

EXPLANATORY STATEMENT

Select Legislative Instrument 2008 No. 215

FEDERAL MAGISTRATES COURT AMENDMENT RULES 2008 (No. 2)

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

Section 81 of the *Federal Magistrates Act 1999* permits the Federal Magistrates or a majority of them, to make rules of Court not inconsistent with the Act. These rules may provide for the practice and procedure to be followed in the Court and may extend to all matters incidental to any such practice or procedure that are necessary or convenient to be prescribed for the conduct of any business of the Court.

Pursuant to sub-section 81(3) of the *Federal Magistrates Act 1999*, the *Legislative Instruments Act 2003* (other than sections 5, 6, 7, 10, 11 and 16 of that Act) applies in relation to rules of court made by the Court under the *Federal Magistrates Act 1999* or another Act:

- (a) as if a reference to a legislative instrument were a reference to a rule of court; and
- (b) as if a reference to a rule-maker were a reference to the Chief Federal Magistrate acting on behalf of the Federal Magistrates of the Court; and
- (c) subject to such further modifications or adaptations as are provided for in regulations made under section 120 *Federal Magistrates Act 1999*.

The Federal Magistrates have agreed to adopt the *Federal Magistrates Court Amendment Rules 2008 No 2* ('the Amendment Rules').

The Amendment Rules include a number of miscellaneous amendments to the *Federal Magistrates Court Rules 2001* ('the Rules'), the most significant of which include:

- amendments to remove the so-called '2 day rule' from the list of factors the Court may consider in deciding whether to transfer a family law matter to the Family Court;
- amendments to include rules which will facilitate e-filing/e-lodgement;
- amendments to the rules in relation to Discontinuance to include summary judgment rules similar to those which are prescribed in the Federal Court under Order 35A *Federal Court Rules*

The amendments have been the subject of consultation with the Federal Court, the Family Court, and, in relation to items 20, 21, and 22, the Commissioner responsible for Disability Discrimination.

Details of the changes to the Rules are in the **Attachment**.

The Rules commence on the day after they are registered.

ATTACHMENT

Federal Magistrates Court Amendment Rules 2008 (No. 2)

RULE 1 Name of rules

This rule provides that the Rules are to be cited as the *Federal Magistrates Court Amendment Rules 2008 (No. 2)*.

RULE 2 Commencement

This rule provides that these Rules commence on the day after they are registered.

RULE 3 Amendment of *Federal Magistrates Court Rules 2001*

This rule provides that the *Federal Magistrates Court Rules 2001* are amended as set out in Schedule 1.

SCHEDULE 1

[1] Paragraph 2.01(1)(e)

The amendment substitutes the current requirement for documents to have a space of not less than 3 mm between the lines of writing with the requirement that a document must be written in English.

[2] After subrule 2.01(1)

The amendment inserts a new subrule 2.01(1A) to provide that unless the Court otherwise orders, strict compliance with the requirements in subrule 2.01(1) is not required in certain circumstances.

[3] Rule 2.03

The amendment is a minor drafting amendment consequent upon new subrule 2.03(2) as set out in item [4]

[4] Rule 2.03

The amendment inserts a new subrule 2.03(2) to make provision for the attaching of a signature to a document (other than an affidavit) by electronic means

[5] Paragraph 2.05(1)(c)

The amendment is consequent upon the inclusion of new rules in relation to electronic communication, which term is included in the dictionary by way of item [24]

[6] Paragraph 2.05(1), note

The amendment to the note reflects a recent amendment to the *Federal Magistrates Regulations 2000* which makes provision for payment of a fee on invoice.

[7] After subrule 2.05(1)

The amendment inserts a new subrule 2.05(1A) to prohibit a document (including an attachment) which is over 100 pages long from being filed by electronic communication

[8] Subrule 2.05(2)

The amendment is consequent upon new Division 2.4 as set out in item [12]

[9] After subrule 2.05(2), including the note

The amendment includes a new subrule 2.05(3) which outlines when a document sent by fax or electronic communications, if accepted, is taken to have been filed.

[10] Rule 2.07

The amendments substitute new rules for filing by fax and electronic communication in place of Rule 2.07. The new Rule 2.07 removes the reference to filing by email. New subrule 2.07A puts in place new rules for filing by electronic communication via the new Commonwealth Courts Portal or the Federal Magistrates Court's home page. New Rule 2.07B sets out other requirements for filing by electronic communication.

[11] Rule 2.08

The amendment substitutes new rules in relation to searching records. Prior to this amendment Rule 2.08 applied to all proceedings and was similar to the access rule prescribed by the *Family Law Rules 2004*. The new Rule 2.08 adopts the access rule of the Federal Court (Order 46 rule 6) for proceedings other than family law and child support proceedings. Whilst it would be ideal to have one consistent access rule across all proceedings, it is not possible given the different public policy and privacy considerations that apply to family law proceedings. Accordingly, the amended rule prescribes an access rule for family law and child support proceedings which mirrors the access rule prescribed in the *Family Law Rules 2004* while prescribing the access rule of the Federal Court (Order 46 rule 6) for proceedings other than family law and child support.

[12] After Division 2.3

The amendment introduces a new Division 2.4 relating to the seal and stamp of the Court.

[13] Paragraph 6.01(3)(c)

The amendment makes provision for an address for service to include an email address.

[14] Paragraphs 8.02 (4)(e) and (f)

The amendment removes the so-called '2 day rule' from the list of factors the Court may consider in deciding whether to transfer a family law or child support matter to the Family Court. It is considered that the range of family law work being undertaken by the Court is appropriate and it

is no longer useful to seek to apply a two day rule. The removal of the two day rule also reflects the inadequacy of measuring the complexity of a matter by reference to estimated hearing length.

[15] Subrule 9.03(1)

The amendment makes provision for an approved form of notice of withdrawal as lawyer.

[16] Subrule 9.03(3)

The amendment requires that a notice of intention to withdraw as lawyer must be in accordance with the approved form.

[17] Division 13.1, heading

The amendment to the heading is as a consequence of new Division 13.1A in item [18]

[18] Rules 13.03, 13.03A, 13.03B and 13.03C

The amendment includes a new Division 13.1A - Order or judgment on default. The new Division includes summary judgment rules similar to those prescribed in Order 35A *Federal Court Rules* to enable an applicant in certain circumstances in which the respondent has defaulted to seek relief without the need for supporting affidavit evidence.

[19] Subrule 13.11(2)

The amendment to Subrule 13.11(2) widens the classes of persons able to make applications for an order under Subrule 13.11(1) to include persons against whom a vexatious proceeding has been instituted or conducted, and persons who have sufficient interest. The amendment also removes the reference to the Solicitor-general. This amendment mirrors recent amendments made to Order 21 subrule 1(2) of the *Federal Court Rules* (see *Federal Court Amendment Rules 2008 (No 1)*).

[20] – [22] Rule 15.27, heading; Subrule 15.27(1); After subrule 15.27(1)

These items amend the rules relating to affidavit requirements for illiterate or vision impaired persons to reflect changes in terminology and take account of advances in technology.

[23] Rule 20.00A

The amendments increase the list of powers which may be delegated to Registrars. Note that Rule 20.00A(2) still provides that a power delegated may be exercised only by a Registrar who is approved, or is in a class of Registrars who are approved by the Chief Federal Magistrate for the exercise of the power.

[24] Dictionary, after definition of *discovery*

The amendment inserts a new definition of *electronic communication*.