

FEDERAL COURT LEGISLATION AMENDMENT RULES 2024

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 Judges of the Court or a majority of them have previously made the *Federal Court Rules 2011*, the *Federal Court (Bankruptcy) Rules 2016*, the *Federal Court (Corporations) Rules 2000* and the *Federal Court (Criminal Proceedings) Rules 2016*. These amending rules, the *Federal Court Legislation Amendment Rules 2024* ('the amendments'), have now been made by a majority of the Judges of the 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 holds the view 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 2024

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* 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 in several ways. The amendments ensure an effective application process in relation to allegations of sexual harassment under the *Fair Work Act 2009* (Cth). They extend, consolidate and clarify the powers that registrars may exercise pursuant to a direction of the Chief Justice or a Judge of the Court. Further, they improve existing mechanisms for applications under the *Trans-Tasman Proceedings Act 2010* (Cth), service outside Australia, and for proceedings under the *Patents Act 1990* (Cth) and the *Trade Marks Act 1995* (Cth). Lastly, the amendments provide for an increase in the costs allowable for work done and services performed consistent with the recommendations of the 16th Report of the Joint Cost Advisory Committee, effectively increasing the costs recoverable by a successful party.

Otherwise, as these amendments are minor and generally 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

Schedule 1 contains amendments to the *Federal Court Rules 2011*, including the following:

- Inserting rule 34.05A which makes provision for an application for an order in relation to an alleged contravention of section 572D(1) of the *Fair Work Act 2009* (Cth) with respect to sexual harassment.
- Amending the rules to extend, consolidate and clarify the powers that registrars may exercise pursuant to a direction of the Chief Justice or a Judge of the Court.
- Amending rule 10.42 and subrule 10.43(1) to clarify the documents that must be served pursuant to those rules.
- Amending rules 10.07 and 10.08 to provide an improved mechanism for service for proceedings under the *Patents Act 1990* (Cth) and *Trade Marks Act 1995* (Cth).
- Amending rule 34.63 to clarify how applications may be made under the *Trans-Tasman Proceedings Act 2010* (Cth).
- Amending Schedule 3 to provide for an increase in the costs allowable for work done and services performed consistent with the recommendations of the 16th Report of the Joint Cost Advisory Committee.

Schedule 2 – Amendments

Schedule 2 contains amendments to the *Federal Court (Bankruptcy) Rules 2016* to extend, consolidate and clarify the powers under those rules that registrars may exercise pursuant to a direction of the Chief Justice or a Judge of the Court.

Schedule 3 – Amendments

Schedule 3 contains amendments to the *Federal Court (Corporations) Rules 2000* to extend, consolidate and clarify the powers under those rules that registrars may exercise pursuant to a direction of the Chief Justice or a Judge of the Court.

Schedule 4 – Amendments

Schedule 4 confirms the repeal of Part 10 of the *Federal Court (Criminal Proceedings) Rules 2016*.

2. Consultation

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

The Court consults regularly with the legal profession, both nationally and locally, about practice and procedure generally and in its different practice areas.

The Court undertook both internal and external consultation on these amendments. Internally, the Court consulted with judges, registrars and staff. Externally, the legal profession and broader community were consulted widely in respect of specific amendments. Specific consultation included the Law Council of Australia in respect of service under the *Patents Act 1990* (Cth) and the *Trade Marks Act 1995* (Cth), and the profession and wider community in

respect of the increases in costs allowable for work done and services performed as recommended by the Joint Costs Advisory Committee’s 16th Report.

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

3. Details of Amendments

[1] Name

The name of the rules is the *Federal Court Legislation Amendment Rules 2024*.

[2] Commencement

The whole of the *Federal Court Legislation Amendment Rules 2024* commence on the day after registration.

[3] Authority

The *Federal Court Legislation Amendment Rules 2024* are made under the *Federal Court of Australia Act 1976* (Cth).

[4] Schedules

Indicates that each instrument that is specified in a schedule to these *Federal Court Legislation Amendment Rules 2024* is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to these Rules has effect according to its terms.

Schedule 1 – Amendment of the Federal Court Rules 2011

[1] Paragraph 34.01(2)(a)

Extends the operation of this paragraph to include the new rule 34.05A.

[2] After rule 34.05

Inserts a new rule 34.05A which makes provision for an application for an order in relation to an alleged contravention of section 572D(1) of the *Fair Work Act 2009* (Cth) with respect to sexual harassment.

[3] Subrule 3.01(3) (not including the notes)

Repeals the subrule to remove the qualification for the exercise of a Registrar’s power under paragraph 3.01(1)(e).

[4] Subrule 3.01(3) (note 2)

Repeals the note which references that “Without notice” is defined in the Dictionary. The note is no longer required with the repeal of subrule 3.01(3).

[5] Part 3.2 of Schedule 2 (at the end of the table)

Amends the table in Part 3.2 of Schedule 2 by adding items 15 – 18, additional powers that may be exercised by a Registrar under the *Trans-Tasman Proceedings Act 2010* (Cth).

[6] Part 3.3 of Schedule 2

Repeals Part 3.3 of Schedule 2 and substitutes it with a new Part 3.3. This incorporates the powers that a Registrar may exercise under the *Federal Court of Australia Act 1976* (Cth) within items 21 – 47.

[7] Part 3.7 of Schedule 2

Repeals Part 3.7 of Schedule 2 and substitutes it with a new Part 3.7 and Part 3.8. This incorporates the powers that a Registrar may exercise under the *Federal Court Rules 2011* within items 91 – 227 and under the *Fair Work Act 2009* (Cth) within item 241.

[8] Rule 10.42

Amends rule 10.42 to clarify that the documents that may be served outside Australia without leave includes not only the originating application, but each document required to accompany the application by rule 8.05, rule 10.43B or any other rule of the Court.

[9] Subrule 10.43(1)

Amends subrule 10.43(1) to clarify that the documents that may be served outside Australia with leave of the Court includes not only the originating application, but each document required to accompany the application by rule 8.05, rule 10.43B or any other rule of the Court.

[10] Rules 10.07 and 10.08

Repeals the rules and substitutes with new rules for service in a proceeding under the *Patents Act 1990* (Cth) or the *Trade Marks Act 1995* (Cth) respectively. Specifically, these rules expand the operation of the previous rules 10.07 and 10.08 and improve the mechanisms by which service may be achieved in certain proceedings under those Acts.

[11] Subrule 34.63(1)

Amends subrule 34.63(1) to insert the words “(other than under section 67 of that Act)” after “Trans-Tasman Proceedings Act”. This clarifies that this subrule does not apply to applications under section 67 of that Act.

[12] At the end of rule 34.63

The amendment adds a subrule (3) at the end of rule 34.63. Subrule (3) provides that an application under section 67 of the *Trans-Tasman Proceedings Act 2010* (Cth) must be made in accordance with subsection 67(5) of that Act.

[13] Item 1A of Schedule 3

Repeals this item and substitutes “1A Application of this Schedule”. The Schedule applies to work done or services performed on or after the commencement of the *Federal Court Legislation Amendment Rules 2024*.

[14] Amendments of listed provisions – Schedule 3

These amendments provide for an increase in the costs allowable for work done and services performed consistent with the recommendations of the 16th Report of the Joint Cost Advisory Committee.

[15] At the end of Division 27.1

This amendment adds a note that rules 27.04 – 27.20 have been left blank.

[16] At the end of Division 34.5

This amendment adds a note that rules 34.87 – 34.90 have been left blank.

[17] In the appropriate position in Part 43

This amendment inserts Division 43.2 which sets out transitional provisions relating to the *Federal Court Legislation Amendment Rules 2024*. In particular, rule 43.12 provides that rules 10.07 and 10.08 as substituted apply in relation to documents served on or after the commencement of the amending *Federal Court Legislation Amendment Rules 2024*. Further rules 10.42 and 10.43, as amended, apply in relation to originating applications served on or after the commencement of those rules.

Division 43.14 will expire after the end of the period of 6 months beginning on the day the *Federal Court Legislation Amendment Rules 2024* commence.

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

[1] Subrule 1.05(1)

Inserts a definition of “Insolvency Practice Schedule (Bankruptcy)”.

[2] After paragraph 2.02(1)(a)

Amends paragraph 2.02(1)(a) by inserting a new prescribed power as subparagraph (aa), namely a power of the Court under a provision of the Insolvency Practice Schedule (Bankruptcy) referred to in Part 1A of Schedule 1.

[3] Schedule 1

Repeals the Schedule and substitutes “Schedule 1 – Powers of the Court that may be exercised by a Registrar”. This updates the powers a Registrar of the Court may exercise under the *Bankruptcy Act 1966* (Cth), the Insolvency Practice Schedule (Bankruptcy) and the *Federal Court (Bankruptcy) Rules 2016*.

Schedule 3 – Amendment of the Federal Court (Corporations) Rules 2000

[1] Division 4 (after the heading)

Inserts a note in Division 4 clarifying that Division 11 deals with inquiries, examinations, investigations, and orders against a person concerned with a corporation.

[2] After paragraph 16.1(1)(aa)

Inserts paragraph (ab) which provides that a Registrar may exercise a power of the Court for specified provisions of the *Corporations Regulations 2001* or the *Federal Court (Corporations) Rules 2000*.

[3] Parts 1 and 1A of Schedule 2

Repeals the Parts and substitutes the powers a Registrar of the Court may exercise under Part 1 – *Corporations Act 2001* (Cth), Part 1A – Insolvency Practice Schedule (Corporations) and Part 1B – *Corporations Regulations 2001*.

Schedule 4 – Amendment of the Federal Court (Criminal Proceedings) Rules 2016

[1] Part 10

This amendment repeals Part 10.