



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: SW:cl:Dispute Resolution  
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31 May 2011

The Hon. Justice Lander  
Federal Court of Australia  
Level 5  
Roma Mitchell Commonwealth Law Courts Building  
6 Angas Street  
Adelaide SA 5000

Dear Justice Lander,

**Draft Federal Court Rules**

The Law Society's Dispute Resolution Committee (Committee) reviewed the draft Federal Court Rules in April but its attached brief comments were inadvertently omitted from the Society's previous submission.

The Committee greatly appreciates the opportunity to have its comments considered. I apologise for the delay in making this submission.

Yours sincerely,

Stuart Westgarth  
**President**

## **Submission on the Draft Federal Court Rules**

The Committee welcomes the proposed new rules and thanks the Federal Court Rules Revision Committee for this opportunity to comment on them.

The Committee draws the following points to the attention of the Revision Committee:

### **Rule 1.01**

"20111" should read 2011.

### **Rule 2.23**

This Rule should refer to the eCourt or eLodgement page rather than to the Court's home page (through which nothing can be lodged). The rule should *not* allow affidavits to be filed in image format because they are not text searchable in that form. The previous practice should be continued, namely, that the solicitor filing the affidavit must ensure that the form filed contains the content as sworn and must retain the original signed version and produce it to the court on demand and supply a relevant party with one image copy or hard copy on demand. However, where necessary, Annexures can be filed in image format.

### **Rule 2.24(2)**

Add "except for the purposes of Rules 2.16(1) and 29.02".

### **Rule 2.31(2)**

This Rule should include an additional subparagraph as follows:

*(2)(c) the Registrar has given written permission for the uplifting of a document for the purposes of copying or scanning the document.*

### **Rule 2.32(1)**

A *claim* of confidentiality ought to be honoured pending a ruling by the court, especially for subpoenaed documents.

### **Rule 5.06**

Remove the comma after the word "must".

### **Rule 6.11(2)**

This Rule is too broad and would unreasonably inhibit SMS messages being sent to a practitioner's staff member to assist the smooth running of the proceedings or, for example, to alert witnesses when they may be required. In addition, it is not clear that the place where a hearing is being held means the inside of a courtroom or extends to the precincts of a courtroom.

Note 1 appears to assume a power to grant leave that is not apparent on the face of the Rule (apart from the general relief provision in Rule 1.34).

### **Rule 7.21**

Insert the word "relevant" before "proceeding". Presumably being a party to an unrelated proceeding in the court is not intended to 'protect' a prospective respondent from the operation of this regime.

### **Rule 7.43(b)**

The loss or destruction of evidence is not necessarily a loss to the applicant. If (c)(ii) is made out, the Committee queries whether (b) is necessary.

**Rule 20.32(1)**

This Rule needs to extend to any document discovered by category if it is not individually discovered.

**Rule 24.17(7)(b)**

This Rule is too technology-specific. CD-ROM has been superseded by DVD, USB drive, and the like. The test should be whether the document is stored on a medium and in a format which the responding party reasonably believes the issuing party will be able to utilise without difficulty, and subject to the Court's right to order that an alternative storage medium be used.

**Rule 28.21(a)**

The Committee queries whether the Registrar has the discretion to substitute a Registrar or another person for a named mediator agreed by the parties and/or named in a court order. A mediator should have the flexibility to conduct some other ADR process as required, despite a mediation having been ordered. It should not be necessary to revert to the Court if the parties agree to a different ADR process than the one ordered. References to a mediator reporting to the Court need to be treated cautiously. A mediator should not be required to do more than report that the mediation was conducted and whether or not a settlement was reached in whole or in part.