

***FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2) (FAMILY  
LAW) AMENDMENT (COSTS) RULES 2022***

**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 was 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 was continued 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), as well as for all matters and things incidental to any such practice or procedure, or that are necessary or convenient to be prescribed for the conduct of any business of the FCFCOA (Division 2).

The Chief Judge made the *Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021* (‘the Rules’) on 26 August 2021. These amending rules, the *Federal Circuit and Family Court of Australia (Division 2) (Family Law) Amendment (Costs) Rules 2022* (‘the amendments’), have now been made to amend the Rules, specifically the scale of costs in Schedule 1 to the Rules.

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 in the *Legislation Act 2003* (Cth) is to be read as a reference to a rule of court and a reference to a rule-maker as a reference to the Chief Judge.

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. 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) Amendment (Costs) Rules 2022**

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).

The instrument only updates the figures in the scale of costs in Schedule 1 to the Rules.

Article 14(1) of the *International Covenant on Civil and Political Rights* (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. The award of costs to a party who has been successful before the Court in accordance with the relevant law is an important aspect of ensuring equality before the courts and a fair process for all parties. The ability for a successful party to recoup legal costs ensures they are not prevented from seeking a remedy through the Court, which in turn enhances access to justice.

This instrument otherwise has limited human rights implications and 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).

#### **1. General Outline**

Schedule 1 contains the amendment to the Rules, which is the repeal of Schedule 1 to the Rules and its replacement with a new Schedule which contains updated amounts for each Item in the table that comprises the scale of costs in family law and child support matters.

#### **2. Consultation**

Consultation was undertaken during the process of updating the amounts for each Item in the scale of costs through the Joint Costs Advisory Committee, which functions to review and recommend variations to the quantum of costs contained in the rules made by the federal courts. The Joint Costs Advisory Committee comprises representatives of the High Court of Australia, Federal Court of Australia, FCFCOA (Division 1) and FCFCOA (Division 2). The Committee sought written submissions from the Commonwealth Attorney-General's Department, the Law Council of Australia, the National Association of Community Legal Centres and National Legal Aid inviting each of them, and their respective constituent bodies or State/Territory counterparts, to make submissions to the review. Further, through publication on the Court website, other interested persons and organisations were invited to

submit in writing any views on changes to the scales of costs they wished to have considered by the Joint Costs Advisory Committee.

The Committee then considered the submissions received and the FCAC formula to recommend an increase of 4.0% to the scale of costs for the FY2021-22.

This amendment also implements the 2.5% increase that was recommended by the Committee in September 2021 but not yet implemented. The amounts for each Item in the table that comprises the scale of costs in family law and child support matters therefore reflects the cumulative 2.5% increase and the 4.0% increase recommended by the Committee over the past two financial years.

### **3. Details of rules**

Item 1 states the name of the amendments.

Item 2 indicates the commencement of the amendments, which is 1 January 2023.

Item 3 indicates that the amendments are made under Chapter 4 of the *Federal Circuit and Family Court of Australia Act 2021*.

Item 4 states that each instrument that is specified in a Schedule to the amendments is amended or repealed as set out in the applicable items in the Schedule.

#### **Schedule 1 – amendments**

Item 1 in Schedule 1 repeals Schedule 1 – Scale of costs in family law and child support matters to the Rules, and substitutes a new Schedule, including an Application provision and a table containing the new scale of costs in family law and child support matters.