Rule 8.06 requires that the applicant in a proceeding serve the originating documents on each respondent at least 5 days before the return date of the application.

Consistent with the overarching purpose of civil practice and procedure referred to in [5] above, Practice Notes issued by the Chief Justice clarify that the Court expects that parties to a proceeding co-operate with the Court and amongst themselves in achieving that overarching purpose and, in particular, in identifying the real issues in dispute early and in dealing with those issues effectively. These also clarify that, at the return date of the application, the parties or their legal representatives will discuss issue identification. Service of the originating documents at the earliest possible time is encouraged to assist preparation.

The existing rule is repealed and replaced with a rule requiring that service be effected as soon as practicable and at least 5 days before the return date of the application. A note clarifies that service may be effected immediately after filing but otherwise should be as soon as possible to provide time for any steps required to be taken under a Practice Note to be completed before the return date.

[10] Item 7 – Paragraph 15.06(1)(a)

Rule 15.06 deals with the documents which a notice of cross-claim must be accompanied by in different circumstances. Consequential to the amendments discussed in [8] above, the amendment provides that if the originating application was accompanied by a statement of claim or an alternative pleading process the notice of cross-claim must be accompanied by a statement of cross-claim.

[11] Item 8 – Before Rule 16.01

This amendment is consequential to the amendments discussed in [8] above and [17] below.

A new rule 16.01A and heading are inserted dealing with the application of Division 16.1. The new rule provides that, subject to new rule 16.13 discussed at [13] below, Division 16.1 (which deals with pleadings generally) does not apply to a pleading that is an alternative accompanying document referred to in rule 8.05.

[12] Items 9 and 10 – Paragraph 16.01(c) and at the end of that paragraph

Rule 16.01 provides that a pleading must state the name of the person who prepared it and, if that person is a lawyer, include a certificate signed by that lawyer that any factual and legal material available to the lawyer provides a proper basis for each allegation, denial and non-admission in the pleading.

These amendments are consequential to the amendment discussed in [8] above and the amendment discussed in [17] below to extend the definition of “pleading” to include an alternative pleading process. As a result of these amendments, a lawyer’s certificate on a pleading other than an alternative pleading process must be as currently required but, for an alternative accompanying document, the certificate is to be that any factual and legal material available to the lawyer provides a proper basis for the matters set out in the pleading.

[13] Item 11 – at the end of Division 16.1 (before the note)

This amendment is consequential to the amendments discussed in [8], [11] and [12] above.

Although an alternative pleading process is to be a pleading for the purposes of the FCR 2011 (see [17] below) the requirements for its content and similar matters are set out in Practice Notes rather than drawn from Division 16.1. This is made clear in new subrule 16.13(2).

In addition, subrule 16.13(1) clarifies that the only requirements of Division 16.1 that apply to an alternative accompanying document referred to in rule 8.05 are paragraphs 16.01(a), (b) and (d) and subrule 16.02(2).

As explained in [8] above, Practice Notes are issued to provide information to parties in proceedings in the Court, and their lawyers, about particular aspects of the Court's practice and procedure. Practice Notes are issued by the Chief Justice on the advice of the Judges of the Court under the Court's implied or inherent power to control its own processes. In general, Practice Notes are issued to:

* complement particular legislative provisions or rules of court;
* set out procedures for particular types of proceedings; and
* notify parties and their lawyers of particular matters which may require their attention.

Practice Notes assist users and their lawyers in understanding case management principles applied in the Court both generally and in specific types of cases. In particular, these aim to ensure that case management is not process-driven or prescriptive, but flexible - with parties and their lawyers being encouraged and expected to take a common-sense and co-operative approach to litigation to reduce its time and cost. The case specific principles can allow for expedited or truncated hearing processes and tailored or concise pleading and other processes, such as tailored discovery and evidence procedures.

Some Practice Notes apply to all or many cases generally and provide guidance on administrative matters or set out particular arrangements or information concerning key procedural or practice areas, such as appeals and related applications; class actions; expert evidence; survey evidence; costs; subpoenas; and accessing Court documents.

[14] Item 12 – Division 16.1 (note at the end of the Division)

For the assistance of Court users, the FCR 2011 includes, at the end of Divisions, notations indicating provisions which have been left blank.

In view of the expansion of Division 16.1 by the inclusion of rule 16.13, this amendment omits the existing notation at the end of the Division and substitutes a new notation indicating that rules 16.14 -16.20 are left blank.

[15] Item 13 – Before Rule 16.41

This amendment is consequential to the amendments discussed in [8] above and [16] below.

A new rule 16.41A and heading are inserted dealing with the application of Division 16.4. The new rule provides that the Division (which deals with particulars in pleadings) does not apply to a pleading that is an alternative accompanying document referred to in rule 8.05. Although an alternative pleading process is to be a pleading for the purposes of the rules (see [17] below), the requirements for its content and similar are set out in Practice Notes rather than drawn from Division 16.4.

[16] Items 14 to 21 – Subrules 34.42 (1), (2) and (3), Rules 34.43 and 34.44 and Subrules 34.45 (1), (2) and (3)

Rules 34.42 to 34.44 deal with applications under the *Patents Act 1990.*

These amendments are consequential to the amendments discussed in [8] above and extend the operation of each relevant rule and subrule to include an alternative pleading process if a Practice Note permits or requires this.

[17] Item 22 - Definition of “Pleading” in Schedule 1 to FCR 2011 (Dictionary)

This amendment is consequential to the amendments discussed in [8] above.

The definition of “pleading” set out in the Dictionary to the FCR 2011 (Schedule 1) is expanded to include an alternative accompanying document referred to in rule 8.05. As noted above in [11], [12], [13] and [15], this is subject to limitations in other rules of the Court.

**SCHEDULE 3 - Other amendments**

[18] Item 1 – Subrule 2.32(5) (note 1)

The note to the subrule corrects the reference to the current Regulation which prescribes filing and other fees payable in the Court.

[19] Item 2 – Subrule 8.07(1) and (2)

Subrules 8.07 (1) and (2) allow a party to apply to a Registrar for a change of the return date of an application in appropriate circumstances and, if granted, for the relevant party to endorse the changed date on the copy of the application to be served.

The existing subrules are repealed and replaced with subrules which, in addition to the existing arrangements, permit a request for a change of the return date to be made by sending an amended application by electronic communication to a Registry for filing. If granted a Registrar will attach a notice of filing and hearing as the first page of the amended application which will show the changed return date.

[20] Items 3, 4 and 21 – Subrules 15.17(1) and (2) and Part 3.7 of Schedule 2 (table item 148, column headed “Description (for information only)”)

Rule 15.17 sets out the procedure which must be followed in amending a notice of cross-claim. Subrule (1) provides that all required alterations must be made on the notice of cross-claim on the Court file along with a notation of the date when those amendments were made and the date of the order permitting the amendment. Subrule (2) provides that, if the amendments are so numerous or lengthy to make them difficult to read, the cross-claimant must file an amended notice of cross-claim that incorporates and distinguishes the amendments and is marked with the details of the date of amendment and date of the relevant order as required by subrule 15.17(1).

The amendment to subrule 15.17(1) inserts, after the words “amend a”, the words “notice of” to make it clear that the document to be amended is the notice of cross-claim that was filed in the proceeding.

The amendment to subrule 15.17(2) inserts, after the word and punctuation “read,”, the words and punctuation “or if the notice of cross-claim was lodged by electronic communication,” to make it clear that in all circumstances where the notice of cross-claim to be amended was electronically filed, it can be amended only through the filing of an amended notice of cross-claim.

Schedule 2 of the FCR 2011 sets out powers which may be exercised by a Registrar, including powers under provisions of the FCR 2011. Currently this includes, at table item 148 in Part 3.7 of that Schedule, the power under rule 15.15 to make an order, as described in that item, in relation to an amendment to a cross-claim. Consistent with the amendments to rule 15.17 above, the description in item 148 is amended to refer to an amendment to a notice of cross-claim.

[21] Items 5 to 7 – Rule 33.11 (definition of “Registrar of the Tribunal”), Paragraph 33.18(2)(b) and Rule 33.18 (note 2)

These amendments are consequential to changes made to the *Administrative Appeals Tribunal Act 1975* (AAT Act) by the *Tribunals Amalgamation Act 2015.*

The existing definition of “Registrar of the Tribunal” in rule 33.11 is replaced with a new definition. That definition clarifies that, for the purpose of Division 33.2 of the FCR 2011, the Registrar of the Administrative Appeals Tribunal (AAT) includes the officers of the AAT appointed under section 24PA of the AAT Act as now in force, persons to whom powers or functions have been delegated under subsection 10A(3) of that Act and a person who is authorised under section 59B of that Act to be an authorised officer for the purposes of any provision of the AAT Act or any other enactment.

Paragraph 33.18(2)(b) is amended to clarify that the list of documents which the Registrar of the Tribunal must send to the Court following a notice of appeal from a decision of the AAT being filed, includes any documents in relation to which the AAT made an order under subsections 35 (3) and (4) of the AAT Act rather than (as formerly) the documents about which the AAT made an order under subsection 35(2) as previously in force.

Note 2 to rule 33.18 is also amended consequently to refer to subsections 35 (3) and (4) rather than subsection 35(2).

[22] Items 8 to 12 and 20 – Division 33.3 and Schedule 1 to FCR 2011 (Dictionary)

These amendments are consequential to changes made by the Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Act.

Division 33.3 currently provides that Division 33.2 (which deals with AAT Appeals) applies to an appeal under section 46 of the *Superannuation (Resolution of Complaints) Act 1993* from determinations of the Superannuation Complaints Tribunal.

As a result of the Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Act, the Superannuation Complaints Tribunal will be replaced by the Australian Financial Complaints Authority. The Superannuation Complaints Tribunal will continue to deal with and make determinations in relation to superannuation complaints made to it up to 1 November 2018. The Australian Financial Complaints Authority started to accept superannuation complaints from that date. An appeal may be brought from a determination of the Australian Financial Complaints Authority on any such complaint to the Federal Court under section 1057 of the *Corporations Act 2001.*

For the assistance of court users, a new definition of “AFCA” is inserted into the Dictionary to the FCR 2011 (Schedule 1) clarifying that that term means the Australian Financial Complaints Authority.

The heading to Division 33.3 is amended to include a reference to the Australian Financial Complaints Authority in addition to the Superannuation Complaints Tribunal.

The heading to existing rule 33.34 is amended to include a reference to section 1057 of the Corporations Act in addition to section 46 of the Superannuation (Resolution of Complaints) Act.

Existing rule 33.34 is renumbered as subrule (1) and is amended to also refer to an appeal under section 1057 of the Corporations Act from a determination of the AFCA. A new subrule (2) is inserted to clarify that, for the purposes of the application of Division 33.2 to an appeal from the Superannuation Complaints Tribunal or the AFCA, “Tribunal” in Division 33.2 is taken to include the Superannuation Complaints Tribunal and the AFCA.

[23] Items 13 to 15 – Subrules 34.03(3), 34.04(3) and 34.05(3)

These amendments are consequential to changes made to the Fair Work Actby the *Fair Work Amendment Act 2013.*

Existing subrules 34.03(3) and 34.05(3) each require that an application to the Court filed under rule 34.03 or 34.05 respectively must be accompanied by a certificate issued by the Fair Work Commission under section 369 of the Fair Work Act that the Fair Work Commission is satisfied that all reasonable attempts to resolve the dispute have been, or are likely to be, unsuccessful. Existing rule 34.04(3) requires that an application to the Court filed under rule 34.04 must be accompanied by a certificate issued by the Fair Work Commission under section 777 of the Fair Work Act that the Fair Work Commission is satisfied that all reasonable attempts to resolve the dispute have been, or are likely to be, unsuccessful.

As a result of the *Fair Work Amendment Act 2013*, the requirements contained in former sections 369 and 777 of the Fair Work Act for the issue by the Fair Work Commission of relevant certificates were repealed and replaced by substantially identical requirements in sections 368 and 776, respectively, of that Act.

Each of subrules 34.03(3), 34.04(3) and 34.05(3) are amended to remove the references to the relevant former sections. Each retains, however, the requirement that a relevant application which is filed in the Court must be accompanied by a certificate, issued by the Fair Work Commission, under the Fair Work Act that the Fair Work Commission is satisfied that all reasonable attempts to resolve the dispute have been, or are likely to be, unsuccessful.

[24] Item 16 – Paragraph 36.03(a)

Rule 36.03 requires that, in the absence of the court appealed from having fixed a date for this purpose, any notice of appeal must be filed and served within 21 days from the date when the judgment appealed from was pronounced or the relevant order was made, or, the date on which leave to appeal was granted.

For greater consistency with the time allowed for filing a notice of appeal in other Australian superior courts, paragraph 36.03(a) is amended to extend the time to file and serve a notice of appeal in the Federal Court from 21 to 28 days from the date when the judgment appealed from was pronounced or the relevant order was made, or, the date on which leave to appeal was granted.

[25] Items 17 to 19 and 24 – Rule 40.43, Subrules 40.44 (1) to (4), At the end of Rule 40.44 and Item 15 of Schedule 3 to the FCR 2011

Rules 40.43 and 40.44 deal with short form bills of costs on a migration appeal. Schedule 3 of the FCR 2011 sets out the costs that lawyers are allowed in respect of work done and services performed in proceedings in the Court and item 15 of that Schedule sets out the amounts that can be claimed in a short form bill on a migration appeal.

A review of rules 40.43 and 40.44 and Item 15 of Schedule 3 was undertaken following concerns being raised by the Court about the effectiveness of the operation of these rules and that item (see *SZTRB v Minister for Immigration & Border Protection* [2015] FCA 336 at [28]).

Existing rule 40.43 is repealed and replaced with a new rule.

The new rule clarifies that the provision operates where there is an appeal, an application for leave to appeal and/or an application for extension of time to start an appeal from an order made by the Federal Circuit Court of Australia in respect of a migration decision (as defined in the *Migration Act 1958*).

If such an appeal or application is discontinued or dismissed before hearing and a party is entitled to costs under the FCR 2011 or obtains an order for costs, that party may claim the costs set out in item 15.1 of Schedule 3.

If such an appeal or application is discontinued or dismissed after hearing and a party is entitled to costs under the FCR 2011 or obtains an order for costs, that party may claim the costs set out in item 15.2 of Schedule 3.

If a party is entitled to claim costs under either items 15.1 or 15.2 as above and the Court has, at a separate hearing, granted leave to appeal or an extension of time to start the appeal, that party may claim the additional costs set out in item 15.3 of Schedule 3.

Subrules 40.44 (1) to (4) are also repealed and replaced by subrules (1) to (3).

The new subrules clarify that a party claiming costs under rule 40.43 must file a bill for the relevant amount or amounts set out in item 15 of Schedule 3 and that the bill does not need to include an itemised account of the work or services performed or disbursements incurred.

A certificate of taxation will be issued for the amount claimed in the bill unless, within 14 days after being served with the bill, a party interested in the bill files a notice of objection in accord with rule 40.25 (which deals with objections to costs claimed in a bill to be taxed by a Taxing Officer of the Court).

If a party claiming costs receives a notice of objection, that party must file in the Court copies of the notice of objection, an affidavit of service on the other party and an itemised account or evidence that the costs incurred by the claimant were equal to, or more than, the amount of the bill.

Notes to rule 40.44 clarify that rule 40.27 deals with taxation of costs and that “file” is defined in the Dictionary to the FCR 2011 (Schedule 1) to mean “file and serve” for the assistance of court users.

Item 15 of Schedule 3 to the FCR 2011 is also repealed and replaced. The new item sets out the amounts which can be claimed if a relevant appeal or application is discontinued or dismissed before hearing ($4,592) or is discontinued or dismissed after hearing ($7,241). It also sets out the additional amount ($2,180) which can be claimed if a party is entitled to claim an amount (as above) for discontinuance or dismissal before or after hearing and the Court had, at a separate hearing, granted leave to appeal or an extension of time to start the appeal. The item clarifies that each of the relevant amounts include both costs and disbursements.

The amounts set out in the new item that can be claimed for discontinuance or dismissal before a hearing and after a hearing are based on the amounts which could be claimed in similar circumstances under existing item 15 of Schedule 3 but adjusted according to recommendations made by the Joint Costs Advisory Committee calculated as explained in [24] below.

[26] Items 22, 23 and 25 – Schedule 3

Schedule 3 of the FCR 2011 sets out the costs that lawyers are allowed in respect of work done and services performed in proceedings in the Court.

These amendments replace, in Schedule 3, the amounts mentioned in each of subitems 1.1, 1.2, 1.3, 2.1, 2.2, 2.3, 3.2, 3.3, 10.1, 13.1, 14.1, 14.2 and 17.1 with an amount increased by 2.8% for 2014, 3 % for 2015, 1.7% for 2016, 1.9% for 2017 and 2.1% for 2018 in each case calculated cumulatively and rounded to the nearest whole dollar. That rounding calculation takes account of the rounding adjustments made to some of these items when previous similar adjustments were made.

These adjustments have been determined by adopting the recommendations, as above, made by the Joint Costs Advisory Committee (JCAC) in its Seventh (2014), Eighth (2015), Ninth (2016),Tenth (2017) and Eleventh (2018) Reports on Legal Practitioners’ Costs.

JCAC was established by the Attorney-General in 2007 following the abolition of the Federal Costs Advisory Committee (FCAC). It comprises representatives of the four federal courts: High Court of Australia, Federal Court of Australia, Family Court of Australia and Federal Circuit Court of Australia; and must include a judicial officer. It is required to inquire and make recommendations to the federal courts annually on variations in the quantum of costs contained in the rules made by the federal courts. It must inform itself having regard to previous decisions of FCAC, a formula used by FCAC based on data provided by the Australian Bureau of Statistics and written submissions from the Law Council of Australia and other interested parties.

The amended rates apply to work done or services performed on or after the date of commencement of the Rules. The repeal and replacement of item 1A to the Schedule dealing with its application clarifies this.

The rates in some of the subitems mentioned above were previously adjusted:

* with effect from 9 May 2013, having regard to the recommendation made by the JCAC in its Fifth Report on Legal Practitioners’ Costs (2012) by the *Federal Court Amendment Rules (No 1) 2013;* and
* from 1 January 2014, having regard to the recommendation made by the JCAC in its Sixth Report on Legal Practitioners’ Costs (2013) by the *Federal Court Amendment (Costs and Other Measures) Rules 2013.*

The rates set out in Schedule 3:

* as originally registered in the FRoL on 28 July 2011 continue to apply to work done or services performed from 1 August 2011 to 8 May 2013;
* as amended by the *Federal Court Amendment Rules (No 1) 2013* continue to apply to work done or services performed from 9 May 2013 to 31 December 2013; and
* as amended by the *Federal Court Amendment (Costs and Other Measures) Rules 2013* will continue to apply from 1 January 2014 until the day before the commencement of the Rules.

The repeal and replacement of the note to the Schedule heading is consequential to the amendments explained at [25] above.