

Family Law Rules 2004



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Not sure if the new *Family Court Rules 2004* (Cth) (**Rules**) simplify or complicate the way we do things? At least until the new Rules (and forms) cease to be “new”, I am inclined to say that there has been a “complication” of the Rules.

Overview

On 29 March 2004, the old *Family Law Rules 1984* were replaced with an entirely new set.

The aim was to modernise the language and the structure, reduce the number of, and simplify the forms and also take a look at the issues in need of review, for example, disclosure from a non-party, expert evidence and the “culture of non-compliance”.

The main purpose of the Rules is stated as follows: “to ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstances of the case” (r1.04).

Key changes

Forms

Here is an example of “complication”. The number of prescribed forms has been reduced from 84 to 25 but the length of at least some of these forms has increased by as many as 10 pages.

In addition to the prescribed forms, there are other compulsory/approved forms including to interim affidavits for parenting cases, the conciliation conference document, compliance certificates, and various undertakings (see r13.15 for example).

Two “ready reckoner” tables are included in the new Rules (see r2.01 and r2.02). These tables set out the form of application you must file to start a case and the documents you must file with the application.

Pre-action procedures

Parties must first comply with the pre-action procedures (PAPs) before they can start a case. They are set out in Schedule 1 of the Rules and there are different requirements for financial cases and for parenting cases. Essentially, the PAPs encourage parties to be less adversarial, make appropriate disclosure, and make a genuine effort to participate in alternate dispute resolution.

If a reasonable attempt has been made to comply with the PAPs and the parties have not reached agreement, notice of intention to start a case must then be given to the other party.

The sanctions for not complying with the PAPs include:

- an order might be made staying your client’s application until the PAPs have been complied with; and
- personal costs orders against the party or lawyer who has failed to comply with the PAPs.

The PAPs will not apply in cases of:

- divorce applications;
- child support applications;
- child abuse;
- family violence;
- fraud;
- urgency;
- if unduly prejudicial;
- intractable disputes;
- where a time limit is close to expiring; and
- a similar application has been brought within the preceding 12 months.

Consequences of non-compliance

There are four main changes to the Rules which have been driven by what the Court perceived as “culture of non-compliance”.

The new Rules have “raised the bar” in relation to the responsibility of parties and their lawyers to assist the Court to achieve the objective of resolving/determining cases justly and in a timely and cost effective manner. For example, a lawyer appearing in a case must have sufficient knowledge of the matter and be authorised to deal with any issue likely to arise. The Court may take this into account when considering a costs order against a lawyer.

The other party may now make an application for a personal costs order against a lawyer or party for failure to file documents on time, comply with the PAPs or an order of the Court.

The nullity rule (r11.02) is another tool which the Court can use to promote compliance. In summary, the rule states that “if a step is taken after the time specified for taking the step in these Rules, in the Regulations or a procedural order, the step is of no effect”.

If you want to file a document or take a step “out of time” an application for leave must be made. This must ordinarily be done in writing, however, it may be possible to make an oral application. Again, the lawyer/party may be exposed to a costs order in relation to an application for relief from the nullity rule.

In addition, the Court has other powers in relation to non-compliance, including:

- the case may lose priority in the list; or
- the party may be prevented from filing any further documents or doing anything else in the case (i.e. the other party’s case may be heard on an undefended basis).

Disclosure

Chapter 13 codifies the parties’ duty to make proper disclosure. More particularly, chapter 13 prescribes early, full and continuing disclosure of all information that is “directly relevant” to the case. The requirement to disclose “directly relevant” documents is meant to impose a more detailed scrutiny of client’s documents so that burying important documents in a stack of irrelevant documents, intentionally or otherwise, does not occur.

There are set time frames for the exchange of documents – during the PAPs stage, two days before the first Court event and then seven days before a conciliation conference.

Parties are now required to certify that they are aware of the duty and that they have complied with it. Before the pre-trial conference, an undertaking must be given to the Court that they have made full and frank disclosure.

Documents from a Non-Party

Division 13.4.2 sets out the procedure for obtaining the production of documents by a person who is not a party to a case.

Unless there is an objection to the production of the requested documents by the non-party, the process will hopefully be less expensive than it was under the old Rules because the process takes place out of Court.

In summary, if you want to obtain documents from a non-party, a Form 12 must be completed and served on all other parties and any person affected by the notice (e.g. a co-director). After seven days from the date of service of the Form 12 on the other parties, it can be served on the non-party. If there is no objection, the non-party has seven days within which to comply with the request. If there is an objection, the notice is stayed until the objection is heard.

The non-party’s reasonable costs must be paid and must be at least equal to the minimum amount of conduct money set out in Part 1 of Schedule 4.

(continued on page 15)