



**High Court of Australia  
Family Court of Australia**

**Federal Court of Australia  
Federal Circuit Court of Australia**

**Submission to the Sunsetting Review Secretariat, Attorney-General's Department  
Review of the Operation of the Sunsetting Provisions in the *Legislation Act 2003*  
Consultation Paper, May 2017**

The High Court of Australia, Federal Court of Australia, Family Court of Australia and the Federal Circuit Court of Australia (the **federal courts**) are pleased to provide a joint submission to the Sunsetting Review Secretariat (the **Secretariat**) on the review of the Operation of the Sunsetting Provisions in the *Legislation Act 2003* (the **2017 Review**) and in response to the May 2017 Consultation Paper prepared for that review.

This submission adopts the same abbreviations as set out on page 3 of the Consultation Paper.

The Consultation Paper raises 39 questions for consideration. The federal courts submission focuses on the appropriateness of rules of court being subject to sunsetting at all and, assuming that it is accepted that sunsetting of court rules is inappropriate, the most appropriate means of addressing this.

Introduction

The federal courts support sunsetting of legislative instruments as an appropriate mechanism to ensure that legislative instruments generally are kept up-to-date, reflect changing times and only remain in force for as long as they are necessary. The courts agree that, in general, legislative instruments should be subject to ongoing review to confirm that they remain fit for purpose, relevant and required, and either modified or replaced if found to be out of date but necessary or repealed completely if no longer needed.

Nevertheless, sunsetting is not appropriate for each and every legislative instrument (or equivalent) and mechanisms (such as implemented under the *Legislation (Exemptions and Other Matters) Regulation 2015* (LEMOR)) should be available to exempt certain types or classes of legislative instruments as well as specific legislative instruments.

Application of the Legislation Act to Court Rules

Rules of court are made by the judicial officers of each court and make provision for the practice and procedure to be followed in the relevant court generally, as well as for particular types of proceedings. Court rules also make provision for practice and procedure to be followed in registries of the relevant court and matters and things incidental to practice and procedure or which are necessary or convenient to be prescribed for the conduct of the business of the relevant court.

Rules of court are not legislative instruments<sup>1</sup> but, under the enabling legislation of each court<sup>2</sup>, are registered under the Legislation Act and are treated, subject to some exceptions, as if they were

---

<sup>1</sup> See paragraph 8(8)(d) Legislation Act and the note to subsection 8(8) of that Act.

<sup>2</sup> See subsection 86(2) *Judiciary Act 1903* (for the High Court of Australia), subsections 59(4) *Federal Court of Australia Act 1976* (for the Federal Court of Australia), section 26E and subsections 37A(14) and 123(2) *Family*

---

legislative instruments. The sunset provisions of the Legislation Act apply to the rules of court of each federal court as their operation has not been excluded in the relevant application provisions in the enabling legislation of any of the federal courts<sup>3</sup>.

Sunset has applied to the Federal Court of Australia's *Federal Court (Bankruptcy) Rules 2005* (replaced by the *Federal Court (Bankruptcy) Rules 2016* with effect from 1 April 2016) and the Federal Circuit Court of Australia's *Federal Circuit Court (Bankruptcy) Rules 2006* (replaced with the *Federal Circuit Court (Bankruptcy) Rules 2016* also with effect from 1 April 2016)<sup>4</sup>.

Over the next five years, sunset will apply to the following further rules of court of the federal courts:

<b>Rules</b>	<b>Sunset On</b>
<i>Federal Court (Corporations) Rules 2000</i>	1 April 2019
<i>Federal Circuit Court Rules 2001</i>	1 October 2019
<i>Family Law Rules 2004</i>	1 April 2020
<i>High Court Rules 2004</i>	1 April 2020
<i>Federal Court Rules 2011</i>	1 October 2021

#### Difference Between Court Rules and Legislative Instruments

Rules of court differ from legislative instruments in a number of important aspects.

Each federal court has established a Rules Committee to monitor the operation of court rules in the relevant court and to make recommendations to the judges of the court about modification to address legislative or procedural changes or difficulties identified in practice. These Committees meet regularly and are very active in their ongoing review of the operation of court rules in their respective courts.

Some court rules are harmonised across courts in specialist jurisdictional areas<sup>5</sup> or in a particular area of practice or procedure<sup>6</sup>.

---

*Law Act 1975* (for the Family Court of Australia) and subsections 81(3) *Federal Circuit Court of Australia Act 1999* (for Federal Circuit Court of Australia).

<sup>3</sup> See note 2 above.

<sup>4</sup> Each of the Federal Court of Australia and Federal Circuit Court of Australia have almost identical jurisdiction under the *Bankruptcy Act 1966*. The Family Court of Australia and the Family Court of Western Australia, in some circumstances and on transfer of a proceeding from the Federal Court of Australia or Federal Circuit Court of Australia, also have significant jurisdiction under the Bankruptcy Act. The Federal Court of Australia and Federal Circuit Court of Australia have harmonised specialist rules of court for bankruptcy (which, in part, are adopted by each of the Family Court of Australia and Family Court of Western Australia in their court rules for their more limited bankruptcy jurisdictions). The operation of the harmonised court rules in bankruptcy is monitored by the Harmonised Bankruptcy Rules Monitoring Committee, which is made up of judges and registrars of the Federal Court of Australia, Family Court of Australia and Federal Circuit Court of Australia and a legal practitioner with specialist knowledge in bankruptcy nominated by the Law Council of Australia.

<sup>5</sup> See note 4 above.

<sup>6</sup> Since 1996, Rules Harmonisation Committees of the Council of Chief Justices of Australia and New Zealand have made recommendations for harmonised rules, forms and practice notes in a very broad range of areas of common jurisdiction of the superior courts of Australia and New Zealand. This has included Corporations and Cross-Border Insolvency, Freezing Orders, Search Orders, Subpoenas, Hague Service Convention, Payment of Interest on Judgments, Expert Witnesses, International and Domestic Arbitration and Service out of Australia. The Committees have been and are made up of judges, registrars, and legal academics (with assistance at times from parliamentary counsel and other experts in subject areas). Recommendations are endorsed by the Council of Chief Justices before being adopted by each individual court with any modification necessary for the

Some of the committees involved in the rule making process include representatives from outside of the court or courts with specialist knowledge<sup>7</sup>.

Day-to-day individual rules, their operation and their interrelationship in the circumstances of matters before each court are examined closely by judges and registrars. Frequently this includes detailed analysis of them, consideration of how that rule or those rules has or have been applied in other circumstances and, at times, comparisons with similar rules in other courts (nationally and, less frequently, internationally). Brief reasons, at least, must be provided for how it is decided the rule or rules apply in that circumstance. These can sometimes be detailed and included in published judgements and decisions. These decisions can be the subject of judicial review or appeal.

These day-to-day processes ensure that court rules are under constant review and scrutiny by experts (judges and registrars), very frequently with the benefit of argument by other experts (the parties' lawyers) about potential deficiencies and relevance.

Each federal court has in place mechanisms for any difficulties or concerns about existing court rules or about practice or procedure more generally which might be addressed by new or modified court rules to be referred to the relevant Rules Committee for consideration. As a result of recommendations of Rules Committees court rules are amended regularly, generally at least once a year, and often such amendment rules are broad ranging and can be extensive.

It is also very important that changes to individual court rules are made only where necessary. Over time the consideration of and decisions about individual rules build into a body of procedural case law and provide guidance to litigants and their advisers, and to judges and registrars on practice and procedure requirements and implications. Particularly where court rules are harmonised across a number of courts, that guidance may go beyond the individual court concerned and extend nationally (and in some circumstances even internationally).

#### Case Study: Federal Court (Bankruptcy) Rules 2016 and Federal Circuit Court (Bankruptcy) Rules 2016

As noted above at page 2, the harmonised bankruptcy rules of the Federal Court of Australia and Federal Circuit Court of Australia sunsetted on 1 April 2016 and were replaced with effect from that date with new harmonised bankruptcy rules.

Each of the sunsetted harmonised rules had been developed in 2005 following some significant reforms in bankruptcy law, had been subject to ongoing review by the Harmonised Bankruptcy Rules Monitoring Committee<sup>8</sup> and had been amended by eight separate amending rules. These actions were undertaken to address legislative or procedural changes, any practical difficulties which had been identified and to ensure the continued relevance and operational efficiency of the rules.

The development of the replacement rules placed a significant burden on judges and registrars of both the Federal Court of Australia and Federal Circuit Court of Australia and on the Office of Parliamentary Counsel (OPC). The replacement harmonised bankruptcy rules, save and except that they adopted stylistic changes required to meet current OPC drafting policies, were substantially identical to the sunsetted rules. This was of significant importance to ensure that any such changes did not impact adversely on the established jurisprudence, both substantive and procedural, in

---

individual circumstances of the relevant jurisdiction. Following implementation, the Committee monitors the operation of the harmonised rules and, if necessary, makes recommendation for modification.

<sup>7</sup> See notes 4 and 6 above.

<sup>8</sup> See note 4 above.

bankruptcy practice in each of the two courts and by legal and insolvency practitioners nationally. The need to preserve this added significantly to the burden placed on the personnel of the two courts and OPC in the preparation of the replacement rules.

#### Appropriateness of Sunsetting of Court Rules

Unlike many statutory instruments, court rules are subject to constant and detailed scrutiny and review by subject area experts, frequently with the benefit of argument by external subject area experts, and with decisions about the operation of those rules in individual circumstances often published publically and sometimes subject to judicial review or appeal.

Each court has established Rules Committees (some with representation by external experts) to monitor the operation of court rules and make recommendations for modifications to address legislative or procedural changes or difficulties identified in practice. Mechanisms are in place to refer any such difficulties or any other concerns which may emerge about existing court rules to each Rules Committee for consideration.

In different ways, each of the federal courts has also established mechanisms to liaise regularly with the legal profession and other groups with professional interests in the work of the federal courts and the justice system more broadly. These provide a further means by which each of the courts receive information about the operation of court rules from the perspective of users. All such information obtained is also referred to relevant Rules Committees for consideration.

Some court rules are harmonised across courts in specialist jurisdictional areas or in a particular area of practice and procedure and the operation of these harmonised rules are also subject to monitoring by separate committees with external representation.

Rules Committees and the various harmonised rules monitoring committees are active in their scrutiny of court rules and, in each of the courts, amendments to ensure currency and relevance are made regularly to court rules.

Decisions about the operation of individual rules in individual circumstances build a body into a body of procedural case law and provide guidance to litigants and their advisers, and to judges and registrars on practice and procedure requirements and implications. Particularly for harmonised rules and sometimes in other areas, this may extend beyond the individual court and be significant nationally. Unnecessary modification of rules can adversely impact on established jurisprudence.

The sunset of the harmonised bankruptcy rules of the Federal Court of Australia and Federal Circuit Court of Australia on 1 April 2016 and the making of substantially identical rules in replacement, illustrates that those courts' longstanding review and scrutiny processes ensured that those rules were up-to-date, appropriate and necessary.

The burden on the resources of the federal courts and those of OPC from sunsetting in ensuring further review of court rules and the development of replacements is very significant but, as discussed above, the existing process for constant review and modification is such that little benefit is apparent or warranted.

In these circumstances, in the view of the federal courts it is not appropriate for court rules to continue to be subject to the sunsetting provisions of the Legislation Act. The federal courts understand that this view is shared by the First Parliamentary Counsel of OPC.

### Removal of the Requirement for Court Rules to Sunset

If the federal courts' view that it is inappropriate for court rules to continue to be subject to the sunset provision of the Legislation Act is accepted, that requirement could be removed in two ways.

As noted on pages 1 and 2 above, although rules of court are not legislative instruments relevant provisions of the Legislation Act (including for registration) apply to the rules of court of each federal court only by operation of provisions of the enabling legislation of each court. Those latter provisions currently exclude the application of some parts of the Legislation Act<sup>9</sup>. Accordingly, in the view of the federal courts, the most appropriate mechanism for removal of sunset of court rules is to amend the enabling legislation of each federal court to extend the current exemptions from the operation of the Legislation Act to include the sunset provisions.

Alternatively, section 12 of the LEOMR could be amended to include appropriately rules of court made by each of the federal courts as instruments that, for the purposes of paragraph 54(2)(b) of the Legislation Act, sunset of legislative instruments does not apply.

Such a change (regardless of which of the methods suggested above was adopted) would not alter any of the other requirements currently imposed on the federal courts in relation to the making and registration of rules, including the obligation under section 17 of the Legislation Act to consult as reasonably appropriate.

As the time available relative to the enormity of the work which will be required to replace each of the various rules of court which, currently, will sunset in 2019 and 2020, the federal court will shortly be applying to the Attorney-General for approval of exemption of those court rules from the sunset provisions.

### Conclusion

The federal courts argue that, with rules of court being constantly reviewed and amended through longstanding mechanisms which exist in each court, the significant burden on the resources of the federal courts and OPC from the operation of the sunset provisions is not warranted and it is not appropriate for court rules to sunset.

Ideally, the enabling legislation of each of the federal courts should be amended to exclude the sunset provisions of the Legislation Act from applying to rules of court made by the judges of each court.

---

<sup>9</sup> Sections 8 (Definition of *legislative instrument*), 9 (Inference of legislative character), 10 (Instruments declared to be legislative instruments) and 16 (Measures to achieve high drafting standards for legislative instruments and notifiable instruments). In regard to the latter, each of the relevant enabling Acts includes a provision permitting OPC to provide drafting assistance for court rules to each federal court.