THE LAW SOCIETY
OF NEW SOUTH WALES

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4 April 2010

Justice Lander
Federal Court of Australia
Level 5
Roma Mitchell Commonwealth Law Courts Building
3 Angas Street
Adelaide SA 5000

By email: ea.landerj@fedcourt.gov.au

Dear Justice Lander,

**Draft Federal Court Rules**

The Law Society's Litigation Law and Practice Committee (Committee) has reviewed the draft Federal Court Rules and its detailed comments are enclosed.

The Committee's principal submission concerns the timing of the introduction of any new rules. The Committee is concerned that in circumstances where the draft rules have not yet been circulated widely within the profession and a further draft is not expected to be released until some time after the Judges' meeting in April, there is very little time for the profession to become familiar with the new rules and ensure that resources (in particular, precedent documents used by practitioners) are amended to reflect them and the new forms.

As you will appreciate, the fact that the new rules constitute a complete re-write of the existing rules and are accompanied by a new set of forms, means that the work involved in familiarisation and updating resources will be very significant. In these circumstances, the Committee requests that the Court consider deferring commencement of the new rules until 1 January 2012.

The Committee appreciates the opportunity to comment on the proposed new rules.

Yours sincerely

**Stuart Westgarth**
President

# Submission – Draft Federal Court Rules

## General comments

At a general level the Committee welcomes the proposed new rules and thanks the Federal Court Rules Revision Committee for this opportunity to comment on them. In this submission the Committee refers to the draft new Federal Court Rules (provided to the Law Society under cover of letter dated 24 December 2010) as "FCR 2011" and to the existing rules by reference to their Order and rule number.

All simplifications are welcome: of structure (that the FCR 2011 follow the usual course of a proceeding); of language (direct speech, gender neutrality), of procedure (e.g. "file" means "file and serve"; the use of an application to commence any proceeding or step, thereby doing away with the need for notices of motion; abolition of solicitor/client and solicitor own client costs).

The Committee does, however, have serious concerns about the proposed timing for the publication of FCR 2011 and their introduction.

While the Committee notes the transitional arrangements provided in rule 1.04, the Committee's view is that a later date for commencement is required. Firstly, a proposed commencement of 1 July 2011 does not allow sufficient time for practitioners to become familiar with such extensive change. Many practitioners will want to spend time understanding the structure and major changes being introduced. The Committee expects that many firms will conduct training sessions designed to address that need. Further, practitioners will need to prepare precedent versions of court documents based on the new forms and undertake the rigorous testing and roll out of those documents onto their precedent systems. The time and expense incurred in a precedent roll out on this scale was perhaps not fully taken into account when the decision to release the consultative drafts so close to the proposed commencement date was made.

## Delayed commencement

It is the Committee's submission that practitioners need a minimum of six months from the time of publication of the final version of FCR 2011 to allow for the necessary training and the preparation of precedents.

Delaying commencement may also provide further opportunity for the Federal Court Rules Revision Committee to consider the findings of the Australian Law Reform Commission (the ALRC) Inquiry into Discovery in Federal Courts as well as the anticipated introduction of the new pre-litigation protocol provisions contemplated under the *Civil Disputes Resolution Bill 2010* that is currently awaiting assent.

## Explanatory Guides and comparative tables

It would be of considerable assistance to the profession and all court users, if the Federal Court will prepare and release a comprehensive explanatory guide that provides an overview of the changes and the policies or reasoning behind them. A comparative table of old to new rules as well as old to new forms would also be of great benefit to all court users. The Committee respectfully requests that the Court consider publishing such documents in conjunction with the final version of FCR 2011.

**Specific comments**

**Part 1: Preliminary**

**General powers of the Court**
The Committee endorses the Court's practice of case management and agrees that the Court should have all the power it requires to conduct and conclude proceedings.

However, the Committee is of the view that this power is embodied in FCR 2011 rules 1.32 and 1.34: the Court may make any order it considers appropriate in the interests of justice, including an order to dispense with the rules. The Committee is concerned that the provisions may provide the Court with more power than this, in particular to act inconsistently with FCR 2011, by new rule 1.35. This may have significant implications for practitioners, who advise their clients and prepare cases (in terms of both procedural structure and costs) on the basis of the rules and the cases that consider them. It will be of benefit to the Committee to know the reasoning for this proposed rule. In particular, the Committee enquires as to the intended scope of rule 1.35?

FCR 2011 rules 1.31 and 1.32 have no equivalent in the existing court rules. The Committee accepts that the Court should have the power to make any order that it considers appropriate in the interests of justice and so supports rule 1.32. However, the need for rule 1.31 is not clear; nor is the distinction between sub-rule 1 and sub-rule 2. It seems to the Committee that rule 1.31 as a whole is a subset of rule 1.32, and that there may be no need for 1.31(2). An explanation as to the intended scope and policy under-pinning these new provisions will be helpful to the Committee so that it may better understand the work it is intended that rules 1.31 and 1.32 will do.

The Committee queries the need for rule 1.33 and the use of the phrase "the Court may make an order **or do an act or thing**" [emphasis added]; where otherwise in FCR 2011 the Court makes orders. The Committee would like to know what is contemplated by this rule other than the making of orders that the Court considers appropriate in the interests of justice.

Similarly, the Committee also queries the need for rule 1.38. The Committee considers that it falls within the Court's broad powers acknowledged elsewhere in this Part of the rules (as is noted in the commentary to the equivalent Order 3 r 4.)

**Part 5: Court supervision of proceedings**

**Directions - reference to consent orders/attendance of parties**
Rule 5.03 (2) requires the attendance by all the parties at a directions hearing.

The Committee considers that specific provision encouraging parties to seek agreement to case management steps and allowing/encouraging the submission of consent orders to the Court (see rule 39.11) should be included in this Part. Where consent orders are provided and accepted by the docket judge there should be no need for attendance by the parties.

It is not necessarily in the interests of parties (and may not sit well with the over-arching purpose provisions under section 37M of the *Federal Court of Australia Act 1979*) to have to incur the expense of attending all routine directions hearings, and indeed some of the more routine directions hearings could be dispensed with all together, if prior agreement was specifically encouraged.

The Committee notes rule 5.01 requires the parties to attend on the first return date which is sensible and is supported.

**Part 9: Parties and proceedings**

*Rule 9.71*
The Committee submits that the opinion contemplated by rule 9.71(2)(b) ought be expressed as an opinion of a lawyer (consistent with the terminology used in other parts, e.g. Part 4) rather than a barrister.

**Part 15: Cross-claimants and third party claims**

*Rule 15.08*
This rule is new and requires a cross claimant to serve a copy of the notice of cross claim **on the same day as it is filed**, on each cross respondent who has an address for service. If a cross respondent has not filed a notice of address for service, the notice of cross claim must be served personally.

The Committee submits that the obligation to file and serve on the same day may be onerous for practitioners and self-represented litigants and proposes that a longer period should be allowed.

*Rules 15.16, 15.17, 15.18, 15.19 and 15.20*
These rules are new and make specific provision for amendments to cross claims.

The Committee notes that this Part does not make express provision for when a party must seek leave to amend, how amendments should be marked up, the date from which amendment takes effect and how amendments should be served. The Committee considers that this Part should be expanded to include this.

It should be noted that under rule 15.20, an order permitting a party to amend a cross claim ceases to have effect unless the cross claimant amends the cross claim in accordance with the order within the period specified in the order or if no period is specified within **fourteen** days of the date of the order.

As a general observation, the Committee considers it would be prudent for the Court to draw attention to any new time limits created under FCR 2011.

**Part 16: Pleadings**

*Rule 16.45 – Application for order for particulars*

(a) This rule will require as a pre-condition to the application for an order for particulars, that the inadequacy in particulars provided be such that "The party may be significantly prejudiced in the conduct of its case, (16.45(1)). Further, an application may only be made under sub-rule (1), if "The party seeking the order could not conduct the party's case without further particulars," (sub-rule (2)(b)).

(b) Current Order 12 r 5 merely empowers the Court to make an order that a party provide further particulars at any time, but, as a general rule, within a reasonable time after the need arises.

(c) It is fair to say that the preconditions to making an application for particulars in rule 16.45 will discourage such applications and will further discourage the practice of parties voluntarily providing particulars in response to a letter of request. The Committee queries whether this possible consequence was intended?

(d) The object of particulars has been described variously and includes:

(i) to inform the opponent of the nature of the case he has to meet as distinguished from the manner in which the case will be proved;

(ii) to prevent surprise at trial;

(iii) to inform the collection of evidence;

(iv) to limit the generality of pleadings;

(v) to define the ambit of discovery; and

(vi) to define, the matters in issue at trial, which cannot be widened without leave of the Court.

(e) While the efficient, fair and cost effective resolution of a dispute should discourage the bringing of unnecessary interlocutory applications, the raising of the bar which must be met in order to bring an application for particulars may have unintended consequences which run counter to this overriding purpose. By way of example, unless the issues in dispute are appropriately defined and narrowed, discovery may be overly broad and costly.

(f) The note to rule 16.45 states that the intent of the pleading rules is to ensure all material facts are made patent so there is no unfairness to another party and notes that a lack of particularity may prevent a party from broadening its case at trial. While that statement may be accepted as a statement of intent, experience would suggest it is not always achieved. The Committee considers that in light of rule 16.45 greater responsibility should be placed on parties to plead properly in the first instance. The Committee would welcome the opportunity to further consult with the Rules Revision Committee in this regard.

(g) The ALRC noted[1] support for the requirement that parties plead with greater specificity, for the abolition of bare denials and the requirement that parties admit facts they know to be true. The ALRC referenced relevant provisions of the Civil Procedure Rules (UK) and the Uniform Civil Procedure Rules (Qld) which impose such requirements. The Committee would like to know if the Rules Revision Committee considered adopting these recommendations? The ALRC also referenced Order 11 rule 18 of the Federal Court Rules which requires a party denying an allegation of fact not to do so evasively or

[1] Managing Justice: A Review of the Federal Civil Justice System (ALRC Report 89), February 2000 at para 7.171.

generally but to answer the point of substance. In this context it is noted that Order 11 rule 18 has been omitted from FCR 2011 as has Order 11 rule 17 which provides that a party shall not plead the general issue. The Committee would like to understand the reasoning or policy behind the decision to omit these provisions.

*Rule 16.03 - Pleading of Facts*

(a) Rule 16.03 now provides, in part, that:

> "(1) A party must plead a fact if:
>
> (a) it is necessary to plead it to meet an express denial of the fact pleaded by another party; or
>
> (b) failure to plead it may take another party by surprise if it is later pleaded."

(b) Sub-rule (1)(b) is familiar, however sub-rule (1)(a) is not, nor is its intent or meaning obvious. Further, the referenced existing rules, do not assist in this regard.

(c) If a fact must be pleaded in order to meet an express denial of a fact pleaded by another party, can this requirement ever apply to a statement of claim or affidavit supporting an application? Rule 16.11 provides that if no reply to a defence is filed a joinder of issue is implied in relation to any allegation of fact in the defence and each allegation of fact is taken to be denied. This is potentially inconsistent with rule 16.03(1)(a) which may require a reply to be pleaded to meet an express denial of the fact pleaded by another party.

The Committee would be pleased to know the intention and application of rule 16.03(1)(a)].

Non-admissions have now been done away with, however a party may state that it does not know and therefore cannot admit a particular fact (see rule 16.07). Rule 16.01(e) requires a lawyer preparing a pleading to certify among other matters, as to the proper basis for each "non-denial" in the pleading. The current reference is to each admission. The Committee would appreciate some further clarification as to the meaning and scope of the term "non-denial".

Rule 16.42 is headed, "Fraud, misrepresentation, etc" and now requires pleading of particulars in relation to unconscionable conduct. However, "misrepresentation" has been omitted from the rule itself. Is this intentional or a typographical error?

**Part 20: Discovery**

*Rule 20.14*

The rule uses the concept *directly relevant* but gives no guidance as to the meaning of that term. The relevance concept is tied to issues raised by the pleadings or in affidavits. Affidavits setting out evidence to be relied on at trial are, in many matters, prepared and filed after discovery has been given. Of course, a party has a continuing obligation to give discovery (see rule 20.20), but the Committee submits

that the structure of the proposed rule makes that continuing obligation more complex and is likely to add to the cost of litigation.

**Part 36: Appeals**

Rule 36.55(2) will require parties to file submissions at an earlier stage; for an appellant 20 business days before the appeal, and for a respondent 15 business days before the appeal. This is likely to add to the costs of an appeal because practitioners, having prepared submissions in advance, will have to spend additional time reviewing and refreshing themselves in relation to the material before the hearing of the appeal.

**Approved Forms**

**Notification of changes**
Changes to approved forms are not gazetted (as is the case with prescribed forms) and therefore some other form of effective announcement is needed. The Committee suggests that this could be achieved by Practice Up-date announcements to be issued via the Federal Court website setting out the names/numbers of the forms affected with a brief description of the amendment.

**Addition of version numbering**
It is important that on each occasion a form is amended its version number is up-dated alongside the date the form was up-dated. The draft forms do not have provision for version numbering/dating and this should be included.

**Acceptance of service noted in 'footer' of forms**
The Committee opposes the addition of fax and email provision in the footer of the new forms as an indication that acceptance of service by those methods is thereby given. The Committee's view is that it is unnecessary as specific provision can be provided more clearly by other means and too imprecise (and therefore risky) to provide for acceptance of service in this manner.

Acceptance of service by fax or email must be specifically dealt with through clear (but optional) provision on the originating application and also on the notice of address for service (i.e. on the first substantive document filed by the party). The email and fax details appearing in the footer of each form should only be used as additional contact details for the filing party - not for service of documents.

The concern is that it will be overlooked and inadvertently offered. It is the Committee's view that it is inherently risky to allow for inadvertent acceptance at say, an unmanned email address and this is so, in spite of the warning that appears at the bottom of the new forms.

The Committee suggest optional provision in Form 12 and in Form 16 (under "Applicant's address") as follows:

| | |
|---|---|
| Electronic service address | [insert email address for electronic service e.g. service@emailaddress.com.au or write "Not applicable"] |
| Fax service number | [#insert fax number or write "Not applicable"] |