EXPLANATORY STATEMENT

Select Legislative Instrument 2013 No. 65

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

Federal Court Amendment Rules 2013 (No. 1)

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 came into operation on 1 August 2011. They 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.

The Judges have agreed to amend the Federal Court Rules 2011 (FCR 2011) by:

1. amending subrules 2.32(3) and 20.13(5) consequential on amendments to the *Federal Court of Australia Act 1976* by the *Access to Justice (Federal Jurisdiction) Amendment Act 2012* relating to discovery and suppression and non-publication orders;
2. amending Division 6.1 and Schedule 1 consequential on amendments to the *Federal Court of Australia Act 1976* by the *Access to Justice (Federal Jurisdiction) Amendment Act 2012* relating to vexatious proceedings;
3. amending a number of rules to rectify minor errors or omissions, or to clarify or remove ambiguity in the FCR 2011;

4. amending the FCR 2011 consequential on the commencement of Schedule 1 of the *Federal Circuit Court of Australia Legislation Amendment Act 2012* which changes the name of the Federal Magistrates Court to the Federal Circuit Court of Australia;
5. amending Schedule 3 to adjust the quantum of costs allowable for work done and services provided by lawyers in proceedings in the Court to give effect to recommendations made in the Fifth Report of the Joint Costs Advisory Committee.

The amendments mentioned above were agreed at the Judges' Meeting held on 21 March 2013.

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

These amendments will commence as follows:

- items 1, 3, 4 and 5 as above - the day after these Rules are registered;
- item 2 as above- on the commencement of Schedule 3 of the *Access to Justice (Federal Jurisdiction) Amendment Act 2012*.

ATTACHMENT 1

Federal Court Amendment Rules 2013 (No 1)

RULE 1 Name of Rules

This rule provides that the Rules are to be cited as the *Federal Court Amendment Rules 2013 (No. 1)*.

RULE 2 Commencement

This rule provides that these Rules commence as follows:

- Rules 1 to 4 and Schedule 1 on the day after these Rules are registered;
- Schedule 2 immediately after the commencement of Schedule 3 of the *Access to Justice (Federal Jurisdiction) Amendment Act 2012*.

RULE 3 Authority

This rule provides that these 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 Schedules to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

SCHEDULE 1

[1] At the end of subrule 2.32(2)

Rule 2.32 deals with the inspection of documents. Subrule 2.32(2) provides a list of the documents in a proceeding that a person, who is not a party to that proceeding, may inspect without the leave of the Court. That entitlement is, under subrule 2.32(3), subject to any confidentiality ordered. Currently the documents available for inspection by a person who is not a party to a proceeding under subrule 2.23(2) does not include a transcript in the proceeding that may have been obtained by the Court and placed on the Court file.

Subrule 2.32(5) deals with obtaining a copy of a document in a proceeding. It provides that a person may obtain from the Court, on payment of the prescribed fee, a copy of any document that that person is entitled to inspect. Subrule 2.32(5), however, makes it clear that a copy of a transcript in a proceeding cannot be obtained from the Court. Note 2 to that subrule directs that, provided there is no order that a transcript is confidential, any person can obtain a transcript from the Court's transcript provider on payment of the applicable charge.

To make it clear that there is no conflict between subrules 2.32(2) and 2.32(5), this amendment adds to the list of documents which may be inspected under subrule 2.32(2) by a person who is not a party to the proceedings a transcript of a hearing heard in open Court.

[2] Subrule 2.32(3) (note)

Subrule 2.32(3) states that a person who is not a party to the proceeding is not entitled to inspect a document that the Court has ordered be confidential or is forbidden from, or restricted from publication to, the person or a class of persons of which the person is a member. The note at the foot of this subrule provides a reference to section 50 of the Act for the prohibition of evidence or the name of a party or witness.

This amendment replaces in the note the reference to section 50 of the Act with a reference to sections 37AF and 37AI of the Act.

This is consequential on section 50 of the Act being repealed by the *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (AJ(FJ) Amendment Act) and replaced by the new Part VAA which was inserted by the AJ(FJ) Amending Act. Part VAA sets out the provisions concerning suppression and non-publication orders with section 37AF setting out the powers of the Court in making suppression and non-publication orders and section 37AI allowing for interim orders. These changes came into force on 12 December 2012.

[3] Subrule 5.04(3) (table items 26 to 28)

Rule 5.04 provides for the Court making directions for the management, conduct and hearing of a proceeding. The table in subrule 5.04(3) lists instances when the Court may make a direction.

This amendment makes two corrections to the items in the table. Firstly, it reverses the order of items 26 and 27 so that the current item 27 becomes new item 26 and current item 26 becomes new item 27.

Secondly, it corrects the reference in item 28. This reference is currently to item 25. It should have been to item 27 which is now to be item 26.

The amendment was required to correct the reference in item 28 and the opportunity was taken to re-order the numbering of items 26 and 27.

[4] Paragraph 7.23(1)(a)

Rule provides for discovery from a prospective respondent. Subrule 7.23(1) states that a prospective applicant may apply to the Court for an order under subrule (2) *inter alia* if the prospective applicant reasonably believes he or she may have the right to obtain relief in the Court from a prospective respondent whose description has been ascertained.

This amendment replaces the words 'he or she' with the words 'the prospective client' in order to be consistent with the rest of the rules.

[5] Subparagraphs 9.64(b)(i) and (ii)

Division 9.6 deals with persons under a legal incapacity. Rule 9.64 sets out the conditions whereby a litigation representative may take steps in a proceeding. The litigation representative can only take steps if the following documents have been filed:
(a) the litigation representative's consent;
(b) a signed certificate.

Subparagraphs (i) and (ii) state that the certificate is to be signed by, if the person is a lawyer, the person and, if the person is not a lawyer, the person's lawyer.

This amendment replaces in these subparagraphs the words 'person' and 'person's' with the term 'litigation representative' and 'litigation representative's' respectively. The amendment is to clarify that the person referred to in these subparagraphs is the litigation representative.

[6] Rule 10.04

Rule 10.04 provides for service on an organisation. It provides that a document that is to be served personally on an organisation registered under the Fair Work legislation must be served at the office of the organisation that is shown in the records lodged with Fair Work Australia in accordance with section 233 of the *Fair Work (Registered Organisations) Act* 2009 by leaving the documents with a person who is apparently an adult and appears to be engaged in the service of the organisation.

This amendment is to replace the reference to Fair Work Australia with a reference to Fair Work Commission. The amendment is consequential on the commencement of the *Fair Work Amendment Act 2012* which changed the name of Fair Work Australia to the Fair Work Commission as of 1 January 2013.

[7] At the end of rule 19.01
[8] Rule 19.02

Part 19 deals with security for costs. Subrule 19.01 sets out the types of orders that a respondent may seek in making an application for security of costs. Subrule 19.01(2) states that an application under subrule 19.01(1) must be accompanied by an affidavit stating the facts on which the order for security for costs is sought.

Rule 19.02 sets out the matters that are to be addressed by the respondent in this affidavit.

For greater clarity and ease of understanding, the amendment repeals the existing rule 19.02 and incorporates its provisions into rule 19.01 as subrule (3). In addition a new interpretative provision is included as subrule 19(4) providing definitions, for the purpose

of rule 19.01, to make it clear that the term 'applicant' includes a cross-claimant and the term 'respondent' includes a cross-respondent and to remove any doubt that a cross-claimant may make an application under Part 19 for security of costs in a cross-claim.

[9] At the end of rule 20.13

Part 20 deals with discovery and inspection of documents. Rule 20.13 sets out the requirements for an application for discovery.

This amendment inserts in rule 20.13 a new subrule (5) which provides that if a party who is required to give discovery wants an order under paragraph 43(3)(h) of the Act, that party must file an affidavit stating the orders sought, the party's calculation of the cost of making discovery and why the orders should be made. The new subrule includes a note referring to the Court's relevant powers under paragraph 43(3)(h).

The amendment is consequential on the commencement of the AJ(FJ) Amendment Act, referred to in item [2] above, which inserted paragraph 43(3)(h) into the Act. The new paragraph was inserted to implement a recommendation from the Australian Law Reform Commission (ALRC) report: *Managing Discovery: Discovery of documents in federal courts* which was tabled in Parliament on 25 May 2011. The recommendations of the Report were aimed at improving the functional operation of discovery laws.

[10] Subrule 20.23(4)

Rule 20.23 sets out the requirements for discovery from a non-party.

Subrule 20.23(1) allows a party to apply to the Court for an order that a non-party make discovery of documents in the control of that non-party that are directly relevant to an issue raised on the pleadings or affidavits. Subrules 20.23(2) and (3) provide for service of documents should such an application be made, including any affidavit filed in support of the application for an order that the non-party makes discovery setting out the facts on which the applicant relies.

Currently subrule 20.23(4) provides that a reference "in this rule" is a reference to an affidavit accompanying an originating application and an affidavit in response to the affidavit accompanying the originating application.

This amendment replaces in subrule 20.23(4) the words "this rule" with "subrule (1)" to clarify that the affidavit mentioned in subrule (1) is an affidavit which was filed accompanying the origination application or in response to such an affidavit and not the affidavit mentioned in subrules (2) and (3).

[11] Subrule 20.31(3)

Rule 20.31 sets out the requirements for a notice to produce a document in pleading or affidavit.

Subrule 20.31(3) states that if the second party does not comply with the requirements set out in paragraphs 20.31(2) (a) and (b) or claims that the document is privileged, the first party may apply to the Court for an order for production for inspection of the document.

This amendment corrects subrule 20.31(3) by replacing the phrase at the end of the sentence: "production and inspection of the document" with the phrase: "production for inspection of the document".

[12] Subrule 20.32(2)

Rule 20.32 deals with an order for production for inspection of any document from a party. Currently subrule 20.32(2) provides that the Court may order that inspection be given by electronic means.

This amendment replaces for clarity the phrase: "inspection be given" with the phrase: "production for inspection be".

[13] At the end of subrule 23.02(2)
[14] After paragraph 23.13(1)(g)

Division 23.1 deals with Court experts. Subrule 23.02(2) sets out what is required in a report of an expert appointed by the Court and subrule 23.13(1) sets what is required in a report of an expert called by a party.

These amendments insert an additional requirement in each subrule, as paragraphs 23.02(2)(g) and 23.13(1)(g) respectively. The new requirement is that the relevant expert must include in the report an acknowledgement that the opinions provided are based wholly or substantially on the specialised knowledge of the expert acquired from his or her training, study and experience particularised in the report.

The need to include such an acknowledgment in an expert's report currently is contained in the Court's Practice Note CM7 and as a result of case law (for example see *Dasreef Pty Ltd v Hawaf Hawchar* [2011] HCA 21).

These amendments clarify that requirement and make it easier to locate it for those dealing with the Court.

[15] Rule 23.15 (note 1)

Rule 23.15 deals with evidence of experts. It sets out the orders that a party can apply for if two or more parties to a proceeding intend to call experts to give opinion evidence about a similar question.

Note 1 at the foot of this rule refers to the table in rule 5.04, which lists the directions the Court may make for the management, conduct and hearing of a proceeding. The note refers to the items in this table which specifically concern experts.

The amendment makes two corrections to the note. The first is to remove a surplus comma which appears between the words 'about' and 'expert'. The second is to correct item numbers mentioned in the note. Currently, the note refers to items 14 to18 of the table when it should correctly refer to items 14 to 19.

[16] Subrule 27.13(1)

Part 27 deals with the transfer of proceedings to the Federal Court. Rule 27.13 sets out the procedures for a transfer from the Federal Magistrates Court.

This amendment replaces the name of the Federal Magistrates Court with its new name, Federal Circuit Court of Australia, consequential on Schedule 1 of the *Federal Circuit Court of Australia Legislation Amendment Act 2012* which commenced on 12 April 2013.

[17] Rule 30.03
[18] Division 30.1
[19] At the end of Division 30.3
[20] Division 30.3

Part 30 concerns hearings. Division 30.1 deals with separate decisions on questions. In this Division, rule 30.03 provides that at any hearing a party may apply to the Court for an order for the attendance of any person before the Court, a Registrar, an examiner, a referee, or other person authorised to take evidence, for examination or for production by that person of any document or thing specified in the order.

The amendment in item [17] repeals rule 30.03 to remove it from Division 30.1. Rule 30.03 is better situated in Division 30.3 which deals with trials. The amendment in Item [19] inserts current rule 30.03 into Division 30.3 as new rule 30.34.

As a consequence of these amendments, the notations at the foot of Division 30.1 and Division 30.3, advising which rules are left blank, are no longer correct. The amendment in item [18] substitutes the correct notation for Division 30.1: "**Rules 30.03—30.10 left blank**". The amendment in item [20] substitutes the correct notation for Division 30.3: "**Rules 30.35—30.40 left blank**".

[21] Subrules 31.05(4) and 31.24(4)

Part 31 deals with judicial review.

Rule 31.05 sets out the requirements for a notice of objection to competency. Subrule 31.05(4) states that the respondent is not entitled to any costs of the application if the respondent has not filed a notice under subrule (1) and the application is dismissed by the Court as incompetent.

Rule 31.24 deals with a notice of objection to competency. Subrule 31.24(1) provides that a respondent who objects to the competency of an application must, within 14 days after being served with the application, file a notice of objection. Subrule 31.24(4)

provides that if a respondent has not filed a notice under subrule (1), and the application is dismissed by the Court as incompetent, the respondent is not entitled to any costs of the application.

This amendment replaces in subrules 31.05(4) and 31.24(4) the term "incompetent" with the term "not competent". The purpose of this amendment is to harmonise the language used in each of the rules dealing with notices of objection to competency.

Similar amendments are also made to subrules 33.30(4) and 36.72(4) as outlined in items [25] and [31] below.

[22] Subrule 32.15(1)

Division 32.1 deals with the referral of a petition under the *Commonwealth Electoral Act 1918*. Subrule 32.15(1) outlines what the respondent must do if a petition claims a Parliamentary seat for a person who has not been returned as a Senator or member of the House of Representatives and the respondent wishes to contend that the person was not duly elected.

This amendment replaces the word "wishes" with the word "want" to harmonise the language used in the FCR 2011 in expression of similar concepts.

[23] Paragraph 33.11(c)

Part 33 deals with appeals from decisions of bodies other than courts. Division 33.4 deals with appeals from the Administrative Appeals Tribunal. Rule 33.11 sets out the definition of Registrar of the Tribunal. Paragraph 33.11(c) states that it means: "any other officer for the time being performing the duties of the Registrar, a District, Registrar or a Deputy Registrar".

This amendment makes a typographical correction to paragraph 33.11(c) by removing the surplus comma between the words "District" and "Registrar" so that it reads "District Registrar".

[24] Subparagraph 33.26(a)(vii)

Part 33 deals with appeals from decisions of bodies other than courts and rule 33.26 with the contents of appeal books. It states that the appeal books must be comprised of certain things. Paragraph 33.26(a) sets out the contents of Part A of the appeal books, the core set of standard items, and the required order of these. Subparagraph 33.26(a)(vii) refers to any submitting appearance or submitting notice.

This amendment omits from subparagraph 33.26(a)(vii) the requirement for the inclusion of a submitting appearance.

The FCR 2011 abandoned the terminology of a party "appearing" in a proceeding which existed under the former rules. FCR 2011 now requires only that a party files an address

for service. Consistent with that approach a party served with an originating application or a notice of appeal who does not contest the relief sought is permitted by rule 12.01 to file a submitting notice. As a result submitting appearances are no longer filed in the court and no longer need be included in appeal books.

[25] Subrule 33.30(4)

This amendment replaces in subrule 33.30(4) the word: "incompetent" with the words: "not competent". The purpose, as mentioned in item [21] above, is to harmonise the language used in each of the rules dealing with notices of objection to competency.

[26] Subrule 34.03(3)
[27] Subrules 34.04(3) and 34.05(3)

Division 34.1 deals with Fair Work proceedings. Rule 34.03 sets out the requirements for an application in relation to dismissal from employment in contravention of a general protection. Rule 34.04 sets out the requirements for an application in relation to alleged unlawful termination of employment. Rule 34.05 sets out the requirements for an application in relation to discrimination. Subrule (3) in each of these rules states that the application must be accompanied by a certificate issued by Fair Work Australia under section 777 of the *Fair Work Act 2009* that Fair Work Australia is satisfied reasonable attempts to resolve the dispute have been, or are likely to be, unsuccessful.

This amendment replaces the name of Fair Work Australia with the name "the Fair Work Commission" in subrules 34.03(3), 34.04(3) and 34.05(3). It is consequential upon the commencement of the *Fair Work Amendment Act 2012* which changed the name of Fair Work Australia to the Fair Work Commission as of 1 January 2013.

[28] Division 34.4

This amendment corrects the notation at the foot of Division 34.2. The notation currently states incorrectly that: "**Rules 34.78–34.89 left blank**". The amendment corrects the typographical error so the notation will read: "**Rules 34.78—34.80 left blank**".

[29] Paragraphs 35.32(a), (b) and (c)

Part 35 deals with leave to appeal and Division 35.3 of this Part deals with ending applications early.

Rule 35.32 sets out the four circumstances under which a respondent may apply to the Court for an order to dismiss the application. Paragraph (a) is a failure to comply with a direction of the Court, paragraph (b) is a failure to comply with these Rules and paragraph (c) is a failure to attend a hearing relating to the application. Paragraph (d) is want of prosecution but is not affected by this amendment.

This amendment replaces the words "a failure" in paragraphs 35.32(a), (b) and (c) with the words: "an applicant's failure".

The amendment provides clarity by indicating that the failure mentioned in each of the three relevant paragraphs is the failure of the applicant.

[30] Subparagraph 36.54(a)(ix)

Part 36 deals with appeals and rule 36.54 with the contents of appeal books. It states that the appeal books must comprise of certain things. Paragraph 36.54(a) sets out the contents of Part A of the appeal books, the core set of standard items, in the required order. Subparagraph 36.54(a)(ix) is any submitting appearance or submitting notice.

This amendment omits the requirement for the submitting appearance for the reasons mentioned in item [24] above.

[31] Subrule 36.72(4)

This amendment replaces in subrule 36.72(4) the word: "incompetent" with the words: "not competent". The purpose, as mentioned in item [21] above, is to harmonise the language used in each of the rules dealing with notices of objection to competency.

[32] Paragraph 40.43(2)(a)
[33] Paragraph 40.43(3)(a)
[34] Paragraph 40.43(3)(b)

Division 40.3 deals with short form bills of costs and rule 40.43 specifically with short form bill of costs on a migration appeal.

Schedule 3 of the FCR 2011 provides for the costs allowable for work done and services provided by lawyers in proceedings in the Court. Item 15 of this Schedule provides the quantum of costs allowable under a short form bill in five types of proceedings which could arise under the *Migration Act* 1958.

These amendments change the reference in paragraphs 40.43(2)(a), 40.43(3)(a) and 40.43(3)(b) to the paragraphs in item 15.1 of Schedule 3 of the FCR 2011 relevant to the type of proceedings each is concerned with. They are consequential on the amendment to item 15.1 of Schedule 3 mentioned in item [57] below which repeals paragraph (a) of item 15.1 and renumbers the remaining paragraphs.

The reference to item 15.1(b) in paragraph 40.43(2)(a) becomes 15.1(a), the reference to item 15.1(d) in paragraph 40.43(3)(a) becomes item 15.1(c) and the reference to item 15.1(e) in paragraph 40.43(3)(b) becomes 15.1(d).

[35] Subrule 41.07(1)

Part 41 concerns enforcement. Rule 41.06 requires an endorsement be made on any order which requires that a person do, or not do, an act or thing and Rule 41.07 sets out the requirements for the service of such an order. Subrule 41.07(1) states that an order made

under rule 41.06 must be served personally on the person who is bound to do, or not do, the act or thing within the time mentioned in the order or, if no time is mentioned, within a time that would allow the person to comply with the order.

This amendment corrects the subrule by replacing the phrase: "made under" with the phrase "mentioned in". The order referred to in rule 41.07 is not made under rule 41.06, but rather only mentioned in rule 41.06.

[36] Paragraph 41.08(3)(a)

Rule 41.08 deals with applications which can be made where a person fails to comply with an order that that person is bound to comply with. In this context "person" includes a body politic or corporate (see subsection 13(1) of the *Legislative Instruments At 2003* and section 2C and subsection 46(1) of the *Acts Interpretation Act 1901*). Subrule 41.08(2) provides that if the person in default is a corporation or an organisation, a party may apply to the Court for an order for the committal of an officer of or for the sequestration of the property of the corporation or organisation.

Subrule 41.08(3) states that no application may be made for an order for the committal of an officer unless the officer has been appropriately served with the suitably endorsed order and the officer was present when the order was made or was notified of the order.

This amendment corrects the subrule to make the paragraphs disjunctive rather than conjunctive, by replacing the "and" at the end of paragraph (a) with "or". Consequently the subrule will require that such an application may not be made unless the officer has been appropriately served with the suitably endorsed order *or* the officer was present when the order was made or was notified of the order (italics added for emphasis).

[37] Subrule 41.10(1)

Rule 41.10 outlines certain matters concerning execution under a judgment or order generally. Subrule 41.10(1) states that a party may apply to the Court to issue a writ, order or any other means of enforcement of a judgment or order than can be issued or taken in the Supreme Court of the State or Territory in which the judgment or order has been made as if it were a judgment or order of that Supreme Court.

This amendment clarifies the intended meaning by inserting into the subrule the phrases: "who wants to enforce a judgment or order of the Court", "make an order" and " any other steps that can be taken" so that the subrule will read: "A party who wants to enforce a judgment or order of the Court may apply to the Court to *make an order*, to issue any writ or take *any other steps that can be taken* in the Supreme Court of the State or Territory in which the judgment or order has been made as if the judgment or order was a judgment or order of that Supreme Court" (italics added for emphasis).

[38] Schedule 1 (definition of *principal proceeding*)

Schedule 1 of the FCR 2011 contains the dictionary of terms which sets out the meaning of various terms used in these Rules.

This amendment amends the definition for the term "principal proceeding". The definition states that this term means a proceeding in which a cross-claim is made under Part 15. Part 15 deals with cross-claims and third party claims.

The amendment inserts into the definition the phrase: "in which a respondent wants to make a cross-claim or" to clarify the intended meaning.

[39] Schedule 2 (after table item 24)
[40] Schedule 2 (table item 38)

Schedule 2 sets out the powers of the Court that may be exercised by a registrar.

The amendment in item [39] inserts into the table a new item, item 24A. Item 24A is the power under sections 37AF and 37AI of the Act to make an order prohibiting or restricting the publication or other disclosure of particular evidence or the name of a party or witness.

The amendment mentioned in item [40] repeals item 38 in the table. Item 38 is the power under section 50 of the Act to make an order forbidding or restricting the publication of particular evidence of the name of a party or witness.

These amendments are consequential on section 50 being repealed and sections 37AF and 37AI being inserted into the Act by the *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (AJ(FJ) Amendment Act) which came into force on 12 December 2012 as mentioned in item [2] above.

[41] Schedule 2 (table item 135)

Item 135 of the table in Schedule 2 is the power of the Court which a registrar may exercise to make an order for the service of an order made under rule 9.10.

This amendment corrects item 135 by replacing the words: "made under" with the words: "mentioned in" as the relevant order is only mentioned in rule 9.10.

[42] Schedule 2 (after paragraph (c) of table item 193)

Item 193 of the table in Schedule 3 is the power of the Court which a registrar may exercise under rule 28.02. Rule 28.02 provides for the (a) making of an order referring any proceeding or any part of a proceeding to mediation or an alternative dispute resolution process, (b) adjourn the mediation or alternative dispute resolution process and (c) order the mediator or person appointed to conduct the alternative dispute resolution process to report to the Court.

This amendment inserts, for clarification and removal of doubt, a further power. The additional power is expressed as paragraph (d), to make an order about the conduct of the mediation or alterative dispute resolution process.

[43] Schedule 2 (table item 202)
[44] Schedule 2 (after table item 211)

Item 202 is the power, pursuant to rule 30.03, to make an order for the attendance of a person for examination, or for the attendance of the person and the production of a document or thing by the person.

These amendments remove item 202 and instead insert it as item 211A consequential on the amendments mentioned in items [17] and [19] above which renumber rule 30.03 as rule 30.34 to retain the sequential accuracy of the list of powers.

[45] Schedule 3 (note to Schedule heading)

Schedule 3 sets out the costs that solicitors are allowed in respect of work done and services performed by lawyers in proceedings in the Court.

After the heading of this Schedule there is a note that states this schedule applies to work done and services performed after 1 August 2011, the date on which the FCR 2011 first commenced.

This amendment repeals that note after the Schedule heading to avoid confusion consequential to the adjustments to Schedule 3 mentioned in items [46] to [58] below.

Schedule 3 as in force from 1 August 2011 until the day on which these Rules are registered (i.e. the day before Rules 1 to 4 and Schedule 1 commence) continues to apply for work done and services performed during that period. The amended Schedule 3 applies for work done and services performed from the day after these Rules are registered (i.e. the day Rules 1 to 4 and Schedule 1 commence).

[46] Subitem 1.1 of Schedule 3
[47] Subitem 1.2 of Schedule 3
[48] Subitem 2.1 of Schedule 3
[49] Subitem 2.2 of Schedule 3
[50] Subitem 2.3 of Schedule 3

These amendments replace in Schedule 3 the amounts mentioned in each of subitems 1.1, 1.2, 2.1, 2.2 and 2.3 in that Schedule with an amount increased by 2.7% in each case.

The adjustments have been determined having regard to the recommendation made by the Joint Costs Advisory Committee (JCAC) in its Fifth Report on Legal Practitioners' Costs (September 2012) for a 2.7% increase in costs specified in the rules of the Court.

JCAC was established by the Attorney-General in 2007 following the abolition of the Federal Costs Advisory Committee (FCAC). It comprises representatives of the four federal courts: High Court of Australia, Federal Court of Australia, Family Court of Australia and Federal Circuit Court of Australia; and must include a judicial officer. It is required to inquire and make recommendations to the federal courts annually on variations in the quantum of costs contained in the rules made by the federal courts. It must inform itself having regard to previous decisions of FCAC, a formula used by FCAC based on data provided by the Australian Bureau of Statistics and written submissions from the Law Council of Australia and other interested parties.

[51] Schedule 3 (at the end of item 2)

Item 2 of Schedule 3 deals with costs in relation to the preparation of documents.

This amendment inserts, for clarification and removal of doubt, a new item, item 2.5, covering the preparation of a bill of costs which states that the costs allowable are at the discretion of the taxing officer.

[52] Schedule 3 (subitem 3.3)
[53] Schedule 3 (subitem 10.1)
[54] Schedule 3 (subitem 13.1)
[55] Schedule 3 (subitem 14.1)
[56] Schedule 3 (subitem 14.2)

These amendments replace in Schedule 3 each of the amounts mentioned in subitems 3.3, 10.1, 13.1, 14.1 and 14.2 in the Schedule with an amount increased by 2.7% in each case.

The adjustments have been determined having regard to the recommendation made by the JCAC in its Fifth Report on Legal Practitioners' Costs (September 2012) for a 2.7% increase in costs specified in the rules of the Court. Further information on JCAC is set out at [46] to [50] above.

[57] Paragraphs 15.1(a) to (e) of Schedule 3

Item 15 of Schedule 3 deals with short form bills of costs including claims for costs and disbursements for proceedings initiated under the Migration Act.

This amendment repeals paragraph 15.1(a), which is the amount allowable in a short form bill of costs for a standard migration case, and renumbers the remaining four paragraphs.

Since amendments to the Migration Act in 2005, most matters which until then could be regarded as a 'standard migration case' must be brought in the Federal Circuit Court of Australia and then to the Federal Court only on appeal from that Court. As a result this paragraph has caused confusion about what a 'standard mediation case' is. This amendment removes any confusion which might flow from this.

[58] Subitem 17.1 of Schedule 3

This amendment replaces in Schedule 3 the amount mentioned in subitem 17.1 in the Schedule with an amount increased by 2.7%.

The adjustment has been determined having regard to the recommendation made by the Joint Costs Advisory Committee in its Fifth Report on Legal Practitioners' Costs (September 2012) for a 2.7% increase in costs specified in the rules of the Court. Further information on JCAC is set out at [46] to [50] above.

[59] Further amendments

This amendment removes the reference to Federal Magistrates Court in each of the heading of Division 27.2 and rules 27.11 and 27.13 and substitutes Federal Circuit Court of Australia.

The amendment is consequential on the commencement on 12 April 2013 of Schedule 1 of the *Federal Circuit Court of Australia Legislation Amendment Act 2012* which changes the name of the Federal Magistrates Court to the Federal Circuit Court of Australia.

[60] Further amendments

This amendment removes the reference to Federal Magistrates Court in each of rule 27.11, the note to subrule 27.13(2), subrules 27.13(1) and (3), subrule 35.41(2), paragraph 36.01(1)(a), paragraph (a) of note 4 to Subrule 36.01(4), paragraph 36.02(c), subrules 40.43(2) and (3) and items 23 and 24 of the table to Schedule 2 and substitutes Federal Circuit Court of Australia.

This amendment is consequential on the commencement on 12 April 2013 of Schedule 1 of the *Federal Circuit Court of Australia Legislation Amendment Act 2012* which changes the name of the Federal Magistrates Court to the Federal Circuit Court of Australia.

SCHEDULE 2

[1] Rules 6.02 and 6.03

Division 6.1 deals with vexatious proceedings. Rule 6.02 in this Division provides that certain people may apply to the Court for an order that a person who starts a vexatious proceeding in the Court against another person must not continue the proceeding or start or continue any other proceeding in the Court without the leave of the Court. Rule 6.03 states that a person against whom the Court has made an order under rule 6.02 must not start or continue a proceeding without the leave of the Court and the Court may make such an order without notice to any other party.

This amendment replaces rules 6.02 and 6.03 with new rules 6.02 and 6.03 and consequential on the commencement of Schedule 3 of the *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (AJ(FJ) Amending Act).

Schedule 3 of the AJ(FJ) Amending Act amends the Act by inserting a new part, Part VAAA. This part sets out the powers of the Court in dealing with vexations proceedings, the kinds of vexatious proceedings order that can be made and the circumstance in which those orders can be made.

The new rule 6.02 concerns a certificate of vexatious proceedings order. It states that a person who wants the Registrar to issue a certificate under the new subsection 37AP(1) of the Act must make a request in writing and include in the request the applicant's name and address and the person's interest in making the application. The request must be lodged in the District Registry in which the vexatious proceedings order was made. Subrule 6.02(3) outlines the contents of the certificate.

The new rule 6.03 sets out the procedure for making an application under subsection 37AR(2) of the Act for leave to institute proceedings. It must be made in accordance with Form 2 and without notice to any other person.

Two notes have been included at the foot of rule 6.03 referring to subsection 37AR(3) of the Act, which deals with an application for leave to institute proceedings.

Note 1 refers to the power for a person who is subject to a vexatious proceedings order to apply to the Curt to institute a proceeding. Note 2 refers to the contents of the affidavit that must be filed with such an application.

[2] Schedule 1 (definition of *vexatious proceeding*)
[3] Schedule 1

Schedule 1 of the FCR 2011 contains the dictionary of terms which sets out the meaning of various terms used in the FCR 2011.

Consequential on the amendments to the Act referred to in item [1] above, the amendment in item [2] replaces the definition of the term: "vexatious proceeding" with a reference to section 37AM of the Act. The section sets out a definition of the term.

The amendment in item [3] also inserts a new term: "vexatious proceedings order" with a reference to section 37AM of the Act which also sets out a definition of that term.