

EXPLANATORY STATEMENT

Select Legislative Instrument 2011 No. 134

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

Federal Court Rules 2011

Authority for Federal Court Rules

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 that 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*.

Other Legislative Imperatives

Part VB of the *Federal Court of Australia Act 1976* was introduced from 1 January 2010 by the *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* as part of reforms to strengthen the Court's case management powers and increase the efficiency of civil litigation. Section 37M of the *Federal Court of Australia Act 1976* provides that the overarching purpose of the civil and procedural provisions of the Court is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible. Significantly, in the context of the Rules and the rule-making power, subsection 37M (3) provides that the civil and procedure provisions must be interpreted and applied, and any power conferred or duty imposed by them (including the power to make Rules of Court) must be exercised or carried out, in the way that best promotes that overarching purpose. As a result, with the commencement of Part VB a legislative imperative was created requiring the Court to adopt Rules that promote the overarching purpose.

Former Rules

The existing Federal Court Rules (“the former Rules”) came into operation on 1 August 1979. Subsequently they were amended extensively, through 116 separate amending rules, but never completely revised. The original Rules were based, with some notable differences, on the Rules of the Supreme Court of New South Wales as in force at the time. As a result the former Rules are disjointed, adopt disparate drafting types and approaches, contain a significant amount of administrative detail and, for those unfamiliar with them, can be confusing and laborious to navigate.

Development of the New Rules

The new Rules were developed in the Court over several years in consultation with the Office of Legislative Drafting and Publishing. The rules revision project was carried out under the direction of the Rules Revision Committee, comprised of judges of the Court, with significant input from all judges and registrars.

The project did not include an examination of the Federal Court (Bankruptcy) Rules 2005 and the Federal Court (Corporations) Rules 2000. Both of are harmonised rules with other Australian courts and are not affected by the new Rules other than for some minor consequential changes, for example references to particular new rules in place of repealed former rules. Likewise the new Rules have no impact on the Admiralty Rules. To the extent that other parts of the former Rules were harmonised with the rules of other courts (for example subpoenas), those parts have been retained in the general body of the new Rules unchanged.

The new Rules include some significant changes in relation to costs. These changes are the result of a separate review of costs carried out from mid 2009 until late 2010.

Goals of the Rules Revision Project

The goals of the Rules Revision Project were to write rules that would:

- (a) facilitate access to justice;
- (b) promote efficiency in the administration of the law;
- (c) complement and reflect the Court’s case management philosophy and systems;
- (d) take into account current and future advances in information technology;
- (e) be easily capable of being updated; and
- (f) be simple and clear.

Although developed earlier, these goals were consistent with the Court’s obligation to exercise its rule-making power in a way that best promotes the overarching purpose of resolving disputes according to law and as quickly, inexpensively and efficiently as possible which commenced on 1 January 2010 when Part VB of the *Federal Court of Australia Act 1976* came into effect.

Consultation

The Court commenced consultation with the legal profession about the proposal to revise the Federal Court Rules in the early 2000s. From this time, the revision of the Court’s Rules was a standing item on the agenda for liaison meetings between the Court and the

Law Council of Australia (Law Council), as the representative body of the legal profession at the national level.

During 2006 the Convenor of the Rules Revision Committee undertook more detailed preliminary consultations with the Law Council as well as Bar Associations and Law Societies in Adelaide, Brisbane, Canberra, Darwin, Melbourne, Perth and Sydney. Arrangements were also made for the Convenor to meet with legal practitioners in Hobart, however that meeting was ultimately conducted more informally by another judge. The purpose of these meetings was to inform the legal profession about the rules revision project and to invite comment and suggestion on any particular matters that should be addressed.

In mid-2009, the Court commenced a review of the basis used to quantify costs that have been ordered to be paid by one party in a proceeding to another. The structure of the scale of costs used in that process was also reviewed. On 12 May 2009 comments were sought from the Law Council and the Bar Associations and Law Societies of all States and Territories. Formal responses were received from the Law Council and seven Bar Associations and Law Societies. Following consideration of alternatives identified through that consultation and with extensive input from all judges and registrars, it was decided that changes to the rules in relation to costs and the scale of costs should be introduced in conjunction with the new Rules.

At a specially convened meeting of the judges of the Court on 13 November 2010 an advanced draft of the new Rules was considered and it was agreed that, subject to a number of further revisions, an exposure draft of the new Rules and proposed forms be provided to the Law Council and all State and Territory Bar Associations and Law Societies for comment.

The revised draft of the new Rules and drafts of the majority of the proposed forms were provided to the Law Council and the Bar Associations and Law Societies of all States and Territories on 24 December 2010 with a request for comments and suggestions and an invitation from the Convenor of the Rules Revision Committee to meet to discuss the drafts if required. Comments and suggestion on that draft were also sought from the Attorney-General's Department, Australian Government Solicitor, Australian Competition and Consumer Commission, Australian Securities and Investments Commission and the Federal Magistrates Court. The Convenor of the Rules Revision Committee then met with representatives of the Law Council and a number of State and Territory Bar Associations and Law Societies in February and March 2011 to discuss the draft, the comments and suggestions received and the implementation of the new Rules.

Formal responses with comments and suggestions were received from the Law Council, six Bar Associations and Law Societies, the Federal Magistrates Court and four Australian Government agencies. Overall these comments were supportive of the style and approach adopted in the new Rules and of most of the changes and innovations proposed. Many very constructive and useful suggestions were made and a significant number of these were adopted. The Convenor of the Rules Revision Committee replied

to each of the organisations and agencies who responded to the Court addressing the issues raised in their responses.

A further revised draft of the new Rules incorporating changes from the consultation process as well as correcting errors, inadvertent omissions and inconsistencies was considered by the judges of the Court on 15 April 2011 and approved in principle.

On 3 June 2011 a further refined and revised draft of the new Rules and a revised draft of the proposed forms were published on the Court's website for the information of legal practitioners and others. During June and July 2011 the Convenor of the Rules Revision Committee provided presentations on the new Rules to legal practitioners in Adelaide, Brisbane (with video conference links to the North Queensland regional centres of Townsville and Cairns), Canberra, Darwin, Hobart, Melbourne, Perth and Sydney to a total of over 1,600 attendees. Since 21 June 2011 a podcast of one of the presentations (with a transcript and PowerPoint slides) has been available for viewing, accessed from the Court's webpage. As a result a number of further constructive and useful suggestions were made by Law Societies, legal practitioners, cost assessors and precedent managers and were adopted. In addition the Convenor of the Rules Revision Committee met with staff of the Attorney-General's Department to discuss additional legislative amendments and necessary revisions to the new Rules to support or implement these.

Through the consultation process undertaken, the Court was able to draw on the knowledge of the most skilled legal practitioners in Australia experienced in federal civil litigation and court users with significant litigation expertise. The Court was also able to obtain valuable comment and suggestion for the improvement of the new Rules from entities and people likely to be affected by those rules. The judges of the Court are satisfied that any further consultation will not significantly improve the content of the new Rules.

New Rules

The Federal Court Rules 2011 ("the new Rules") are drafted in plain English and gender neutral language. They are structured to reflect the sequence of events in a proceeding in the Court. The party rather than the Court is the actor, with the Court empowered generally rather than specifically. Generally Registrars' administrative functions have been removed in the new Rules. In most cases the Registry function in relation to particular procedures is described in notes. In line with current drafting techniques, notes have been used to provide cross-references.

The new Rules are divided into Chapters, Parts, Divisions and Rules. Some rule numbers at the end of Divisions are purposely left blank.

For the assistance of court users, comparative tables have been developed identifying the new provisions in the new Rules and any equivalent in the former Rules and the provisions in the former Rules and their equivalent in the new Rules. These will be available on the Court's website (www.fedcourt.gov.au).

Commencement of the New Rules

The new Rules will commence on 1 August 2011 and repeal the former Rules. The new Rules apply to all proceedings started in the Court on or after 1 August 2011 and to any step taken after that date in any existing proceeding. The Court may order, however, that the former Rules, with or without modification, apply to any step in such an existing proceeding.

Explanation of the New Rules

The new Rules are lengthy (426 pages). They set out the practice and procedure requirements to be adopted by litigants and their legal representatives in all phases and for all types of proceedings in the Court and therefore provide the machinery for court processes. Although the new Rules are written in more modern and simpler language than the former Rules, the new Rules (like the former Rules) are based on long-existing and well-understood procedures for legal proceedings.

The new Rules do not substantially alter existing practice and procedure but rather explain it in a way that it can be more easily followed and applied. They do contain a number of new provisions and some innovative and streamlined procedural approaches. All provisions have been developed with ease of understanding in mind and so that, individually and collectively, the new Rules speak for themselves.

The new Rules are explained in **Attachment 1**.

The explanation in that attachment provides details of the structure of the new Rules and outlines the content of those new rules where that replace existing provisions in the former Rules. More detailed explanations are provided for those new provisions and where there is a substantial change or where the approach in the new Rules is markedly different to that in the former Rules.

Federal Court Rules 2011

STRUCTURE

The new Rules are divided into six Chapters. Chapter 1 contains introductory provisions of general application. Chapter 2 deals with proceedings generally in the Court's original jurisdiction. Chapter 3 deals with special classes of proceedings in the Court's original jurisdiction. Chapter 4 deals with the Court's appellate jurisdiction. Chapter 5 deals with judgments, costs and other general provisions. Chapter 6 contains disciplinary provisions.

The new Rules also include a number of Schedules. Schedule 1 is a dictionary defining the meaning of words and expressions used in the Rules. Schedule 2 sets out the powers of the Court that may be exercised by a Registrar. Schedule 3 contains details of costs that may be claimed and allowed for work done and services performed by lawyers, their staff and agents.

Notes appear after many rules and provide references to legislation, related rules, words or expressions defined in the Dictionary and other relevant information. The latter includes guidance which the Court has given, for example in a practice note issued by the Chief Justice; functions or actions to be taken by the registry in relation to the procedure; and steps which a person should or should not take associated with the procedure.

The new Rules make liberal use of forms to be used in proceedings in the Court but, unlike the former Rules, do not generally prescribe the forms. The new Rules provide for the Chief Justice to approve forms for the purpose of the Rules. The approved forms are to be published on the Court's internet home page (www.fedcourt.gov.au).

It is proposed that, on the commencement of the Rules, the Chief Justice will approve 143 forms including originating applications, interlocutory applications, pleadings, petitions, affidavits, subpoenas, notices, requests, certificates, an information, a summons, bill of costs, a statement of charge and warrants. A small number of forms prescribed by subject area regulations (for example Fair Work (Registered Organisations) Regulations 2009 and Native Title (Federal Court) Regulations 1998) are also required to be used for particular applications or steps in proceedings.

CHAPTER 1 INTRODUCTORY PROVISIONS

Chapter 1 contains Parts 1 to 6.

Part 1 deals with preliminary aspects, such as the scope of the rules (covering the name, commencement and application of the new Rules to both new proceedings and existing proceedings as well as the repeal of the former Rules); application for orders about procedures in the absence of legislative guidance or doubt; and the general powers of the

Court. The latter include dealing with a proceeding in a manner that is proportionate to its nature and complexity, making orders considered appropriate in the interests of justice and subject to any conditions considered appropriate, dispensing with compliance with the Rules and making orders inconsistent with the Rules where appropriate, making orders other than in open court, giving directions to a Registrar, fixing of time for acts or things to be done, extending or shortening of time fixed by the Rules or in an order, exercising any powers mentioned in the Rules on its own initiative or on application, making or refusing to make on any application orders as sought or different orders and specifying as part of an order the consequences of not complying with the order.

Part 1 also deals with a number of interpretative aspects, including that words and expressions used in the Rules which are defined in the Dictionary (Schedule 1) have the meanings as shown in that Dictionary; and how time fixed by the Rules or by an order of the Court is to be calculated. As noted above, the new Rules do not prescribe the forms which are to be used in proceedings in the Court.

Other than the formal provisions in relation to the name, commencement, application of the new Rules and the repeal of the former Rules and the provisions in Rules 1.31, 1.32, 1.35 and 1.52 discussed below, Part 1 adopts, simplifies and streamlines the process and procedures which operated under the former Rules. It does not substantially alter existing practice.

Rules 1.31 and 1.32 provide that in making any order in a proceeding the Court may have regard to the nature and complexity of the proceeding, deal with the proceeding in a manner that is proportionate to its nature and complexity and make any order that the Court considers appropriate in the interests of justice. These rules support the overarching purpose of civil practice and procedure set out in section 37M of the *Federal Court of Australia Act 1976*.

Rule 1.35 complements the power to dispense with compliance with any of the rules (Rule 1.34) by providing that the Court may make an order that is inconsistent with the Rules and, in that event, the order will prevail.

As noted above, the new Rules do not include prescribed forms for use in court proceedings. Rule 1.52 provides that a reference in the Rules to a form by number is a reference to the form approved under subrule 1.52 (2). Subrule 1.52 (2) provides that the Chief Justice may approve a form for the purpose of a provision of the Rules and notes that approved forms will be published on the Court's internet home page (www.fedcourt.gov.au). The Dictionary to the Rules defines "approved form" to mean a form approved by the Chief Justice.

Part 2 deals generally with the Registry and documents. These rules include the use (including electronically) of the seal and stamps of the Court on various documents; transfer of the management and conduct of a proceeding to another registry; document requirements (titles to be used, use of the unique court file number once issued, inclusion of essential contact information and the dating and signing of documents); filing and lodging of documents by presenting them to a registry when it is open for business, by

faxing them to approved fax numbers and by sending them by electronic communication using the facility for this purpose on the Court's internet home page (www.fedcourt.gov.au); acceptance and refusal of documents presented or sent to a registry for filing; custody and inspection of documents; and administration of money paid into and out of Court.

Rule 2.12 deals with compliance with approved forms and provides that a document is in accordance with an approved form if the document substantially accords with the approved form and any practice notes issued by the Chief Justice or has only those variations that the nature of the case requires.

Part 2 adopts, simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice.

Part 3 deals with powers of Registrars and includes prescribing, for the purposes of subsection 35A(1)(h) of the *Federal Court of Australia Act 1976*, the powers of the Court that can be exercised by a Registrar; providing authority for a Registrar to administer an oath or affirmation in a proceeding; and for a Registrar to make orders other than in open court. Part 3 also provides for a person to apply to the Court for an order that a Registrar do an act or thing that a Registrar is required or entitled to do but which he or she has refused to do; to apply for a matter for determination before a Registrar to be heard by the Court; and to apply for the review of the exercise by a Registrar of a power of the Court.

Schedule 2 sets out comprehensively the powers of the Court which can be exercised by a Registrar, whether under a provision of an Act or of the new Rules.

Part 3 adopts, simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice. The powers which can be exercised by a Registrar under the new Rules are substantially the same as those which could be exercised under the former Rules although some are new. For example, under the new Rules a Registrar may order under subrule 1.04 (3) that the former Rules apply to a step in a proceeding which existed on 1 August 2011; give judgment or make an order under rule 1.41 even if the applicant has not made a claim for that relief; and order under rule 6.01 that a document containing matter that is scandalous, vexatious or oppressive be removed from the Court file or the matter be struck out of the document.

Part 4 deals with lawyers and representation. This includes that a person may be represented in the Court by a lawyer or may be unrepresented but that a corporation must be represented by a lawyer; specifies the powers a lawyer has in a proceeding when acting for a party; and sets out the requirements for filing notices of a lawyer being appointed to act and for termination of a lawyer's retainer. It also includes referral of an unrepresented party to a Pro Bono lawyer for legal assistance and administrative aspects associated with such referrals.

Part 4 adopts, simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice.

Part 5 deals with the Court's supervision of proceedings. It provides machinery for case management, for the operation of the Court's individual docket system and to assist the Court in achieving the objectives of the overarching purpose under Part VB of the *Federal Court of Australia Act 1976*. While it largely adopts, simplifies and streamlines processes and procedures which operated under the former Rules and does not substantially alter existing practice, it does expand it and sets out some aspects in more detail. It also contains some new provisions.

Provisions in Division 5.1 require that a party or the party's lawyer must attend the Court on the return date fixed in an originating application, cross-claim (if one is filed) and any hearing; specify that the Court may make directions for the management, conduct and hearing of a proceeding or a cross-claim and sets out the types of directions that this may entail; provide that the Court can adjourn a directions hearing from time to time; require that a party seeking an interlocutory order must make application for such an order and allow a party to apply at a directions hearing for the Court to hear and determine the proceeding or to dispose of an originating application or cross-claim at the directions hearing.

Rule 5.03 deals with a respondent's new obligation to file a genuine steps statement in compliance with the requirements of the *Civil Dispute Resolution Act 2011*. That Act will commence on 1 August 2011. Subrule 5.03 (1) provides that if an applicant has filed a genuine steps statement in a proceeding, the respondent must file the respondent's genuine steps statement in the approved form before the return date fixed in the originating application. Subrule 5.03 (2) provides that that genuine steps statement must comply with section 7 of the *Civil Dispute Resolution Act 2011*.

Division 5.2 provides for orders on default. This includes specifying the orders that may be sought by a party when another party has failed to comply with an order, attend a hearing or prosecute or defend the proceeding with due diligence. It is also makes clear that the Division does not limit the powers of the Court to punish for contempt.

Rule 5.21 allows a party to apply to the Court for an order (called a self-executing order) that, unless another party does an act or thing within a specified time the proceeding be dismissed, the applicant's statement of claim or the respondent's defence be struck out or the party applying have judgment against the other party.

Part 6 deals with Court supervision of parties and other persons. Its provisions allow a party to apply for a document filed in a proceeding which is scandalous, vexatious or oppressive to be removed from the Court file or for the matter to be struck out of the document; allow a respondent, the Commonwealth or a State or Territory Attorney-General, the Registrar of the Court or an interested person to apply for an order that a person who has commenced a vexatious proceeding in the Court not continue that proceeding or start or continue any other proceeding in the Court against the person applying or any other person without the leave of the Court. Rule 6.11 deals with the use of a communication or recording device which might record or disturb a hearing, concern a witness or other participant in a hearing or allow a person who is not present in the

Court to receive information about the proceeding or the hearing to which that person is not entitled. It is also made clear that the Part does not limit the powers of the Court to punish for contempt.

Part 6 adopts, simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice.

CHAPTER 2 ORIGINAL JURISDICTION – PROCEEDINGS GENERALLY

Chapter 2 contains Parts 7 to 30.

Part 7 deals with applications for orders before starting a proceeding for substantive or actual relief. These include urgent applications for an injunction; detention, custody, preservation or inspection of property and to authorise a person to enter land or do something to give effect to such an order; payment of money into Court or to otherwise secure an amount of money; or to appoint a receiver. Also included are applications for approval of a compromise or settlement on behalf of a person under a legal incapacity; for preliminary discovery of information or documents from a prospective respondent; applications for a freezing order to restrain a person from frustrating a prospective judgment of the Court by removing assets or disposing, dealing with or diminishing the value of those assets; and applications for a search order requiring a prospective respondent to permit persons to enter premises for the purpose of securing or preserving evidence.

The provisions in Divisions 7.1 (Injunctions, Preservation of Property and Receivers), 7.2 (Approval of Agreement for Persons under a Legal Incapacity) and 7.3 (Preliminary Discovery) adopt, simplify and streamline the process and procedures which operated under the former Rules and do not substantially alter existing practice. Divisions 7.4 (Freezing Orders) and 7.5 (Search Orders) are harmonised with the rules of other courts and are substantially identical to the equivalent rules in the former Rules.

Part 8 deals with starting proceedings for substantive or actual relief. This includes filing of an originating application, what this must contain, the documents which must accompany it, when it must be served and how the return date of the application can be changed. ‘File’ is defined in the Dictionary (Schedule 1) of the new Rules to mean, unless the context otherwise provides, both file and serve. Also included in Part 8 are provisions on how a constitutional matter can be raised and how an originating application can, with leave, be amended.

These provisions of Part 8 adopt, simplify and streamline the process and procedures which operated under the former Rules and do not substantially alter existing practice.

Rule 8.02 deals with an applicant’s new obligation to file a genuine steps statement in compliance with the requirements of the *Civil Dispute Resolution Act 2011*. As noted previously, that Act will commence on 1 August 2011. Subrule 8.02 (1) provides that, if the *Civil Dispute Resolution Act 2011* applies to the proceeding, the applicant must, when

filing the originating application, file a genuine steps statement in the approved form. Subrule 8.02 (2) provides that that genuine steps statement must comply with section 6 of the *Civil Dispute Resolution Act 2011*.

Part 9 deals with parties and proceedings. This includes joining of multiple causes of action (that is claims or grounds for legal action or relief); joining two or more persons as applicants and respondents; applying to join additional parties; applying for separate trials if joining multiple causes of action or joining of parties complicates, delays or causes other inconvenience to the trial; applying to remove parties improperly or unnecessarily joined; impact of errors in joining parties and of the death, bankruptcy or transmission of interests of a party; impact of substitution of a party; and applying to intervene in a proceeding.

This Part also includes bringing of proceedings by or against a representative party representing a large number of people with the same interest (for example beneficiaries in a trust or a deceased estate); grouped proceedings or class actions under Part IVA of the *Federal Court of Australia Act 1976*; proceedings by or against partners in a partnership; proceedings against a person who carries on a business under a business name or against a business name; and proceedings by or against a person under a legal incapacity.

Part 9 adopts, simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice. Rule 9.71 however requires that, in seeking the Court's approval of a compromise or settlement on behalf of a person under a legal incapacity, more information must be filed than previously required, including an opinion of an independent lawyer that the agreement is in the best interests of the person under the legal incapacity.

Part 10 deals with service of documents. This includes how personal service, where required, of a person or an entity is carried out; acceptance of service by a lawyer where authorised; applying for substituted service; how service is carried out if personal service is not required (for example by pre-paid post or electronic transmission); and how the time of service is calculated for particular types of service.

This Part also includes service out of Australia of an originating application or other documents filed in proceedings; applying for leave for overseas service; methods of such service (such as in accordance with a convention, the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* done at the Hague on 15 November 1965 (the Hague Convention) or the law of a foreign country); proof of such service; substituted service; process for service through diplomatic channels; and process for service under Hague Convention.

Other than Division 10.6 (Service under Hague Convention) and Rules 10.02, 10.07 and 10.08, Part 10 adopts, simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice.

Division 10.6 is part of a scheme to implement Australia's obligations under the Hague Convention and is substantially identical to the equivalent rules in the former Rules. The Hague Convention commenced to operate in Australia from 1 November 2010.

Rule 10.02 provides that service on a corporation must be in accordance with section 109X of the *Corporations Act 2001*.

Rules 10.07 and 10.08 deal with service in proceedings under the *Patents Act 1990* (the Patents Act) and *Trade Marks Act 1995* (the Trade Marks Act). These rules provide that in a proceeding brought against a patentee under the Patents Act or the owner of a registered trade mark under the Trade Marks Act, service of a document may be served on a person who is apparently an adult at an address for service given by that patentee to the Commissioner of Patents under section 221 of the Patents Act or by that owner of the registered trade mark to the Registrar of Trade Marks under section 215 of the Trade Mark Act respectively.

Part 11 deals with addresses for service. This includes provisions which apply generally for each party in a proceeding to maintain an address at which any document in the proceeding may, during ordinary business hours, be left for that party or to which such a document may be posted; for notification in the approved form of that or those addresses as well as any changes of address; that a notice of address for service by a corporation must be filed by a lawyer; and requirements for giving a notice of address for service by particular persons or entities (for example where proceedings are brought against a business name or a partnership or where a person is appointed as a receiver).

Part 11 adopts, simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice. Subrule 11.01 (4) introduces electronic service on a party represented by a lawyer in a proceeding by allowing service of any document in the proceeding to be effected by sending it to the email address of that party's lawyer.

Part 12 deals with submitting notices. It provides that a party served with an originating application or a notice of appeal who does not want to contest the relief sought in the application or appeal may file a submitting notice in the approved form. The notice must state that the party submits to any order the Court may make, state whether the party wants to be heard on the question of costs, include an address for service and be filed before the return date for an originating application or within 14 days of service for a notice of appeal. A party who has filed a submitting notice may apply to the Court for leave to withdraw the notice and any application for such leave must be accompanied by an affidavit stating why the party wants to withdraw the submitting notice and the party's intentions in relation to the further conduct of the proceeding.

The former Rules did not contain equivalent provisions to Part 12. Section 38 of the *Federal Court of Australia Act 1976* provides that where the Rules of Court are insufficient, the Rules of the High Court may be applied. Rule 23.02 of High Court Rules 2004 provides that a defendant willing to submit to any order that the Court may make, save as to costs, may file a submitting appearance in the prescribed form under those

Rules. Part 12 adopts, simplifies and streamlines the process and procedures which have operated in the Federal Court through the application of the High Court's Rule 23.02 where a party wished to submit. It does not substantially alter existing practice.

Part 13 deals with jurisdiction to set aside an originating application. It provides that a party may apply to set aside an originating application or its service and specifies what a respondent must file in making such an application. Part 13 adopts, simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice.

Part 14 deals with interlocutory orders for preservation of rights and property. This includes that a party may apply for orders for inspection of property or associated purposes or to give effect to the order, specifies what must be filed and the type of service required and also that a party may apply to have the Court inspect any place, process or other thing that relates to a matter in question. The Part also provides that a party may apply for an order for preservation of property, for the sale or disposal of property, for interim distribution of property or income from property and for immediate payment to 2 or more persons to shares of a fund. In addition, the Part provides that a party may apply for an order appointing a receiver and for the filing by the receiver before appointment of a guarantee in the approved form; for a receiver to apply for authority to do any act or thing or for the receiver's remuneration to be fixed; for filing and service of receiver's accounts and for a receiver to attend an appointment for examination of an account; and for a party or an interested person to apply for the discharge of the receiver and appointment of another person as receiver if the receiver fails to pay into Court monies due or if the receiver dies.

Part 14 adopts, simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice.

Part 15 deals with cross-claims and third party claims. This includes that a cross-claim can be made against an applicant for any relief that the respondent would be entitled in a separate proceeding or against any other respondent or person for any relief, including for contribution or indemnity, which is related to the subject of the proceeding. The Part covers starting a cross-claim; the title, content, time for bringing, extension of that time, documents accompanying, service, conduct, hearing and amendment with leave of a cross-claim.

Part 15 adopts, simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice, apart from now requiring an initiating document called a Notice of Cross Claim which is supported by pleadings (statement of cross claim) or an affidavit.

Part 16 deals with pleadings. A pleading is a document which defines the issues to be decided in the proceeding, including a statement of claim or cross-claim, defence and reply but not an application, notice or an affidavit. Part 16 provides for the content of pleadings generally including, in Rule 16.02, the requirement to state the material facts necessary to give an opposing party fair notice of the case at trial. It also deals with how

particular matters or things are to be dealt with (for example facts, references to documents or spoken words, conditions precedent, admissions and denials); matters that in certain pleadings must be expressly pleaded; close of pleadings; making an application to strike out pleadings; the time for filing a defence and a reply; making an application for particulars (for example of a claim, defence or other matter stated in a pleading, of the nature of the case relied on or a claim for damages); and amendment of pleadings.

Part 16 adopts, simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice.

Part 17 deals with interlocutory applications. An interlocutory application is made if a party wants to apply for an order in a proceeding that has already started. Part 17 provides for the form and content of an interlocutory application as well as accompanying documents; when such an application may be made orally; service; and hearing and determination of an interlocutory application. Other than Rule 17.02, Part 17 adopts, simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice.

Rule 17.02 provides that in circumstances where a party wants to rely on correspondence or other documents, the authenticity of which is not in dispute, an interlocutory application can be filed without an accompanying affidavit.

Part 18 deals with interpleader proceedings. An interpleader is a procedure available to a person who is faced with two or more claims about the same debt or personal property and enables the competing claimants to litigate their difference while the stakeholder abides by the result. Part 18 provides for interpleader by a debtor or holder of personal property including how an application is made, the orders which can be sought, default by claimant, neutrality of debtor or holder of the property and that application can be in several proceedings. The Part also provides for interpleader by the Court's Sheriff who takes or intends to take personal property in execution under process.

Part 18 adopts, simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice.

Part 19 deals with security for costs. It provides that a respondent may apply for an order that an applicant give security for costs, for stay of the proceeding pending that security being given and dismissal of the proceeding in the event of default. It also specifies the matters to be addressed by the respondent in the affidavit which must accompany an application.

Part 19 adopts, simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice. It does provide better guidance to a respondent on what must be addressed in support of an application.

Part 20 deals with discovery and inspection of documents. This includes general provisions in relation to withholding documents on public interest grounds, privilege and the impact of reading or referring to documents in open court on undertakings given or

orders made limiting the use of those documents to particular proceeding. Provision is also made restricting discovery to only where it will facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible; requiring that discovery be given only where an order is made for discovery; allowing a party to apply for an order for discovery but limiting when this can be done and the types of discovery which can be sought; specifying what standard discovery (if ordered) entails; specifying what must be identified if non-standard (or more extensive) discovery is sought and how this is to be done; specifying the process to be followed in giving discovery and providing guidance on practical issues (for example that the list of documents to be filed must be in the approved form, if more than one copy of a document is held discovery of that document is required only once, privilege may not be claimed by a party on the ground that a document related solely to and did not undermine that party's case and it does not relate to or support another party's case and that a party who has given discovery remains under a continuing obligation to discover any additional document found or obtained which is within the scope of the order for discovery); and allowing a party to apply for discovery from a non-party of documents that are directly relevant to an issue raised on pleadings or affidavits in the proceeding.

Part 20 also allows a party to serve on another party notice in the approved form to seek production for inspection of documents mentioned in a pleading or affidavit filed in the proceeding and, in default, to seek an order for production of those documents. In addition, if a non-party has been ordered to give discovery but refuses or neglects to allow inspection of the documents, this Part allows a party to seek an order for that inspection. The Part also allows a party to copy at its expense any document produced to that party for inspection. It also allows for a party to apply for an order that another party produce a document under the control of that other party to the Court.

Part 20 adopts, simplifies and streamlines the process and procedures which operated under the former Rules. It also provides better and more detailed guidance and clarification on a number of aspects of discovery and inspection of documents (for example that discovery does not affect privilege (Rule 20.02), discovery is to be given only if it will facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible (Rule 20.11) and the obligations of a non-party if ordered to give discovery (Rule 20.24)). It does not substantially alter existing practice but introduces an additional method for giving non-standard and more extensive discovery; with guidance on what must be identified and how this is to be done, including use of a discovery plan where appropriate (Rule 20.15); and allows for discovery of documents by category (Subrules 20.15 (1), (2) and (4) and 20.17 (2)).

Part 21 deals with interrogatories. Its provisions allow a party to apply for an order that another party provide written answers to interrogatories; specifies how to apply; limits when this can be done; and specifies that answers must be in the approved form and verified by affidavit. It also provides that answers provided may be tendered in evidence by any party other than the party who made the answers and, if a party ordered to do so fails to answer an interrogatory sufficiently, the party seeking the written answer may apply to the Court for an order that a sufficient answer be given or that the defaulting party attend before the Court or a Registrar to be interrogated orally.

Part 21 adopts, simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice.

Part 22 deals with admissions. This includes that a party may give to another party a notice in the approved form to admit facts or documents; that a party served with such a notice can serve on the party who gave the notice a notice in the approved form disputing the truth of any fact or the authenticity of any document mentioned in the notice to admit; and specifies the implications (including in relation to costs) of disputing facts or the authenticity of documents if later proved and of not disputing facts or documents if served with a notice to admit. Provision is also made for the withdrawal, with leave, of admissions and judgment on admissions.

Part 22 adopts, simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice.

Part 23 deals with experts. This includes allowing a party to apply for a court expert to be appointed; the content of a court expert's report and how it is to be provided and used at trial; and that a party may adduce evidence of another expert on a question reported on by the court expert only with leave. It also provides for the calling of an expert at trial by a party; providing in advance to any expert witness intended to be called guidelines issued by the Court for expert witnesses; content of an expert report; allowing a party to apply for an order that another party provide a copy of that other party's expert report; and, where two or more parties intend to call experts to provide opinion on similar questions, allowing any of those parties to apply for orders to manage the evidence of those experts (for example requiring that the experts confer, produce to the Court a document identifying where the expert opinions agree or differ and at trial the experts be sworn at the same time and cross-examination and re-examination be conducted by putting to each expert in turn each question).

Part 23 adopts, simplifies and streamlines the process and procedures which operated under the former Rules. It does not substantially alter existing practice but provides better guidance to parties and experts on requirements and obligations.

Part 24 deals with subpoenas. Its provisions are harmonised with the rules of other courts and are substantially identical to the equivalent rules in the former Rules. A subpoena can be issued only with the leave of the Court. The former Rules, however, provided a single form of subpoena which is adjusted depending on whether it is to attend to give evidence, to produce documents or to attend to give evidence and produce documents. Subrule 24.13 provides that a subpoena to give evidence, a subpoena to produce documents and a subpoena to give evidence and produce documents are each in separate approved forms. The Part also provides for the process for issue a subpoena; changing the date for attendance or production; a party or a person having a sufficient interest applying to set aside a subpoena; service of a subpoena; the requirements and obligations in complying with a subpoena; production of documents or things other than by attendance; removal, return, inspection, copying and disposal of documents and things

produced to the Court; costs and expenses of compliance with a subpoena; and that failure to comply with a subpoena is a contempt of court.

Part 25 deals with offers to settle. This includes that an offer to compromise is to be in the approved form; that this must not be filed in the Court; that pleadings and affidavits must not refer to an offer having been made; and that no communication about the existence or terms of an offer is to be made to the Court other than as provided for in the rules. The provisions also specify what the offer must contain; when an offer can be made; the time for acceptance of an offer; how an offer may be withdrawn and accepted; how an acceptance may be withdrawn; the consequences of failure to comply with an accepted offer; and cost implications (including in relation to an offer between contributor parties).

Part 25 adopts, simplifies and streamlines the process and procedures which operated under the former Rules. It does not substantially alter existing practice but provides better guidance to parties on some aspects (for example the content of an offer) and more flexibility on aspects to do with the structure of offers (for example in relation to interest). Rule 25.12 limits the costs which can be recovered on an offer being accepted (if that offer is not inclusive of costs) to up to and including 14 days after the offer was made regardless of when the offer may be accepted.

Part 26 deals with ending proceedings early. This includes making application for summary judgment on the grounds that the applicant has no reasonable prospect of successfully prosecuting the proceeding, the proceeding is frivolous or vexatious, no reasonable cause of action is disclosed, the proceeding is an abuse of the process of the Court or the respondent has no reasonable prospect of successfully defending the proceeding. It also includes withdrawing a plea raised in a pleading and discontinuing a proceeding in whole or in part. Part 26 adopts, simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice.

Part 27 deals with the transfer of proceedings. This includes applying to the Federal Court of Australia (Federal Court) for an order to transfer certain types of proceedings to the Family Court of Australia; making application to the Federal Court for an order to transfer a proceeding (other than an appeal) or an appeal from the Administrative Appeals Tribunal (AAT) to the Federal Magistrates Court of Australia (Federal Magistrates Court) and the matters to be addressed in any such application; the process to be followed if the Federal Magistrates Court makes an order transferring a proceeding of that Court to the Federal Court; applying to the Federal Court under the *Jurisdiction of Courts (Cross-Vesting) Act 1987* for an order to transfer a proceeding to another court; and the process to be followed if another court makes an order transferring a proceeding of that court to the Federal Court. Part 27 adopts, simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice.

Part 28 deals with alternative dispute resolution. It consolidates the provisions under the former Rules relating to mediation and arbitration, international arbitration and referees.

Division 28.1 contains general provisions. Significantly, rule 28.1 places a new, positive obligation on parties to consider options for alternative dispute resolution as early as possible in all matters and provides that the Court will help to implement those options if appropriate. These obligations are complementary to but independent of the obligations imposed under the *Civil Dispute Resolution Act 2011*.

Rule 28.02 sets out the orders that a party may apply for to refer the whole or part of a proceeding to mediation, arbitration or an alternative dispute resolution process. ‘ADR process’ is defined in the Dictionary (Schedule 1) to mean an alternative dispute resolution process conducted by a suitable person.

Rule 28.05 confirms that parties may refer their matters to mediation, arbitration or an alternative dispute resolution process privately without an order of the Court but that, in those circumstances, the applicant must within 14 days of the referral apply to the Court for directions as to the future management and conduct of the proceeding.

Divisions 28.2 and 28.3 relate to arbitration and mediation respectively. These Divisions adopt, simplify and streamline the provisions under the former Rules as well as introducing provisions relating to applications for registration and for orders in terms of an arbitrator’s award. Division 28.4 deals with other alternative dispute resolution processes in the same terms as those relating to mediation.

Division 28.5 provides for international arbitration and adopts, simplifies and streamlines the provisions contained in the former Rules, as well as expanding the provisions with respect to subpoenas, applications under sections 23A, 23F and 23G of the *International Arbitration Act 1974* and recognition of an award.

Division 28.6 deals with referrals to a referee by the Court and adopts, simplifies and streamlines the terms of the former Rules.

Part 29 deals with evidence. This includes the swearing and affirming of affidavits generally and by persons who have disabilities; the form, style, formal requirements and content of an affidavit; service of affidavits and any exhibits and annexures to them; consequences of irregularity in form; and cross-examination of deponents of affidavits. It also allows a party to apply for an order for examination of a person before a Judge or some other person appointed by the Court as examiner at a place in Australia or abroad or for the sending and issue of a letter of request to the judicial authority of another country to take, or cause to be taken, the evidence of a person; the process for issue of a letter of request if ordered; the conduct of examinations, including examination of additional persons by consent, recording of objections, taking of depositions, filing of authenticated depositions, report by an examiner on the absence or conduct of a person from or at the examination and process in the event of the default of a witness; and allows a party to apply for an order in relation to evidence of a future right.

Part 29 adopts, simplifies and streamlines the process and procedures which operated under the former Rules. It does not substantially alter existing practice but provides

better guidance to parties on some aspects (for example that an affidavit must be served at least three days before it is to be used).

Part 30 deals with hearings. This includes allowing a party to apply for an order for separate trials on questions in the proceedings; disposal of the proceedings after hearing separate questions in some circumstances; allowing a party to apply for an order for the examination of any person before the Court, a registrar or examiner or for the production by that person of any document or thing. This Part also allows a party to apply for the consolidation of several proceedings involving common questions of law or fact or which arise out of the same transaction or series of transactions. It also provides for the absence of some or all parties at the trial; allows for a party to seek limitations in a trial (for example on the time for examination, cross-examination or re-examination of a witness, the number of witnesses that a party may call, the time for oral submissions, the time which may be taken for the hearing, the number of documents a party may tender in evidence, that submissions be in writing and the length of any written submissions); and to provide guidance and direction on practical issues (for example death of a party after a hearing but before judgment, evidence taken in other proceedings, tender of plans, photographs and models, effect and sufficiency of written consents, forms of giving notice to adduce or tender evidence permitted under the *Evidence Act 1995* and for production of a party or witness in lawful custody). It also allows a party seeking production of documents or things by another party to give notice in the approved form and, should the document not be produced, leading of secondary evidence of the contents or nature of the document or thing.

The Part also provides that a party may apply for an order in some circumstances that an amount of damages be calculated by the Registrar and the process to be followed before and by the Registrar in calculating and certifying damages, including for objection. It also provides that a party who has claimed an account or made a claim that involves taking an account may apply for an order that an account be taken and associated supporting action; for the form and filing of the account; for giving notice of additional charges or errors; that a party may apply for orders staying or expediting the proceeding or for the future conduct of the proceeding in the event of delay; for a party to apply for an order that the Registrar take an account or hold an inquiry into the taking of an account; for making objection to any certificate issued by the Registrar; and the consequences of making an objection.

Part 30 adopts, simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice.

CHAPTER 3 ORIGINAL JURISDICTION – SPECIAL CLASSES OF PROCEEDINGS

Chapter 3 contains Parts 31 to 34.

Part 31 deals with judicial review. This includes proceedings under the *Administrative Decisions (Judicial Review) Act 1977*, *Judiciary Act 1903*, *Migration Act 1958* and

Australian Crime Commission Act 2002 and covers filing an application for review or relief, joining claims, applying for an extension of time, objecting to competency, accompanying documents, special service provisions in some circumstances and the approved forms to be used.

Part 31 adopts, simplifies and streamlines the process and procedures which operated under the former Rules and introduces some greater consistency in some steps across the different types of judicial review. It does not substantially alter existing practice.

Part 32 deals with remittals and referrals from the High Court of Australia. This includes what must be filed in the Federal Court if the High Court orders a proceeding be remitted to the Federal Court, what subsequently must be done and what orders may, in some circumstances, be sought from the Federal Court. It also includes what must be filed in the Federal Court if the High Court orders a petition under section 354 (1), or part of a petition under section 354 (3), of the *Commonwealth Electoral Act 1918* be referred to the Federal Court, what subsequently must be done, how a petition may be withdrawn and how another petitioner may be substituted, particularly in the event of the death of a sole petitioner before the conclusion of a trial. The Part also covers the approved forms to be used.

Part 32 adopts, simplifies and streamlines the process and procedures which operated under the former Rules. It changes some responsibilities, for example the new Rules require that the applicant must file in the Federal Court the order of the High Court for remittal or referral, but otherwise does not substantially alter existing practice.

Part 33 deals with appeals from decisions of bodies other than courts. This includes taxation appeals and appeals from the AAT, Superannuation Complaints Tribunal and National Native Title Tribunal (NNTT).

Taxation appeals cover reviewable objection decisions under section 14ZZ of the *Taxation Administration Act 1953* and departure prohibition orders under section 14V of that Act. Division 33.1 covers how to start a taxation appeal, the documents that the Commissioner of Taxation (or Second or Deputy Commissioner) must file and serve in the event of an appeal and the approved forms to be used.

Division 33.2 covers filing an appeal from the AAT; applying for extension of time; amending a notice of appeal; applying to raise other questions of law or to rely on grounds not stated in the notice of appeal; applying for a stay of the AAT's decision; the documents the Registrar of the AAT must provide to the Court; cross-appealing; filing and effect of a notice of contention; orders or directions which can be sought at a directions hearing; preparing appeal books; filing written submissions, chronologies and lists of authorities; applying for the Court to receive further evidence on the appeal; objecting to competency; discontinuing appeals; applying to dismiss appeals; and the approved forms to be used.

Divisions 33.3 and 33.4 provide that Division 33.2 is to be applied (with one exception) for an appeal under section 46 of the *Superannuation (Resolution of Complaints) Act*

1993 from a determination the Superannuation Complaints Tribunal and under section 169 of the *Native Title Act 1993* from a decision or determination of the NNTT. The exception, in Division 33.3, is that a notice of appeal from the Superannuation Complaints Tribunal must be filed in the Registry in the State or Territory in which the applicant ordinarily resides.

Part 33 adopts, simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice. It does provide better and more detailed guidance to parties in relation to AAT appeals and introduces greater consistency between steps in appeals from other bodies (conducted in the original jurisdiction of the Court) to those applicable in the Court's appellate jurisdiction (Chapter 4), for example in relation to objections to competency.

Part 34 deals with other specific proceedings, such as Fair Work proceedings, proceedings for an offence, intellectual property proceedings, Trans-Tasman market and general proceedings, proceedings under the *Aboriginal and Torres Strait Islander Act 2005*, Native Title proceedings and Human Rights proceedings.

Division 34.1 covers Fair Work proceedings. These include proceedings under the *Fair Work Act 2009*, *Fair Work (Registered Organisations) Act 2009* and Fair Work (Registered Organisations) Regulations 2009. The Division adopts, simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice. Its provisions now make it clear that it is not necessary to file a certificate issued by Fair Work Australia under either section 369 or 777 of the *Fair Work Act 2009* in proceedings relating to dismissal from employment in contravention of a general protection, alleged unlawful termination of employment or alleged discrimination if the application is brought by a Fair Work Inspector.

Division 34.2 covers proceedings for an offence. The Division adopts, simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice.

Division 34.3 covers intellectual property proceedings. These include proceedings arising in relation to infringement of a design provided for under the *Advance Australia Logo Protection Act 1984*, copyright under the *Copyright Act 1968*, a design registered under the *Designs Act 2003*, a patent granted under the *Patents Act*, a trade mark registered under the *Trade Marks Act*, a design provided for under the *Olympic Insignia Protection Act 1987*, eligible layout rights under the *Circuits Layouts Act 1989*, plant variety rights granted under the *Plant Variety Rights Act 1987*, plant breeders' rights under the *Plant Breeder's Rights Act 1994* or other applications, appeals or proceedings under any of those Acts except for applications under the *Administrative Decision (Judicial Review) Act 1977* and *Judiciary Act 1903* to which Divisions 31.1 or 31.2 of the new Rules apply. The Division adopts, simplifies and streamlines the process and procedures which operated under the former Rules. It does not substantially alter existing practice but provides more comprehensive guidance to parties on requirements.

Divisions 34.4, 34.5 and 34.5A cover proceedings to which the *Trans-Tasman Proceedings Act 2010* (Trans-Tasman Act) apply and the transition from the commencement of the new Rules until section 3 of the Trans-Tasman Act comes into effect. The Trans-Tasman Act and the *Trans-Tasman Proceedings (Transitional and Consequential Provisions) Act 2010* (Transitional Act) were both assented to on 13 April 2010 but their substantive provisions are yet to commence. The Trans-Tasman Act implements the *Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement* which was signed on 24 July 2008. It streamlines the process for resolving civil proceedings with a trans-Tasman element in order to reduce costs and improve efficiency and minimises existing impediments to enforcing certain New Zealand judgments and regulatory sanctions. The Transitional Act repeals the *Evidence and Procedure (New Zealand) Act 1994* and makes consequential amendments to the *Federal Court of Australia Act 1976* required in connection with the Trans-Tasman Act.

Division 34.4 provides that each party to a proceeding to which the Trans-Tasman Act applies must comply with Divisions 34.4, 34.5 and 34.5A and any other rule in the new Rules that is relevant and consistent with these Divisions as well as the general procedural requirements for such proceedings. These include filing originating and interlocutory applications; the necessary accompanying documents; requirements if interim relief is sought; how to seek leave to serve a subpoena in New Zealand, to apply to have such a subpoena set aside and to have a certificate of non-compliance with such a subpoena issued; restrictions on access to court documents used in an application for leave to serve a subpoena in New Zealand; applying to enforce an order made by a New Zealand court under section 58(2) of the Trans-Tasman Act; serving notice of registration of a New Zealand judgment in the Court; applying for an extension of time in which that notice may be given; applying to set aside registration of a New Zealand judgment, to stay enforcement of such a judgment to enable an appeal to be heard and to seek an extension of time to apply for such a stay; using audiovisual links to enable evidence to be taken or submissions made from New Zealand; and the approved forms to be used.

Division 34.5 provides special rules in relation to proceedings to which the Trans-Tasman Act applies regarding alleged breaches by a corporation of specified provisions of the *Competition and Consumer Act 2010* (Australian market proceeding) or the *Commerce Act 1986* of New Zealand (New Zealand market proceeding) relating to misuse of market power to eliminate or damage competition in any market. These include requirements for filing documents in Australian market proceedings in a New Zealand registry and in New Zealand market proceedings in a Registry of the Court in Australia; applying for the Court to sit in New Zealand; and the application of the rules in Division 34.4 relating to serving notice of registration of a New Zealand judgment in the Court, applying for an extension of time in which that notice may be given, applying to set aside registration of a New Zealand judgment, to stay enforcement of such a judgment to enable an appeal to be heard and to seek an extension of time to apply for such a stay to a New Zealand market proceeding judgment.

Division 34.5A provide transitional arrangements for any proceeding to which the Trans-Tasman Act applies which is started after the new Rules commence but before the

substantive provisions of the Trans-Tasman Act take effect. These include that Order 69 and 69A of the former Rules and all forms prescribed for those Orders continue to apply to any such proceeding as if those rules had not been repealed. In addition, the powers of the Court which can be exercised by registrars in respect to any such proceeding will continue to include the powers currently contained in the former Rules under the *Evidence and Procedure (New Zealand) Act 1994*. This Division will expire on the commencement of the Trans-Tasman Act.

Divisions 34.4 and 34.5 provide the procedural machinery and guidance necessary for implementation in the Court of the expanded and streamlined provisions for proceedings to which the Trans-Tasman Act applies from when that Act commences. Some of the coverage and provisions are similar to those in the former Rules which applied to Trans-Tasman proceedings but simplified and streamlined. The processes and procedures for proceedings to which the Trans-Tasman Act applies are consistent with the general scheme of the new Rules but not a significant departure from those which formerly applied.

Division 34.6 covers proceedings under the *Aboriginal and Torres Strait Islander Act 2005*. The Division adopts, simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice.

Division 34.7 covers native title proceedings. The Division does not substantially alter existing practice and largely adopts the process and procedures which operated under the former Rules.

Some of the provisions contained in the former Rules in relation to native title proceedings have been omitted as they are dealt with in the general body of new Rules. These include powers of registrars; amending and striking out main application; changing an address for service; and giving notice. Provisions relating to applications for payment secured by bank guarantee which existed under the former Rules have also been removed, as they are now dealt with by section 52(1) of the *Native Title Act 1993*.

Some other provisions, including those with respect to joinder of parties and withdrawal (rules 34.104 to 34.106), have been simplified and modified for consistency with the general provisions of the new Rules.

Division 34.8 covers proceedings under Division 2 of Part IIB of the *Australian Human Rights Commission Act 1986*. The Division adopts, simplifies and streamlines the process and procedures which operated under the former Rules. It does not substantially alter existing practice although, unlike the former Rules, it requires that a respondent file a notice of address for service but does not require that a respondent file a defence to an application.

CHAPTER 4 APPELLATE JURISDICTION

Chapter 4 contains Parts 35 to 38.

Part 35 deals with leave to appeal. It simplifies and streamlines the processes and procedures for applying for leave to appeal orally or in writing, ending applications early and revoking leave to appeal.

Division 35.1 allows a party to apply orally for leave to appeal from an interlocutory judgment or order of the Court at the time that the judgment or order is made. Its provisions are in similar terms to existing practice.

Written applications for leave to appeal, including where no oral application for leave to appeal has been made, are dealt with under Division 35.2. Unlike the equivalent provisions in the former Rules, this Division makes no distinction between applying for leave to appeal from an interlocutory judgment or order of the Court (required under subsection 24 (1A) of the *Federal Court of Australia Act 1976*) and other circumstances where leave to appeal is required (for example, subsection 158 (2) of the *Patents Act*, subsection 195 (2) of the *Trade Marks Act* and subsection 87 (2) of the *Designs Act 2003* which provide that an appeal does not lie to the Full Court against a judgment or order of a single judge of the Court in the exercise of its jurisdiction to hear and determine appeals from decisions or directions of the Commissioner of Patents, Registrar of Trade Marks or Registrar of Designs, respectively, except with the leave of the Court). It prescribes only one approved form for all applications for leave to appeal irrespective of whether the judgment or order from which leave to appeal is sought is interlocutory or final or whether it is a judgment or order of the Court or another court.

The Division adopts a more consistent approach to the time for filing than the former Rules by requiring that all applications for leave to appeal be filed within 14 days after the day on which the judgment was pronounced or order made or on or before such other date fixed for that purpose by the Court. It also streamlines the existing procedures for applying for an extension of time to seek leave to appeal.

In addition the Division deals with the documents which must accompany the application; service requirements; the respondent's filing of an address for service; any objection to the application being considered without an oral hearing; filing and content of submissions in applications being dealt with without oral argument; and it generally provides greater consistency and better guidance to parties.

Division 35.3 sets out new procedures for ending early applications for leave to appeal and applications for extensions of time for leave to appeal. This includes withdrawing an application, the approved form to use and dismissing an application for failure to comply, for failure to attend or for want of prosecution. This Division also sets out a new procedure where a party is absent when an application is called on for hearing. Division 35.4 deals with revocation of leave to appeal. The provisions of these Divisions provide better guidance to parties on practical issues and requirements.

Part 36 deals with the processes and procedures for instituting appeals. It does not substantially alter existing practice but streamlines, simplifies and consolidates some aspects of the former Rules, although it does provide for some new time limits within which steps are to be taken in certain circumstances.

Rule 36.01 distinguishes between appeals from a single judge of the Court and an appeal from any other court by prescribing different approved forms for notices of appeal. Rule 36.09 allows a party to apply for security for costs of an appeal. It differs from the approach adopted in the former Rules which provides that no security for costs for an appeal is required unless otherwise directed. Rule 36.10 provides for a supplementary notice of appeal to be filed, without leave, during the 28 days after the filing of the notice of appeal. This Part also deals with notices of cross-appeal, notice of contention, parties and interveners in similar terms existing under the former Rules.

Division 36.4 allows for certain applications to be dealt with on the papers. The kind of applications that may be dealt with without an oral hearing is broader under the new Rules. Division 36.5 reflects the Court's streamlined approach to the content and preparation of appeal books and the accelerated provision of outlines of submissions. Division 36.6 deals with the ending of appeals by dismissal or discontinuance. Rule 36.72 deals with competency. Unlike the former Rules, which allowed an objection to competency to be made at any time, Rule 36.72 requires any notice of objection to competency be filed within 14 days of service of the notice of appeal. The Part does not substantially alter existing practice and provides better guidance to parties on obligations and requirements.

Part 37 deals with appeals in criminal cases from the Supreme Court of a Territory in similar terms to those under the former Rules and does not substantially alter existing practice.

Part 38 deals with cases stated and questions reserved in similar terms to those under the former Rules and does not substantially alter existing practice.

CHAPTER 5 JUDGMENTS, COSTS AND OTHER GENERAL PROVISIONS

Chapter 5 contains Parts 39 to 41.

Part 39 deals with orders. This includes specifying the date of effect of judgments and orders; prescribing the time for compliance with orders if not otherwise specified; applying to preserve the right to bring fresh proceedings where a proceeding or part of a proceeding is dismissed or for a stay of any such further proceedings until any costs ordered on dismissal have been paid; varying and setting aside a judgment or order; and prescribing the rate of interest payable on a judgment. It also includes making of consent orders; applying for orders in relation to undertakings given to the Court; and entering and authenticating orders.

Part 39 adopts, simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice.

Part 40 deals with costs and adopts, simplifies and streamlines the process and procedures which operated under the former Rules. In particular Part 40 mandates the

processes implemented progressively over the last 20 years which have very successfully eliminated the necessity for full taxation of costs in many matters.

This Part does introduce some significant changes in relation to the basis on which party and party costs are determined and the structure of the scale of costs used in that process as well as the quantum of costs which must or can be allowed for work done and services performed by legal practitioners. Importantly, ‘costs as between party and party’ is defined in the Dictionary (Schedule 1) to mean only the costs that have been fairly and reasonably incurred by the party in the conduct of the litigation. In contrast, the test under the former Rules was what was necessary or proper for the attainment of justice or for maintaining or defending the rights of a party.

Subject to some limitations and exclusions in particular types of proceedings (for example, under section 570 of the *Fair Work Act 2009* and representative proceedings under Part IVA of the *Federal Court of Australia Act 1976*), the Court has a wide discretion to award costs in all proceedings before it, including proceedings dismissed for want of jurisdiction (section 43 of the *Federal Court of Australia Act 1976*). This can include that a party to the proceeding will pay the costs which one or more of the other parties to that proceeding have fairly and reasonably incurred in the conduct of that litigation or a particular part of it; that a party will pay to another party to the proceeding all of the costs which the latter party incurred as a complete indemnity, other than costs incurred unreasonably; that a party will pay a share of the costs of one or more of the other parties; that an individual who or other entity which is not a party to a proceeding will pay the costs of one or more of the parties to a proceeding; and that a lawyer for a party to the proceeding will pay costs in regard to the proceeding personally. Orders may require that the costs ordered to be paid be taxed (that is the process for a bill of costs to be examined, allowed or reduced and certified by a Registrar) or be for a specified amount.

Generally, the Court has no role in regulating the fees charged by lawyers to their own clients in respect of proceedings in the Court or determining the amount which a lawyer is entitled to charge a client for work done on that client’s behalf in relation to a proceeding in the Court. These are matters for State and Territory Professional and Regulatory bodies and/or contract between individual lawyers and their clients.

Division 40.1 deals with general costs issues (including interpretative provisions; entitlements; liabilities; costs of interlocutory applications and in other courts where proceedings are transferred to the Federal Court; and reduction of costs in particular circumstances). Division 40.2 deals with procedures for the taxation of costs; content, filing and service of bills of costs; application of the scale of costs for which charges may be made for work done and services performed by lawyers, their staff and agents; taxing officer’s estimates and provisional taxation of costs; objections and responses; confidential conferences to consider resolution of costs disputes; powers and responsibilities of a taxing officer; costs of taxation; certificates of taxation; review of a taxation by the Court and stay of execution on costs. Division 40.3 deals with short form bills on an application for winding up under the *Corporation Act 2001* and on a migration

appeal. Division 40.4 deals with a determination by the Court of the maximum costs as between party and party that can be recovered in a proceeding.

Rule 40.29 provides for allowance of costs in accordance with Schedule 3 to the new Rules. Schedule 3 regulates the amounts which must or can be allowed for work done and services performed in determining a bill of costs, including short form bills. The schedule only applies to work done and services performed after 1 August 2011. The rates specified in the schedule, however, cannot exceed the rates actually charged by a lawyer to the client. Other than when a party chooses to use a short form bill, a bill of costs must be prepared and determined based on items in the Scale for all attendances; documents and correspondence prepared; documents and correspondence read; research undertaken; required delegation and supervision of others; electronic document management performed; masking, collation, pagination, indexing and copying of documents; and required service of documents attempted or completed. The amount allowed for this work is either calculated on the time fairly and reasonably taken or fixed charges together with an allowance for skill, care and responsibility. Alternatively, if a time costing basis is not adopted, a fair and reasonable lump sum amount can be claimed. Schedule 3 sets out the criteria to be considered in assessing and determining an allowance for skill, care and responsibility or the alternative allowance of a fair and reasonable lump sum amount.

Part 41 deals with enforcement. Division 41.1 covers general enforcement provisions. These include applying for directions about the enforcement or execution of an order; impact of a condition precedent in any order and applying for an order revoking such a condition precedent or varying the order; applying to stay a judgment or order; obligations to comply with an order or an undertaking; applying for a warrant for arrest if a person fails to attend Court in response to a subpoena or order; requirements for an endorsement on an order where non-compliance may result in imprisonment, sequestration of property or punishment for contempt; service requirements for such an order; applying for committal of a person (including an officer of a corporation) or sequestration of property for failure to comply with an order; applying for an order for substituted performance; applying for orders for execution or other enforcement of an order by any means that can be issued or taken in the Supreme Court of the State or Territory in which the judgment or order was made as if that order was an order of that Supreme Court; and applying for stay of execution of such an order.

Divisions 41.2 and 41.3 cover enforcement against a partnership and a business name. This includes execution against the property of a partnership and against any partner in the partnership; applying for an order to clarify the liability of an individual partner; applying for leave to enforce an order as well as directions or an order for the taking and holding of accounts and inquiries in proceedings between co-partners; and property against which execution can be made if an order is against a person or partnership in that person's or the partnership's business name.

Divisions 41.4 and 41.5 cover the Sheriff and fees for the service or execution of a process of the Court. This includes the Sheriff suspending execution of a process if given written notice by the party who applied for its issue instructing the Sheriff to suspend that

execution; withdrawing any such instruction; applying for an order directing the Sheriff to execute a process; the Sheriff applying for directions about whether a process is to be executed and, if so, the way in which the execution is to be carried out; the Sheriff requiring a payment as security for fees for the service or execution of a process or an undertaking by the lawyer for the party requesting service or execution to pay the fees; liability of a party's lawyer for payment of the Sheriff's fees if that lawyer lodges a process with the Sheriff for service or execution; requiring the Sheriff to prepare a bill of fees; taxing such a bill; and the Sheriff applying for an order that a party's lawyer pay outstanding fees.

Division 41.6 covers the reciprocal enforcement of judgments under the *Foreign Judgments Act 1991*. This includes applying for registration of a foreign judgment; supporting documents required; the approved forms to be used; serving a notice of registration; applying to set aside registration of a judgment, to stay enforcement of the judgment, to set aside a judgment which has been registered, for directions for the hearing and determination on any such applications and for security for costs; and the Registrar maintaining a record of registered judgments.

Part 41 adopts, simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice.

CHAPTER 6 DISCIPLINARY

Chapter 6 contains Part 42.

Part 42 deals with contempt both in the face of the Court and in the hearing of the Court. This includes applying for a person to be brought before the Court or for the issue of a warrant for a person's arrest in relation to an alleged contempt; the requirements if a person charged with contempt is brought before the Court; orders which may be made pending disposal of the charge; for a person to be kept in custody or released with or without security; the application and supporting documents which must be filed; service requirements; applying for punishment of a contempt; procedures to be followed on the hearing of a charge; proceedings for contempt which may be commenced by the Registrar; issue of a warrant for imprisonment; applying for discharge before the end of a prison term; and the approved forms to be used.

Part 42 adopts, simplifies and streamlines the process and procedures which operated under the former Rules and does not substantially alter existing practice.