

EXPLANATORY STATEMENT

Select Legislative Instrument No. 283, 2013

Issued by the authority of the Judges of the Federal Court of Australia

Federal Court Amendment (Costs and Other Measures) Rules 2013

Section 59 of the *Federal Court of Australia Act 1976* permits the Judges of the Court or a majority of them, to make Rules of Court not inconsistent with the Act. These rules may provide for the practice and procedure to be followed in the Court and in Registries of the Court. They may extend to all matters incidental to any such practice or procedure that are necessary or convenient to be prescribed for the conduct of any business of the Court.

Under subsection 59(4) of the *Federal Court of Australia Act 1976*, the *Legislative Instruments Act 2003* (other than sections 5, 6, 7, 10, 11 and 16 of that Act) applies in relation to Rules of Court made by the Court under the *Federal Court of Australia Act 1976* or another Act:

- (a) as if a reference to a legislative instrument were a reference to a rule of court; and
- (b) as if a reference to a rule-maker were a reference to the Chief Justice acting on behalf of the Judges of the Court; and
- (c) subject to such further modifications or adaptations as are provided for in regulations made under section 59A of the *Federal Court of Australia Act 1976*.

The Federal Court Rules 2011 (FCR 2011) came into operation on 1 August 2011. These rules are reviewed regularly.

Section 9 of the *Legislative Instruments Act 2003* provides that Rules of Court made for the Federal Court of Australia are not legislative instruments for the purposes of that Act. As a result the *Human Rights (Parliamentary Scrutiny) Act 2011* does not apply to any such Rules of Court and no statement of compatibility for the purposes of that latter Act is included in this Explanatory Statement.

The Judges have agreed to amend the FCR 2011 by:

1. limiting the length of an applicant's genuine steps statement which must be filed under rule 8.02 and a respondent's genuine steps statement which must be filed under rule 5.03 to no more than 2 pages;
2. correcting a grammatical error in rule 10.04;
3. increasing the rates of costs in Schedule 3 for work done and services provided by lawyers on or after 1 January 2014 to give effect to recommendations made in the Sixth Report of the Joint Costs Advisory Committee.

Details of the Rules are in **Attachment 1**.

All of the amendments, except those mentioned in item 3 above, will commence on the day after the Rules are registered on the Federal Register of Legislative Instruments (FRLI). The amendment mentioned in item 3 will commence on 1 January 2014.

**Federal Court Amendment (Electronic Court File Measures No. 1)
Rules 2013**

RULE 1 Name of Rules

This rule provides that the Rules are to be cited as the *Federal Court Amendment (Costs and Other Measures) Rules 2013*.

RULE 2 Commencement

This rule provides that these Rules commence as follows:

- Rules 1 to 4 and Schedule 1, items [1] to [5] – on the day after they are registered; and
- Schedule 1, items [6] and [7] – on 1 January 2014.

RULE 3 Authority

This rule notes that the Amendment Rules are made under the *Federal Court of Australia Act 1976* (the Act).

RULE 4 Schedules(s)

This rule provided that each instrument specified in the Schedule to the Amendment Rules is amended or repealed as set out in the applicable items in the Schedule, and that any other item in a Schedule to the Amendment Rule has effect according to its terms.

SCHEDULE 1

[1] Subrule 5.03(2)

[2] After subrule 5.03(2) (before the notes)

[3] After subrule 8.02(2) (before the notes)

Section 6 of the *Civil Dispute Resolution Act 2012* requires that, with some exemptions, an applicant instituting civil proceedings in the original jurisdiction of the Court must file a genuine steps statement setting out the steps that have been taken to try to resolve the dispute or why no such steps were taken. Section 7 of that Act requires that a respondent who receives an applicant's genuine steps statement must also file a genuine steps statement indicating whether the respondent agrees or disagrees (wholly or in part) with the applicant's statement. If the respondent disagrees, the reasons why must also be set out. The respondent's statement must be filed before the hearing date specified in the application.

Section 18 of that Act permits the Rules of Court to, amongst other things, make provision for the form of genuine steps statements. Section 8 requires that any genuine steps statement filed must comply with any Rules of Court made under section 18. Subrule 8.02(1) specifies that an applicant's genuine steps statement must be in accordance with Form 16 approved by the Chief Justice under rule 1.52 for the purposes of the FCR 2011. Subrule 8.02(2) requires that such a statement must comply with section 6 of the Civil Dispute Resolution Act.

Subrule 5.03(1) specifies that a respondent's genuine steps statement must be in accordance with approved Form 11. Subrule 5.03(2) requires that such a statement must comply with Section 7 of the Civil Dispute Resolution Act and include, if the respondent claims that the applicant's steps were not genuine, the reasons for that claim.

Section 37M of the Federal Court of Australian Act provides that the overarching purpose of the civil and procedural provisions of the Court is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible. Subsection 37M(3) requires that the civil and procedure provisions must be interpreted and applied, and any power conferred or duty imposed by them (including the power to make Rules of Court) must be exercised or carried out, in the way that best promotes the overarching purpose.

For reduced time and cost of preparation and increased efficiency overall, consistent with the overarching purpose, the amendments insert subrules 8.02(3) and 5.03(3) respectively to introduce a limit of 2 pages for any genuine steps statement filed by either an applicant or a respondent.

In addition, the amendment to subrule 5.03(2) introduces uniform language to that currently adopted in subrule 8.02(2) to assist court users in more clearly understanding and differentiating the obligations and requirements of each subrule.

[4] Rule 10.04

Rule 10.04 provides for service on an organisation registered under the *Fair Work (Registered Organisations) Act 2009*. It provides that a document that is to be served personally on such an organisation must be served at the office of the organisation shown in the records kept by the Fair Work Commission in accordance with section 233 of that Act.

The rule was amended, with effect from 9 May 2013, by the Federal Court Amendment Rules 2013 following the change of name of Fair Work Australia to the Fair Work Commission on 1 January 2013.

The amendment corrects a grammatical error introduced into the rule by the earlier amendment in the omission of the definite article before "Fair Work Commission".

[5] After Chapter 6

To allow litigants and their lawyers sufficient lead time in the preparation of applicant's or respondent's genuine steps statements for filing in the Court in compliance with the new length limitation mentioned in items [2] and [3] above, subrules 8.02(3) and 5.03(3) respectively will apply only in relation to proceedings commenced on or after 3 February 2014.

To comply with Commonwealth drafting policy, that application, saving or transition provisions that relate to the amendment of an instrument should be included, by amendment, in the principal instrument to which they relate, the Amendment Rules insert a new Chapter 7 into the FCR 2011 to contain all such provisions.

The amendment then inserts into Chapter 7 Division 43.1, which contains an appropriate application provision (rule 43.01) clarifying that the two subclauses only apply in relation to proceedings commenced on or after 3 February 2014.

It is also Commonwealth drafting policy to repeal instruments, and provisions of instruments, that have no continuing operation or effect. The guidance provided by rule 43.01 is necessary only during a period of transition. To ensure (consistent with that policy about spent provisions) that rule 43.01 is repealed once it is no longer needed, Division 43.1 also contains an expiry provision (rule 43.02) providing that the Division will expire on 3 February 2015 as if it had been repealed.

[6] Before item 1 of Schedule 3

[7] Amendment of listed provisions – Schedule 3

Schedule 3 sets out the costs that solicitors are allowed in respect of work done and services performed by lawyers in proceedings in the Court.

These amendments replace in Schedule 3 the amounts mentioned in each of subitems 1.1, 1.2, 1.3, 2.1, 2.2, 2.3, 3.2, 3.3, 10.1, 13.1, 14.1, 14.2, 15.1(a), (b), (c) and (d) and 17.1 in that Schedule with an amount increased by 2.7% in each case rounded to the nearest whole dollar. That rounding calculation takes account of the rounding adjustments made to some of these items when previous similar adjustments were made.

These adjustments have been determined having regard to the recommendation made by the Joint Costs Advisory Committee (JCAC) in its Sixth Report on Legal Practitioners' Costs (September 2013) for a 2.7% increase in costs specified in the rules of the Court.

JCAC was established by the Attorney-General in 2007 following the abolition of the Federal Costs Advisory Committee (FCAC). It comprises representatives of the four federal courts: High Court of Australia, Federal Court of Australia, Family Court of Australia and Federal Circuit Court of Australia; and must include a judicial officer. It is required to inquire and make recommendations to the federal courts annually on variations in the quantum of costs contained in the rules made by the federal courts. It

must inform itself having regard to previous decisions of FCAC, a formula used by FCAC based on data provided by the Australian Bureau of Statistics and written submissions from the Law Council of Australia and other interested parties.

The amended rates apply to work done or services performed on or after 1 January 2014. The addition, by the amendments, of item 1A.1 to the Schedule clarifies this.

The rates in some of the subitems mentioned above were previously adjusted, with effect from 9 May 2013, having regard to the recommendation made by the JCAC in its Fifth Report on Legal practitioners' Costs (September 2012) by the Federal Court Amendment Rules 2013.

The rates set out in Schedule 3 as originally registered in the FRLI on 28 July 2011 will continue to apply to work done or services performed from 1 August 2011 to 8 May 2013. The rates as set out in Schedule 3 as amended by the Federal Court Amendment Rules 2013 will continue to apply to work done or services performed from 9 May 2013 to 31 December 2013.