

# EXPLANATORY STATEMENT

## Select Legislative Instrument No. 256, 2013

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

#### Federal Court Amendment (Electronic Court File Measures No. 1) 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.

At the Judges' Meeting held on 21 August 2013, the Judges agreed to amend the FCR 2011 to support the first stage of the implementation in the Federal Court of an electronic court file. That implementation is proposed through a gradual transition over several stages. During the transition the Court's rules must support both the existing paper based and the new electronic court files. The amendments are to accommodate changes to such things as use of stamps and seals; preparation and lodging of documents; redacting, amending and removing documents; and producing documents for inspection or in compliance with a subpoena.

The Court has been consulting with the legal profession about the implementation of the electronic court file and the impact this will have on practice and procedure since late 2011. From mid-2013, this has extended to include discussions with high volume users of the Court at both a national and District Registry level. A national strategy for communicating with Court users generally during the transition from paper to electronic court file has been developed and is now in operation. This strategy will continue until the transition is complete.

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

These amendments commence on the day after these Rules are registered.

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

**RULE 2 Commencement**

This rule provides that these Amendment Rules commence on the day after the Rules are registered.

**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 2.01(2)

[2] Subrule 2.01(3)

Subsection 37(6) of the Act permits the seal of the Court and the stamp of each District Registry to be affixed to documents as provided in that Act, any other Act or by the rules of court. Rule 2.01 deals with the use of the seal and stamps of the Court.

Subrule 2.01(2) sets out the document that the stamp of a District Registry must be affixed to, namely:

- (a) an originating application, notice of address for service, interlocutory application, notice of appeal, subpoena, summons or warrant filed in the District Registry;
- (b) an order of the Court;
- (c) any other document as ordered by the Court.

The amendment to subrule 2.01(2) is to insert the words: “seal of the Court or the” before the word “stamp”. It is to make it clear that the documents referred to in subrule 2.01(2) may have affixed to them either the stamp of a District Registry (for convenient processing in paper) or the seal of the Court (for convenient processing electronically).

Subrule 2.01(3) lists what may be affixed to a document; either by hand or by electronic means. Included are:

- (a) the seal of the Court;
- (b) the signature of the Registrar;
- (c) the stamp of the District Registrar;
- (d) the signature of a District Registrar or Deputy District Registrar.

Subsection 37(1) of the Act permits writs, commissions and process issued by the Court to be signed (including by way of electronic signature) by not only the Registrar or a District Registrar but also any officer of the Court acting with the authority of the Registrar or a District Registrar. The amendment to subrule 2.01(3) inserts a new paragraph (e) at the end of the existing list to include the signature of such an officer as something which can be affixed to a document by hand or electronic means. This aligns the sealing and signing provisions of the rules more closely with those of the Act and reinforces the flexibility that both allow for either physical or electronic signing.

[3] Rule 2.11 (note 2)

Rule 2.11 makes general provisions about documents. It states that a document that is to be filed in a proceeding must be in accordance with any approved form and the Court's requirements. A document can be filed only if it is accepted in the Court after lodgment (see rule 2.27). A person lodges a document by presenting, posting or faxing it to a Registry or sending it by electronic communication using the Court's website (see subrule 2.21(1)). Some documents must be lodged at the "proper registry".

There are two notes to Rule 2.11. The first note states that "Proper Registry" is defined in the Dictionary. The second note states that the Court's requirements in relation to the preparation of documents are set out in practice notes issued by the Chief Justice.

This amendment replaces in Note 2 the phrase: "the preparation of documents" with the phrase: "preparing and lodging documents".

The amendment to the note clarifies that the Court's requirements in relation to documents which can be set out in practice notes issued by the Chief Justice relate not only to the preparation of documents but also to their lodgment.

[4] Rule 2.21 (note)

As noted in [3] above, rule 2.21 outlines how a document is to be lodged with the Court.

The note at the foot of rule 2.21 states that "Proper Registry" is defined in the Dictionary.

This amendment renumbers the existing note as "Note 1" and inserts after it a second note. The new note is identical to the amended Note 2 to rule 2.11 (see [3] above), reinforcing that the Court's requirements in relation to documents which can be set out in practice notes issued by the Chief Justice can relate to both the preparation and lodging of documents.

[5] At the end of Division 2.3

Division 2.3 deals with lodging and filing of documents generally.

This amendment inserts at the end of the division two new rules. Rule 2.28 provides for removal from the Court file of a document which has been accepted for filing in certain circumstances and for the storage of any such document after removal. Rule 2.29 provides for the removal from the Court file of a document and its replacement with a redacted copy in certain circumstances and the storage of any such document after removal.

Under subrules 2.28(1) and 2.29(1) a document will be removed or removed and replaced:

- if the Court orders that the document be removed from the Court file or that it be removed and replaced with a redacted copy, on its own initiative or on the application of a party under rule 6.01 or subrule 16.21(2); or
- for an affidavit, if the Court orders that the affidavit be removed from the Court file or removed and replaced with a redacted copy, on its own initiative or on the application of a party under subrule 29.03(2); or
- if the Court is satisfied that:
  - for paragraph 2.28(1)(c) - the document is otherwise an abuse of process of the Court or should not, under rule 2.27, have been accepted for filing; and
  - for paragraph 2.29(1)(c) - any part of the document is otherwise an abuse of process of the Court and it is reasonably practicable for that part of the document to be redacted.

Subrules 2.28(2) and 2.29(2) respectively provide that a party may apply to the Court for an order:

- under subparagraph 2.28(1)(c)(i) or (ii) that a document be removed from the Court file; and
- under subparagraph 2.29(1)(c) that a document be removed from the Court file and replaced with a redacted copy.

Subrules 2.28(3) and 2.29(4) provide that a document removed from a Court file under the rule, as relevant, must be stored:

- if any order made under the relevant rule specifies a way to store the document, then in the way that is specified; or
- otherwise as directed by the District Registrar.

Subrule 2.29(3) provides that if any part or parts of a document are struck out or removed under rule 2.29

- the corresponding part or parts of the redacted copy of the document replacing it must be unable to be read in any way; and
- that redacted copy must be marked with the date on which the relevant order was made and each date on which redaction was performed.

The insertion of the rules 2.28 and 2.29 remove any doubt about the powers of the Court in regard to the removal of a document from a Court file and, if appropriate, its replacement with a redacted copy. These rules clarify the circumstances where orders for removal or removal and replacement may be made and sought and the way any document which is removed must be stored.

[6] Division 2.3

Rule numbers were purposely left blank at the end of each Division of the FCR 2011 for future rules. Appropriate notations were included of the numbers reserved.

Following use of rule numbers 2.28 and 2.29 for new rules as discussed at [5] above, this amendment removes the existing notation at the end of Division 2.3 that “Rules 2.28 – 2.30 left blank” and inserts instead “Rule 2.30 left blank”.

[7] Rule 7.28

Where the Court has ordered preliminary discovery before the start of a substantive proceeding and, as a result, a document is produced for inspection by a prospective applicant, rule 7.28 permits that prospective applicant to copy the document at his or her own expense, subject to any reasonable conditions imposed by the person producing the document.

In the case of discovery ordered as between parties in a substantive proceedings, the equivalent provision (rule 20.34) permits a party to whom a document is produced for inspection to “copy or make an electronic image” of the document at his or her own expense, subject to any reasonable conditions imposed by the person producing the document.

This amendment aligns these equivalent provisions by inserting into rule 7.28, with appropriate punctuation, the additional words “or makes an electronic image” after the word “copy”.

It establishes consistency in practice in comparable circumstances and reinforces the acceptability of electronically imaging of documents, rather than photocopying, in conducting the inspection of documents for the purpose of litigation.

[8] Subrule 8.23(1)

[9] Subrule 8.23(2)

Rule 8.23 sets out the procedure which must be followed in amending an originating application if the Court gives leave to do so.

Subrule 8.23(1) provides that all required alterations must be made on the originating application on the Court file along with a notation of the date when those amendments were made and the date when it was ordered that the amendments be made.

Subrule 8.23(2) provides that, if the amendments are so numerous or lengthy to make them difficult to read, an amended originating application with the amendments clearly distinguished and otherwise marked with details of the dates of amendment and order for amendment as required by subrule 8.23(1) must be filed.

The amendment to subrule 8.23(1) inserts the punctuation and words “, if reasonably practicable to do so” to make it clear that its requirements apply only where alteration by hand on the originating application is practicable.

The amendment to subrule 8.23(2) inserts, after the words “so numerous or lengthy to make it difficult to read”, the words “or if the originating application was lodged by electronic communication” to make it clear that in all circumstances where the originating application to be amended was electronically filed it can be amended only through the filing of an amended originating application.

[10] Subrule 16.59(1)

[11] Subrule 16.59(2)

Rule 16.59 sets out the procedure which must be followed in amending a pleading.

Subrule 16.59(1) provides that all required alterations must be made on the pleading on the Court file along with a notation of the date when those amendments were made and, if made with the leave of the Court, the date when it was ordered that the amendments be made.

Subrule 16.59(2) provides that, if the amendments are so numerous or lengthy to make them difficult to read, an amended pleading with the amendments clearly distinguished and otherwise marked with details of the dates of amendment and (if appropriate) order for amendment as required by subrule 16.59(1) must be filed.

The amendment to subrule 16.59(1) inserts the punctuation and words “, if reasonably practicable to do so” to make it clear that its requirements apply only where alteration by hand on the pleading is practicable.

The amendment to subrule 16.59(2) inserts, after the words “so numerous or lengthy to make it difficult to read”, the words “or if the pleading was lodged by electronic communication” to make it clear that in all circumstances where the pleading to be amended was electronically filed it can be amended only through the filing of an amended pleading.

[12] Paragraph 24.17(7)(b)

[13] At the end of rule 24.17

Rule 24.17 deals with compliance with a subpoena.

Subrule 24.17(5) permits a person who has been properly served with a subpoena to produce a document or thing to comply with that subpoena by producing the appropriate

document or thing to the Registrar at the Court’s relevant District Registry. Subrule 24.17 (6) permits a person who has been properly served with a subpoena to produce a document to comply with that subpoena by producing a copy of the relevant document, unless the subpoena specifically required the production of original documents. Subrule 24.17(7) provides that that copy can be either a photocopy or in an electronic form that the party at whose request the subpoena had been issued indicates will be acceptable.

The amendment to subrule 24.17(7) substitutes “officer” for “party” to move the responsibility for indicating what electronic formats are acceptable to the officer of the Court who issues the subpoena. The formats which in future will be indicated will be those which are compatible with the electronic court file to ensure that any copy of a document received by the Court from a person complying with a subpoena can, if and when required, be managed in the electronic court file.

The second amendment inserts at the end of rule 24.17 new subrule 24.17(8). That subrule requires that, where a person properly served with a subpoena to produce a document complies with that subpoena by producing a photocopy of the document, the party at whose request the subpoena was issued will make an electronic image of the photocopy produced at that party’s expense and lodge that image with the Registrar at the Court. This will ensure that such a document can, if and when required, also be managed in the electronic court file.

[14] Paragraph 39.35(1)(b)

Rule 39.35 deals with the authentication of orders.

Subrule 39.35(1) provides that an order is authenticated by:

- the Court or a Registrar signing it; and
- the Court, a person at the direction of the Court or a Registrar affixing the stamp of the Court to it.

This amendment replaces the phrase “stamp of the Court” with “seal of the Court or stamp of a District Registry” for consistency with the amended rule 2.01 (which deals with use of seal and stamp of Court generally) as discussed at [1] and [2] above.

[15] Schedule 1

[16] Schedule 1

The expressions “*issuing officer*” and “*issuing party*” are defined in subrule 24.11(1) for the purposes of Division 24.2 only. That Division deals with subpoenas. It is harmonised with the rules of other Australian courts dealing with subpoenas. Harmonised rules operating across multiple-jurisdictions, of necessity, must use generic language and terminology.

The expression “*issuing party*” is also defined in subrule 28.46(1) for the purpose of an application to the Court for the issue of a subpoena under subsection 23(3) of the



*International Arbitration Act 1974* to attend for examination before an arbitral tribunal or to produce documents to an arbitral tribunal or both.

Schedule 1 to the FCR 2011 is a Dictionary of the meanings of words and expressions used in those rules. It includes “signpost definitions” to words and expressions which are defined elsewhere in the rules (see subrule 1.51(2)).

For the assistance of court users dealing with Division 24.2 and rule 28.46 (particularly occasionally), these amendments add signpost definitions of “*issuing officer*” and “*issuing party*” to the Dictionary so that the attention of such users may more quickly and easily be drawn to the definitions of these expressions in subrules 24.11(1) and 28.46(1) as appropriate.

[17] Schedule 1 (definition of *stamp*)

As noted in [15] and [16] above, Schedule 1 is a Dictionary.

It defines “*stamp*” (for a document) to mean affix the stamp of a particular District Registry to the document under subrules 2.01(2) and (3).

This amendment inserts the words “the Court or” into that definition so that, consistent with the amendments discussed at [1], [2] and [14] above, “*stamp*” in that context will now include affixing the stamp of the Court to the document.

[18] Schedule 2 (after table item 102)

Schedule 2 to the FCR 2011 sets out the powers of the Court that a Registrar can be directed to exercise.

These amendments insert as additional powers that a Registrar may exercise the powers to make an order to remove from a court file documents accepted for filing and for redaction of a document on a court file under the new rules 2.28 and 2.29 discussed at [5] above.