

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
FEDERAL COURT OF AUSTRALIA

Question No. 4

Senator Brandis asked the following questions at the hearing on 25 May 2011:

Senator BRANDIS: I understand that the draft of the new rules and forms was first provided to the profession on 24 December 2010. Is that right?

Mr Soden: I would have to take that precise date on notice, but I think that is right.

Senator BRANDIS: That was the first occasion on which the professional associations were shown what I presume was an exposure draft of the proposed new rules and forms?

Mr Soden: Taking on notice the actual date, most probably yes.

....

Senator BRANDIS: ... why was it decided to first circulate this extensive rewrite of the Federal Court rules and forms just before Christmas?

...

Senator BRANDIS: ... it does surprise me that even if this had been in ordinary time rather than over Christmas time, a maximum consultation period of effectively not more than two months and, in a practical sense, less than two months, was all that was vouchsafed to the profession.

Mr Soden: I have to say that I was not close to the decision that was taken, but I think I could say on behalf of Justice Lander, who has had carriage of this on behalf of all of the judges, that if there had been a strong reaction from the profession in relation to that time, and a request for extra time, then that would have been very carefully considered by him, I am sure. I do not think that has been the case.

Senator BRANDIS: Could you check that please and take it on notice for me?

Mr Soden: I will certainly take that on notice.

....

Senator BRANDIS: ...I am told, by the way, that the Law Institute of Victoria did not even receive the exposure draft on 24 December—that it never got it. Can you check that, please?

Mr Soden: I will certainly take that on notice.

Senator BRANDIS: I do not want to belabour the point but perhaps you could give us some explanation on behalf of the court as to why a decision to have such a relatively brief consultation period arising from such an extensive and large project was settled upon.

Mr Soden: Yes, I am very happy to take that on notice.

Senator BRANDIS: Those rules will commence on 1 August this year?

Mr Soden: That is my recollection as to the intention, yes.

Senator BRANDIS: The announcement that the commencement date would be 1 August this year was made on 16 May.

Mr Soden: That is my recollection as well, but I will take that on notice to be concise and accurate.

Senator BRANDIS: Once again, and not just thinking about the rules but also about the forms which, as you know, the law firms have to build into their precedents, could you provide an explanation—given what you say is not the particular urgency of the task, if I understand you correctly—as to why the Federal Court was able to do this in a leisurely way over 10 years but the profession is expected to completely reconfigure its operation within the space of the period between 16 May and 1 August.

Mr Soden: I will take that on notice.

The answer to the honourable senator's question is as follows:

1. The draft of the rewritten Rules and forms of the Court was provided to the legal profession on 24 December 2010.

2. The exposure draft provided on 24 December 2010 was the first occasion on which legal professional associations were shown the proposed new Rules and forms, in their current form.
3. The Court, conscious of its obligation under section 17 of the *Legislative Instruments Act 2003* to satisfy itself that it has undertaken any consultation that it considered appropriate and reasonably practicable, has consulted the legal profession throughout the process of re-writing the Court's Rules.

The Court has regular liaison meetings with representatives the Law Council of Australia, as the representative body of the legal profession at the national level. The revision of the Court's Rules has been on the agenda for these meetings since the project commenced. Justice Lander undertook preliminary consultations with the Law Council and local law societies and bar associations during 2006. In September 2007, the liaison meeting was advised that the draft of the Rules would be circulated to all judges before being provided to the profession. In October 2009, representatives of the Law Council were advised that the Court had devoted additional resources to the Project and obtained the services of a consultant legal editor to audit and proofread the draft chapters as they were made available by the Office of Legal Drafting and Publishing (OLDP). A consultant was also engaged to develop the forms. It was then anticipated that an exposure draft of the revised Rules would be provided to the judges for their consideration and subsequently to the Law Council for comment in early 2010.

The Court's capacity to advance the Project was subject to resourcing availability at the OLDP as well as the internal resources available to the Court. This resulted in sporadic progress.

At the Judges' meeting on 26 August 2010, it was agreed that the judges would meet to consider the draft revised Rules on 13 November 2010 and only after the judges had completed their consideration of the draft revised Rules would the detailed consultation process with the legal profession begin. It was anticipated at that time that any drafting arising from comments made by the judges at the November meeting would be completed by mid December 2010. This information was contained in a memorandum from the Chief Justice to all the judges circulated on 30 August 2010.

Changes agreed upon by the judges were not incorporated until late December 2010. The draft Rules and forms were provided to the profession as soon as these changes were incorporated, that is 24 December 2010. Given January is a relatively quiet time for the profession, it was considered that it would be beneficial to have the draft available for comment during that period.

There were few requests for an extension of time to meet the deadline for comments. Comments received after the deadline were considered in any event and responses provided. For example, the submissions of the NSW Law Society were received on 4 April 2011, the comments were considered and addressed and a response sent on 8 April 2011.

4. The draft Rules were sent to the Law Institute of Victoria (LIV) by email on 24 December 2010 at 2:44pm (Adelaide summer time) to the address lawinst@liv.ans.au. The LIV provided a response to the draft Rules through the Law Council of Australia. The

Law Council has advised it received comments from the LIV, via email, on 16 February 2011.

5. In order to put resources into completing a re-write of the Rules, the Rules Committee reported to the Judges' Meeting in August 2010 that it had agreed there should be no further amendments to the current Rules other than those that might be absolutely necessary due to legislative changes or are otherwise of an urgent nature. The aim was to address any issue in the new Rules that were expected to be promulgated in 2011. It was considered this would also reduce inconvenience to the profession. Ensuring that the new Rules commenced as soon as possible was, therefore, crucial. Comments on the draft Rules and forms have been accepted throughout the consultation period, and since, and amendments made as appropriate.

It should be noted that not all of the rules of the Court were affected. The project did not include the Federal Court (Bankruptcy) Rules 2005 or the Federal Court (Corporations) Rules 2000, other than for minor consequential changes. Nor were the Admiralty Rules affected. The rules associated with costs were reviewed in a separate process through 2009 and 2010 and were the subject of extensive consultation at that time. For convenience, the introduction of changes from this review was delayed until the introduction of the Federal Court Rules 2011.

6. An announcement was made on 16 May 2011 advising that the new Rules would commence on 1 August 2011.
7. An announcement was made on 16 May 2011 advising that the new Rules would commence on 1 August 2011.
8. The resources (both internal and through the OLDP) available to the Court to undertake a major project of this nature dictated the lengthy time that the Court has been working on a review of the Court's Rules.

The consultation process outside the Court would need to be relatively short, given that the current Rules are no longer being amended.

In relation to the forms, the Court has developed new approved forms that are user friendly for all involved, with proper functionality as court documents. The forms have adopted the plain language of the Rules and are clear and easy to understand. They have a logical structure and layout with helpful instructions about how to complete the form. The forms are already properly formatted and ready to use in Microsoft Word format. The footer on the first page is a Word footer already set up with the details required. The forms can be downloaded from the Court's website and used immediately or saved in the user's system.