

# Family Law Rules 2021

## A Few Thoughts

Family Law Bar Association CPD – 6 October 2021

## What's New

### Harmonised Rules

1. In place of the old *Family Law Rules 2004* (“**FCA Rules**”) and old *Federal Circuit Court Rules 2001* (“**FCC Rules**”), there is now a single set of Rules which comprehensively governs both Courts, as well as Courts of summary jurisdiction, in family law matters. Almost.
2. The harmonised Rules are the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (“**Family Law Rules**”). The Family Law Rules are, strictly speaking, just the Rules for the Federal Circuit and Family Court of Australia (Division 1) (“**Division 1**”), being the renamed Family Court of Australia (“**FCA**”).
3. The other Court, the Federal Circuit and Family Court of Australia (Division 2) (“**Division 2**”), being the old Federal Circuit Court (“**FCC**”), has its own Rules (several sets of them, actually<sup>1</sup>).
4. In relation to family law, it has the *Federal Circuit and Family Court of Australia (Division 2) (Family Law) Rules 2021* (“**Division 2 Rules**”).
5. This is necessary because, despite in practice operating as much as possible as one Court, the two Divisions are, in fact, two separate Courts.<sup>2</sup>

### Pre-action procedures and Genuine Steps Certificate

6. Not strictly entirely new – the FCA Rules had pre-action procedures.
7. Sensible practitioners should, as a matter of course, have engaged in pre-action procedures whether or not obligations existed under the rules of the relevant Court.
8. However, given that the vast majority of matters were previously filed in the FCC, compulsory pre-action procedures may not be an entirely familiar concept. Beyond that, there is now a stronger focus on compliance with pre-action procedures under the Family Law Rules.

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<sup>1</sup> Separate Rules for each of family law, bankruptcy, and general federal law.

<sup>2</sup> *Federal Circuit and Family Court of Australia Act 2021* (“**FCFCOA Act**”) ss 7 (particularly the definition of “Federal Circuit and Family Court of Australia”), 9, 10.

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### *Final Orders Applications*

9. The requirement to comply with pre-action procedures for new proceedings is found in rule 4.01(1). The exceptions are in rule 4.01(2).
10. The actual procedures are set out in Schedule 1 to the Family Law Rules, where Part 1 deals with financial cases, and Part 2 deals with parenting cases. This schedule largely mirrors the same schedule in the FCA Rules.
11. Those provisions are fairly self-explanatory. Practitioners should use clauses 3 to 6 inclusive of each Part of Schedule 1 as a checklist.
12. A few key points to be aware of:
  - 12.1. A prospective applicant must invite a prospective respondent to participate in “dispute resolution”. That term is defined in rule 1.05 to include “a mediation and a conference (including a conciliation conference)”. That is an inclusive definition.
  - 12.2. A prospective respondent has an obligation make a genuine effort to resolve the matter by participating in dispute resolution.
  - 12.3. A prospective applicant must, before issuing, give to a prospective respondent a written notice of intention to start proceedings, which must:
    - 12.3.1 set out the issues in dispute;
    - 12.3.2 set out the orders to be sought if proceedings are started;
    - 12.3.3 inclusive a genuine offer to resolve the dispute; and
    - 12.3.4 specify a period during which the prospective respondent must respond, and that period cannot be shorter than 14 days.
  - 12.4. A prospective respondent must respond to that notice within the time specified, setting out whether they accept the offer and, if not, essentially provided the same information required in the prospective applicant’s notice.
  - 12.5. A prospective applicant must provide to the prospective respondent a copy of the pre-action procedures. There is no exception to this, so it must be done even where both parties are represented. The exception which existed in the FCA Rules at clause 3(1A) of each Part is no longer there. This means that the pre-action procedures must be provided to the other potential party even if they’ve been previously provided.
13. What is totally new is the requirement to file, with any final Orders Application or Response, a Genuine Steps Certificate in the approved form (rule 4.01(4)).
14. Practitioners and parties should take great care in preparing the Genuine Steps Certificate.

### *Interlocutory Orders Application*

15. Before filing an application seeking interlocutory orders, a party must make a genuine attempt to resolve the issues to which the application relates (rule 4.03(1)). Exceptions are in rule 4.03(2).
16. The affidavit in support of the application must set out how rule 4.03(1) was complied with, or why an exception in rule 4.03(2) applies (rule 4.03(3)).
17. Importantly, this rule is **not** limited to an Application in a Proceeding. It applies to any application seeking interlocutory orders. So, if you are filing an Initiating Application or Response to Initiating Application which seeks interlocutory orders, you must comply with rule 4.03(3), as well as filing a Genuine Steps Certificate.

#### *Consequences for Non-Compliance*

18. Rule 4.04 sets out consequences for non-compliance, which can include a stay of the application, as well as costs orders against the party, the legal practitioner, or both. Again, take great care in preparing Genuine Steps Certificates.

### **What's Different Between the Two Divisions**

19. The Division 2 Rules are quite short. The Division 2 Rules primarily just adopt the Family Law Rules for Division 2 with some modifications (rule 2.02 and table 2.1).
20. Most of the modifications just account for the fact that Division 2 is a separate Court, such as referring to the Chief Judge instead of Chief Justice, and referring to the relevant sections of Chapter 4 of the FCFCOA Act instead of Chapter 3.
21. The most important modifications to note, in terms of day-to-day practice, are items 7 and 8 of table 2.1, which modify the permitted length of, and number of annexures to, affidavits for interlocutory hearings:
  - 21.1. in Division 1, they can be 25 pages long and have 10 annexures; and
  - 21.2. in Division 2, they can be 10 pages long and have 5 annexures, in line with the old FCC Practice Direction 2 of 2017.
22. The only real substantive difference between the divisions is in relation to costs.
23. Rule 4.01(1) of the Division 2 Rules sets out that, when making a costs order, Division 2 may apply either the scale under Family Law Rules, or the scale under the Division 2 Rules.
24. Essentially, the Family Law Rules costs scale is an update of the scale in the FCA Rules, with costs based on time and folios, and ranges for junior and senior counsel.
25. The Division 2 costs scale is an update of the FCC Rules scale, with mostly lump sums for different events.
26. When seeking costs in Division 2, given the discretion available under rule 4.01(1), practitioners may be tempted to ask for the Family Law Rules scale.

27. In practice, I expect that Division 2 will usually apply the Division 2 costs scale. That has certainly been my experience over this past month of the new Rules being in force.
28. More than that, practitioners should be careful about what they wish for. There is usually a lot more work involved in putting together a figure to seek under the Family Law Rules scale, with evidence potentially needed to justify each component. Depending on the circumstances, you may also just get less under the Family Law Rules scale, because of the ranges – you may be more junior in the eyes of the Court than you are in your own mind.

## Everything Else

29. Virtually everything else really is a harmonisation of the FCA Rules and FCC Rules. Each Division in the Family Law Rules mirrors an equivalent division in either the FCA Rules or FCC Rules.
30. The Court has published [cross-reference tables for each of the FCA Rules and FCC Rules as against the Family Law Rules](#), to enable practitioners to quickly find the corresponding new rule for an old rule. Personally, I find it easier to either look in the table of contents, or to grab a PDF of the Family Law Rules and search.
31. I'll touch on a few of the matters which come up most commonly.

### Affidavits

32. For Initiating Applications and Responses, the FCA Rules approach usually applies: affidavits are filed only if interlocutory orders are sought – issues affidavits are no more.<sup>3</sup>
33. For interlocutory hearings:
  - 33.1. I've already mentioned the page and annexure limits for each division.
  - 33.2. There is a limit of one affidavit by each witness, but witness affidavits are only permitted if the evidence can't be given by a party, and if it's actually relevant (the latter is obviously redundant in the face of the *Evidence Act 1995*).
34. There is no general right to file affidavits.
35. In a parenting proceeding, if a party does not disclose their address on their affidavit and has not otherwise disclosed it to the Court, the party's address **must** be provided to the Court via email, on the basis that it will not be disclosed to the other party except by Order of the Court.

### Undertaking as to Disclosure

36. In a general sense, this follows the FCA Rules.

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<sup>3</sup> For some types of proceedings, affidavits are still required in support of applications for final Orders – the requirements may be found in the relevant Practice Directions.

37. There is a requirement to file a written notice and undertaking as to disclosure in the approved form **before the first Court date** (rule 6.02).
38. This differs from the old requirement under the FCA Rules to file an undertaking as to disclosure 28 days before the first day before a Judge (what used to be the First Day of Trial or Trial Management Hearing in the FCA).

### Experts

39. The expert rules broadly follow the old FCA Rules.
40. Most importantly, there is a single-expert rule (Division 7.1.2).
41. A single-expert report may be tendered as of right (rule 7.03(2)).

### Subpoenas (Division 6.5.1)

42. Subpoenas follow the old FCC Rules.
43. A represented party has a right to seek to issue up to 5 subpoenas to produce documents to the Court.
44. Permission must be sought:
  - 44.1. to seek to issue more subpoenas for production;
  - 44.2. to seek to issue a subpoena for production for a final hearing;
  - 44.3. to seek to issues a subpoena to give evidence (including a subpoena to produce and give evidence);
  - 44.4. to seek to issue a subpoena directed to a party; and
  - 44.5. by a self-represented litigant to seek to issue a subpoena in any event.

### Joinder of Parties (Part 3.2)

45. The joinder process follows old FCC Rules.
46. Can add a party by amending the application or response to name the party (rule 3.03(2)) supported by an affidavit setting out the relevant facts (rule 3.03(3)), but only until the first Court date. After that, requires leave of the Court. (rule 3.03(4))

### Litigation Guardians

47. The process is in line with the FCC Rules.
48. Most notably, we are calling them Litigation Guardians as we did in the FCC, rather than Case Guardians as we did in the FCA.

### Specific Questions (Part 6.3)

49. The interrogatories process follows the FCA Rules.
50. One set of up to 20 questions.
51. May be asked after a first court date has been allocated (cf allocation of first day before a judge, as was the case under the FCA Rules).

52. Must be answered on affidavit within 21 days.

#### Admissions (Part 8.1)

53. Follows the FCA Rules.

54. Curiously, the wording appears to mirror the wording in Division 11.2.1 of the FCA Rules, including a lack of any reference to an approved form.

55. You may recall that there was an approved form in the FCC, but in the FCA there was no form, and a Notice to Admit was typically contained in a letter.

56. Despite the Family Law Rules not requiring use of an approved form, there is nevertheless [a corresponding form on the FCFCOA website](#).

57. My reading of the Family Law Rules is that the use of that form is optional.