

***FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA
(DIVISION 2) (FAMILY LAW) RULES 2021***

EXPLANATORY STATEMENT

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Issued by the authority of the Chief Judge of the Federal Circuit and Family Court of Australia (Division 2)

Section 8 of the *Federal Circuit and Family Court of Australia Act 2021* (‘the FCFCOA Act’) provides that, from the commencement day of the FCFCOA Act, the Family Court of Australia will be continued in existence as the Federal Circuit and Family Court of Australia (Division 1) (‘the FCFCOA (Division 1)’) and that the Federal Circuit Court of Australia will continue in existence as the Federal Circuit and Family Court of Australia (Division 2) (‘the FCFCOA (Division 2)’).

Section 217 of the FCFCOA Act provides, among other things, that the Chief Judge of the FCFCOA (Division 2) may make Rules of Court providing for, or in relation to, the practice and procedure to be followed in the FCFCOA (Division 2). The rules may also provide for all matters and things incidental to any such practice or procedure, or necessary or convenient to be prescribed for the conduct of any business of the Court.

Section 5 of the FCFCOA Act provides that one of the objects of the FCFCOA Act is to provide a framework to facilitate cooperation between the FCFCOA (Division 1) and the FCFCOA (Division 2), with the aim of ensuring common rules of court and forms, common practices and procedures, and common approaches to case management. Relatedly, section 216 provides that for the purposes of ensuring the efficient resolution of family law or child support proceedings, the Chief Judge of the FCFCOA (Division 2) must work cooperatively with the Chief Justice of the FCFCOA (Division 1) with the aim of ensuring common rules of court and forms, and common practices and procedures.

From the commencement day of the FCFCOA Act, new rules made under section 76 of the FCFCOA Act will apply in the FCFCOA (Division 1): the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (‘2021 Rules’). The 2021 Rules have the effect of harmonising the existing *Family Law Rules 2004* (‘FLR 2004’) with the existing *Federal Circuit Court Rules 2001* (‘FCCR 2001’), creating common rules of court suitable for use in family law and child support matters from the commencement of the FCFCOA Act.

The *Federal Magistrates Court Rules 2001* were made by the Judges of the Federal Magistrates Court of Australia (as the Federal Circuit Court of Australia was then called) and commenced on 18 April 2002. On 12 April 2013 the *Federal Magistrates Court Rules 2001*

were amended to the FCCR 2001. They have been regularly reviewed and amended since that date.

These new Rules, the *Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021* ('Division 2 Family Law Rules'), have now been made by the Chief Judge of the FCFCOA (Division 2), in consultation with the Judges of the FCFCOA (Division 2), to adopt the 2021 Rules as the rules of court to apply to family law and child support matters in the FCFCOA (Division 2), in place of the FCCR 2001, with effect from the commencement day of the FCFCOA Act, with minor modifications as necessary. These modifications are set out in a table in rule 2.02 of the Division 2 Family Law Rules.

The only additional provisions set out in the Division 2 Family Law Rules not included in the 2021 Rules are in relation to:

- Transfers from the FCFCOA (Division 2) to the FCFCOA (Division 1);
- The costs schedule that may be applied (noting the Courts' intention is to undertake further consultation before harmonising the scale of costs to be applied in family law and child support proceedings between the Courts); and
- Additional powers that are delegated to Judicial Registrars which are found in Chapter 4 of the FCFCOA Act or these Rules and so are not applicable to the FCFCOA (Division 1).

The 2021 Rules have also been adopted by the Chief Justice of the FCFCOA (Division 1) under section 123 of the Family Law Act as the rules of court to apply in other courts exercising jurisdiction under the Family Law Act, and will operate as the standard Rules of Court for the purposes of the Family Law Act from the commencement day of the FCFCOA Act.

Subsection 217(3) of the FCFCOA Act provides that the *Legislation Act 2003* (Cth) (other than sections 8, 9, 10, 16 and Part 4 of Chapter 3) applies to rules of court. In this application, a reference to a legislative instrument is to be read as a reference to a rule of court.

The Court has proceeded on the basis that a statement of compatibility with human rights is not required to be included in an explanatory statement to rules of court, as whilst the FCFCOA Act applies the *Legislation Act 2003* (Cth) to rules of court, it does not expressly translate a reference to a legislative instrument in legislation other than the *Legislation Act 2003* (Cth) into a reference to rules of court, such as in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

The Court notes that different views are held as to whether a statement of compatibility with human rights is formally required to be included in an explanatory statement to rules of court. However for the avoidance of doubt, a statement of compatibility with human rights is included below.

Statement of Compatibility with Human Rights

Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021

This legislative instrument 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* (Cth).

Human rights implications

This legislative instrument engages applicable human rights or freedoms, including the following:

- ***The best interests of the child:*** Article 3(1) of the *Convention on the Rights of the Child* (CRC) provides that in all actions concerning children, including by courts, the best interests of the child shall be a primary consideration. Article 7(2) of the *Convention on the Rights of Persons with Disabilities* (CRPD) provides for this right in relation to children with disabilities. Article 3(2) of the CRC requires all legislative, administrative and judicial bodies and institutions to systematically consider how children’s rights and interests are or will be affected directly or indirectly by their decisions and actions. Article 9(1) of the CRC provides that a child shall not be separated from their parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Article 12(1) of the CRC provides that a child capable of forming their own views has a right to express those views in matters affecting the child and that those views should be given due weight in accordance with the child’s age and maturity.
- ***The right to protection from exploitation, violence and abuse:*** Article 20(2) of the *International Covenant on Civil and Political Rights* (ICCPR) provides for the right to protection from exploitation, violence and abuse. Article 16(1) of the CRPD provides for the same protection in relation to persons with disabilities. Article 24(1) of the ICCPR provides for the protection of all children, without discrimination, by virtue of their status as minors. Article 19(1) of the CRC provides for the right of children to be protected from exploitation, violence and abuse, and requires States to ‘take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person’. Article 34 of the CRC additionally provides for the right of children to be protected from all forms of sexual exploitation and sexual abuse.

- ***The rights of parents and children:*** Article 5 of the CRC provides that States shall respect the responsibilities, rights and duties of parents, legal guardians or other persons legally responsible for a child to provide direction and guidance in the child's exercise of the rights recognised in the CRC. Article 18 of the CRC provides for the recognition of the principle that both parents (or legal guardians) have common responsibilities for the upbringing and development of a child.
- ***The right to respect for the family:*** Article 23 of the ICCPR provides that the family is entitled to the protection of the State and that States shall take appropriate steps to ensure the equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. Article 10(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) provides that the widest possible protection and assistance should be accorded to the family. Article 17(1) of the ICCPR provides that a person has a right not to be subjected to arbitrary or unlawful interference with their family. Article 16(1) of the CRC provides for this right in relation to children. Article 23(3) of the CRPD provides that children with disabilities have equal rights with respect to family life.
- ***The right to a fair hearing:*** Article 9(2) of the CRC provides that in proceedings involving the separation of a child from their parents in the best interests of the child, all interested parties shall be given the opportunity to participate in the proceedings and make their views known. Article 14(1) of the ICCPR provides that all persons shall be equal before the courts and that where their rights or obligations are to be determined in legal proceedings they shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Article 12(2) of the CRPD provides that persons with disabilities shall be recognised as enjoying legal capacity on an equal basis with others in all aspects of life and Article 12(3) provides that States shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

The Division 2 Family Law Rules adopt the 2021 Rules to apply in family law and child support proceedings in the Court, in order to harmonise the rules of court that apply across the federal family law and child support jurisdictions.

To that end, the considerations set out in the Statement of Compatibility with Human Rights in the Explanatory Statement to the 2021 Rules are also applicable to the Division 2 Family Law Rules. Those considerations are set out below.

The provisions in the 2021 Rules broadly replicate existing provisions in the FLR 2004 and the FCCR 2001, with some reorganisation and harmonisation to promote greater procedural efficiency and enhance access to justice for parties.

The 2021 Rules relate principally to proceedings under the Family Law Act. In proceedings in which a parenting order is sought in relation to a child, section 60CA of the Family Law Act provides that the court must regard the best interests of the child as the paramount consideration. The 2021 Rules provide mechanisms for the Court to receive information relevant to the consideration of a child's best interests, including through the Notice of Child Abuse, Family Violence or Risk, the Parenting Questionnaire and a family consultant's report. In addition, parties to parenting proceedings are generally required to comply with pre-action procedures, in which they must at all stages have regard to the best interests of the child.

The 2021 Rules broadly replicate existing provisions in the FLR 2004 and the FCCR 2001 providing for the Court and relevant child welfare authorities to be informed of allegations of child abuse, family violence or other risks to children and parties in parenting proceedings. Recent amendments to those provisions which are replicated in the 2021 Rules require the provision of risk-related information at the commencement of family law parenting proceedings through the Notice of Child Abuse, Family Violence or Risk. This form includes questions about a broad variety of risk factors, enabling the Court to better understand and respond to those risks, and protect children and vulnerable parties from violence and abuse.

The 2021 Rules additionally protect children and parties from exploitation, violence and abuse by providing for:

- exceptions to requirements for parties to comply with pre-action procedures or to attempt to settle interlocutory applications where proceedings involve allegations of, or a risk of, child abuse or family violence;
- requirements for parties to certain proceedings to file a copy of any relevant family violence order;
- a requirement for a party making an application without notice to disclose a history or allegation of child abuse or family violence;
- requirements for each party to consent parenting orders to inform the Court whether or not the party considers that the child in relation to whom the orders are sought has been, or is at risk of being, subjected to or exposed to abuse, neglect or family violence, and whether any party to the proceedings has been, or is at risk of being, subjected to family violence;
- exemptions from requirements to provide a physical address as an address for service where disclosing the address would compromise a person's safety;
- requirements for the Court to take account of the available facilities having regard to any safety concerns when considering whether to transfer a family law or child support proceeding between courts, or to another registry of the Court; and
- a process by which parties can seek to attend court events by electronic communication if they hold concerns about security, including family violence and intimidation.

The 2021 Rules provide that the parents or any other persons responsible for the care, welfare and development of a child must be parties to any application for parenting orders in relation to the child. This ensures that the rights of parents (and legal guardians) are respected and that all interested parties have an opportunity to participate in proceedings and make their views known.

Equality of access to the Court is promoted by the provision in the 2021 Rules for:

- the right of a person who has a right to be heard in a proceeding to conduct the proceeding on their own behalf or to be represented by a lawyer;
- the appointment of independent children’s lawyers to secure the independent representation of children’s interests; and
- the appointment of litigation guardians for persons who do not understand the nature or possible consequences of a proceeding or who are not capable of adequately conducting, or giving instruction for the conduct of, a proceeding.

The 2021 Rules further facilitate the conduct of fair hearings by setting out the practices and procedures to be followed in family law proceedings, such as:

- the procedures for parties to be served with court documents to ensure they receive and can respond to material the Court may take into account;
- the procedures for disclosure of documents to ensure parties have timely access to relevant material;
- the procedures governing the appointment of expert witnesses and the clarification and use of expert reports; and
- the provision for an interlocutory application to be determined in the absence of the parties without an oral hearing only if the parties consent to the application being determined in that way and the Court considers it appropriate to determine the application in that way.

The 2021 Rules thereby support and enhance the treatment of the rights listed above, as do the Division 2 Family Law Rules, through the adoption of the 2021 Rules.

Conclusion

This legislative instrument is compatible with human rights as it provides procedures which improve the Court’s capacity to make substantive decisions in the best interests of children and to protect children and vulnerable parties from violence and abuse. The legislative instrument also provides procedures which facilitate equality of access to court proceedings, participation by parents and other interested parties, and the fair and safe conduct of hearings.

1. General Outline

Part 1 – Preliminary

Part 1 sets out the name of these Rules, their commencement date and the enabling legislation under which they are made, as well as the general power to dispense with compliance with these Rules. These Rules are the *Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021*. They commence on 1 September 2021, and they are made under Chapter 4 of the *Federal Circuit and Family Court of Australia Act 2021*, specifically section 217.

Part 2 – Application of the Federal Circuit and Family Court of Australia (Family Law) Rules 2021

Part 2 applies the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* ('2021 Rules') to the FCFCOA (Division 2) as modified by the Division 2 Family Law Rules. The modifications made are set out in table 2.1 in rule 2.02 of the Division 2 Family Law Rules.

Part 3 – Transferring proceedings

Part 3 sets out the procedure and considerations for transferring a family law or child support proceeding from the FCFCOA (Division 2) to the FCFCOA (Division 1).

Part 4 – Costs

Part 4 provides that in applying Chapter 12 of the 2021 Rules, the Court may apply the scale of costs in Schedule 3 to the 2021 Rules, or the scale of costs in Schedule 1 to the Division 2 Family Law Rules.

Part 5 – Delegation

Part 5 expands the table of powers delegated to Senior Judicial Registrars and Judicial Registrars in Schedule 4 to the 2021 Rules to include the items in the table in Schedule 2 to the Division 2 Family Law Rules.

Schedule 1 – Scale of costs in family law and child support proceedings

Schedule 1 is the scale of costs that may be applied in family law and child support proceedings in the FCFCOA (Division 2).

Schedule 2 – Additional delegated powers

Schedule 2 includes the table of additional powers that are delegated to Senior Judicial Registrars and Judicial Registrars. These powers are found in the FCFCOA Act and the Division 2 Family Law Rules.

2. Consultation

The *Legislation Act 2003* (Cth) provides for certain consultation obligations when Rules are made.

The Family Court and Federal Circuit Court undertook extensive internal and external consultation on the 2021 Rules. Internally, consultation took place with Judges of both Courts, Registrars, and other staff. The Courts also consulted on the 2021 Rules with approximately 55 external stakeholders including the Family Law Section of the Law Council of Australia, the Commonwealth Attorney-General's Department, State and Territory Law Societies and Bar Associations, Legal Aid commissions and child welfare agencies, women's and men's legal groups, other Government departments and the Family Court of Western Australia, amongst other stakeholders. The consultation took the form of an opportunity to make submissions on an exposure draft of the 2021 Rules.

Consultation with the same stakeholders also occurred in relation to exposure drafts of various practice directions referred to in, and intended to operate alongside, the 2021 Rules.

As the effect of the Division 2 Family Law Rules is to adopt the 2021 Rules, no separate consultation was undertaken on the rules that adopt the 2021 Rules. Consultation was undertaken with the stakeholders set out above on Part 3 of the Division 2 Family Law Rules in relation to transfer. Consultation was undertaken on the scale of costs set out in Schedule 1 with the Law Council of Australia.

3. Details of rules

Part 1 – Preliminary

Rule 1.01 Name

Rule 1.01 states that these Rules are the *Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021*.

Rule 1.02 Commencement

Rule 1.02 states that these Rules commence on 1 September 2021. From that date, all new proceedings commenced in the FCFCOA, and any existing proceeding in the FCFCOA, will be conducted in accordance with the Division 2 Family Law Rules and therefore the 2021 Rules. Judicial officers have the discretion to order otherwise, for example if this would create an unjust or unfair result in a given proceeding.

Rule 1.03 Authority

Rule 1.03 sets out the enabling legislation for the Division 2 Family Law Rules, which is Chapter 4 of the *Federal Circuit and Family Court of Australia Act 2021*.

Rule 1.04 Court may make orders or dispense with these Rules

This rule permits the court, in the interests of justice, to dispense with compliance, or full compliance, with any of the Rules at any time. It also states that a direction or order of the court prevails in the event of any inconsistency with the Rules.

Part 2 – Application of the Federal Circuit and Family Court of Australia (Family Law) Rules 2021

Rule 2.01 Application of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*

Rule 2.01 applies the 2021 Rules (other than Rule 1.01 to 1.03) to the exercise of Division 2’s jurisdiction in family law or child support proceedings as if the 2021 Rules were provisions of the Division 2 Family Law Rules, subject to the modifications set out in rule 2.02. This has the effect of harmonising the rules of court for family law and child support proceedings across Division 1 and Division 2, notwithstanding that they remain separate courts and have separate rule making powers.

Rule 2.02 Modifications of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021*

Rule 2.02 modifies certain provisions of the 2021 Rules in their application to the FCFCOA (Division 2). This is effected by a modification table that omits certain words or phrases from listed provisions of the 2021 Rules, and substitutes different words or phrases. The modifications are principally references to points of difference between the two Divisions, for example substituting ‘Division 2’ for ‘Division 1’, ‘Chief Judge’ for ‘Chief Justice’ and the sections in Chapter 3 of the FCFCOA Act (which only applies to Division 1) with their equivalent in Chapter 4 of the FCFCOA Act (which only applies to Division 2).

One rule that is modified in its effect is rule 5.08 of the 2021 Rules in relation to the limit on the length of affidavits that may be relied on in support of or in opposition to an application for interlocutory orders. In Division 1, the limit is 25 pages in length and contain no more than 10 annexures. In Division 2, the limit is 10 pages in length and contain no more than 5 annexures. For Division 2, this reflects the existing limits for the Federal Circuit Court set out in Practice Direction 2 of 2017 – *Interim Family Law Proceedings*.

Part 3 – Transferring proceedings

Rule 3.01 Transfer to Federal Circuit and Family Court (Division 1)

Rule 3.01 sets out how the Court may transfer a proceeding to the FCFCOA (Division 1) and the matters the Court must have regard to in addition to those set out in subsection 149(3) of the FCFCOA Act. This rule is the equivalent of rule 9.02 in the 2021 Rules.

These transfers may occur on the application of a party or on the Court’s own motion. Unless the Court otherwise orders, any application must be made in a response or in an Application in a Proceeding, in either case supported by an affidavit.

In deciding whether to transfer the proceeding, the Court must consider the factors set out in subrule (3) in addition to the factors listed in FCFCOA Act subsection 149(3).

The list of factors in subrule (3) is an updated, harmonised list based on both FCCR 2001 subrule 8.02(4) and FLR 2004 subrule 11.18(1).

Rule 3.02 Proceeding transferred to Federal Circuit and Family Court (Division 1) – transfer of documents

This rule provides for the transfer to the FCFCOA (Division 1) of all filed documents and court orders, if a proceeding is transferred. A copy of all orders made in the proceeding is to be kept in the FCFCOA (Division 2). This rule is an adapted version of FCCR 2001 rule 8.03.

Part 4 – Costs

Rule 4.01 Costs in family law and child support matters

Rule 4.01 gives discretion as to the scale of costs the FCFCOA (Division 2) may apply in relation to family law or child support proceedings in applying Chapter 12 of the 2021 Rules. Schedule 3 to the 2021 Rules is the scale of costs from the FLR 2004 with amounts updated, and Schedule 1 to the Division 2 Family Law Rules is the scale of costs from the FCCR 2001 with amounts updated. The Court intends to undertake further consultation to develop a single scale of costs in the near future.

Part 5 – Delegation

Rule 5.01 Delegation of additional powers to Senior Judicial Registrars and Judicial Registrars

Rule 5.01 expands the table of powers delegated to Senior Judicial Registrars and Judicial Registrars in Schedule 4 to the 2021 Rules to include the items in the table in Schedule 2 to the Division 2 Family Law Rules. These are powers that are found either in Chapter 4 of the FCFCOA Act or these Rules, and so cannot be delegated under the 2021 Rules.

Schedule 1 – Scale of costs in family law and child support proceedings

The scale of costs set out in this schedule is based on the scale in FCCR 2001. The amounts have been updated.

Schedule 2 – Additional delegated powers

Schedule 2 contains the additional powers delegated to Senior Judicial Registrars and Judicial Registrars that are specific to the FCFCOA (Division 2).