



## Access to Justice (Federal Jurisdiction) Amendment Bill 2011

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## Access to Justice (Federal Jurisdiction) Amendment Bill 2011

**Date introduced:** 23 November 2011

**House:** House of Representatives

**Portfolio:** Attorney-General

**Commencement:** Sections 1 to 3 commence on Royal Assent. Schedules 1, 2 and 4 commence on the day after Royal Assent. Schedules 3 and 5 commence on a day to be fixed by Proclamation, or six months after Royal Assent whichever is the earlier.

**Links:** The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bill's home page, or through <http://www.aph.gov.au/bills/>. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at <http://www.comlaw.gov.au/>.

### Purpose

The Bill will make amendments to the *Federal Court of Australia Act 1976* (the FCA) to give the Federal Court stronger powers to make costs orders in relation to discovery procedures and to clarify that discovery is an incidental proceeding, in relation to which the Court is able to make the orders that it may make in other types of proceeding, including orders requiring a person to give oral evidence, in this case to assist in identifying documents subject to discovery. The Bill will also amend the *Family Law Act 1975* (the FLA), the FCA, the *Federal Magistrates Act 1999* (the FMA) and the *Judiciary Act 1903* to make provision for suppression and non-publication orders, and for dealing with vexatious litigants. These latter amendments will be relevant to all the federal courts named, and the High Court of Australia is also covered. There are also amendments relevant to the Family Court of Western Australia, and to fee setting in the Administrative Appeals Tribunal.

In summary, there are five Schedules to the Bill to:

- enhance the Federal Court's powers in relation to discovery
- implement in all four federal courts the model Bill concerning suppression orders and non-publication orders
- implement in all four federal courts the model Bill concerning vexatious proceedings
- align the jurisdictional limit for matters heard by Family Law magistrates in Western Australia with that applying to Federal Magistrates in other states and territories and
- give the Administrative Appeals Tribunal more flexibility when dealing with the payment of fees.

Only Schedules 1, 2 and 3 are canvassed in this Digest.

## Background

The amendments relating to discovery in the Federal Court of Australia implement recommendations of the Australian Law Reform Commission (the ALRC) report, *Managing Discovery: Discovery of documents in Federal Courts*, tabled in Parliament in May 2011.<sup>1</sup>

The Bill also implements the model law on vexatious proceedings and, in part, the model law on suppression and non-publication orders. Both of these model laws were developed by the then Standing Committee of Attorneys-General (SCAG).<sup>2</sup>

The suppression and non-publications orders provisions, in Schedule 2 of the Bill, are modelled on the *Court Suppression and Non-publication Orders Act 2010* (NSW) (the New South Wales Act), which is the template for other jurisdictions to follow. The vexatious proceedings provisions, in Schedule 3 of the Bill, reflect the legislation that has been implemented in Queensland, New South Wales and the Northern Territory as a result of the SCAG process.<sup>3</sup>

## Committee consideration

The provisions of the Bill were referred to the Senate Legal and Constitutional Affairs Committee (the Committee) for inquiry and the Committee reported in March 2012.<sup>4</sup> The Committee recommends that the Bill be passed. Most of the comments to the Committee relate to suppression and non-publications orders, and vexatious proceedings orders.

Two of the key issues identified by the Committee were in relation to suppression and non-publication orders and vexatious proceedings orders. These issues are succinctly discussed in the Committee report.

In brief, in relation to suppression and non-publication orders, Australia's Right to Know, representing the media, submitted that there are too many, and unjustified, orders being made,

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1. Australian Law Reform Commission, *Managing discovery: discovery of documents in federal courts*, ALRC Report 115, March 2011. <http://www.alrc.gov.au/publications/managing-discovery-discovery-documents-federal-courts-alrc-report-115> viewed 29 June 2012.

2. SCAG has been replaced by the Standing Council on Law and Justice.

3. B O'Connor (Minister for Justice), 'Second reading speech: Access to Justice (Federal Jurisdiction) Amendment Bill 2011', House of Representatives, *Debates*, 23 November 2011, p. 13553, viewed 16 March 2012, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F1496503\\_4-cdb8-4a26-98aa-26c862a1cd0e%2F0046%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F1496503_4-cdb8-4a26-98aa-26c862a1cd0e%2F0046%22). These Acts are: the *Vexatious Proceedings Act 2005* (Qld), the *Vexatious Proceedings Act 2007* (NT) and the *Vexatious Proceedings Act 2008* (NSW).

4. Senate Legal and Constitutional Affairs Committee, *Inquiry into the Access to Justice (Federal Jurisdiction) Amendment Bill 2011*, March 2012, viewed 6 June 2012, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=legcon\\_ctte/access\\_to\\_justice\\_federaljurisdiction/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/access_to_justice_federaljurisdiction/index.htm)

noting an increase in such orders since the passing of the New South Wales Act. In its response, the Attorney-General's Department could not comment on the reason for such increases, but submitted it did not anticipate an increase in such orders in the federal courts as a result of this Bill's provisions.<sup>5</sup>

As to the issues relating to vexatious proceedings orders, concerns were raised about the proposed provisions limiting the ability of the Family Court of Australia to make such orders because of the expression 'proceedings under this Act'. The Attorney-General's Department submitted that the intent of the wording is to prevent family law vexatious litigants from making vexatious proceedings in multiple courts, rather than limit the Family Court's powers to make such orders.<sup>6</sup>

## Key provisions

### Schedule 1 — Discovery

**Item 2 of Schedule 1** of the Bill inserts **new subparagraphs 43(3)(h)(i)-(iii)** to the FCA to enable the court to make specific costs orders in relation to discovery applications. The court will be able to make orders to require the party requesting discovery to pay the costs in advance, or to give security for the payment of the cost (**paragraphs 43(3)(i) and (ii)**). The court will also be able to make an order specifying the maximum cost that may be recovered for discovery or inspection of documents (**paragraph 43(3)(iii)**). The proposed provisions regarding discovery and costs are only applied to the Federal Court.

### Schedule 2 — Suppression and non-publication orders

The following coverage of Schedules 2 and 3 refer to the amendments in the Bill as made to the FLA. This is because the amendments are the same for each of the four federal courts. The equivalent provisions for the FCA, the FMC Act and the Judiciary Act can be found in **items 4, 7 and 8 of Schedule 2**, and **items 8, 9 and 10 of Schedule 3**. The courts already have powers in this area, but the Bill consolidates and makes the area more consistent.

**Item 1 of Schedule 2** inserts **new Part XIA**, comprised of **new sections 102P to 102PK** into the FLA, introducing a new regime for suppression and non-publication orders. It is to be noted that the Bill preserves the FLA's current provisions governing 'Restriction on publication of court proceedings' in section 121 of the FLA.<sup>7</sup>

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5. Legal and Constitutional Affairs Legislation Committee, *Access to Justice (Federal Jurisdiction) Amendment Bill 2011 [Provisions]*, March 2012, pp. 5-6.

6. *Ibid.*, pp. 9-10.

7. The current text of the *Family Law Act 1975* is available through Comlaw at: <http://www.comlaw.gov.au/Details/C2012C00404>

**New section 102P** has the key definitions. A suppression order is defined as an ‘order that prohibits or restricts the disclosure of information (by publication or otherwise)’, and a non-publication order is an ‘order that prohibits or restricts the publication of information (but that does not otherwise prohibit or restrict the disclosure of information)’.

‘Publish’ means disseminating or providing access to the public by any means, including written publications, radio or television broadcasts, public exhibition or broadcast by way of the internet.

The court can make a suppression or non-publication order on its own initiative, or on the application of a party to the proceedings, or any other person considered by the court to have a sufficient interest in the making of an order (**new subsection 102PG**).

The grounds for making an order are that the order is necessary to:

- prevent prejudice to the proper administration of justice
- prevent prejudice to the interests of the Commonwealth, a state or territory in relation to national or international security
- protect the safety of any person and
- avoid undue distress or embarrassment to a party or witness in criminal proceedings involving sexual offences (**new section 102PF**).

In deciding whether or not to make an order, the court is obliged to take into account that a primary objective of the administration of justice is to safeguard open justice (namely public hearings).

**New section 102PE** specifies the type of information that is to be protected by the making of an order. In essence it is information relating to persons, or information that relates to the proceedings, such as the evidence, or information obtained and produced through discovery or a subpoena, or information lodged or filed in the court.

**New subsection 102PG(2)** provides that persons who may appear and be heard on an application are the applicant, a party, an Australian government, a news publisher, or any other person who in the court’s opinion has sufficient interest in the matter.

The contravention of an order is an offence with a penalty of 12 months imprisonment, 60 penalty units, or both.<sup>8</sup>

**Items 4, 6 and 8 of Schedule 2** insert the same provisions into the FCA, the FMA and the Judiciary Act respectively.

The above amendments will apply to proceedings that are already pending, or proceedings that are instituted after the commencement of the amendments (**item 11**).

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8. A penalty unit is currently \$110 – see section 4AA of the *Crimes Act 1914* (Cth).

## Schedule 3 — Vexatious proceedings

**Item 2 of Schedule 3** inserts **new Part XIB**, comprising **new sections 102Q – 102QG** into the FLA.

‘Vexatious proceedings’ are defined to include:

- proceedings that are an abuse of the process of a court or tribunal
- proceedings instituted to harass or annoy, to cause delay or detriment, or for another wrongful purpose
- proceedings instituted or pursued without reasonable ground and
- proceedings conducted in a court or tribunal in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

As the definition uses the word ‘include’, these points should be read as disjunctive, namely all or any one of them may apply. As the Explanatory Memorandum states:

*The definition of vexatious proceedings is an inclusive definition, which lists some examples of various kinds of proceedings which could give rise to a vexatious proceedings order.<sup>9</sup>*

**New section 102QB** provides that if the court is satisfied a person has ‘frequently’ instituted or conducted vexatious proceedings, or a person, acting in concert with another person who is subject to a vexatious proceedings order or has frequently instituted or conducted such, has instituted or conducted vexatious proceedings, then the court can make an order. However, note that **new section 118** allows the court, at any stage of proceedings, to dismiss the proceedings and make an order as to costs, if the court is satisfied that the proceedings are vexatious or frivolous. This matter was raised before the Committee and the Attorney-General’s Department responded that the Bill was only intended to capture a course of proceedings that is vexatious.<sup>10</sup>

**Items 8, 9 and 10 of Schedule 3** insert equivalent provisions into the FCA, the FMA and the Judiciary Act respectively.

The amendments in **Schedule 3** will apply to proceedings that are already pending, or proceedings that are instituted after the commencement of the amendments (**item 11**).

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9. Explanatory Memorandum, Access to Justice (Federal Jurisdiction) Amendment Bill 2011, paragraph 202, p. 33.

10. Op. cit., p. 13.

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