



13 August 2021

## Update to the profession (No. 3): Commencement of the new Federal Circuit and Family Court of Australia

In the lead up to the commencement of the Federal Circuit and Family Court of Australia (FCFCOA) on 1 September 2021, the Family Court of Australia (FCoA) and Federal Circuit Court of Australia (FCC) have previously released [two updates](#) for the legal profession and the public to advise them of changes to court operations. This third update provides information on:

- the objects and purpose of the FCFCOA Act;
- in the family law jurisdiction:
  - the overarching purpose of family law practice and procedure;
  - pre-action procedures;
  - dispute resolution in the new case management pathway;
  - property matters;
  - the Lighthouse project;
- the Court's migration and general federal law (GFL) jurisdictions;
- and the Commonwealth Courts Portal.

The reforms being implemented to the FCoA and FCC are built upon the framework provided by the *Federal Circuit and Family Court of Australia Act 2021*. It is instructive to set out some of the core features that the legislature have enshrined in the Act:

The **objects** of the Act clearly summarise the aims of the merged court (s 5 FCFCOA Act):

- (a) to ensure that justice is delivered by federal courts effectively and efficiently; and
- (b) to provide for just outcomes, in particular, in family law or child support proceedings; and
- (c) to provide a framework to facilitate cooperation between Division 1 and Division 2 with the aim of ensuring:
  - i. common rules of court and forms; and
  - ii. common practices and procedures; and
  - iii. common approaches to case management.

The focus is clearly on effective and efficient delivery of justice, and achieving common approaches to simplify the court system.

### **The family law jurisdiction**

The Courts have been working diligently to build a court system that is innovative, truly focuses on the safety of children and vulnerable litigants, and that changes the culture and conversation around family law – learning from the many inquiries, reviews and calls for change that have occurred in the past.



From 1 September we will see a new structure that is innovative, fair and efficient and focuses on risk, responsiveness and resolution, by:

- ✓ Improving early risk identification and safety of children and vulnerable parties
- ✓ Encouraging smarter ways to separate with less acrimony, less cost and more dispute resolution, where it is safe to do so
- ✓ Expecting compliance with court orders
- ✓ Enhancing national access to justice for vulnerable parties and regional communities through the use of technology, and
- ✓ Aiming to resolving up to 90 per cent of cases within 12 months.

The legislative changes have enabled the Court to undertake major structural changes which will feature:

- A single point of entry for all family law matters
- A new case management pathway
  - Specialist lists
- Harmonised family law rules
- New family law practice directions
- Focus on dispute resolution and an increase in internal dispute resolution in parenting and financial matters
- Enhanced and effective child expert reporting process
- An informative and modernised website
- Appellate jurisdiction exercised in Division 1 through a Full Court model rather than an Appeal Division

### ***Leadership structure and judiciary***

The leadership structure includes the Chief Justice and Deputy Chief Justice for Division 1, and in Division 2, one Deputy Chief Judge for Family Law, and one for General Federal Law and Fair Work.

Specialist family law Judges are already a feature of both the FCoA and FCC. Importantly specialist Judges with expertise in family law will continue to be appointed, with the FCFCOA Act requiring that, by reason of knowledge, skills, experience and aptitude, all Judges exercising family law jurisdiction must be suitable to deal with family law matters, including matters involving family violence.

### ***The overarching purpose (ss 67,68 and 190, 191)***

The FCFCOA will have an expansive overarching purpose that is resolution focused, and can carry costs consequences if not complied with.



The overarching purpose of the family law practice and procedure provisions is to facilitate the just resolution of disputes: (a) according to law; and (b) as quickly, inexpensively and efficiently as possible. This includes the following objectives:

- a) the just determination of all proceedings before the FCFCOA;
- b) the efficient use of the judicial and administrative resources available for the purposes of the Court;
- c) the efficient disposal of the Court's overall caseload;
- d) the disposal of all proceedings in a timely manner;
- e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

All practice and procedure, and any powers or duties imposed, are to be carried out in the way that best promotes the overarching purpose.

Parties have a duty to conduct proceedings in a way consistent with the overarching purpose, and lawyers must assist their clients to comply with that duty. Costs consequences may follow for either the party or their lawyer if they fail to comply with this duty.

#### ***Pre-action procedures***

The pre-action procedures currently contained in Schedule 1 to the Family Law Rules have been retained and enhanced. They apply across both Divisions and will be enforced. Parties should not file proceedings until they have exhausted the pre-action requirements, including engaging in dispute resolution, exchanging documents and correspondence and making a genuine attempt to settle the dispute, with the usual exceptions for genuine urgency or where it is not safe to undertake these steps.

In addition to the requirement to comply with section 60I of the *Family Law Act* and file a certificate or seek an exemption when parenting orders are sought, both the Applicant and Respondent to an application for final orders will be required to file a Genuine Steps Certificate, certifying that they have complied with the pre-action procedures and made a genuine attempt to resolve the dispute.

#### ***Dispute resolution in the new case management pathway***

The FCFCOA's new case management pathway, as outlined in the [Update to the Profession No. 1](#), places significant emphasis on providing dispute resolution opportunities to litigants to assist them in resolving, or better identifying, the issues in dispute. The Court's expectation is that, where it is safe to do so, parties will avail themselves of every opportunity to participate in dispute resolution – whether that be a court-based family dispute resolution conference or conciliation conference, privately funded dispute resolution, mediation or arbitration (in property cases only), or conferences through the legal aid commissions.



- Parties and practitioners will be encouraged to identify the best opportunities for dispute resolution, and the information and preparation needed to ensure the dispute resolution event is a success.
- Under the new case management pathway, where it is safe to do so, parties will be expected to participate in dispute resolution in both financial and parenting matters within 5-6 months of the date of filing.
- Parties concerned about their safety or capacity to meaningfully negotiate at such conferences will have the opportunity to raise those concerns with a Registrar who will take those issues into account when making orders for and/or conducting those conferences.
- Parties should take the time to prepare for conferences thoroughly including by bringing proposed minutes of orders but also by identifying in advance areas of agreement and compromises that may be made in the interests of finalising matters.
- Parties should come to the conferences fully informed of their legal rights and options as well as the practical and financial realities of proceeding to a contested hearing.
- Parties will be required to use their best endeavours to reach agreement at all dispute resolution conferences.

### ***Property-only matters***

The new single point of entry will require all applications to be filed in Division 2 of the FCFCOA. For property-only applications, they will be separated out into their own first return list, similar to the Discrete Property List, with a general first return list for all parenting and parenting & property applications, and applications with other orders sought.

For those property matters with asset pools that meet the criteria for the PPP500 Small Claims Property Pilot currently being run in the Adelaide, Brisbane, Parramatta and Melbourne registries, the PPP500 process will continue to apply.

### ***Lighthouse Project***

The commencement of the FCFCOA will not impact the Court's [Lighthouse Project](#) which operates as a pilot in the FCC in Adelaide, Brisbane and Parramatta. The project provides a highly specialised and sophisticated approach to risk screening that focuses on public health and tailored case management for families involved in the family law system.

The primary change to be expected, is that more cases will likely be eligible for inclusion into the Lighthouse pathway, as at present, only parenting matters filed in the pilot locations of the FCC are eligible, which excludes matters filed in the Family Court. With the commencement of a single point of entry, whereby all family law matters will be filed in Division 2 (currently FCC), all parenting only applications filed in the pilot locations will be captured.

For more information, the Project team releases monthly updates which are published on the [FCC website](#).



## **Migration and general federal law jurisdiction**

### ***General Federal Law Rules and Practice Directions for Division 2***

The *Federal Circuit Court Rules 2001* (FCC Rules) are made pursuant to the *Federal Circuit Court of Australia Act 1999* (Cth). As the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021* repeals the *Federal Circuit Court of Australia Act 1999* (Cth) in its entirety, all rules of court made under that Act will lapse on 1 September 2021.

Consequently, the FCC Rules that relate to general federal law proceedings as well as the FCC Bankruptcy Rules will be updated and remade.

It should be noted that there will not be a great deal of difference in the new rules, at this stage for general federal law cases.

The existing GFL Rules have been redrafted only in limited circumstances:

- a) to remove references to family law and child support proceedings;
- b) to address the preference for electronic filing and broaden the use of email;
- c) to tidy up obsolete references; and
- d) to make consequential amendments.

It is proposed that a more fulsome review and update of the GFL and Bankruptcy Rules be undertaken in the future at a time that will allow for broader consultation.

A cross-reference table comparing the current FCC rules with the new GFL and Bankruptcy rules will also be provided to the profession for 1 September 2021.

Two general practice directions have been developed for migration proceedings and general federal law proceedings in the FCFCOA, and will be available on the Court's website from 1 September.

### ***eLodgment of General Federal Law matters***

eLodgment and eCourtroom will continue to be used in general federal law and migration matters in Division 2 of the new FCFCOA. There will be some changes made on 1 September 2021 to adjust the applications for the new court name. In addition:

- All saved eLodgment templates will be deleted on 30 August 2021. New templates can be created from 1 September 2021.
- Any Incomplete lodgements started or saved will be deleted on 30 August 2021.
- Any credit cards for FCC files lodgments will need to be re-saved for FCFCOA files lodgments that attract a fee.



***Commonwealth Courts Portal (CCP)***

The commencement of the FCFCOA will result in a single point of entry for all applications filed from 1 September 2021, so when starting a new application via the CCP from 1 September, the user will no longer be required to select a court (FCoA or FCC).

The Court will have a suite of new forms which will be published on the Court's website, but it is important for practitioners to note that there will be a 90 day grace period allowing the use of old forms, but after this period the old forms will not be accepted.

All partly completed applications not submitted by 31 August 2021 will be deleted.

***Further information***

Practitioners are encouraged to review previous updates which can be accessed from the Media Releases section of the [FCoA website](#) and [FCC website](#). Topics covered in previous updates include information on rules and forms, new case management pathway, changes to child dispute services and the role of Registrars.

Practitioners and the public can subscribe to receive updates from the Courts via the [FCoA website](#) or [FCC website](#).

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