



REMUNERATION TRIBUNAL

Replacement Explanatory Statement: Remuneration Tribunal Amendment Determination (No. 5) 2021

This Explanatory Statement replaces the Explanatory Statement registered on 29 September 2021 for Remuneration Tribunal Amendment Determination (No.5) 2021. It provides additional clarification on the retrospective application of this Determination in paragraphs 11 and 12.

1. The *Remuneration Tribunal Act 1973* (the Act) establishes the Remuneration Tribunal (the Tribunal) as an independent statutory authority responsible for reporting on and determining the remuneration, allowances and entitlements of key Commonwealth office holders. These include Judges of Federal Courts and most full-time and part-time holders of public offices, including Specified Statutory Offices. An additional function of the Tribunal is to determine a classification structure for Principal Executive Offices and the terms and conditions applicable to each classification within the structure.

Consultation

2. Section 11 of the Act advises that in the performance of its functions the Tribunal:
 - may inform itself in such manner as it thinks fit;
 - may receive written or oral statements;
 - is not required to conduct any proceeding in a formal manner; and
 - is not bound by the rules of evidence.
3. The Tribunal normally receives submissions on remuneration from a portfolio minister, or a secretary, program manager or employing body (in respect of a Principal Executive Office) with responsibility for the relevant office(s). The Tribunal will normally seek the views of the portfolio minister prior to determining remuneration for an office.
4. The Tribunal may reach a decision based on the information provided in the submission and other publicly available information such as portfolio budget statements, annual reports, corporate plans, legislation and media releases. On occasion it may wish to meet with relevant parties or seek further information from the minister or person making the submission.
5. Amongst other relevant matters in deliberating on appropriate remuneration for an office the Tribunal informs itself on:
 - the main functions, responsibilities and accountabilities of the office;
 - the organisational structure, budget and workforce;
 - the requisite characteristics, skills or qualifications required of the office holder(s); and
 - the remuneration of similar, comparator, offices within its jurisdiction.

Federal Circuit and Family Court of Australia, Various

6. On 3 August 2021, the Attorney-General, Senator the Hon Michaelia Cash, wrote to the Tribunal seeking an indicative determination of remuneration for the new offices of Deputy Chief Judge (Family Law) and Deputy Chief Judge (General and Fair Work) of the Federal Circuit and Family Court of Australia (Division 2). The letter was accompanied by a submission which included details of the roles and responsibilities of the offices. These offices were established by the *Federal Circuit and Family Court of Australia Act 2021*, which took effect from 1 September 2021.
7. In the same submission, the Attorney-General noted the office of Chief Executive Officer of the Federal Circuit Court of Australia was abolished by the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021*, with effect from 1 September 2021.
8. Various additional consequential amendments were required to the Remuneration Tribunal (Judicial and Related Offices) Determination 2021 as a result of the *Federal Circuit and Family Court of Australia Act 2021 and Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021*, including updates to names and definitions. These amendments do not alter existing entitlements or confer additional entitlements on any existing office. On this basis, no further consultation was undertaken on these matters.

Federal Circuit and Family Court of Australia (Division 2), Judges

9. On 7 September 2021, the Honourable Justice Alstergren, Chief Judge of the Federal Circuit and Family Court of Australia (Division 2) wrote to the Tribunal seeking temporary amendments to recreation leave arrangements for a Judge of the Federal Circuit and Family Court of Australia (Division 2), given the impact of the COVID-19 pandemic on the ability of Judges to access recreation leave during the period.

Retrospectivity

10. Any retrospective application of this determination is in accordance with subsection 12(2) of the *Legislation Act 2003* as it does not affect the rights of a person (other than the Commonwealth or an authority of the Commonwealth) to that person's disadvantage, nor does it impose any liability on such a person.
11. This determination has been applied retrospectively to appropriately align various amendments with the commencement of the *Federal Circuit and Family Court of Australia Act 2021* on 1 September 2021, and the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021* on the same date. Specifically, these amendments:
 - set remuneration for two new public offices established by that Act, to ensure individuals can be appointed to those offices from the date of establishment without disadvantage;

- remove reference to remuneration for a public office abolished by the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021* , with no disadvantage to any person on the basis the office no longer exists, with no person appointed to the office from that date;
 - update references to the Federal Circuit and Family Court of Australia and its public offices transferring from the former Federal Circuit Court of Australia and Family Court of Australia, from the date they will be so known. These amendments make no change to the remuneration or other entitlements of these public offices, and therefore pose no disadvantage to any person.
12. For simplicity, additional amendments to the determination have been applied with the same date of effect. These amendments provide that certain judges may retain leave accrued in 2021 for use in future years, where they would usually forfeit any balance at the end of that year. This amendment does not disadvantage any person as it provides a more generous condition. Additionally, it is only realised at the end of 2021, so its retrospective application has no practical effect.

The power to repeal, rescind and revoke, amend and vary

13. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Details of the determination are as follows:

14. Section 1 specifies the name of the instrument.
15. Section 2 specifies when the instrument commences. The day on which this instrument comes into operation in relation to Judges is affected by ss7(5A) to (5F) of the Act, which stipulate that determinations that relate to remuneration of the judiciary take effect once the Parliamentary disallowance period has passed.
16. Section 3 specifies the authority for the instrument.
17. Section 4 outlines the effect of the instrument specified in a Schedule to the instrument.
18. Schedule 1 sets out the amendments made to the instrument specified in Schedule 1.

SCHEDULE 1—AMENDMENTS

Remuneration Tribunal (Judicial and Related Offices—Remuneration and Allowances) Determination 2021

19. Item 1 repeals the definition of *Family Court* in section 7 (Definitions).
20. Item 2 repeals the definition of *Federal Circuit Court* in section 7 (Definitions).
21. Item 3 repeals the definition of *Federal Circuit Court Judge* in section 7

(Definitions).

22. Item 4 renames the office of Family Court - Chief Justice in Table 2A the Federal Circuit and Family Court of Australia (Division 1) - Chief Justice.
23. Item 5 renames the office of Family Court – Deputy Chief Justice in Table 2A the Federal Circuit and Family Court of Australia (Division 1) – Deputy Chief Justice.
24. Item 6 renames the office of Family Court - Judge in Table 2A the Federal Circuit and Family Court of Australia (Division 1) – Judge.
25. Item 7 renames the office of Federal Circuit Court – Chief Judge in Table 2A the Federal Circuit and Family Court of Australia (Division 2) – Chief Judge.
26. Item 8 sets the remuneration and travel tier for the offices of Federal Circuit and Family Court of Australia (Division 2) – Deputy Chief Judge (Family Law) and Federal Circuit and Family Court of Australia (Division 2) – Deputy Chief Judge (General and Fair Work) in Table 2A, with effect from 1 September 2021.
27. Item 9 renames the office of Federal Circuit Court – Judge in Table 2A the Federal Circuit and Family Court of Australia (Division 2) – Judge.
28. Item 10 amends the note associated with Table 2A to reflect the name change from Family Court to Federal Circuit and Family Court of Australia (Division 1) and the abolition of the Appeal Division of the Family Court.
29. Item 11 amends subsection 13(2) to specifically exclude Judges of the Federal Circuit and Family Court of Australia (Division 2) from this provision.
30. Item 12 replaces the reference to Federal Circuit Court Judges in the heading of subsection 13(3) to Judges of the Federal Circuit and Family Court of Australia (Division 2).
31. Item 13 replaces the reference to a Federal Circuit Court Judge in subsection 13(3) to Judge of the Federal Circuit and Family Court of Australia (Division 2).
32. Item 14 replaces the reference to a Federal Circuit Court Judge in subsection 13(4) with *Judge*, noting Item 16 amends the definition of *Judge* to include a Judge of the Federal Circuit and Family Court of Australia (Division 1) and a Judge of the Federal Circuit and Family Court of Australia (Division 2).
33. Item 15 replaces the reference to the Chief Justice of the Family Court in subsection 13(6), paragraph (c) of the definition of *Commonwealth car-with-driver service* to Chief Justice of the Federal Circuit and Family Court of Australia (Division 1).
34. Item 16 updates the definition of *Judge* to include a Judge of the Federal Circuit and Family Court of Australia (Division 1) and a Judge of the Federal Circuit and Family Court of Australia (Division 2).
35. Item 17 replaces the reference to the Family Court in subsection 13(6), paragraph (c) of the definition of *principal registry* to the Federal Circuit and

Family Court of Australia (Division 1).

36. Item 18 replaces the reference to Federal Circuit Court Judges in the heading of Division 4 to Judges of the Federal Circuit and Family Court of Australia (Division 2).
37. Item 19 replaces the reference to Federal Circuit Court Judges in paragraphs 15(1)(a) and (b) to Judges of the Federal Circuit and Family Court of Australia (Division 2).
38. Item 20 sets temporary recreation leave arrangements for Judges of the Federal Circuit and Family Court of Australia (Division 2).
39. Item 21 replaces the reference to Federal Circuit Court Judge in subsection 16(1) to Judge of the Federal Circuit and Family Court of Australia (Division 2).
40. Item 22 replaces the reference to Federal Circuit Court Judges in the heading of section 17 to Judges of the Federal Circuit and Family Court of Australia (Division 2).
41. Item 23 replaces the reference to Federal Circuit Court Judge in subsection 17(1) to Judge of the Federal Circuit and Family Court of Australia (Division 2).
42. Item 24 replaces the reference to Federal Circuit Court Judges in the heading of section 18 to Judges of the Federal Circuit and Family Court of Australia (Division 2).
43. Item 25 updates the reference to Federal Circuit Court Judge in section 18 to Judge of the Federal Circuit and Family Court of Australia (Division 2).
44. Item 26 renames the office of Family Court – Chief Executive Officer in Table 3A the Federal Circuit and Family Court of Australia (Division 1) – Chief Executive Officer and Principal Registrar.
45. Item 27 removes the office of Federal Circuit Court – Chief Executive Officer from Table 3A.

Authority: subsections 7(3), (3AA) and (4) of the *Remuneration Tribunal Act 1973*

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Remuneration Tribunal Amendment Determination (No. 5) 2021

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*.

Overview of the Legislative Instrument

This determination amends the principal determination:

- *Remuneration Tribunal (Judicial and Related Offices—Remuneration and Allowances) Determination 2021*

The determination:

- updates references to the Family Court of Australia, and its officers, to reflect its transition to the Federal Circuit and Family Court of Australia (Division 1);
- updates references to the Federal Circuit Court of Australia, and its officers, to reflect its transition to the Federal Circuit and Family Court of Australia (Division 2);
- sets the remuneration and travel tier for the offices of Federal Circuit and Family Court of Australia (Division 2) – Deputy Chief Judge (Family Law) and Federal Circuit and Family Court of Australia (Division 2) – Deputy Chief Judge (General and Fair Work) with effect from 1 September 2021;
- sets temporary recreation leave arrangements for Judges of the Federal Circuit and Family Court of Australia (Division 2) as a result of the COVID-19 pandemic;
- removes the office of Chief Executive Officer of the Federal Circuit Court of Australia; and
- makes consequential amendments resulting from the commencement of the *Federal Circuit and Family Court of Australia Act 2021* and the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021*.

Beyond the temporary recreation leave arrangements for Judges of the Federal Circuit and Family Court of Australia (Division 2), this determination does not alter existing entitlements or confer additional entitlements on any continuing office.

The instrument maintains the principle of fair, and current, remuneration for work performed.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

The Remuneration Tribunal