Queensland Law Society

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Your Ref:

Quote in reply: Litigation Rules Section 30 June 2011

The Honourable Justice Bruce Lander
Federal Court of Australia
Level 16 Law Courts Building
QUEENS SQUARE
SYDNEY NSW 2000
CC: by email: Patricia.Christie@fedcourt.gov.au

Dear Judge

FEDERAL COURT RULES 2011

On behalf of the Queensland Law Society and its members, I would personally like to commend you and the Federal Court Rules Committee for organising information sessions for the profession on the new *Federal Court Rules.* The feedback from our members was that the information session was highly informative, an excellent overview of the new Rules and of valuable assistance to our members. In particular, the podcasting of the session, together with the uploading of the transcript and power point presentation was of benefit to our rural members.

Following the information session, there are several issues that the Queensland Law Society Litigation Rules Section would like to bring to your attention.

Orders inconsistent with the Rules

The Society notes that rule 1.35 relevantly states:

> *1.35 Orders inconsistent with Rules*
> *The Court may make an order that is inconsistent with these Rules and in that event the order will prevail.[emphasis added]*

However rule 10.62 states:

> *10.62 Provisions of this Division 10.6 to prevail*

> *The provisions of this Division[1] prevail to the extent of any inconsistency between those provisions and any other provisions of these Rules. [emphasis added]*

Although the Society notes Division 10.6 would be used less frequently than other provisions, the Society notes the Rules, when read together, may cause confusion to practitioners as to whether the rules or the Court Order (in relation to that Division) is to prevail. To overcome this, the Society recommends that rule 10.62 be reconsidered or subject to rule 1.35. Alternatively, practitioners may be guided by a Practice Direction on inconsistencies between Court Orders and the Rules.

As an additional comment, we understand the intention of Division 1.3 of the Rules to set out the general powers of the Court, including the ability to make orders as a Court sees fit. At present, the proposed Rule 1.34, largely emulates the existing Federal Court Rule 1.8, allowing a dispensation of compliance of the Rules. As such, we are unsure as to the intent of proposed Rule 1.35 allowing the Court to make an order that is inconsistent with the Rules. Given the existence of proposed Rule 1.34, clearly the Court intends that proposed Rule 1.35 will encompass something different to dispensing with compliance with the Rules. There is slight unease in the profession at the Court making orders that are inconsistent with the established Court Rules, as opposed to dispensing with requirements within the Rules. Accordingly, we raise, for consideration, whether proposed Rule 1.35 is necessary.

Application by litigation representative for approval or agreement

Proposed Rule 9.71(2)(c) requires an opinion of a barrister that an agreement is in the best interests of the person under an incapacity. The Society objects to the exclusion of solicitors from the category of potential advisors. Australia's various *Legal Profession Acts* do not exclude solicitors from this category of legal work and there are sound public policy grounds why no such restriction should be imposed. It is our respectful submission that the *Federal Court Rules* should substitute the words "independent lawyer" for the word "barrister," so as to encompass both barristers and solicitors under the proposed rule 9.71(2)(c).

Further and better particulars

The proposed Rule 16.45 will create difficulties. The Rule provides that a party may only make an application for further and better particulars if that party is "significantly prejudiced in the conduct of its case". We understand from your information session that one of the drivers for the change of Rule is that most matters settle and the Court wishes to avoid pleadings and particulars skirmishes.

Most matters settle because the parties generally are able to ascertain, at various stages in the proceedings, the likely outcome of the trial, which often leads to a settlement. An important part of that process is the provision of properly particularised pleadings. Whilst the Court may view some "pleadings and particulars" arguments as lacking utility, such arguments often are of assistance allowing parties to ascertain the true issues of a matter, which are necessary to guide discovery of relevant documents (as set out in proposed Rule 20.14(1)(a)) and potentially settlement.

Parties may become loose with their pleadings knowing that they would not be the subject of a request for particulars, given the high bar that proposed Rule 16.45 places upon parties. There will be a greater number of applications under Rule 16.21 to strike out the pleading, rather than seek particulars. A lack

[1] Service under Hague Convention

of particularity in pleadings, will cause difficulties when parties are trying to settle matters because they will be unsure of the true issues in the dispute.

Accordingly, we respectfully suggest that the word "significantly" be deleted from Rule 16.45(1). We certainly agree that if the parties are able to demonstrate prejudice, that would be a fair basis for the provision of the particulars. That would seem consistent with the intention which underpins proposed Rule 16. 211)(d) dealing with strike out of pleadings.

Filing and serving documents

There are a number of aspects in the Rules (proposed Rules 15.08 and 16.60 are examples) which require that documents be filed and served on the same day. That may prove problematic. We respectfully propose that the words "on the same day" be replaced with the words "as soon as reasonably practicable".

Schedule 3 - Cost Scale

There was a meeting held on 9 May 2010 with the Judges and various parties to discuss the proposed draft Scale.

The proposed wording of Items 1.2 and 1.3 refers to the attendances and has a qualification of whether such attendance is "capable of performance by" a law graduate, articled clerk, clerk or paralegal.

The original draft Scale discussed at the meeting on 9 May 2010 only provided in Item 1.2 that:

> "*Where any attendance referred to in Item 1.1 is by a trainee lawyer, law graduate, articled clerk or equivalent, for each unit of 6 minutes*"

The traditional test for the recovery of costs by a lawyer was that if the attendance was by a lawyer and required the skill or legal knowledge of an experienced clerk, the lawyer rate was allowed (see *re Murjen Pty Ltd v M V Parmelia* unreported decision by Justice Derrington in the Queensland Supreme Court [15 October 1993]). The difficulty of the wording as it currently stands is that it potentially creates an argument about attendances by a lawyer. Any concerns that may be raised on the seniority of the lawyer attending would seem to come within Item 1.1 and be dealt with at the Registrar's discretion in that Item to reduce the rate where it does not require a high degree of skill.

Forms

As to the Forms themselves, we have two observations.

Firstly, it would beneficial if Form 59, being the Affidavit form, could have a place for execution by a deponent and witnessing on the front and subsequent pages. Most firms do their own individual insertions into the documents in any event. However, self-represented litigants and others may not be aware of the requirement that a deponent must swear on each page. The provision of a specified position for signing would alleviate that concern. Such an insertion would only require a slight change to the macro design of the form.

We also comment that there is a slight chronological disconnect in having Form 11 (the Respondent's genuine steps statement) prior to Form 16 (the Applicant's genuine steps statement) but we appreciate that outcome is a function of the placement of Rules 5.03 and 8.02 respectively.

Secondly, the proposed new Form 16 for an Applicant's Genuine Steps Statement reflects the proposed Rule 8.02. Our difficulty is with the requirement in Rule 8.02 (3) (g) as emulated in Form 16. It is often a very subjective view as to whether a party has made genuine steps to resolve a matter. A view by one party that a "walk away position with each party bearing their own costs" is genuine may not be accepted by the other party. We respectfully suggest that the requirement in Rule 8.02 (3) (g) as reflected in Form 16 may create more disagreement between the parties and drive positions further apart. The benefit in identifying a view on whether a step is genuine or not is not immediately apparent, especially as the requirement is not reflected in the *Civil Dispute Resolution Act.* We suggest that it be removed from the proposed Rule and Form 16.

Thank you once again for the opportunity to participate in the consultation process.

Yours faithfully

Bruce Doyle
President