

NEW FEDERAL COURT RULES 2011¹

1. On 1 August 2011 the *Federal Court Rules 2011* came into force pursuant to s59(4) of the *Federal Court of Australia Act 1976*. The new rules were introduced in the context of the changes made to the *Federal Court of Australia Act 1976* by introduction of Part VB by Act No 117 of 2009 which commenced operation on 1 January 2010.
2. The new Part VB introduced three new important provisions, s37M, s37N and s37P. In summary, s37M introduced an overarching purpose for civil practice and procedural provisions to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible. Materially, s37M informs the interpretation and application of the civil practice and procedure provisions. The civil practice and procedure provisions are in substance the new *Federal Court Rules 2011* insofar as they apply to civil proceedings. This means s37M provides an important overarching purpose in civil proceedings which purpose is informed by objectives including the just determination of all proceedings before the Court:
 - (a) the just determination of all proceedings before the Court;
 - (b) the efficient use of the judicial and administrative resources available for the purposes of the Court;
 - (c) the efficient disposal of the Court's overall caseload;
 - (d) the disposal of all proceedings in a timely manner;
 - (e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.
3. Section 37N imposes an obligation on parties to a civil proceeding to conduct the proceedings, including negotiations for a settlement of the dispute, in a way that was consistent with the overarching purpose. This provision imposes an obligation in civil proceedings upon the parties which is likely to be the subject

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of close examination in the context of disputes concerning the civil practice and procedure provisions. Section 37N also imposes a duty on the party's lawyer both in the conduct of the proceedings and also in negotiations for settlement to take account of the duty imposed on the party and to assist the party to comply with that duty. Section 37N(3) provides a power to require the party's lawyer to give to the client party an estimate of the duration of the proceedings or a part thereof and the likely costs that the party will have to pay in connection with the proceedings.

4. Moreover, in any costs consideration the Court must take into account a failure to comply with subsection (1) or subsection (2) of s37N being the duty respectively imposed upon the parties and the duty imposed upon the parties' lawyer. Section 37N(5) expressly provides for an order that the lawyer bear costs personally because of a failure to comply with the duty imposed by s37N(2).
5. Section 37P is a general power in civil proceedings for the Court to give directions about practice and procedure and includes a power to consider making an order under s53A which permits the Court to refer the matter out to arbitration to a mediator or to a suitable person for alternative dispute resolution process. Section 37P also provides for a broad power in relation to making an order or directions as the Court thinks appropriate for a failure to comply with a direction given by the Court which include under s37P(6):
 - (a) dismiss the proceeding in whole or in part;
 - (b) strike out, amend or limit any part of a party's claim or defence;
 - (c) disallow or reject any evidence;
 - (d) award costs against a party;
 - (e) order that costs awarded against a party are to be assessed on an indemnity basis or otherwise.
6. These powers are, of course, not exhaustive of the power of the Court to deal with the failure to comply with directions.
7. The background to the introduction of the new Rules is set out in the explanatory memorandum that may be found out to:

<http://www.comlaw.gov.au/Details/F2011L01551/Explanatory%20Statement/Text>

8. Whilst the new Rules apply to any step taken in existing proceedings after 1 August 2011 there is a power to order that the former Rules with or without modification apply to any step in existing proceedings.
9. The new Rules are divided into the following six chapters:
 - Chapter 1 Introductory provisions (Parts 1 to 6)
 - Chapter 2 Original jurisdiction – proceedings generally (Parts 7 – 30)
 - Chapter 3 Original jurisdiction – special classes of proceedings (Parts 31 – 34)
 - Chapter 4 Appellate jurisdiction (Parts 35 – 38)
 - Chapter 5 Judgments, costs and other general provisions (Parts 39 – 41)
 - Chapter 6 Disciplinary (Part 42)
10. The table of contents, being 33 pages identifies the Parts, Divisions and Rules of the 426 page new *Federal Court Rules 2011*. The Federal Court site for the new rules and practice note are
 - (a) <http://laredef.typepad.com/fedcourt/2011/07/federal-court-rules-summary-of-resources.html>
 - (b) http://www.fedcourt.gov.au/how/practice_notes.html
11. Schedule 1 to the new *Federal Court Rules 2011* sets out the dictionary for the meaning of words and expressions used in the Rules including signpost definitions. The powers that may be exercised by Registrar are addressed in Part 3 and Schedule 2. Part 3 includes a new Rule 3.03 for orders by a Registrar other than in open court. Schedule 3 contains details of costs allowed for work done or services performed by lawyers, their staff and agents.
12. The new Rules are in substance a plain English upgrade and more modern presentational structure of the old Rules with a number of important new Parts and Rules consistent with the purpose of Part VB of the Act.
13. In Chapter 1, Part 1 the application for procedures provision in Rule 1.21 is useful. The new rules include six new provisions – Rules 1.31, 1.32, 1.36, 1.37 and 1.41. There are powers to mould orders having regard to the nature and complexity of the proceedings, orders that the court considers in the interests of justice, orders subject to any conditions the court considers

appropriate, orders inconsistent with Rules, orders other than in open court, orders on the court's initiative or a that of a party or person of sufficient standing, orders that grant, refuse an application or a different order, orders specifying consequences of non-compliance.

14. The new electronic signature and filing is dealt with in Part 2, which includes a revised right of inspection and a new Rule 2.16. Part 4 introduces a new concept in Rule 4.03 of a Notice of Acting (Form 4) and the Rules provide for notices as to change of lawyer, termination of retainer, intention to cease acting and ceasing to act, includes a referral for legal assistance in relation to a Pro Bono lawyer.
15. Part 5 provides for the Court's supervision of proceedings, and has four new Rules 5.01, 5.02, 5.03 and 5.21. This part requires the genuine step statement, (Forms 11 and 16), if valid, and Rule 5.04 sets out a sweeping but not exhaustive combination of directions for the management, conduct and hearing of proceedings. Rule 5.02 and Rule 11.07 introduce a new rule for a notice of address for service in accordance with Form 10. Notice of change of address is dealt with by Rule 11.09(c) and Form 28. Rule 5.08 means that the court can deal with the matter substantively at a directions hearing and there are provision for self-executing and default orders.
16. Part 6 addresses vexatious proceedings and also addresses communication and recording devices in court.
17. In Chapter 2, Part 7 addresses orders before commencement of proceedings as well dealing with persons under a legal incapacity, preliminary discovery freezing orders, ancillary orders and search orders. There is a new Rule 7.25.
18. Part 8 addresses the commencement of proceedings, including a provision dealing the s78B notice of a constitutional matter and amendment of the originating application. There is a new Rule 8.02.
19. Part 9 deals with Parties with a new Rule 9.71. Part 10 deals with service including some new provisions for service outside Australia, which may be set aside under Part 13. There are three new Rules 10.07, 10.08, and 10.09. Part 11 deals with an address for service and Part 12 submitting notices which is new.

20. Part 14 deals with interim preservation and inspection of property including receivers. Part 15 deals with cross claims and the amendment thereof. There are three new rules in Part 15, Rules 15.05, 15.06 and 15.08.
21. Pleadings, strike-out, particulars and amendments are dealt with by Part 16.
22. Part 26 deals with summary disposal, withdrawal, discontinuance and stay until costs paid.
23. Part 17 deals with Interlocutory applications, Form 35 and there is a new Rule 17.02 concerning lists of correspondence without an affidavit. Part 18 deals with interpleader process.
24. Security for costs is dealt with in Part 19 and Part 20 has three new provisions, Rules 20.02, 20.16 and 20.24, for controlling discovery and inspection of documents to conduct proceedings as quickly, inexpensively and efficiently as possible. Part 20.31 provides a power for a notice to produce a document identified in a pleading or affidavit.
25. Part 21 deals with interrogatories and has one new Rule 21.02. Part 22 admissions, Part 24 subpoenas and Part 25 offers to settle with a new Rule 25.13.
26. Experts are dealt with by Part 23 which has three new Rules 23.11, 23.12 and 23.14. The Practice Note specifies the guidelines for expert witnesses required by Rule 23.12. Part 29 deals with evidence including affidavits, taking of evidence on commission or abroad. There is a useful instruction for completing affidavits that is on page 3 of the standard Form 59. Part 30 hearings, separate questions, consolidation and trial with two new Rules 30.43 and 30.57, with significant powers to impose limitations in Rule 30.23 and notices to produce (Form 61) are dealt with by Rule 30.28. Part 30 also deals with certain notices required under the *Evidence Act* and the assessment of damages and accounts.
27. Part 27 deals with transfer of proceedings, Part 28 alternative dispute resolution including international arbitration, mediation and referees and has ten new Rules 28.01, 20.05, 28.12, 28.13, 28.14, 28.33, 28.35, 28.46, 28.47 and 28.49.

28. In Chapter 3 original jurisdiction involving special classes of proceedings are dealt with by Part 31 with a new Rule 31.21 and remittals or referrals from the High Court of Australia are dealt with by Part 32 with two new Rules 32.03 and 32.13.
29. Part 33 deals with appeals from bodies other than courts in relation to taxation affairs and the Administrative Appeals Tribunal, the Superannuation Complaints Tribunal and the National Native Title Tribunal and has one new Rule 33.30.
30. Part 34 deals with proceedings under the *Fair Work Act 2009*, as well as in relation to proceedings for an offence, intellectual property and Trans-Tasman general, as well as market proceedings for which there are transitional arrangements, as well as provision for application of *Evidence and Procedure (New Zealand) Act 1994*, election proceedings under the *Aboriginal and Torres Strait Islander Act 2005*, Native Title proceedings and Human Rights proceedings. Part 34 has six new Rules 34.63, 34.64, 34.65, 34.73, 34.76 and 34.86A.
31. In Chapter 4 Part 35 deals with leave to appeal and appellate jurisdiction for which relevantly in relation to applications for leave to appeal there is a 14 day time limit under Rule 35.13. There are six new Rules 35.18, 35.19, 35.22, 35.31, 35.32, 35.33.
32. Part 36 deals with appeals generally with a time limit of 21 days under Rule 36.03 and 21 days for cross appeals under Rule 36.22. Part 36 has three new Rules 36.23, 36.43 and 36.71.
33. Part 37 deals with appeals in criminal cases from the Supreme Court of a Territory.
34. Part 38 deals with cases stated and questions reserved, and has a new Rule 38.03.
35. In Chapter 5, Part 39 deals with orders and Part 40 deals with costs with three new Rules 40.17, 40.22 and 40.35.
36. Part 41 deals with enforcement and has six divisions covering general enforcement in relation to court orders and subpoenas, enforcement against

partnerships, execution against business name, the sheriff and fees, as well as reciprocal enforcement of judgments under the *Foreign Judgments Act 1991*.

37. The last chapter, being Chapter 6 is entitled Disciplinary and in that Chapter Part 42 deals with contempt and has a new Rule 42.15.
38. The comparison for the old Rules to the new Rules is at http://www.fedcourt.gov.au/pdfsrtfs_f/FCRulesOldToNew.pdf.

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