



HIGH COURT OF AUSTRALIA

HIGH COURT AMENDMENT (2014 MEASURES No. 1) RULES 2014

9 SEPTEMBER 2014

EXPLANATORY STATEMENT

Select Legislative Instrument No. 139, 2014

These Amendment Rules of Court, signed by the Justices on 9 September 2014, are made by the Justices under the *Judiciary Act* 1903, the *Commonwealth Electoral Act* 1918, the *Nauru (High Court Appeals) Act* 1976 and the *High Court of Australia Act* 1979.

The Amendment Rules amend the following parts of the High Court Rules:

Part 5 (and Part 45) – Judiciary Act 1903 – section 78B Notice;

Part 13 – Interlocutory applications;

Part 56 – Taxation of costs – Particular items;

Part 58 – Costs of taxation;

Schedule 1 – Forms; and

Schedule 2 – Schedule of fees for work done or services performed.

Part 5 (and Part 45) – Judiciary Act 1903 – section 78B Notice

Schedule 1 – Forms

The filing and service of notices of a constitutional matter required by s78B of the *Judiciary Act* 1903 is presently dealt with in two parts of the Rules. Part 5 deals with the filing and service of a notice in original jurisdiction matters. Part 45 deals with the filing and service of a notice in appeals and applications referred to an enlarged Court for hearing as if on appeal. The Amendment Rules amalgamate Parts 5 and 45 so that there will be one part (Part 5) dealing with the filing and service of notices of a constitutional matter in all types of proceedings.

There is no requirement in the High Court Rules for an Attorney-General intervening in a High Court proceeding pursuant to s78A of the *Judiciary Act* to formally notify the Court or the parties to the proceeding of his or her intervention. The Amendment Rules (see new Rule 5.04) introduce a notice of intervention (Schedule 1 - Form 1A), to be filed and served before any step is taken on behalf of an Attorney-General. This will ensure that the intervention of an Attorney-General is formally recorded on the Court file and brought to the attention of the parties to the proceedings.

Part 13 – Interlocutory applications

Interlocutory applications are automatically listed for hearing before a single Justice and generally involve the attendance of all parties. The Amendment Rules amend Part 13 to provide that any interlocutory applications (whether by represented or unrepresented parties) may, at the discretion of the Court or a Justice, be dealt with on the papers without a hearing (see New Rule 13.03.1).

New Rule 13.03.2 provides that the Court or a Justice may direct a party to file written submissions in advance of the hearing or consideration of an application. New Rules 13.03.3 and 13.03.4 retain the procedures in existing Rules 13.03.1 and 13.03.2 where a person to whom a summons is addressed or an applicant fails to attend the hearing of an interlocutory application listed for hearing.

To allow for the possibility of an interlocutory application being considered on the papers the service requirement in existing Rule 13.02.2(b) is amended to be made referable to the time of filing the summons rather than the date of the hearing.

Schedule 2 – Schedule of fees for work done or services performed
Part 56 – Taxation of costs – Particular items

The *Schedule of Fees for Work Done or Services Performed* set out in Schedule 2 of the Rules (the Schedule) specifies the amount which solicitors may charge and be allowed on a taxation of costs in respect of proceedings in the Court.

The Schedule has not been subjected to a wholesale review for a number of years, although the amounts prescribed for individual items are regularly reviewed and updated on the recommendation of the Joint Costs Advisory Committee. The Court considers that the existing Schedule is out-dated, particularly in its descriptions of the tasks performed by legal practitioners, including references to telegrams, telexes, carbon copies and folios. The Amendment Rules substitute a simplified Schedule with the individual items based on the work required to be undertaken under the current Court procedures and reflecting modern work practices. The Court will continue its involvement in the Joint Costs Advisory Committee's review process and will continue to consider any variations recommended by the Committee to the amounts in the Schedule.

The amendments are directed to modernising the form and style of the Schedule rather than to introducing radical changes to the basis of the assessment and taxation of bills of costs. The number of individual items in the Schedule has been reduced from 56 to 21. The new Schedule includes different types of charging depending on the tasks that are likely to be undertaken (for example, some items prescribe fixed amounts, some are based on amounts per page of text, and some are time-based). For those items allowed on a time basis the increased figure of \$500 per hour for work undertaken by a legal practitioner is considered to be closer to the rates currently charged by legal practitioners than the lower rates provided in the existing Schedule (which range from around \$190 to \$310). Allowances are also provided for work which does not require the attendance of a solicitor but can be undertaken by a law clerk or other non-legally qualified person.

The Amendment Rules substitute a new Schedule 2 which will apply to work done or services performed on or after 1 January 2015. The consequential amendments to Part 56 (see Amendment Rules 12-18) will commence on 1 January 2015.

Part 58 – Costs of taxation

Rule 58.02.1 deals with the liability for the costs of a taxation of a bill of costs subsequent to a Taxing Officer making an estimate under Rule 57.01. The rule presently requires the objecting party to pay the costs of the taxation regardless of the success of that party's objection. The Amendment Rules amend Rule 58.02.1(a) to provide that where the amount allowed on taxation is varied by more than one-sixth of the estimate, in favour of the party filing the notice of objection or dispute, the costs of the taxation must be paid in the amount and by the party directed by the Taxing Officer.

Chapter 6 – Transitional provisions

New Rule 60.01 provides that the new Rules 13.02 and 13.03 (dealing with the determination of interlocutory applications without a hearing) will apply to interlocutory applications made after the commencement of the Amendment Rules. The intention is that the new provisions will apply to interlocutory applications filed after commencement of the Amendment Rules even if the substantive proceedings were instituted prior to the commencement of the new provisions.

Similarly, new Rule 60.02 provides that new Rules 58.02.1 and 58.02.1A will apply to notices of dispute and notices of objection to the Taxing Officer's estimate filed after commencement of the Rules. The intention is that the new provisions will apply to notices of dispute and notices of objection filed after the commencement of the new provisions even if the estimate of the bill of costs to which the notice relates was completed prior to the commencement of the new provisions.

Commencement

The provisions relating to Part 56 and the substitution of the new Schedule 2 will commence on 1 January 2015. All other provisions in the Amendment Rules will commence on the day after the Rules are registered.

Consultation

Consultations on the changes have taken place with relevant professional organisations and the Special Committee of Solicitors-General. The Amendment Rules incorporate recommendations made by these bodies during the consultation process.

Statement of Compatibility

Section 9 of the *Legislative Instruments Act* 2003 provides that Rules of Court made for the High Court are not legislative instruments for the purposes of that Act. 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 the Explanatory Statement.