

***FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)
(GENERAL FEDERAL LAW) AMENDMENT (2022 MEASURES NO. 1) 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 217 of the *Federal Circuit and Family Court of Australia Act 2021* (Cth) (‘the Act’) provides that the Chief Judge of the Federal Circuit and Family Court of Australia (Division 2) (‘FCFCOA (Division 2)’) may make rules of court providing for 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. The Chief Judge made the *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (‘the Rules’) on 26 August 2021. These amending rules, the *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Amendment (2022 Measures No. 1) Rules 2022* (‘the amendments’), have now been made by the Chief Judge to amend the Rules.

Subsection 217(3) of the 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.

Upon the commencement of the *Federal Circuit and Family Court of Australia Act 2021* (Cth) and the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021* (Cth) on 1 September 2021, amendments were made to the *Federal Court of Australia Act 1976* (Cth) in relation to the transfer of proceedings from the FCFCOA (Division 2) to the Federal Court of Australia. One of those amendments was the addition of section 32AD of the *Federal Court of Australia Act 1976* (Cth) which requires the Federal Court of Australia to confirm the transfer of a proceeding from the FCFCOA (Division 2) for the transfer to be effective. The order transferring the proceeding only takes effect on the day the order is confirmed by the Federal Court of Australia, pursuant to subsection 153(4) of the Act.

These rule amendments, and the concurrently made *Federal Court Legislation Amendment Rules 2022*, formalise the current arrangements of conferral between the Heads of Jurisdiction prior to a matter being transferred to or by either court.

These rule amendments also update the scale of costs in Schedule 2 to the Rules in line with the recommendations of the Joint Costs Advisory Committee.

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 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) (General Federal Law) Amendment (2022 Measures No. 1) 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).

Human rights implications

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

- ***Equality before courts and tribunals:*** Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR) provides for equality of all persons before courts and tribunals, and the right to a fair and public hearing before a competent, independent and impartial decision maker established by law.

These amendments aid in achieving the right to a fair and timely hearing by ensuring the streamlined transfer of proceedings from the FCFCOA (Division 2) to the Federal Court of Australia.

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.

Otherwise, as these amendments are minor and procedural only, they do not have any significant effect on human rights or freedoms.

Conclusion

This legislative instrument is therefore compatible with human rights as it does not raise any human rights issues.

1. General Outline

Schedule 1 – Amendments

Part 1 of the rule amendments clarifies rule 8.02 of the Rules, and insert new subrules (5) and (6) which require consultation between the Court and the Chief Judge, and the Chief Judge and the Chief Justice of the Federal Court of Australia or their delegate, before a transfer

order is made, noting that a failure to comply with the rule does not affect the validity of a transfer order.

Part 2 of the rule amendments repeals Schedule 2 to the Rules and replaces it with a new Schedule which contains updated amounts for each Item in the tables that comprise the scales of costs in general federal law and migration proceedings.

2. Consultation

In relation to the transfer rules, external consultation on these amendments was not considered necessary due to their limited impact for parties to proceedings, and the fact that they are administrative or internal in nature, and principally affect the arrangements for consultation between the Judges of the Court, the Chief Judge, and the Chief Justice of the Federal Court of Australia. Internal consultation was undertaken in the form of a small working group of Judges of both courts who worked together to prepare preliminary drafts of these Rules and the *Federal Court Legislation Amendment Rules 2022*.

In relation to the Costs schedule, 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 scales 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 tables that comprise the scales of costs in general federal law and migration therefore reflect the cumulative 2.5% increase and the 4.0% increase recommended by the Committee over the past two financial years.

3. Details of Amendments

Item 1 Name of Rules

The name of the rules is the *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Amendment (2022 Measures No. 1) Rules 2022*.

Item 2 Commencement

Part 1 of the Rules commences on the day after the Rules are registered, and Part 2, containing the costs schedule, commences on 1 January 2023.

Item 3 Authority

The Rules are made under Chapter 4 of the *Federal Circuit and Family Court of Australia Act 2021* (Cth).

Item 4 Schedules

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

Part 1—Transfer of proceedings

[1] Subrules 8.02(1), (2) and (3)

The amendment repeals subrules 8.02(1), (2) and (3). Subrule 8.02(1) was a restatement of subsection 153(2) of the Act, and so is unnecessary. Subrules (2) and (3) are restated paragraphs (a)-(c) of new subrule (1). This makes clear that an application to transfer a proceeding to the Federal Court must be made on or before the first court date, be included in an application or a response in accordance with the approved form, and be supported by an affidavit.

[2] At the end of rule 8.02

The amendment inserts new subrules (5) and (6) to rule 8.02.

Subrule (5) requires that before the Court makes an order transferring a proceeding to the Federal Court, the Judge must consult with the Chief Judge, and the Chief Judge must consult with the Chief Justice of the Federal Court of Australia or their delegate. This is intended to ensure that the transfer of proceedings to the Federal Court is as administratively streamlined as possible, and to ensure that the Federal Court is prepared to confirm the order transferring the proceeding upon receipt, to reduce delay and inefficiency.

Subrule (6) clarifies that a failure to comply with this rule does not affect the validity of the transfer, for example, a situation could be conceived where a matter is transferred with some urgency and consultation does not occur.

Part 2 – Costs

Item 3 in Part 2 of Schedule 1 repeals Schedule 2 to the Rules, the Costs schedule, and substitutes a new Schedule 2, including an Application provision and tables containing the new scales of costs for general federal law proceedings other than migration proceedings, and for migration proceedings, both concluded and discontinued.