The Family Law Rules 2004

By Michael Kearney

The *Family Law Rules 2004* commenced on 29 March 2004. They replace in their entirety the previous Rules that were in force from 1984. The Rules comprise some 25 chapters (with various parts and divisions to each) and run to some 545 pages, including forms and schedules.

The *Family Law Rules 2004* provide a largely new framework and basis for the conduct of proceedings before the Family Court of Australia. Whilst a number of the old Rules are substantially reproduced (albeit renumbered) there are four particular areas of significant change, those being:

- pre-action procedures;
- non-compliance;
- disclosure and discovery; and
- expert evidence.

The main purpose of the Rules is expressed to be 'to ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstances of the case'.

Pre-action procedures

The concept of 'pre-action procedures' is introduced by the *Family Law Rules 2004* and applies to both parenting and financial cases before the Family Court.

In essence, the Rules require that parties should not commence proceedings until a reasonable attempt to comply with the pre-action procedures has been made. In summary these procedures require:

- participation in primary dispute resolution (such as negotiation, conciliation, mediation, arbitration and counselling);
- the provision of notice to the other party of the intention to make a claim, the issues perceived to be in dispute, the provision of a genuine offer and allowing a reasonable response time for the same; and
- the undertaking of what has been described as 'extensive pre-action discovery' but what is in any event discovery limited to the identified issues and in compliance with schedule 1 to the Rules.

There are exceptions where the requirements for the undertaking of pre-action procedures do not apply, including cases of child abuse, family violence, fraud, urgency and certain types of applications such as divorce and child support.

Whilst untested, the Rules provide sanctions for non-compliance with the pre-action procedure requirements, including staying the proceedings until the same have been complied with, and the making of personal cost orders against practitioners who fail to comply with the same.

Non-compliance

The Rules have been amended to deal with what has been said by the court to be a 'culture of non compliance' with court Rules and procedural orders by practitioners.

The *Family Law Rules 2004* now positively provide that a practitioner attending a court event for a party must be familiar with the case and authorised to deal with any issues that are likely to arise. Further, the other party may make applications for personal cost orders against practitioners for failure to file documents on time, or to comply with pre-action procedures.

In a fundamental shift of the current practice before the court, the Rules introduce what has been called 'the nullity rule'. Rule 11.02 provides *inter alia* that 'if a step is taken after the time specified for taking a step in these Rules, the Regulations or a procedural order, the step is of no effect'. A party who is thus in default must now take positive steps to file an application for leave/extension of time to be relieved from the operation of the nullity rule.

Disclosure and discovery

The concept of full and frank disclosure is one which all practitioners in the family law jurisdiction are well aware. Rule 13.01 expressly sets out the parties' duty of disclosure and it is said to exist from the pre-action procedures and continue until the case is finalised, requiring that each party give to the other 'full and frank disclosure of all information relevant to the case in a timely manner'.

Parties are now required to swear to both their awareness of, and fulfilment of, the duty of disclosure by way of affidavits in their initiating documentation and also by the provision of an undertaking to the court prior to pre-trial conference.

The Lionel Bowen Building.
Photo: Fiona-Lee Quimby / News Image Library.

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The court has attempted to abolish the concept of 'general discovery' by, amongst other things, introducing Rule 13.07, which imposes the duty of disclosure on a party in respect of documents in the possession or control of the party that are 'directly relevant' to an issue. Division 13 deals with the content of the disclosure that is required in the cases to which it applies.

Expert evidence

Part 15.5 of the *Family Law Rules 2004* fundamentally alters the procedures and Rules that govern both the preparation and adducing of evidence of an expert nature.

Central to this part of the Rules are the concepts that the court will control:

- the issues on which it requires expert evidence;
- the nature of the evidence it requires on that issue; and
- the way in which expert evidence is placed before the court.

The expert evidence rules are focused upon encouraging the parties to appoint a single expert in all proceedings. Where a single expert is appointed then the parties do not need permission of the court to tender the evidence of that expert. The court may order of its own initiative that the parties obtain a report from a single expert witness.

Importantly, if a single expert witness has been appointed, a party is prohibited from tendering a report from a further expert witness without permission of the court.

In parenting cases, any expert's report that is obtained must be provided to all other parties. The Rules purport to override any legal professional privilege that would otherwise attach to an expert's report in a parenting case (15.55(4)). A party who fails to disclose an expert's report may not use that report at trial.

In relation to all expert evidence, there are strict requirements regarding the manner in which experts are to be instructed and the disclosure of such instructions.

An expert is now able to ask the court to make procedural orders to assist the expert in carrying out his or her functions. Prior to the hearing or trial a party may now put written questions to a single expert for the purposes of clarification of the expert's report.

Section 106: A source of jurisdictional conflict

The saga continues

By Malcolm Holmes QC

In the Winter 2002 edition of *Bar News* an article appeared which discussed the conflicts which have arisen at the interface between the jurisdiction conferred on the specialist Industrial Relations Commission under sec 106 of the *Industrial Relations Act 1996* (NSW) and the ordinary civil courts; both at first instance and on appeal in this and the other states of Australia.[1] Unbeknownst to the authors of that article, at the time of publication two members of the NSW Bar were sitting in a Colorado courthouse giving expert evidence on the operation of sec 106 in proceedings brought in Colorado by a number of American companies seeking an anti-suit injunction to restrain an American citizen from continuing proceedings in New South Wales under sec 106 of the Industrial Relations Act.

By way of background to those proceedings, it appears that some years ago an American company sent one of its employees, an American citizen, to Sydney to head up its Australian operations. He apparently worked in Sydney for some time and then was to be transferred to work in the American company's European operations. It appears that at the time of the transfer from Sydney he renegotiated his employment arrangement, which resulted in a separate concluded release agreement in relation to some claims which he had made. Also, there was an understanding as to the terms of a new employment arrangement, to be formally concluded, which would operate or be entered into when he commenced work in Europe. When he arrived in Europe the relationship between the parties deteriorated and they parted company.

'Common law courts in Australia: are those the guys that wear the wigs and everything?'

He then returned to Colorado where he commenced proceedings against his American employer and another company alleging that the concluded release agreement had