

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2010 No. 338**

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

### **Federal Court Amendment Rules 2010 (No. 2)**

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 present Federal Court Rules came into operation on 1 August 1979. They are reviewed regularly.

The Judges have agreed to amend the Federal Court Rules by:

1. amending Order 78 consequential upon amendments to the *Native Title Act 1993* relating to mediation;
2. amending Orders 62 and 80 and Form 15B to replace the term 'legal practitioner' with the term 'lawyer' overlooked in the changes adopted in the Federal Court Amendment Rules 2010 (No. 1);
3. amending Schedule 2 to adjust the quantum of prescribed costs.

The amendments mentioned in item 1 above were agreed at the Judges' Meeting held in August 2010. The amendment to Schedule 2 mentioned in item 3 above gives effect to recommendations made in the Third Report of the Joint Costs Advisory Committee.

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

The amendments mentioned in items 1 to 3 above will commence on 1 January 2011.

## ATTACHMENT 1

### Federal Court Amendment Rules 2010 (No 2)

#### **RULE 1      Name of rules**

This rule provides that the Rules are to be cited as the *Federal Court Amendment Rules 2010 (No. 2)*.

#### **RULE 2      Commencement**

This rule provides that these Rules commence on 1 January 2011.

#### **RULE 3      Amendment of Federal Court Rules**

Schedule 1 amends the Federal Court Rules.

#### **SCHEDULE 1**

[1] Order 62, rule 9, heading

[2] Order 62, paragraph 9 (4) (a)

These amendments replace:

- in the heading of Order 62 rule 9, the reference to ‘legal practitioner’ with a reference to ‘lawyer’; and
- in paragraph 9 (4) (a), the reference to ‘legal practitioner’s’ with a reference to ‘lawyer’s’

as a consequence of an amendment to section 4 of the *Federal Court of Australia Act 1976* (the Act) by the *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* which inserted into the Act a definition of ‘lawyer’ that included ‘legal practitioner’.

The amendments in items [1] and [2] above and items [15], [16] and [17] below were overlooked when changes were made to the Rules by the Federal Court Amendment Rules 2010 (No. 1).

[3] Order 78, subrule 16 (1)

Order 78 deals with the proceedings under the *Native Title Act 1993* (the NT Act). During 2009 the NT Act was amended by the *Native Title Amendment Act 2009*. This amendment and the amendments set out in items [4] to [14] below are consequential upon these changes to the NT Act.

Order 78 rule 16 sets out the requirements for the referral to the Court by the National Native Title Tribunal (NNTT) of questions of fact or law under subsection 136D of the NT Act or a question of law under subsection 145 (1) of that Act. Subrule 16 (1) states that the reference to the Court by the NNTT must be in the form of a special case.

This amendment replaces the reference in subrule 16 (1) to subsection 136D of the NT Act with a reference to section 94H (1) of this Act, consequential upon the amendments made to the NT Act concerning mediation. These amendments commenced on 17 September 2009.

Also, where a reference was previously made by the NNTT, consequential upon the above-mentioned amendments, it is now made by the NNTT only where it is a question of law referred under subsection 145 (1) of the NT Act. Where the referral is of a question of fact or law under subsection 94H (1) of the NT Act, it is by the person conducting the mediation.

In addition, for clarity, this amendment changes the format of the subrule and provides in these provisions for the person conducting the mediation to be referred to as the ‘mediator’.

[4] Order 78, rules 17 to 19

Order 78 rule 17 sets out the requirements for the special case. Rule 18 states that the Registrar must set the proceedings down for a directions hearing and give notice of the date. Rule 19 provides for the party who has carriage of the proceeding.

This amendment amends each of rules 17 to 19 and inserts mirror rules to provide for referrals by the mediator as well as referrals by the NNTT.

This amendment is consequential upon the amendments to the NT Act mentioned in item [3] above.

[5] Order 78, Division 3A, heading

[6] Order 78, subrule 20A (1)

The amendment in item [5] replaces the heading of Division 3A with a new heading and the amendment in item [6] replaces the section reference in subrule 20A (1). The effect of these amendments is to replace the reference to section 136DA with a reference to section 94J, consequential upon the amendment to the NT Act as mentioned in item [3] above.

[7] Order 78, paragraph 20B (a)

[8] Order 78, paragraph 20B (b)

Order 78 rule 20B provides for the preparation of a referral made under section 94J of the NT Act (previously section 136DA).

The amendments replace the reference in paragraph 20B (a) to the ‘relevant presiding member of the NNTT’ with the ‘person conducting the mediation (the **mediator**)’ and the reference in paragraph 20B (b) to the ‘NNTT’ with the ‘mediator’ as a consequence of the amendment made to the NT Act mentioned in item [3].

[9] Order 78, subparagraph 20C (b) (i)

Order 78 rule 20C provides for the setting down for hearing of a question referred under section 94J of the NT Act (previously section 136DA).

This amendment replaces the reference in subparagraph 20C (b) (i) to the 'NNTT' with the 'mediator' as a consequence of the amendment made to the NT Act mentioned in item [3].

[10] Order 78, Division 4, heading, including the note

This amendment substitutes the note that follows the heading to Division 4 with a new note consequential upon the amendments made to the NT Act mentioned in item [3].

In the note the reference to 'Division 1B' is replaced with a reference to 'Division 4' and the reference to 'Division 4A of Part 6' is omitted.

[11] Order 78, rule 21

Order 78 rule 21 deals with the cessation of mediation.

This amendment omits rule 21. Rule 21 is no longer required as a consequence of the amendments made to the NT Act mentioned in item [3]. Section 86C of the NT Act now provides the direction and discretion to the Court required in considering cessation of a mediation.

[12] Order 78, subrule 21A (1), except the note

[13] Order 78, subrule 21A (1), note

Order 78 rule 21A sets out the requirements for the report about breaches of good faith in relation to the conduct of a mediation.

The amendment in item [12] replaces in subrule 21A (1), except in the note at the foot of this subrule, the reference to subsection 136GA (4) of the NT Act with a reference to subsection 94P (4).

The amendment in item [13] replaces in the note at the foot of subrule 21A, the reference to subsection 136GA of the NT Act with a reference to subsection 94P.

These amendments are as a consequence of the amendments made to the NT Act mentioned in item [3].

[14] Order 78, subrule 21A (3)

This amendment replaces the reference in subrule 21A (3) to the 'presiding member of the NNTT' with the 'mediator' as a consequence of the amendment made to the NT Act mentioned in item [3].

[15] Order 80, rule 4, heading

This amendment replaces in the heading to Order 80 rule 4 the mention of ‘legal practitioner’ with ‘lawyer’ consequential upon the amendment mentioned in item [1].

[16] Form 15B, heading

[17] Form 15B

These amendments replace in the heading to Form 15B the mention of ‘legal practitioner’ with ‘lawyer’ and in the body of the form ‘(*name of legal practitioner*)’ with ‘(*name of lawyer*)’ as a consequence of the amendment mentioned in item [1].

[18] Schedule 2 – updating costs

Schedule 2 sets out the costs that solicitors are allowed in respect of work done and services performed in Federal Court proceedings.

This amendment replaced Schedule 2 with a new Schedule 2 and has the effect of increasing the amount for each item in the Schedule.

The adjustments have been determined having regard to the recommendation made by the Joint Costs Advisory Committee in its Third Report on Legal Practitioners’ Costs (September 2010) for a 3.1% increase.