

CIVIL DISPUTE RESOLUTION REGULATIONS 2021

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

under the *Civil Dispute Resolution Act 2011*.

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Civil Dispute Resolution Regulations 2021* (the Regulations) address the sunset of the *Civil Dispute Resolution Regulations 2011* on 1 October 2021, and remake the Regulations in substantially the same form.

The *Civil Dispute Resolution Act 2011* (the Act) ensures that, as far as possible, parties take ‘genuine steps’ to resolve a civil dispute before proceedings are commenced in the Federal Court of Australia or the Federal Circuit and Family Court of Australia (Division 2) (FCFC (Division 2)).

For clarity, the *Federal Circuit and Family Court of Australia Act 2021* brings the Federal Circuit Court of Australia and the Family Court of Australia under a single administrative structure, known as the Federal Circuit and Family Court of Australia. Under this structure, the Federal Circuit Court will be known as the FCFC (Division 2). This Act received Royal Assent on 1 March 2021 and will commence on 1 September 2021, prior to commencement of the proposed Regulations. For this reason the new name of the Court is used in this Explanatory Statement.

Certain proceedings in the Regulations have been identified as excluded proceedings which are not subject to the requirements of the Act. A number of proceedings are excluded under Part 4 of the Act. Section 17 of the Act provides that the Regulations may exclude proceedings having regard to, but not limited to:

- the nature of the proceedings;
- the subject matter of the proceedings;
- the Act or regulations, or provisions of an Act or regulations, under which the proceedings arise.

Section 19 of the Act provides that the Governor General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the Regulations is to ensure that three types of proceedings in the Federal Court and the FCFC (Division 2) remain excluded from the operation of the Act.

CONSULTATION

Consistent with the requirements of the *Legislation Act 2003*, the Regulations have been informed by consultation within the Attorney-General's Department and with the Treasury as the responsible portfolio departments for legislation excluded from operation of the Act in the Regulations. Further consultation occurred with key stakeholders, including the Federal Court and the FCFC (Division 2), the Law Council of Australia and the Australian Restructuring Insolvency and Turnaround Association.

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation (OBPR) has confirmed that a Regulatory Impact Statement is not required for the Regulations.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Civil Dispute Resolution Regulations 2021

This Legislative Instrument (the Regulations) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Civil Dispute Resolution Regulations 2021* (the Regulations) address the sunset of the *Civil Dispute Resolution Regulations 2011* on 1 October 2021, and remake the Regulations in substantially the same form.

The *Civil Dispute Resolution Act 2011* (the Act) requires that, as far as possible, parties take 'genuine steps' to resolve a civil dispute before proceedings are commenced in the Federal Court or the FCFC (Division 2) of Australia.

The purpose of the Regulations is to ensure that three types of proceedings in the Federal Court and the FCFC (Division 2) remain excluded from the operation of the Act.

Human rights implications

The Regulations do not engage any of the rights and freedoms recognised or declared by the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The Regulations exclude a number of proceedings from operation of the Act, as the subject matter of those proceedings is inappropriate to require parties to take ‘genuine steps’ to resolve a civil dispute before proceedings are commenced.

The Regulations do not prevent justiciable decisions from being subject to judicial review in the Federal Court or the High Court of Australia under section 39B of the *Judiciary Act 1903* or section 75(v) of the Australian Constitution, respectively. Further, it does not prevent reviews of Registrars’ decisions exercising delegated judicial power occurring under section 256 of the *Federal Circuit and Family Court of Australia Act 2021* and subsection 35A(6) of the *Federal Court of Australia Act 1976*, nor does it prevent reviews of Registrars’ decisions exercising administrative power under the *Administrative Decisions (Judicial Review) Act 1977* and section 39B of the *Judiciary Act 1903*. As such, the Regulations do not unduly affect the ability of individuals to seek review of government decision-making.

Conclusion

The Regulations are compatible with human rights as it does not raise any human rights issues.

NOTES ON SECTIONS

Section 1 - Name of Regulations

This section provides that the title of the Regulations is the *Civil Dispute Resolution Regulations 2021*.

Section 2 - Commencement

This section provides for the Regulations to commence on 1 October 2021.

Section 3 - Authority

This section provides that the *Civil Dispute Resolution Regulations 2021* is made under the *Civil Dispute Resolution Act 2011*.

Section 4 - Schedule(s)

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

Section 5 - Definitions

This section provides that, for the purposes of the Regulations, ‘Act’ means the *Civil Dispute Resolution Act 2011*.

Section 6 - Excluded proceedings

This section provides for a number of excluded proceedings for the purposes of subsection 17(1) of the Act. Excluded proceedings are not subject to operation of the Act, meaning the parties in these proceedings are not required to undertake ‘genuine steps’ to resolve a civil dispute prior to commencing proceedings in the Federal Court or the FCFC (Division 2).

Paragraph (a) – Proceedings for a sequestration order under section 43 of the Bankruptcy Act 1966, if the act of bankruptcy relied on arose under paragraph 40(1)(g) of that Act

This paragraph provides for the exclusion of bankruptcy creditors’ petitions under section 43 of the *Bankruptcy Act 1966*, which are based on an act of bankruptcy arising under paragraph 40(1)(g) of the *Bankruptcy Act 1966*. Under section 43 of the *Bankruptcy Act 1966*, a creditor can present a petition to the court to declare a debtor bankrupt if the debtor has committed an ‘act of bankruptcy’ under subsection 40(1). The most common ‘act of bankruptcy’ is a presumption of bankruptcy arising from the debtor’s failure to comply with the requirements of a bankruptcy notice under paragraph 40(1)(g) of the *Bankruptcy Act 1966*.

It is appropriate to exclude these types of proceedings because:

- there is an element of public interest in insolvent persons being declared bankrupt;
- where a statutory presumption of bankruptcy arises, the proceedings are not *inter-partes* proceedings; and
- these are usually high volume cases (usually dealt with by registrars exercising delegated judicial power).

Paragraph (b) – Proceedings for an order under section 459A of the Corporations Act 2001 to wind up a company in insolvency, if the application for the order relies on a failure by the company to comply with a statutory demand (within the meaning of that Act)

This paragraph provides for the exclusion of winding up applications under section 459A of the *Corporations Act 2001*, which are based on the failure to comply with a statutory demand. Under section 459A of the *Corporations Act 2001*, a creditor can apply for a company to be wound up in insolvency on a number of grounds. The most common ground is a failure to comply with a statutory demand.

It is appropriate to exclude these types of proceedings because:

- there is an element of public interest in insolvent companies being wound up;
- where a statutory presumption of insolvency arises, the proceedings are not *inter-partes* proceedings; and
- these are usually high volume cases (usually dealt with by registrars exercising delegated judicial power).

Paragraph (c) – Proceedings for review of a decision of a Registrar of an eligible court

This paragraph provides for the exclusion of all proceedings for reviews of Registrars' decisions (administrative and judicial). Reviews of Registrars' decisions exercising delegated judicial power occur under section 256 of the *Federal Circuit and Family Court of Australia Act 2021* and subsection 35A(6) of the *Federal Court of Australia Act 1976*. Reviews of Registrars' decisions exercising administrative power occur under the *Administrative Decisions (Judicial Review) Act 1977* and section 39B of the *Judiciary Act 1903*. It is not appropriate to seek to resolve these disputes outside of a legal proceeding.

Schedule 1 – Repeals

This schedule provides that the *Civil Dispute Resolution Regulations 2011* be wholly repealed.

The Regulations will repeal and replace the *Civil Dispute Resolution Regulations 2011*, which sunset simultaneously with the commencement of the Regulations on 1 October 2021.