

FEDERAL COURT LEGISLATION AMENDMENT RULES 2022

EXPLANATORY STATEMENT

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

Section 59(1) of the *Federal Court of Australia Act 1976* (Cth) (‘the Act’) provides that the Judges of the Court or a majority of them may make Rules of Court, not inconsistent with the Act, making provision for or in relation to the practice and procedure to be followed in the Court (including the practice and procedure to be followed in Registries of the Court) and for or in relation to 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.

The majority of Federal Court Judges made the *Federal Court Rules 2011*, the *Federal Court (Criminal Proceedings) Rules 2016*, the *Federal Court (Bankruptcy) Rules 2016* and the *Federal Court (Corporations) Rules 2000*. These amending rules, the *Federal Court Legislation Amendment Rules 2022* (‘the amendments’), have now been made by the Judges of the Federal Court to amend those Rules.

Subsection 59(4) 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 Justice acting on behalf of the Judges of the Court, subject to such further modification or adaptations as are provided for in regulations made under section 59A of the Act.

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 Court Legislation Amendment 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 between the Federal Court of Australia and the Federal Circuit and Family Court of Australia (Division 2). The amendments also reflect harmonisation consistent with recommendations from the Council of Chief Justices and improve the rules relating to examinations by a medical expert and limiting non-party access to documents until after an initial case management hearing or the hearing (whichever is the earlier). 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

The amendments provide updates to references to rules, regulations and the Federal Circuit and Family Court of Australia. They also clarify the transfer of proceedings to and from the Federal Circuit and Family Court of Australia (Division 2). The rule amendments reflect harmonisation consistent with recommendations from the Council of Chief Justices and improve the rules relating to examinations by a medical expert and limiting non-party access to documents.

2. Consultation

The Court consults regularly with the legal profession, both nationally and locally, about practice and procedure generally and in its different practice areas. The legal profession and wider community were consulted widely in respect of specific amendments, such as those relating to the increases in costs allowable for work done and services performed.

Significant consultation was undertaken with the Federal Circuit and Family Court of Australia where the rules affect the arrangements for consultation between the Judges of the Court, the Chief Justice, and the Chief Justice and Chief Judge of the Federal Circuit and Family Court of Australia (Division 1) and (Division 2) respectively.

The amendments also include rules harmonisation consistent with recommendations from the Council of Chief Justices.

In respect of other amendments, external consultation was not considered necessary due to their very limited impact for parties to proceedings and the fact that they are administrative or internal in nature.

3. Details of Amendments

Rule 1 Name of Rules

The name of the rules is the *Federal Court Legislation Amendment Rules 2022*.

Rule 2 Commencement

The whole of the Rules commence on the day after the Rules are registered.

Rule 3 Authority

The Rules are made under the *Federal Court of Australia Act 1976* (Cth).

Rule 4 Schedules

Schedule 1 amends the *Federal Court Rules 2011*.

Schedule 2 amends the *Federal Court (Criminal Proceedings) Rules 2016*.

Schedule 3 amends the *Federal Court (Bankruptcy) Rules 2016*.

Schedule 4 amends the *Federal Court (Corporations) Rules 2000*.

Schedule 1 – Amendment of the Federal Court Rules 2011

[1] Subrule 1.04 (note 1)

Updates the reference to the Bankruptcy Regulations from the *Bankruptcy Regulations 1996* to the *Bankruptcy Regulations 2021*.

[2] Subparagraphs 2.25(1)(b)(i) and (ii)

Updates the rule relating to when a document is filed based on the practice of the Court in affixing the seal of the Court.

[3] At the end of subrule 2.25(1)

Adds a note that a document that is accepted for filing is added to the Court file and refers to the definition of Court file in the Dictionary.

[4] Subrule 2.32(2)

Prevents a person who is not a party from inspecting certain documents in a proceeding until after the first directions hearing or the hearing (whichever is earlier).

[5] Subrule 2.32(5) (note 1)

Updates a reference to the *Federal Court and Federal Circuit Court Regulation 2012* to the *Federal Court and Federal Circuit and Family Court Regulations 2012*.

[6] Subrule 7.11(1) (note 1)

Removes the reference to “for a person under legal incapacity” from the reference to “interested person” as defined in the Dictionary.

[7] Subrule 7.24(1)

Repeals the subrule and substitutes in a new subrule that provides for separate forms for an originating application for discovery to ascertain the description of a respondent under rule 7.22 and an originating application for discovery from a prospective respondent under rule 7.23.

[8] Rule 8.22 (heading)

Clarifies that rule 8.22 is concerned with the date on which an amendment to substitute a party takes effect.

[9] At the end of rule 8.22

Provides that the Court may make an order as to the date on which an amendment to substitute a party takes effect.

[10] Rule 9.02

Repeals rule 9.02 and substitutes a new rule which clarifies how two or more persons may be joined as applicants or respondents in certain proceedings or by leave of the Court granted before or after an originating application is filed. The new rule also provides that the Court

may at any stage order that proceedings by or against any party or parties be conducted separately.

[11] Subrule 9.63(1) (note)

Removes the reference to “for a person under legal incapacity” from the reference to “interested person” as defined in the Dictionary.

[12] Paragraph 10.32(a)

Extends the day on which a document that is served on a person under rule 10.31 is taken to be served on that person, when sent by pre-paid post, from the fourth business day to the seventh business day after the document was sent.

[13] Division 10.4

Repeals Division 10.4 and substitutes a new Division for service of documents outside Australia which have been harmonised in accordance with the advice of the Council of Chief Justices’ Rules Harmonisation Committee.

[14] Rule 10.51

Omits “party has been given leave”, substitutes “party wants”.

[15] Rule 10.51 (note)

Repeals the note and substitutes a new note clarifying that the rule does not apply if service of a document is to be effected on a person in a country, other than Australia, that is a party to the Hague Convention and that service in a country that is a party to the Hague Convention is dealt with in Division 10.6.

[16] Rule 10.61 (definition of Hague Convention)

Repeals the definition of Hague Convention from the definitions for Division 10.6.

[17] Paragraph 13.01(1)(d)

Removes the ability of a respondent to apply for an order confirming service of an originating application outside of Australia.

[18] Subrule 13.01(1) (note)

Repeals the note after paragraph 13.01(1)(d) and substitutes a note that clarifies that rule 10.43 deals with service of originating applications outside Australia with leave.

[19] Rule 16.53

Incorporates rule 16.53 into a new subrule 16.53(1).

[20] At the end of rule 16.53

Adds new subrules setting out when a party may, or may not, apply under subrule (1) for leave to amend a pleading to add or substitute a new claim for relief, or a new foundation in law for a claim for relief.

[21] At the end of rule 16.54

Provides that the date on which an amendment of a pleading that is made under rule 16.51 may be as otherwise ordered by the Court.

[22] At the end of Part 23

Provides for the addition of Division 23.3 “Examinations by a medical expert”, including rules which provide that in certain circumstances a party may request that a relevant person submit to an examination by a specified medical expert at a specified time and place and that the Court may order a relevant person to submit to an examination by a medical expert or make any other order the Court considers appropriate in relation to the examination.

[23] Subrule 24.17(1)

Repeals subrule 24.17(1) and substitutes a new subrule that provides that an addressee need not comply with the requirements of a subpoena if conduct money has not been handed or tendered to the addressee a reasonable time before the date or time specified in the subpoena as the date or time for attendance or for production or for both.

[24] After subrule 24.17(7)

Inserts subrule 24.17(7A) which provides that an addressee that produces a document in compliance with a subpoena must declare whether the document is an original by completing the declaration within the subpoena, or the copy of the subpoena, that accompanies the document produced.

[25] Subrules 24.21(3) to (6)

Repeals subrules 24.21(3) to (6) and substitutes subrule 24.21(3) which provides that a Registrar may, on the expiry of 4 months from the conclusion of the proceeding, cause to be destroyed all the documents produced in the proceeding in compliance with a subpoena that the addressee did not declare to be original documents and which are no longer required in connection with the proceeding, including on any appeal.

[26] Divisions 27.1 and 27.2

This amendment repeals Divisions 27.1 and 27.2 and substitutes Division 27.1.

Subrule 27.01(1) provides that the Court must not make an order under subsection 32AB(1) of the Act on its own initiative transferring a proceeding from the Court to the Federal Circuit and Family Court of Australia unless the parties to the proceeding have been notified of the proposed transfer and have been given an opportunity to be heard in relation to the proposed transfer. Subrules 27.01(2) and (3) provide that prior to an order transferring the proceeding to the Federal Circuit and Family Court of Australia (Division 1) and (Division 2) respectively, the Court must consult with the Chief Justice of the Court and that the Chief Justice must consult with the Chief Justice of the Division to which the proceeding would be transferred. Subrule 27.01(4) provides that a failure to comply with this rule does not affect the validity of an order made transferring the proceeding.

Subrule 27.02(1) provides that the Court must not make an order under subsection 32AC(1) of the Act on its own initiative transferring a proceeding from the Federal Circuit and Family Court of Australia (Division 2) to the Court unless the parties to the proceeding have been notified of the proposed transfer and have been given an opportunity to be heard in relation to the proposed transfer. Subrule 27.02(2) provides that before the Court makes an order to

transfer a proceeding from the Federal Circuit and Family Court of Australia (Division 2), it must consult with the Chief Justice and that the Chief Justice must consult with the Chief Judge of the Federal Circuit and Family Court of Australia (Division 2) in respect of the proposed transfer. Subrule 27.02(3) provides that a failure to comply with this rule does not affect the validity of an order made transferring the proceeding.

Rule 27.03 provides for orders to be filed with the Federal Circuit and Family Court of Australia (Division 2) either by the party who made the application or by the applicant in a proceeding if the order was made on the Court's own initiative.

[27] Division 28.5 (after the heading)

Inserts a note that the Division contains rules that have been harmonised in accordance with the advice of the Council of Chief Justices' Rules Harmonisation Committee.

[28] Rule 28.43 (heading)

Substitutes "a proceeding" for "arbitration" in the heading to more accurately reflect that it is an application to stay the proceeding.

[29] After rule 28.44

Inserts a new rule 28.44A setting out documents that must accompany an application under article 8 of the Model Law to refer parties to arbitration.

[30] Subrule 28.45(1)

Removes relief under article 34 from this rule.

[31] After rule 28.45

Inserts a new rule 28.45A which sets out how an application under article 34 of the Model Law may be made to the Court.

[32] At the end of rule 28.46

Inserts a new subrule (6) requiring the addressee to comply with the subpoena in accordance with its terms.

[33] After rule 28.48

Inserts a new rule 24.48A which provides for an application under section 35(4) of the International Arbitration Act for leave to enforce an award to which Part IV of that Act applies to be accompanied by an affidavit stating specified information.

[34] Division 34.5A

Repeals the Division.

[35] Subrule 35.41(2)

Updates the reference to the Federal Circuit and Family Court of Australia (Division 2).

[36] Paragraph 36.01(1)(a)

Updates the reference to the Federal Circuit and Family Court of Australia (Division 2).

[37] Subrule 36.01(4) (note 4, paragraph (a))

Updates the reference to the Federal Circuit and Family Court of Australia (Division 2).

[38] Paragraph 36.02(c)

Updates the reference to the Federal Circuit and Family Court of Australia (Division 2).

[39] After paragraph 36.41(1)(e)

Adds an application to make or vary an order for costs to the list of applications that may be made by a party to be dealt with without an oral hearing.

[40] Subrule 36.41(2)

Omits “(e)”, substitutes “(ea)”.

[41] Rule 36.43

Substitutes “party” for “respondent”.

[42] Rule 39.32

Repeals the former rule and substitutes a new rule that provides that an order that has been authenticated in accordance with subrule 39.35(1) is taken to be entered on the 14th day after the day it was authenticated, unless the Court otherwise directs.

[43] Paragraph 40.43(1)(a)

Updates the reference to the Federal Circuit and Family Court of Australia (Division 2).

[44] Subrule 41.05(1)

Substitutes a new subrule which has been updated for consistency and provides greater clarity around to whom a warrant may be issued.

[45] Subrule 41.05(2)

Substitutes a reference to “Subrule (1)” with “This rule”.

[46] Subrule 41.05(2)

Substitutes a reference to “court” with “Court”.

[47] Rule 42.01

Substitutes a new subrule which has been updated for consistency and provides greater clarity around to whom a warrant may be issued.

[48] Subrule 42.14(1)

Substitutes a new subrule which has been updated for consistency.

[49] At the end of rule 42.14

Adds a new subrule (4) that provides greater clarity around to whom a warrant may be issued.

[50] In the appropriate position in Part 43

Inserts a new Division 43.1 incorporating the transitional provisions.

[51] Schedule 1 (definition of *conduct money*)

Substitutes an updated definition.

[52] Schedule 1

Inserts new definitions for “convention”, “Court file” and “Hague Convention”.

[53] Schedule 1 (definition of *interested person, twice occurring*)

Repeals those definitions.

[54] Schedule 1

Inserts a new definition for “interested person”.

[55] Schedule 1 (after paragraph (c) of the definition of *pleading*)

Incorporates “a concise statement in response” into the definition of pleading.

[56] Schedule 1 (after paragraph (d) of the definition of *pleading*)

Incorporates “a concise statement in reply” into the definition of pleading.

[57] Part 3.3 of Schedule 2 (table items 23 and 34, column headed “Description (for information only)”)

Updates the reference to the Federal Circuit and Family Court of Australia (Division 2).

[58] Item 1A of Schedule 3

Updates the costs allowable for work done and services performed.

Schedule 2 – Amendment of the Federal Court (Criminal Proceedings) Rules 2016

[1] Subrule 8.08(1)

Substitutes a new subrule to provide consistency with the other rules relating to subpoenas.

[2] After Part 9

Inserts a new Division 10.1 incorporating the transitional provisions.

[3] After paragraph (1)(b) of Schedule 1

Adds a definition of “convention” from the *Federal Court Rules 2011* to the Dictionary.

[4] Subclause (2) of Schedule 1 (definition of *convention*)

Repeals the stand-alone definition of “convention”.

Schedule 3 – Amendment of the Federal Court (Bankruptcy) Rules 2016

[1] Subrule 1.05(1) (definition of *Bankruptcy Regulations*)

Updates the reference to the Bankruptcy Regulations from the *Bankruptcy Regulations 1996* to the *Bankruptcy Regulations 2021*.

[2] Paragraphs 2.01(3)(a) and (4)(a)

Omits “regulation” and substitutes “section”.

[3] Rule 10.05 (note)

Repeals the note and substitutes it with “Note: Subject to subsection 67(2) of the Bankruptcy Regulations, a copy of the order must be given to the Official Receiver within 2 business days after the order is made: see subsection 67(1) of that instrument.”

[4] Rule 11.04 (note)

Omits “Regulation 11.01 of the Bankruptcy Regulations sets out the particulars that must be included in the statement.”

Schedule 4 – Amendment of the Federal Court (Corporations) Rules 2000

[1] Subrule 2.8(3) (before table item 1)

Inserts item 1A before table item 1. Item 1A refers to section 423 “To inquire into the conduct of a controller”.

[2] Rule 2.15

Omits “regulations 5.6.11 to 5.6.36A of the Corporations Regulations”, and substitutes “to the extent applicable, Division 75 of the Insolvency Practice Schedule (Corporations) and Division 75 of the *Insolvency Practice Rules (Corporations) 2016*”.

[3] Rule 4.1

The amendment adds at the end of rule 4.1 the following note “Note: Rule 11.2 is about inquiries, examinations, investigations, and orders against a person concerned with a corporation.”

[4] Rule 5.4(2)(b)

The amendment inserts paragraph 5.4(2)(ba) “state whether or not the company has made an application in any court to set aside the demand and, if so, the outcome of that application; and”.

[5] Schedule 3 (after paragraph 6 of note 2)

Inserts paragraph 6A which states “The defendant has not made any application under section 459G of the Corporations Act to set aside the demand [*or* On [*insert date*], the defendant made an application under section 459G of the Corporations Act to [*insert name of Court*] to set aside the demand. On [*insert date*], that Court dismissed the application [*or* varied the demand by [*state effect of variation*]]. Annexed to this affidavit is a true copy of the court order disposing of the application].”