

## Federal Court Rules 2011

The Federal Court of Australia has circulated the draft amended Federal Court Rules. The new Rules are expected to commence on 1 August 2011. This note sets out a brief (and by no means exhaustive) overview of some of the key changes introduced in the new Rules.

### General

The new Rules have replaced the old numbering system of Orders and Rules with a new system of Chapters, Parts, Divisions and Rules. Rule numbering takes the number of the Part and the Rule.

The new Rules are drafted with the intention of adopting plain English drafting and some supposedly archaic terms, such as 'notice of motion' and 'traverse' have been replaced with 'interlocutory application' and 'denial' respectively.

Court forms are no longer scheduled to the Rules. Forms are approved by the chief justice pursuant to rule 1.52(2) and published on the court website.

Rule 1.04 provides that the new Rules apply to proceedings commenced in the court on or after the commencement date. The new Rules will also apply to all steps taken in existing proceedings after the commencement date, unless the court orders that the old rules are to apply.

### Commencing proceedings

Proceedings in the original jurisdiction of the court are commenced by originating application (rule 8.01, form 15). Originating applications are to be accompanied by a statement of claim or affidavit (rule 8.06), and on filing, will be endorsed with the first return date (rule 5.01). The originating application must be served no later than five days before the first return date (rule 8.07).

An originating application must be filed with the applicant's genuine steps statement in proceedings governed by the pre-trial procedures set out in Part 2 of the *Civil Dispute Resolution Act 2011* (Cth), which is also scheduled to commence on 1 August 2011. Rule 8.02 prescribes the information that must be included in the genuine steps statement. Further information in relation to the pre-trial protocols is set out in the next

article, 'Genuine steps obligations and pre-litigation requirements'.

Originating applications may not be amended without leave (rules 8.21 and 8.22).

On receipt of an originating application, respondents must file a notice of address for service rather than an appearance (Form 10, rule 5.02), and a genuine steps statement where applicable (rule 5.03), before the first return date fixed in the originating application.

The notice of address for service (like the originating application) must comply with rule 2.16, which requires parties represented by lawyers to indicate the telephone number, fax number and email address of the lawyer. If a party is represented by a lawyer, the party agrees for the party's lawyer to receive documents at the lawyer's fax number or email address (rule 11.01). Accordingly, the rules now provide for mandatory service of documents by fax or email.

Where a respondent wishes to contest the jurisdiction of the court, the conditional appearance is replaced by filing of an application to set aside the originating application at the same time as the address for service (rule 13.01). A respondent not intending to contest the application may file a submitting notice prior to the return date (rule 12.01).

The court (including a registrar) is empowered to make a range of directions for the management, conduct and hearing of the proceeding at the first and subsequent directions hearings (rule 5.04).

Cross-claims are not filed as part of the defence but are to be filed as a separate notice of cross-claim, to be filed at the same time as the filing of a defence or otherwise with leave (rules 15.02-15.04, form 31). Cross-claims cannot be amended without leave. The rules are silent on whether cross-claimants are required to comply with the *Civil Dispute Resolution Act 2011* (Cth) when commencing a cross-claim, however rule 15.10 may operate to apply the Rules in relation to originating applications (including those relating to service of genuine steps statements) to cross-claims.

### Pleadings and particulars

A defence may now be filed and served within 28 days

after service of the statement of claim (rule 16.32).

The new Rules require particulars to be provided of allegations of conditions of mind, including knowledge (rule 16.43(1)). If a party alleges that another party ought to have known of something, particulars must be given of the facts or circumstances from which the party ought to have acquired knowledge (rule 16.43(2)).

Further and better particulars will be ordered only where the opposing parties did not have sufficient knowledge of the case to be answered, and would thereby be prejudiced in the conduct of the case (rule 16.45).

### **Interlocutory applications**

Notices of motion are now referred to as interlocutory applications.

Unlike the previous rules, interlocutory applications need not be supported by affidavit in some circumstances. Where a party wishes to rely only on correspondence or other documents the authenticity of which is not in dispute, a list of the documents and correspondence relied on may be provided to the other parties and the applicant on the interlocutory application must file the documents in court, including additional documents identified by the other parties (rule 17.02).

### **Discovery**

The new Rule no longer provides for discovery by notice. Discovery is now available only when the Court orders, and only where necessary for the determination of the issues in the proceedings. Parties giving informal discovery will not be entitled to the costs of giving discovery (rules 20.11 to 20.12).

Parties may apply for an order for discovery. The application may only be made 14 days after all respondents have filed a defence (rule 20.13(1), (3)).

The new Rules distinguish between standard discovery and more extensive discovery. Standard discovery is defined as documents directly relevant to the issues raised in the pleadings, of which the party the subject of the order is aware after a reasonable search and that are in the relevant party's control. The concepts

of relevance and reasonable search are further defined in the same way as the existing Order 15 Rule 2 (rule 20.14).

An application for discovery must state whether the party is seeking standard discovery or the scope of the discovery sought (rule 20.13(2)). Non-standard or more extensive discovery may be sought by identifying any of the criteria for standard discovery that should not apply, any additional criteria that should apply and whether categories of discovery, electronic discovery or a discovery plan are sought. An applicant for non-standard discovery must put on an affidavit stating why the order should be made and including any the proposed categories for discovery, electronic format or draft discovery plan (rule 20.15).

Rule 20.20 provides a limitation on the continuing obligation to make discovery under the present rules. A party is not obliged to give discovery of documents created after the proceeding is commenced and subject to a claim for privilege.

### **Alternative Dispute Resolution**

The new Rules include provisions for the referral of proceedings to Alternative Dispute Resolution (ADR). Parties are required to consider options for ADR, including mediation, as early as possible (rule 28.01). The court is empowered to make orders for reference to ADR processes and a stay or adjournment of the proceedings, and to require mediators and arbitrators to report to the court (rule 28.02). Where parties refer to the proceedings to ADR of their own motion, they must apply to the court for directions as to the future conduct and management of the proceedings within 14 days of the referral (rule 28.05).

A party is no longer able to apply to terminate an arbitration under the new Rules (rule 28.04). The court's ability to enforce the terms of awards has been enhanced under the new Rules: parties can now make applications for registration of an award made in an arbitration that was referred from existing proceedings (rule 28.13) or for an order in terms of the award where the subject matter of the arbitration falls within the original jurisdiction of the court (rule 28.14).

The new Rules also govern the court's supervision of other ADR Processes (rules 28.31-28.35).

Lastly, the new Rules introduce rules applicable to the recent amendments to the *International Arbitration Act 1974* (Cth). Rules 28.31-28.50 govern applications for stay of arbitration, recognition of local awards and enforcement of foreign awards, subpoenas and compulsory attendance before a tribunal, and confidentiality orders.

### **Evidence**

Changes have been made to the form of affidavits under the new Rules. All documents that are not original documents or of such dimensions that they cannot be annexed must be contained in an annexure to the affidavit (and therefore filed) (rule 29.02(4)). The pages of annexures need not be signed but each annexure must be identified by a separate certificate (rule 29.02(7), (8)).

Solicitors' certificates of compliance are no longer required for the filing of affidavits.

The dictionary to the new rules defines 'filing' as filing and service, with the consequence that most documents, including affidavits, are to be filed and

served. Affidavits must now be served with exhibits and annexures at least 3 days before it is intended to be relied on (rule 29.08).

The new Rules provide for the filing and service of expert reports as well as the manner in which expert evidence may be heard. Rules 23.11-23.15 duplicate the existing rules and import the requirements of practice note CM 7 as to the form of experts' reports.

### **Appeals**

The new Rules now incorporate some of the terms of Practice Notes APP 1 and APP2 in relation to preparation of appeals to the Federal Court (rules 33.23-33.28) and appeals to the full court (rules 36.51-36.56). The more detailed provisions of the Practice Notes continue to apply.

Applications for leave to appeal from interlocutory decisions must be made within 14 days of the date that judgment is given or the order made (rule 35.03) and applications may be made orally at the time the judgment or order is made. An application for leave to appeal must be served within two days of filing (rule 35.15).

**By Catherine Gleeson**